COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 25, 1995

No. 94-3023-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTISS J. SWOBODA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Curtiss Swoboda appeals his conviction for first-degree sexual assault of a child, after a trial by jury. Before trial, the court granted the prosecution's motion barring Swoboda from introducing some evidence suggesting that his deceased brother could have committed the sexual assault. If the trial court had ruled the evidence admissible, Swoboda would have introduced evidence that his deceased brother molested their sister when she was a child. On appeal, Swoboda seeks a new trial on two grounds: (1) the trial court erroneously excluded the evidence that Swoboda's deceased brother, the victim's father, had molested the deceased brother's and Swoboda's sister as

a young girl; and (2) the trial court improperly forced Swoboda to use peremptory challenges to strike jurors Swoboda maintained were removable for cause. We reject these arguments and therefore affirm Swoboda's conviction.

On the evidentiary issue, we first must identify the appropriate standard of review. Ordinarily, the trial courts have considerable discretion in their decisions to admit or exclude evidence. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). We uphold discretionary decisions as long as trial courts do not erroneously exercise their discretion. ***Brookfield v. Milwaukee Sewerage Dist.***, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992). Discretion contemplates a logical process of reasoning based on the facts of record and the proper legal standards. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Trial courts' discretionary decisions also must have a reasonable basis in the record. ***Littmann v. Littmann***, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973). Whenever the trial court's decision affects a litigant's constitutional right to present a defense, however, we review the matter de novo. ***State v. Pulizzano***, 155 Wis.2d 633, 648, 456 N.W.2d 325, 331 (1990). Here, the State apparently concedes that we should review the matter de novo. We need not resolve this issue, however. Under either standard, we conclude that the trial court was correct in barring Swoboda from submitting evidence that Swoboda's deceased brother, the victim's father, had molested their sister when she was a child.

In attempting to introduce this proof, Swoboda faced several evidentiary hurdles. Initially, Swoboda could not use this evidence to show that if his deceased brother had molested a young girl once, he probably did it again. Litigants cannot use other crimes, wrongs or acts in this fashion. ***State v. Tabor***, 191 Wis.2d 483, 494, 529 N.W.2d 915, 920 (Ct. App. 1995); § 904.04(2), STATS. Rather, Swoboda could introduce the other acts evidence only to prove other matters, such as his brother's identity, motive, or opportunity, § 904.04(2), provided that Swoboda could first produce some other proof, besides the other acts evidence itself, directly tying his deceased brother to the charged crime. ***State v. Denny***, 120 Wis.2d 614, 622-25, 357 N.W.2d 12, 16-17 (Ct. App. 1984). Here, besides the other acts evidence involving Swoboda's and his brother's sister, Swoboda produced no proof, either direct or circumstantial, tending to show a tie between his brother and the charged offense. In fact, Swoboda's pretrial offer of proof failed to show that his brother's death postdated the assault. Under these circumstances, Swoboda failed to lay a proper foundation

for the other acts evidence and therefore had no ***Denny*** right to use it to prove identity, motive, or opportunity under § 904.04(2).

Swoboda also cannot obtain a new trial on the ground that the trial court improperly refused to strike three jurors for cause. If the trial court ultimately impanels a fair and impartial jury, litigants cannot call for a new trial on the ground that the trial court erroneously forced them to use peremptory challenges. ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 628-29 (Ct. App. 1992). Rather, litigants who claim that the trial court improperly forced them to expend peremptory challenges on biased jurors must show not only that the trial court's decision was wrong, but also that the jury ultimately selected was actually biased. ***Id***. Appellate courts cannot speculate that litigants would have automatically obtained a fairer jury had the trial court let them reserve their peremptory challenges for jurors not removable for cause. ***Id***. Here, the record contains no indication that the trial court's peremptory challenge ruling produced a biased jury. Swoboda has provided no specific evidence on this question, and we will not assume that the jury was predisposed to rule in the prosecution's favor. As a result, we have no basis to doubt the jury's fairness or to require a new trial.

By the Court.—Judgment affirmed.

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