

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-3551-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SIDNEY G. M.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County:
PATRICK J. TAGGART, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

PER CURIAM. Sidney G.M. appeals his judgment of conviction for second-degree sexual assault of a child, his daughter. He claims the circuit court erroneously exercised its discretion by admitting testimony that he had hit the child with a belt hard enough to leave marks on a prior occasion or occasions. However, we agree with the circuit court that the evidence was relevant to rebut

the defense theory that the daughter was motivated to fabricate her account by fear of discipline from her mother, and conclude that the appellant has waived the issue of whether the testimony should have been excluded as prior bad act evidence. Accordingly, we affirm.

BACKGROUND

The victim, her sister and their mother all testified that Sidney had rubbed his daughter's breast and genital areas while they were lying on the couch together sometime during May of 1996. The victim's sister said she was in the room at the time and the mother said she observed the incident from another room and then came out to confront Sidney.

The defense theory was that the mother had fabricated the incident for spite or leverage in a pending divorce and had pressured her daughters to corroborate her account. The mother admitted she did not report the incident until September of 1996, after she and Sidney had separated, and that she did not mention it when she applied for a restraining order against Sidney in July of that year.

To further support its theory, the defense elicited testimony from both the mother and Sidney's son that the mother had disciplined all of the children with spankings, and sometimes used a belt on them. The son testified that his sisters feared receiving corporal punishment from their mother. On cross-examination, the prosecutor asked the son whether Sidney also disciplined the children using a belt. Over a relevancy objection from the defense, the son stated that Sidney had hit the victim with a belt hard enough to leave red marks on her buttocks, and had also hit his other sister with a belt for numerous reasons.

STANDARD OF REVIEW

Because evidentiary decisions lie within the discretion of the trial court, we will not disturb the trial court's ruling so long as it was rationally made in accord with the proper legal standard and facts of record. *State v. Migliorino*, 170 Wis.2d 576, 590, 489 N.W.2d 678, 683 (Ct. App. 1992).

ANALYSIS

Relevant evidence is that which has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Section 904.01, STATS. In some instances, the relevancy of evidence may depend upon the existence of a certain fact or facts, and such foundational facts become necessary prerequisites for the admission of the conditionally relevant evidence. Section 901.04(2).

Sidney claims that evidence relating to his prior discipline of the victim was irrelevant because the charge was sexual assault, not battery, and because it tended to smear his character. He believes the trial court erred by failing to weigh the prejudicial effect of the testimony against its relevance. However, the record does not show that he asked the trial court to weigh the prejudicial effect of the evidence by raising either an undue prejudice or prior bad act objection. *See* §§ 904.03 and 904.04(2), STATS. Therefore, we will not do so. *See State v. Gollon*, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983) (finding no reversible error when the trial court was not asked to exercise its discretion).

Because the only objection before the trial court was relevance, the court properly determined the admissibility of the evidence based on the State's argument that the defense had opened the door on the issue of discipline by suggesting that the threat of the mother's discipline was severe enough to coerce the victim and her sister into lying. If the mother's discipline was no more severe than Sidney's discipline, the defense theory of the girls' motivation for lying was less likely to be true. We conclude the trial court did not erroneously exercise its discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

