

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 29, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3460-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN O'HARE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County:
ROBERT J. KENNEDY, Judge. *Affirmed.*

BROWN, J. Kevin O'Hare was convicted by a jury of two battery counts, disorderly conduct and criminal trespass to a dwelling. He contends that certain other-acts evidence should not have been admitted and that it prejudiced him such that he should get a new trial on all charges. We disagree and affirm.

The State alleged that O'Hare entered the apartment of his former girlfriend without her consent and saw that another man was staying in the apartment. An altercation occurred, which brought about the pertinent charges. Just before trial, the State sought an order permitting it to introduce other-acts evidence at trial. The background for needing such evidence was as follows: O'Hare is the father and his former girlfriend is the mother of a young daughter. The daughter resided with her mother. The mother had originally given O'Hare a key for the limited purpose of permitting entry into the apartment to return the child pursuant to a shared custody arrangement. But O'Hare abused the privilege. At one point, he used a key to come in and stand over her bed while she was sleeping. On another occasion, he used a key to enter the apartment to get into an argument with her. Consequently, she asked for the key to be returned. Although the key was returned, presumably O'Hare had made copies of the key beforehand because he "keyed into" the apartment on this occasion.

The State asserted that this evidence went to intent and absence of mistake and was therefore admissible under § 904.04(2), STATS. The evidence was to prove that O'Hare intended to enter the apartment without consent and to counter any theory that because he had a key, he thought he had consent to enter. Lack of consent is a necessary element to criminal trespass to a dwelling. Section 943.14, STATS. The State also sought this as evidence of O'Hare's intent to "control" his former girlfriend, which is what—in the State's view—precipitated the incident.

O'Hare's counsel claimed surprise at the timing of the motion and asked for a continuance. The trial court inquired of counsel what help a continuance would be to him. When the trial court was unconvinced by counsel's answer, it granted the State's motion. The other-acts evidence was referred to by the prosecutor at opening arguments, was adduced at trial and was referred to again by the prosecutor during closing arguments. O'Hare renews his objection on appeal.

There are several reasons why his argument must be rejected. First, the evidence was relevant to the issues of intent to enter the dwelling without consent and his knowledge that he had no consent. O'Hare never conceded that he did not have consent to enter. It was at issue and the State had to prove it. In that sense, it was relevant. Second, the evidence not only went to trespass, but was also background for the jury to understand what precipitated the altercation. *State v. Shillcutt*, 116 Wis.2d 227, 238, 341 N.W.2d 716, 720-21 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Third, as the State points out, this evidence would have been admissible even without a § 904.04(2), STATS., motion. In truth, while it can be said that O'Hare's two uninvited entrances are "acts" in the strict sense of the word, the evidence is really more akin to probative evidence that the defendant knowingly entered with another key after consent had been rescinded and the original key returned. The evidence would have been admissible under § 904.02, STATS., regardless of § 904.04(2).

Further, the evidence was not *unfairly* prejudicial. While the State could have made its case by evidence from the former girlfriend that O'Hare had no consent to enter, the jury was entitled to know why and how O'Hare was able to let himself into the apartment. While this evidence obviously prejudiced O'Hare, it was not *unfair* prejudice. Moreover, the jury, as part of its function to find the truth, had to know the history of the relationship between O'Hare and his former girlfriend, most particularly, his apparent desire to enter her apartment uninvited.

There is also another reason why O'Hare's prejudice argument fails. While he asked for a continuance to meet the other-acts evidence, under *State v. Fink*, 195 Wis.2d 330, 339-40, 536 N.W.2d 401, 404 (Ct. App. 1995), he must make some showing to *this* court that contradictory or impeaching evidence could have been obtained within a reasonable time. He gives no indication that he can meet this obligation. This alone separates the instant case from *Fink*.

We affirm his convictions.

By the Court. – Judgment affirmed.

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