

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 97-1605-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL GOODREMOTE II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Burnett County:
JAMES H. TAYLOR, Judge. *Affirmed.*

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

PER CURIAM. Daniel Goodremote appeals a judgment convicting him of sexually assaulting his girlfriend's daughter from the time she was six until she was eight years old. He argues that the trial court improperly exercised its discretion when it allowed the State to present evidence that he also sexually assaulted the victim's younger sister. He also contends that his statutory and

constitutional rights to be present at his trial were violated when he was not present at an instructions conference. We reject these arguments and affirm the judgment.

Goodremote was charged with repeatedly sexually assaulting J.D. and her younger sister A.D. The trial court granted Goodremote's motion to sever the charges for trial, but allowed J.D. and expert witnesses to testify to the sexual assaults of A.D. J.D. testified that Goodremote rubbed his hands on her vagina and penetrated her with his "private" on more than ten occasions. She also witnessed Goodremote engaging in the same conduct with her younger sister. Medical personnel who examined J.D. testified that she suffered damage to her hymen that suggested sexual penetration. They conceded, however, that the damage could have been caused by accident. They also testified that a gynecological examination of A.D. also showed penetration and that it was highly unlikely that anything other than sexual abuse caused her condition.

The admissibility of other acts evidence involves a three-step process. See *State v. Sullivan*, No. 96-2244-CR, slip. op. 15-25 (Wis. Mar. 25, 1998). First, we must determine whether the other acts evidence is offered for a permissible purpose under § 904.04(2), STATS. Second, we must determine whether the other acts evidence is relevant; that is, whether it relates to a fact or proposition that is of consequence to the determination of the action and whether it has a tendency to make a consequential fact more or less probable than it would be without the evidence. Third, we must review whether the probative value of the evidence is substantially outweighed by its prejudicial effect. In reviewing these questions, we must sustain the trial court's ruling if it examined the relevant facts,

applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 12.

Evidence that Goodremote sexually assaulted A.D. was properly offered to establish that the damage to J.D.'s hymen was not caused by accident. The defense suggested that the damage could have been caused by application of medicinal cream to treat a yeast infection. The evidence that A.D. was sexually assaulted is admissible under § 904.04(2), STATS., to show that it was unlikely that the damage to J.D.'s hymen was caused by accident. Evidence may be admitted if it tends to undermine an innocent explanation for other evidence of sexual abuse. *Id.* at 16.

Evidence that A.D. was sexually assaulted was relevant to determine whether J.D. was sexually assaulted. Whether J.D.'s damaged hymen resulted from sexual abuse or accident was a matter of consequence at trial. Because the medical experts could find no cause of A.D.'s condition other than sexual abuse, this evidence tends to establish that J.D.'s condition was also due to sexual abuse.

The probative value of the other acts evidence greatly exceeded its unfair prejudicial effect. The unfair prejudice that might result from other acts evidence includes the tendency by the jury to believe that a person is guilty of a crime merely because he is likely to do such acts; the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from another offense; the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and the confusion that might result from bringing in evidence of other crimes. *Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557, 557 (1967). While these concerns are implicated to some degree, in this case it is not likely that the jury would believe

J.D.'s testimony that Goodremote assaulted her sister and sought to punish him for that assault despite entertaining reasonable doubt that he assaulted J.D. herself. In addition, the trial court gave a jury instruction that limited the use the jury could make of the other acts evidence and that instruction, if followed, precluded any prejudicial use of that evidence. See *State v. Fishnick*, 127 Wis.2d 247, 262, 378 N.W.2d 272, 280 (1985). The jury is presumed to follow the court's instruction. *State v. Johnston*, 84 Wis.2d 794, 801, 518 N.W.2d 759, 759 (1994).

Goodremote argues that the trial court found prejudice when it severed the counts relating to A.D. and that its evidentiary rulings were inconsistent with that decision. First, we note that the trial court may have severed the two counts because evidence of Goodremote's assaults of J.D. might not have been admissible at A.D.'s trial since accidental injury to her vagina might not have been an issue at A.D.'s trial. Second, the trial court is not precluded by its earlier finding from changing its ruling. The only question on appeal is whether the court properly allowed the other acts evidence.

Goodremote argues that the trial court failed to specifically weigh the prejudicial effect of the other acts evidence. The record shows that the trial court carefully inquired about the potential prejudice. Its ruling allowing the State to present other acts evidence implicitly found that the prejudicial effect did not substantially outweigh its probative value. *Fishnick*, 127 Wis.2d at 262, 378 N.W.2d at 280.

Goodremote argues that the State should not have been allowed to present other acts evidence in its case-in-chief, but should have been required to wait until the defense put "at issue" questions of mistake or accident. That argument was rejected in *State v. Friedrich*, 135 Wis.2d 1, 17, n.7, 398 N.W.2d

763, 770, n.7 (1987). Furthermore, the question of accidental injury was put at issue in defense counsel's opening statement. Therefore, the State properly introduced the other acts evidence in its case-in-chief.

Goodremote argues that his statutory and constitutional rights were violated when he was not present for an instruction conference. Due process rights are not violated when a defendant is absent from a conference in chambers dealing solely with a question of law or procedure. *See May v. State*, 97 Wis.2d 175, 186, 293 N.W.2d 478, 483 (1980).

Finally, Goodremote contends that the record does not show what portion of a videotape exhibit was redacted. This argument is not sufficiently developed in his brief and we decline to review that issue. *See State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

By the Court.—Judgment affirmed

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

