

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 12, 1996

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.

NOTICE

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No. 96-0159-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES R. COLEMAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

BROWN, J. James R. Coleman contests the trial court's decision to admit "other acts" evidence. The State charged Coleman with one count of unlawful sexual contact alleging that he fondled a coworker. In support of its claim, the State introduced testimony from three of his other coworkers who claimed that Coleman had approached each of them in a similar fashion. We conclude that this evidence was relevant to prove Coleman's

motive and intent as well as opportunity and absence of mistake. Thus, the trial court did not abuse its discretion in admitting this testimony. We affirm.

The State charged Coleman with one count of fourth- degree sexual assault. *See* § 940.225(3m), *STATS.*, 1993-94. The State intended to show that Coleman intended to touch the victim, Roxanne K., and that he did it for purposes of sexual gratification. *See* § 940.225(5)(b), 1993-94.¹

Roxanne testified as follows. She met Coleman when he began working at Norris Linen during the week of November 23, 1993. During his first day, Coleman turned their conversations towards “personal” matters. He asked Roxanne if she might know why he and his pregnant girlfriend were having physical problems with their lovemaking. Coleman also told Roxanne how “horny” he was because he had not been able to really enjoy sex with his pregnant girlfriend. Roxanne also described how Coleman was “grabbing himself” while he was talking with her.

After their shifts ended that day, Roxanne was in the plant's lunch area when Coleman sat down with her and again started a conversation. Here, Coleman continued describing how “horny” he was and eventually got up and approached Roxanne from behind. Roxanne saw, through his clothing, that his penis was erect. Coleman then told her that they could “go in the bathroom right now and do it, nobody would know.” He then started rubbing his penis on her back through his pants.

¹ Both subsecs. of § 940.225, *STATS.*, 1993-94, have been amended, but these changes are not relevant to the issues in this case. *See* 1995 *Wis. Act* 69, §§ 7, 8.

Roxanne also described other encounters with Coleman. The next day, Coleman told her that he had to wear a "jockey strap" at social events, specifically the upcoming Thanksgiving holiday, because he could not "walk around with a hardon all the time." That day Coleman also touched Roxanne's breast. Moreover, Coleman once grabbed at her breast, asking her to show him her nipples. Roxanne also described how Coleman was "constantly rubbing himself across my backside either with his hand or his penis" for a two- to three-week period following his first contact with her.

In addition to Roxanne's testimony, the State also presented three other women who testified about their encounters with Coleman. We will briefly outline what each witness described. First, Jane V. explained that she met Coleman in October 1993 while he was working at Velvac Company. Coleman approached Jane to ask her about the workplace; he was with a temporary agency and was interested in getting a permanent position. After some time, however, the "conversation took a more personal route." Coleman expressed surprise that Jane was the mother of two and gave her a couple of "quick pats" on her stomach asking whether she "had them natural." He then came around to Jane's back, put his hands on her side and lifted her up, asking her how much she weighed. He then slid his arms up under her arms and sat Jane on a scale. During this time, Coleman also quickly lifted Jane's blouse, but she pushed his hand away. Coleman left Jane when a supervisor came along.

Next, Amy B. described her encounter with Coleman while he was stationed as a temporary worker at Velvac. Amy explained that Coleman

accidentally bumped into her while she was in the lunchroom and apologized. A few minutes later, however, he approached her to again say he was sorry. He then started asking Amy questions: what was her name?; how tall was she?; how much did she weigh? He then turned her around so that he was behind her, put his hands on her waist, slid them up under her arms and lifted her into the air. Coleman pulled her close to his body when he put her back down.

Third and finally, Paulina Z. testified that Coleman approached her while she was working at Norris Linen. She explained that Coleman held her from behind and pressed her close. Coleman also told Paulina that he wanted to have sex with her.

In his appeal, Coleman claims that the trial court erred when it admitted the “other acts” testimony described by Roxanne and the three other women. Coleman's challenge requires us to review the trial court's discretionary authority over the admission of evidence. We will thus measure if the trial court applied the correct legal standard and if its decision was grounded on a logical interpretation of the facts. See *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 902 (Ct. App. 1995).

Coleman first alleges that the “other acts” evidence from Jane, Amy and Paulina was not relevant.² Coleman claims that his alleged contacts with these three women were “completely dissimilar” to the incident involving

² The trial court also ruled that the State could introduce testimony from Angie L. She worked in a retail store and claimed that Coleman approached her and made contact with her while she was at work. Nonetheless, Angie did not testify at trial. Therefore, we have not considered whether the trial court erred in its decision to allow her testimony.

Roxanne. Unlike Roxanne, none of the other women alleged that Coleman had an erect penis when he approached them and none of the other women claimed that Coleman touched or rubbed them to gain sexual gratification.

Nonetheless, we agree with the State that Coleman's contacts with these three women were relevant because they buttressed the State's claim that he intended to touch Roxanne. Under § 904.04(2), STATS., evidence of "other acts" may be admissible to establish motive and intent. Here, the similarity between Coleman's contacts with three women and his contact with Roxanne helps a factfinder draw a conclusion that he intended to touch Roxanne. Coleman approached each woman at work. He first engaged each in conversation and then moved closer to the woman, eventually grabbing each of them from behind. These three "other acts" show that Coleman did not grab Roxanne by mistake or accident, thus bolstering the inference that he intended to touch her and why he intended to touch her.

