**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 23, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP1508-CR** **Cir. Ct. No. 2011CF436**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SEAN L. FORESTER-HOARE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Rejecting his claim of self-defense, a jury found Sean Forester-Hoare guilty of first-degree intentional homicide with a dangerous

weapon and two counts of first-degree recklessly endangering safety. We reject his appellate arguments and affirm the judgment.

¶2 These facts are not at issue. Forester-Hoare went outside at about 1:00 a.m. with a tactical boot knife to cut up cardboard boxes for recycling pickup in the morning. He took a cigarette break at the end of his driveway and put the knife in its sheath in his boot. Twenty-one-year-old Jonathan Kwiatkowski, a neighbor Forester-Hoare never had met, drove rapidly past, nearly hitting him. Angry words were exchanged. Forester-Hoare followed Jonathan into his driveway, three houses down. Jonathan woke his parents, Timothy and Lori, who went outside while Jonathan called 911. A verbal and physical altercation ensued. Jonathan and his seventeen-year-old brother, Corey, got involved to assist their parents.

¶3 The fracas intensified. Punches were thrown. The parties differ as to who was the aggressor. Forester-Hoare pulled out his knife and struck Jonathan in the neck. The five-inch-blade punctured Jonathan's trachea and left carotid artery. He bled to death. Forester-Hoare was found guilty of first-degree intentional homicide and two counts of first-degree recklessly endangering the safety of Timothy and Lori. He appeals. Additional facts will be supplied as needed to address the issues.

¶4 Forester-Hoare unsuccessfully moved pretrial to exclude evidence he contended either was other-acts evidence or was irrelevant and unduly prejudicial. He contends here that the trial court erred in allowing the State to introduce those pieces of evidence. We disagree.

¶5 Evidentiary rulings are addressed to the trial court's discretion. ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). We uphold

the trial court's decision if it "exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***Id.*** (citation omitted).

¶6 Evidence of other crimes, wrongs or acts generally is inadmissible at trial to prove a person's character and that the person acted in conformity therewith. ***State v. Hunt***, 2003 WI 81, ¶29, 263 Wis. 2d 1, 666 N.W.2d 771. Under appropriate circumstances, however, WIS. STAT. § 904.04(2) (2011-12)[1] allows other-acts evidence to be admitted for purposes such as proof of motive or intent. ***Hunt***, 263 Wis. 2d 1, ¶29.

¶7 To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." WIS. STAT. § 904.01. Even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03. Evidence is unfairly prejudicial if it would tend to influence the outcome by improper means, appeal to the jury's sympathies, arouse its sense of horror, or provoke its instinct to punish, or otherwise cause a jury to base its decision on something other than the established propositions in the case. ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶8 The first pieces of evidence Forester-Hoare wanted excluded were three conversations he had with his parents' cleaning woman, Mary Munns. Munns testified that, five or six months before the Kwiatkowski incident, Forester-

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

Hoare told her that a neighbor had confronted his parents about cutting some tree branches. She said he told her that if the neighbor "ever gets up [in] my parents' face again I'll kill him." The second conversation, a month before Jonathan's death, involved Forester-Hoare's response when Munns mentioned she had left a cleaning job early upon finding that the client's pit bull had not been restrained as she had requested. She testified that Forester-Hoare told her that "[i]f you get confronted with a pit bull[,] all you have to do is grab him by his neck and turn it like this[;] it's almost as easy to kill the pit bull as it is to kill a human." Finally, Munns testified that Forester-Hoare said to her the week before the offenses, "I don't know why I'm angry all the time … I'm so full of anger and I don't know why."

¶9 The trial court found that the statements went to Forester-Hoare's state of mind and intent, were not too remote to be relevant, were relevant to his claim of self-defense, and were not unfairly prejudicial, as it was up to the jury to decide the weight to give them. We agree with the result but not, necessarily, that the conversations are "other acts." Merely because an act may be factually classified as different in time, place or manner from the act complained of does not mean it constitutes other-acts evidence within the meaning of the law. ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. When evidence is admitted for a purpose other than showing a similarity between the other act and the alleged act, it is not other-acts evidence. *See* ***id.***

¶10 Even if the conversations could be fit into the other-acts pigeon hole, proving intent or state of mind and disproving self-defense are acceptable purposes for admitting such evidence. *See* WIS. STAT. § 904.04(2)(a) (intent), ***State v. Kuta***, 68 Wis. 2d 641, 644, 229 N.W.2d 580 (1975) (state of mind), and

***State v. Payano***, 2009 WI 86, ¶64 n.13, 320 Wis. 2d 348, 768 N.W.2d 832 (disprove defense).

¶11 The State depicted Forester-Hoare as a directionless, angry, narcissist who, twenty-nine and living in his parents' basement playing video games, stoked an inner rage until he allowed it to boil over and vented it on Jonathan while armed with a lethal weapon. The conversation evidence was relevant, as it tended to prove the State's theory that Forester-Hoare had a penchant for violence in the face of perceived affronts and tended to disprove his claim that he was not the aggressor but had acted in self-defense.

