

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 02-2769-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CM-2177

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL A. WHITE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Michael White appeals a judgment entered on a jury verdict convicting him of three counts of exposing his genitals to a child and one count of disorderly conduct, all as a repeater. He argues the trial court erroneously

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

exercised its discretion when it admitted other acts evidence. We disagree and affirm the judgment.

BACKGROUND

¶2 White was charged with three counts of exposing his genitals to a child and one count of disorderly conduct, all as a repeater, after three girls at an Appleton school where White was employed as a janitor complained to their principal that they had seen White's penis hanging out of the zipper on his pants. The principal referred the matter to the school's police liaison. The officer questioned White, who explained that his zipper might have come down accidentally.

¶3 The State informed White of its intent to introduce other acts evidence during the trial. Specifically, the State discovered that White had been accused of exposing his penis outside his zipper while working at a restaurant in Green Bay. The State offered to introduce the evidence through two witnesses who worked at the restaurant.

¶4 The court admitted the evidence. After the jury convicted White, the court sentenced him to two consecutive three-year prison terms and two three-year probation terms, consecutive to the prison time. White appeals.

DISCUSSION

¶5 The only issue presented on appeal is whether the trial court erred by admitting evidence of the Green Bay allegations. Other acts evidence must be subjected to a three-step analysis before being admitted. First, the evidence must be relevant to one of the exceptions listed in WIS. STAT. § 904.04(2); second, the evidence must be relevant considering the two facets of relevance set forth in WIS.

STAT. § 904.01; third, the evidence must be shown to be more probative than prejudicial. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Evidentiary rulings are reviewed for an erroneous exercise of discretion. *See Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Id.*

¶6 White only challenges the trial court's determination on the third prong of the *Sullivan* test. The danger of unfair prejudice outweighing probative value is that the jurors would be so influenced by the other acts evidence they would be likely to convict the defendant because the other acts evidence showed him to be a bad person. *Sullivan*, 216 Wis. 2d at 790.

¶7 The court determined the evidence was highly probative of absence of accident, but expressed concern that introducing the evidence would pressure White to take the stand and rebut the Green Bay allegations. Prior to trial, the court said if White testified, it would consider limiting the cross-examination regarding White's six prior convictions. Because he did not testify, White argues the court's analysis is irrelevant and reflects an erroneous exercise of discretion. We disagree.

¶8 Although the court's phrasing of the issue is a bit unusual, we are satisfied that it represents a proper consideration of the evidence's probative value and prejudicial effect. First, we note White's trial counsel raised the issue of White taking the stand to rebut the allegations. Second, the court repeatedly noted it considered the evidence highly probative to refute White's claim that his zipper was open accidentally. Finally, we view the court's concern with White taking the stand to rebut the allegations as indirectly addressing the prejudicial effects of the

evidence. The court's concern reflects a consideration that White would have to explain the other allegations so that the jury would not convict him merely because the other acts suggested he was a bad person. The court concluded this concern did not outweigh the probative value, and we cannot say this represents an erroneous exercise of discretion.

¶9 Further, we note the trial court instructed the jury regarding the other acts evidence prior to the two witnesses taking the stand. A cautionary instruction, even if not tailored to the case, can go far to cure any adverse effect attendant with the admission of other acts evidence. *State v. Mink*, 146 Wis. 2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988). The instruction given here was specifically tailored to the case. It told the jurors they were about to hear evidence that White had previously exposed his penis, that they could not consider this as evidence of a character trait that White acted in conformity with, and that they could only consider it to show his "intent, preparation or plan, or absence of mistake or accident," for the charges being tried. Although we are satisfied the court reasonably exercised its discretion when it admitted the other acts evidence, this instruction further reduced its potential prejudice.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