We acknowledge that the contacts are not a perfect match. Jane and Amy each described that Coleman used the pretext of "weighing them" to justify his contact, while Roxanne and Paulina each testified that Coleman was more sexually explicit in his conversation. But the basic elements of Coleman's actions—isolating a female coworker, engaging her in some conversation and then making close, personal contact with her from behind—are all the same. We conclude that this evidence was relevant to the issue of Coleman's motive and intent.

Alternatively, and assuming this evidence was relevant, Coleman nevertheless argues that it was prejudicial. He claims that the probative value of this “other acts” evidence was substantially outweighed by its prejudicial effect. He complains that the prejudice stems from the time (several months) between the “other acts” and the alleged crime involving Roxanne. See *State v. Roberson*, 157 Wis.2d 447, 456, 459 N.W.2d 611, 614 (Ct. App. 1990) (describing how prejudice may depend on the time relationship between “other acts” and the crime charged).

Coleman further complains that the trial court did not engage in a balancing process when it ruled on the prejudice issue. He claims that the court only issued a “blanket statement” that the prejudice resulting from the evidence did not substantially outweigh its probative value.

We disagree with Coleman's characterization of the trial court's reasoning process and his ultimate argument that this evidence should have been excluded. Just because evidence is prejudicial, it is not automatically excluded. Rather, the court must calculate whether the probative value of it *is substantially outweighed* by the risk of unfair prejudice. See *id.*; see generally § 904.03, STATS.

It is true that the trial court did not elaborate on why this evidence was not prejudicial to Coleman's defense. But that does not mean that the trial court erred. Our review of the record shows that the trial court focused on the high *probative* value of this “other acts” evidence. Indeed, it found that the probative value of this testimony outweighed its prejudicial effect. The court

explained that the evidence was extremely probative because it showed that Coleman did “have a plan or motive or intent to gain such sexual gratification from co-workers.” Moreover, the separate instances showed that Coleman's contact with Roxanne was not just a simple mistake.

Contrary to Coleman's appellate argument, we also see that the court did address the issue of how the time between the “other acts” and the charged crime could result in prejudice. Here it explained, however, that the several months over which the “other acts” stretched is not of great concern because the State should be given some latitude when it attempts to offer “other acts” evidence to prove a sex crime. See *State v. Friedrich*, 135 Wis.2d 1, 19-20, 398 N.W.2d 763, 771 (1987).

Lastly, on the issue of prejudice, we observe that the trial court delivered a cautionary instruction to the jury regarding how this “other acts” evidence could be used on four occasions: after Jane's testimony, after Amy's testimony, during Roxanne's testimony and at the close of all testimony. The trial court's repeated attention to the cautionary instruction provides another signal that it was concerned with the potential prejudice to Coleman and evidences that it rationally addressed any potential problem. See *State v. Johnson*, 121 Wis.2d 237, 254, 358 N.W.2d at 824, 832 (Ct. App. 1984). In sum,

we approve of the trial court's approach to the issue of prejudice and reject Coleman's argument that the trial court erred.

Next, Coleman points to "other acts" evidence which the trial court refused to admit. During the pretrial stages of the case, the State provided an offer of proof from Sharon H., whom it claimed would testify that she also had contact with Coleman at Norris Linen. Sharon reported to the police that Coleman bumped into her buttocks on numerous occasions in the close quarters of the plant much more often than her other coworkers. Sharon also observed Coleman walking around the plant with an erection which was clearly visible through his sweatpants. Sharon also reported that Coleman used inappropriate sexual language when speaking with her.

The State also set forth an offer of proof from Kathryn S., who was another of Coleman's coworkers at Norris Linen. Kathryn alleged that Coleman approached her and began pulling on her sweatshirt, claiming that he was trying to read it. Then he began to rub against her buttocks until Kathryn hit him and told him to go away.

While Coleman agrees with the trial court's decision not to admit the "other acts" testimony from these two witnesses, he argues that they are nonetheless very similar to the acts that were admitted, thus revealing that the trial court acted arbitrarily.

We disagree. Our review of the record shows that the trial court declined to admit Sharon's testimony because it was not a similar situation. It

noted that Coleman's alleged contacts with her took place in front of other persons and thus were different from the others. With respect to Kathryn's testimony, the trial court was "not convinced" that Coleman's alleged contact, pulling her sweatshirt, was for the purpose of "sexual gratification." Based on the trial court's stated reasoning, we conclude that it engaged in the logical assessment of the facts which is characteristic of proper discretionary decision-making. We affirm its rulings.

Finally, Coleman complains that the trial court erred when it delivered one of its cautionary instructions to the jury regarding the use of "other acts" evidence. After Jane's testimony, the trial court stated that "evidence has been received that the defendant engaged in inappropriate conduct with [Jane]." Coleman claims that through the use of the term "inappropriate," the trial court "unfairly put the inference in the jury's mind that [he] engaged in a bad act which infers that he is of a bad character and thus had to have committed the charged crime."

Coleman, however, did not raise an objection when this instruction was given. We thus apply the general rule that a party waives its right to appeal a jury instruction if it fails to make an objection before the trial court. *See* § 805.13(3), STATS.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.