

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 4, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2283-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH A. ROBERTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth Roberts appeals his conviction for first-degree sexual assault of a child, after a jury trial. The complaint alleged that Roberts engaged in sexual contact with a girl under the age of thirteen, touching her on the buttocks in a swimming pool at a campground. The trial court admitted three other instances of when Roberts was suspected of having sexual contact with

girls he did not know. Specifically, Roberts had been a suspect in: (1) a 1992 incident at a Target store with a ten-year-old girl; (2) a 1992 incident at a Giant Family Center with an eleven-year-old girl; and (3) a 1997 incident at a pharmacy with a seventeen-year-old girl.

¶2 Roberts makes four basic arguments on appeal: (1) the other acts incidents were highly dissimilar from Roberts' swimming pool behavior and thereby irrelevant; (2) any slight relevance the other acts evidence may have had was outweighed by its high degree of prejudice; (3) the prosecution improperly commented on Roberts' silence during the prosecution's closing arguments; and (4) the trial court wrongly admitted evidence of Roberts' prior arrests for sexual offenses. We reject these arguments and affirm Roberts' conviction.

¶3 We first conclude that the trial court reasonably admitted the other acts evidence. The trial court had discretion to receive it concerning the issues of intent, mistake, and state of mind. *See State v. Sullivan*, 216 Wis. 2d 768, 772, 780-81, 576 N.W.2d 30 (1998). Here, the prior incidents were similar in place, manner, purpose, and degree to Roberts' pool touching. Each time, Roberts approached the girl from behind and touched her buttocks. Each incident took place in a public venue, the girls were all juveniles and were relative strangers to Roberts. The similarities hold true despite the victims' various characterizations of his acts as grabbing, squeezing, fondling, or probing. These were, like Roberts' pool acts, all forms of touching. Also, their substantial relevance outweighed any prejudice. The trial court carefully instructed the jury on the limited evidentiary role of those incidents, thus keeping the other acts evidence in proper evidentiary perspective. *See State v. Dekeyser*, 221 Wis. 2d 435, 452, 585 N.W.2d 668 (Ct. App. 1998).

¶4 We briefly address Roberts' remaining two arguments. First, Roberts stipulated to the admission of his arrest record and has thereby waived any error for purposes of appeal. *See Shaun N. v. State*, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992). If Roberts found the evidence objectionable, he should have pursued it in the trial court rather than stipulate to its admission. Second, Roberts has not shown that the prosecution commented on Roberts' silence during closing argument. We agree with Roberts that the prosecution may not direct the jury's attention to a defendant's silence or failure to testify. *See Reichoff v. State*, 76 Wis. 2d 375, 379-80, 251 N.W.2d 470 (1977). Here, however, the prosecutor merely identified a gap in defense counsel's summation wherein he gave no exculpatory explanation for why Roberts touched the victim's buttocks. This gap, when weighed with the other acts evidence, contributed to an inference that there was no innocent reason. The prosecution had the right to show how defense counsel's summation comported with the other acts evidence. The prosecution simply helped make the jury aware of reasonable inferences as they bore on Roberts' state of mind.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

