COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1485

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

IN THE INTEREST OF COURTNEY J.R.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

COURTNEY J.R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: RONALD S. GOLDBERGER and DANIEL A. NOONAN, Judges.[1] *Affirmed.*

CURLEY, J. Courtney J.R., a juvenile, appeals from a trial court dispositional order adjudging him delinquent, entered after a jury found him guilty

[1] The Honorable Ronald S. Goldberger presided over the jury trial and the Honorable Daniel A. Noonan entered the dispositional order adjudging Courtney to be delinquent.

of five counts of fourth-degree sexual assault, contrary to § 940.225(3m), STATS. Courtney claims that the trial court erroneously exercised its discretion by admitting other acts evidence pursuant to § 904.04(2), STATS. He also claims that the trial court erred when it failed to give a jury instruction limiting the use of this § 904.04(2) evidence. Because the trial court correctly found that the other acts evidence met the two-pronged test for admission, we affirm. Additionally, because the defendant failed to request an instruction limiting the use of the evidence, we deem this issue waived.

I. BACKGROUND.

Courtney J.R. was charged in two separate petitions with five counts of fourth-degree sexual assault. The victims were five different girls who attended Courtney's school. They claimed that Courtney touched their buttocks and breasts indecently on the school grounds between September and November, 1995.

In a pretrial motion, the State sought admission, under § 904.04(2), STATS.,[2] of a witness, Bonnie P.'s, testimony that Courtney sexually harassed her in October 1995 at the same school, by touching her improperly and making lewd statements. The trial court made a preliminary ruling that this evidence was admissible, but advised defense counsel that he could revisit the issue at trial. The

[2] Section 904.04(2), STATS., provides:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

trial court also remarked that the evidence could come in "with the proper admonishing instructions to the jury."

At trial, Bonnie P. testified that Courtney sexually harassed her in 1995, and Courtney's trial counsel did not object. Although the trial court stated earlier that it would only permit the testimony with an appropriate instruction on its use to the jury, no limiting instruction was given. In addition to Bonnie P.'s testimony, the five victims testified, as did a fellow student who witnessed some of Courtney's conduct towards the victims. Courtney also took the stand and denied committing any of the complained-of behavior. Courtney's defense was that all the victims were lying and that any touching was unintentional. The jury found Courtney guilty on all counts. Courtney now appeals.

II. ANALYSIS.

Courtney first complains that the trial court erroneously exercised its discretion by admitting Bonnie P.'s testimony concerning the other acts evidence, contending that this testimony was not relevant at his trial. Section 904.04(2), STATS., clearly prohibits the admission of other crimes, wrongs or acts of an accused unless the testimony is used for a purpose delineated in the statute. The trial court must engage in a two-part process before admitting evidence under § 904.04(2). First, the trial court must determine if the proffered evidence fits within one of the exceptions of § 904.04(2), and, if so, the trial court must then decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***State v. Bustamante***, 201 Wis.2d 562, 569, 549 N.W.2d 746, 749 (Ct. App. 1996); § 904.03, STATS.

This court's review of § 904.04(2), STATS., evidentiary issues is governed by the erroneous exercise of discretion standard. The trial court's

determination will be upheld if discretion was exercised according to accepted legal standards and in accordance with the facts of record. *See* ***State v. Fishnick***, 127 Wis.2d 247, 257, 378 N.W.2d 272, 278 (1985). Here, the trial court ruled that the evidence was both relevant and went towards proving motive. The trial court further found that the probative value of the testimony outweighed any unfair prejudicial effect on the defendant.

The crime of fourth-degree sexual assault includes the following elements: the accused must have sexual contact with the victim, and the sexual contact must be intentionally done without the victim's consent. *See* § 940.225(3m), STATS.[3] Thus, the State was obligated to prove any contact between the defendant and the victims was done intentionally. Courtney's testimony was that the girls were lying, and his attorney argued that if there was some inadvertent touching, it was unintentional and not done for the purpose of sexual gratification. Bonnie P. testified that Courtney made vulgar, sexually-offensive comments to her and had contact with her, engaging in behavior such as snapping her bra strap. This was certainly relevant evidence in deciding whether

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[3] Section 940.225(3m), STATS., provides:

> FOURTH DEGREE SEXUAL ASSAULT. Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a class A misdemeanor.

Section 940.225(5)(b), STATS., defines sexual to contact to mean, *inter alia*:

> 1. Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1).

Courtney intentionally touched the victims in the charged case, and whether his motive was to either sexually degrade or sexually humiliate the victims. Thus, the trial court correctly determined that the other acts testimony met the first prong of the test because, as the State notes in its brief, "it clearly tended to show specific sexual intent, motive and lack of mistake or accident on the part of the defendant."

Regarding the issue of whether the probative value outweighed any unfair prejudice to the defendant, the trial court stated: "It [the testimony of Bonnie P.] occurs around the same time so we don't have years of separation … The question is, is it unreasonably prejudicial to outweigh any probative value? I don't think so." Here, the § 904.04(2), STATS., evidence occurred in the same time frame as the charged offenses, at the same location, and with a similar victim. Therefore, the trial court properly exercised its discretion in determining that the testimony's probative value was not substantially outweighed by any unfair prejudice to Courtney.

Next, Courtney contends the trial court erred when it failed to give the "proper admonishing instructions" that it had mentioned at the pre-trial hearing on the admissibility of Bonnie P.'s testimony. Courtney urges this court to review this issue, even though he failed to object to Bonnie P.'s testimony at trial, and failed to make a request either during trial or at the instruction conference for an instruction limiting the use of Bonnie P.'s testimony.

Section 805.13(3), STATS. reads, in part, that "[f]ailure to object at the [jury instruction-]conference constitutes a waiver of any error in the proposed instructions or verdict." A failure to request that an instruction be given to the jury is treated the same as a failure to object to a jury instruction. *See* ***State v. Glenn***, 199 Wis.2d 575, 589, 545 N.W.2d 230, 236 (1996). As noted in ***State v.***

Schumacher, 144 Wis.2d 388, 397, 424 N.W.2d 672, 675 (1988), "the purpose of the requirement for an objection [is] to give the trial court an opportunity to correct the error, and the appellate court an opportunity to review the grounds for the objection."

For whatever reason, Courtney's trial counsel, who opposed the use of § 904.04(2), STATS., testimony at a pre-trial hearing, elected not to object Bonnie P.'s testimony at trial. Courtney's attorney also failed to request that the trial court give a limiting instruction on the use of her testimony. Although this may have constituted thoughtful trial strategy, it nonetheless results in a waiver of this issue on appeal. Accordingly, the order of the trial court is affirmed.

By the Court.—Order affirmed.

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