

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2000

Cornelia G. Clark
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. 00-0034-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NORBERT W. ELLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed.*

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

¶1 PER CURIAM. Norbert Ellis appeals a judgment and order convicting him of first-degree intentional homicide and hiding a corpse and denying his motion for a new trial. He argues that the trial court improperly exercised its discretion when it admitted evidence of several sexual encounters

between Ellis and children other than the victim. We reject the argument and affirm the judgment and order.

¶2 Ellis admitted that he killed twelve-year-old Jennifer Wallace, contending that he unintentionally strangled or suffocated her. He testified that Jennifer took twelve pills in an apparent suicide attempt and that, on the way to the hospital, she tried to jump out of the car. He grabbed her and accidentally choked her, his only intent being to not let her jump from a moving car. He then took her to his house to change her clothes before taking her dead body to the hospital. When the police pulled into the driveway, he quickly put her nude body in a garbage bag. He lied to the police and concealed her body. Several months later he showed the police where her body was located.

¶3 In an effort to establish Ellis's intent to kill Wallace, his motive, preparation and the context of Wallace's death, the State introduced testimony by several witnesses that established Ellis's sexual contact with young girls. The evidence showed a pattern of separating the girls from other family members to facilitate sexual abuse, and threats or force if they tried to leave. He told friends that he preferred sex with young girls because they were still virgins and he could more easily control them. He told a friend that he would set the mood by showing them a pornographic videotape to test their reaction, and he demonstrated how he could easily put drugs in the child's drink.

¶4 Whether other crimes evidence should be admitted is committed to the trial court's discretion. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will uphold the trial court's decision if there is a reasonable basis for it. *See Boodry v. Byrne*, 22 Wis. 2d 585, 589, 126 N.W.2d 503 (1964). Whether other crimes evidence should be admitted involves a three-step analytical

framework: (1) the evidence must be offered for an acceptable purpose under WIS. STAT. § 904.04(2) (1997-98); and (2) it must be relevant, that is, related to a fact or proposition that is of consequence to the determination of the action, and it must have probative value; (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶5 The trial court properly admitted evidence of Ellis's sexual contact with minors. It was offered for acceptable purposes under WIS. STAT. § 904.04(2) including preparation, motive, intent and providing the context of the crime. *See Pharr*, 115 Wis. 2d at 348; *State v. C.V.C.*, 153 Wis. 2d 145, 162, 450 N.W.2d 463 (Ct. App. 1989). The court admitted the other acts evidence to support the State's theory that Ellis intentionally killed Wallace after she refused his sexual advances.

¶6 Relevancy is determined by the trial court in view of its experience, judgment and knowledge of human motivation and conduct. *See Pharr*, 115 Wis. 2d at 344. The other crimes and bad acts were relevant to establish Ellis's motive for killing Wallace and his *modus operandi* including his successful efforts to isolate Wallace from her family. It provided important context for the crime including an explanation for the drugs in Wallace's body and the circumstances that led to her death. The other acts evidence provided a link in the chain of proof establishing Ellis's motive and intent to kill. *See State v. Brewer*, 195 Wis. 2d 295, 309, 536 N.W.2d 406 (Ct. App. 1995).

¶7 The probative value of the other acts was not substantially outweighed by the danger of unfair prejudice. While the evidence was prejudicial, it was not unfairly prejudicial. It did not encourage the jury to find Ellis guilty of

the crimes charged merely because he committed other bad acts. *See State v. Mink*, 146 Wis. 2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988). The court gave several cautionary instructions similar to those approved in *State v. Fishnick*, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985), that serve to minimize or eliminate the risk of unfair prejudice. *See State v. Landrum*, 191 Wis. 2d 107, 122, 528 N.W.2d 36 (Ct. App. 1995).

¶8 Any prejudice that might have arisen from the other crimes evidence was harmless. There is no reasonable possibility that the other crimes evidence affected the outcome of the trial. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Ellis admitted that his hand was on Wallace's throat for twenty to thirty seconds and he heard gasping and gurgling sounds. He claimed for the first time at trial that he accidentally choked her to death to keep her from jumping from his car, after which he inexplicably took her back home to change her clothes. He hid the body and repeatedly lied to police and Wallace's mother. Under these circumstances, his own incredible testimony established his guilt without considering the other crimes testimony.

By the Court.—Judgment and order affirmed.

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

