

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2629-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RANDY D. DZICKOWSKI,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Barron County:
JAMES C. EATON, Judge. *Affirmed.*

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

PER CURIAM. The State appeals an order denying its motion *in limine* to admit other acts evidence in Randy Dzickowski's sexual assault trial. The State argues that the trial court improperly exercised its discretion by maintaining a rigid position that it would not allow other acts evidence and that it

incorrectly applied the law. Because the record shows that the trial court exercised its discretion and correctly applied the law, we affirm the order.

Dzickowski is accused of having sexual contact with his thirteen-year-old son on four occasions. The State seeks to present evidence that Dzickowski also had sexual contact with his seven-year-old son and a four-year-old “quasi-son.” After noting that it had not allowed other acts evidence in the last fifteen years and that it had a “rather rigid” position of not allowing other acts evidence in sexual assault cases, the trial court found that the State’s proffered evidence, although marginally relevant, was more prejudicial than probative. The court indicated that it would allow other acts evidence if the defense raised certain defenses that would increase the probative value of the evidence.

The trial court properly exercised its discretion when it balanced the probative value of the proffered evidence with its prejudicial effect. *See State v. Ingram*, 204 Wis.2d 177, 186, 554 N.W.2d 833, 837 (Ct. App. 1996). The trial court did not merely follow a rigid policy. Rather, the record shows that the trial court carefully considered the facts of this case, the probative value of the evidence and the potential for unfair prejudice. As the trial court noted, the three alleged incidents are not connected in such a way as to show a plan and the motive for the sexual assault was sexual gratification. The trial court reasonably determined that the jury would not need to hear of other alleged sexual assaults in order to determine Dzickowski’s motive or intent. The court also properly considered the clarity of the alleged victim’s testimony at the preliminary hearing and reasonably determined that other acts evidence was not necessary to refute any suggestion of fantasy, unreliability or vindictiveness on the part of the complaining witness. *See State v. Mink*, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103

(1988). These considerations support the trial court's conclusion that the proffered evidence was only marginally relevant.

Other acts evidence should not be admitted where the prejudice from its admission substantially outweighs its probable value. *Id.* at 12, 429 N.W.2d at 103. The trial court reasonably expressed concern that the jury would convict Dzickowski based on his propensity to commit sex crimes or its belief that he is a bad person regardless of whether he committed the crimes charged in this case.

In support of its assertion that the trial court did not correctly apply the law, the State cites several cases with comparable facts in which appellate courts upheld the trial court's discretionary decision to admit other acts evidence. *See State v. Plymesser*, 172 Wis.2d 583, 493 N.W.2d 367 (1992); *State v. Friedrich*, 135 Wis.2d 1, 398 N.W.2d 763 (1987); *Day v. State*, 92 Wis.2d 392, 284 N.W.2d 666 (1979). The fact that appellate courts have upheld other trial courts' discretionary decisions does not create a legal principle that compels other courts to reach the same conclusion in every case with comparable facts. A discretionary decision is, by its very nature, one upon which reasonable persons might differ. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Discretion is appropriately exercised if the trial court reaches a reasonable decision after examining the facts and the law. *Id.* The trial court's refusal to accept the proffered evidence is not inconsistent with the law merely because another court reached a different conclusion.

By the Court.—Order affirmed.

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

