

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1774

**Cir. Ct. No. 97-CF-805
97-CF-558**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT O. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Robert O. Schmidt appeals from an order denying his WIS. STAT. § 974.06 (1999-2000)¹ motion. We affirm.

¶2 Schmidt was convicted of two counts of first-degree sexual assault and one count of child enticement involving Ammie O. and Krystal P., young friends of his granddaughters. We affirmed his conviction in *State v. Schmidt*, No. 98-1717-CR, unpublished slip op. (Wis. Ct. App. June 9, 1999) (*Schmidt I*). Thereafter, Schmidt filed a WIS. STAT. § 974.06 motion in which he challenged evidence of uncharged sexual misconduct involving Donna F. and Stephanie W. and the effectiveness of postconviction and appellate counsel's representation.² The circuit court rejected Schmidt's claims.

¶3 To the extent Schmidt challenges the effectiveness of appellate counsel in *Schmidt I*, we hold that Schmidt has not employed the proper procedure. Claims of ineffective assistance of appellate counsel must be raised in a habeas corpus petition filed in this court, not in a WIS. STAT. § 974.06 motion filed in the circuit court. *State v. Knight*, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). Nevertheless, we will exercise our discretion to reach the merits of Schmidt's claims to bring an end to his somewhat repetitive litigation.

¶4 We turn to the merits of this appeal. Schmidt makes several arguments relating to Krystal P.'s testimony that she saw Schmidt poke his granddaughters, Sarah Beth J. and Heather J., in their vaginal areas as he gave the granddaughters piggy back rides. Krystal P. testified that Schmidt poked her in

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Schmidt had the same counsel at the postconviction and appellate stages.

the same manner during the same activity. Schmidt argues that the alleged conduct with his granddaughters was inadmissible other acts evidence, trial counsel was ineffective for not seeking a limiting instruction, and postconviction and appellate counsel erred by not challenging the admission of this evidence.

¶5 In *Schmidt I*, we addressed evidence that Schmidt had sexual contact with his granddaughters. In the course of describing how Schmidt assaulted her, Ammie O. testified that the granddaughters were present and assaulted at the same time. *Schmidt I*, unpublished slip op. at 3. We held that this evidence was not other acts evidence because “it was part of the panorama of evidence needed to completely describe the events that occurred.” *Id.* The evidence was admissible “because it was inextricably intertwined with the crime.” *Id.*

¶6 As with Ammie O.’s testimony, we hold that Krystal P.’s testimony that Schmidt assaulted her and his granddaughters in the same manner and under the same circumstances was part of the panorama of evidence. This was not other acts evidence. Because this was not other acts evidence, there was no need for a limiting instruction, and postconviction and appellate counsel were not ineffective for failing to argue that the evidence was inadmissible other acts evidence. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel’s failure to pursue a meritless motion does not constitute deficient performance).

¶7 Schmidt next argues that postconviction counsel was ineffective because he did not raise trial counsel’s failure to object to certain of the prosecutor’s remarks during opening statement and closing argument. Schmidt argues that certain of the prosecutor’s remarks in her opening statement invited the jury to anticipate evidence of other uncharged acts and suggested that Schmidt had

victimized his granddaughters. The remarks focused on Schmidt's daughter's reaction when she learned that her daughters, Schmidt's granddaughters, may have been sexually assaulted by Schmidt. Schmidt complains that the circuit court had deferred ruling on the admissibility of this evidence, and it was improper for the prosecutor to discuss it prior to a ruling.

¶8 We reject Schmidt's contention that the prosecutor's opening statement was improper under the facts of this case. Evidence that Schmidt had sexual contact with his granddaughters came into evidence at trial through the testimony of Ammie O. (which we upheld in *Schmidt I*) and Krystal P. (which we have upheld in this appeal). Therefore, the jury properly heard this evidence, and Schmidt was not prejudiced by this aspect of the prosecutor's opening statement. See *Beavers v. State*, 63 Wis. 2d 597, 605-06, 217 N.W.2d 307 (1974).

¶9 In her closing argument, the prosecutor commented on the evidence that Schmidt assaulted his granddaughters. Again, this evidence was properly before the jury, and we discern no basis for reversible error.

¶10 In his final argument, Schmidt alleges that the testimony of two other young girls, Donna F. and Stephanie W., was improperly admitted into evidence. Stephanie W. testified that "Schmidt appeared to look down her shirt when she bent over to pick up a dropped card during a card game at Schmidt's home." *Schmidt I*, unpublished slip op. at 2. Donna F. testified that Schmidt "would rub her shoulders and tell her she had a nice body and nice legs." *Id.* In *Schmidt I*, we assumed that admission of this evidence was error, but held that the error was harmless as "[t]here [was] no reasonable possibility that the incidents described by Stephanie and Donna contributed to Schmidt's conviction." *Id.* at 5-6. The court gave a cautionary instruction regarding this evidence. *Id.* This

holding is the law of the case, and we will not revisit it. *Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 38-39, 435 N.W.2d 234 (1989).

¶11 Having previously held that the admission of Donna F.'s and Stephanie W.'s testimony was harmless error, we do not address Schmidt's claims that his trial counsel should have entered into a *Wallerman*³ stipulation to preclude admission of this evidence. Our holding in *Schmidt I* precludes an attack on this evidence via an ineffective assistance claim.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ *State v. Wallerman*, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996).