¶12 We also reject Forester-Hoare's claim that any probative value was outweighed by the risk of unfair prejudice because it left the jury with a myopic view of him as angry and hostile. Munns also confirmed that, except for those three occasions, he always was "calm and nice." Forester-Hoare could have requested a cautionary instruction to lessen any potential prejudicial impact. Failure to object to jury instructions waives the issue. ***State v. Perkins***, 2001 WI 46, ¶11, 243 Wis. 2d 141, 626 N.W.2d 762.

¶13 Another piece of evidence Forester-Hoare sought to have excluded was what appeared to be the last of ten unsent text messages on his cell phone. Addressed to his brother, the undated message said only, "Kill." Forester-Hoare contends that, as no one could say when it was drafted, the text was not relevant and also was unfairly prejudicial, as shown by the State's argument to the jury that it was proof of his intent.

¶14 We disagree. The evidence was potentially probative and we cannot say it was unfairly prejudicial per se. The jurors were free to ignore the text, as it was for them to determine how much, if at all, an undated, unsent message showed

his intent to kill Jonathan. *See* ***State v. Heitkemper***, 196 Wis. 2d 218, 225-226, 538 N.W.2d 561 (Ct. App. 1995) ("Jurors may rely on their common sense and life experiences during deliberations. This knowledge may include expertise that a juror may have on a certain subject.").

¶15 The last challenged piece of evidence was the testimony of Jerry Mojeck that his lawn furniture was cut up sometime between the evening of April 3 and the afternoon of April 4, 2011. Mojeck lived behind the Forester-Hoares.[2] Forester-Hoare claimed Mojeck's testimony was irrelevant, as there was no evidence tying him to the vandalism.

¶16 The evidence was relevant. Forester-Hoare knew police had been called. When they first spoke to him at his home, he feigned unawareness of and denied involvement in the Kwiatkowski incident and asked if maybe the fight had occurred on the street behind them, where Mojeck lived. Multiple times after that, Forester-Hoare tried to deflect suspicion onto the teenagers who lived there, whom he described as neighborhood troublemakers. Considering his efforts to shift the blame to the Mojeck home and that he was outside with a sizeable knife during the relevant time frame, a jury reasonably could conclude that he slashed the furniture in hopes the police would believe that it got damaged during a fray at the Mojecks'. The evidence also was relevant to show Forester-Hoare's intent and state of mind and to the State's theory of his mounting anger and desire to harm someone. Given the undisputed evidence that Forester-Hoare admitted to being outside with a nine-inch tactical boot knife during the relevant time frame, Mojeck's testimony was not unfairly prejudicial.

[2] Mojeck was not the neighbor involved in the tree-branch dispute.

¶17 Forester-Hoare next contends that the trial court erroneously denied his motion for a mistrial. We disagree.

¶18 Forester-Hoare testified in his own defense. As the State was about to cross-examine him, the prosecutor stood, clapped and said, "That was quite the performance." The court excused the jury. Defense counsel argued that the prosecutor's "highly unethical … display calls into question ... the validity of any verdict in this trial" and moved for a mistrial. The court responded that it did not know if the action was unethical, "but it certainly was uncalled for…. It was directly in front of the jury. The meaning of the situation was clear…. [I]t could be considered taunting." Still, the court disagreed that the action demanded a mistrial and instead immediately addressed the matter upon the jury's return, instructing it to completely disregard the prosecutor's "inappropriate … demonstration[]."

¶19 A ruling on a mistrial motion based on prosecutorial misconduct is reviewed for an erroneous exercise of discretion. ***State v. Patterson***, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602. "The trial court must determine, in light of the whole proceeding, whether the claimed error [is] sufficiently prejudicial to warrant a new trial." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The denial of the motion will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Id.*** "The underlying question is whether the prosecutor's conduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Patterson***, 321 Wis. 2d 752, ¶33 (citation omitted).

¶20 The trial court did not erroneously exercise its discretion by concluding a new trial was unwarranted. Well into the third day of trial, the

evidence against Forester-Hoare was significant. The court chastised the prosecutor in front of the jury. Also, a curative instruction presumptively erases any potential prejudice. ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). We presume the jury follows the instructions given. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

¶21 The last issue involves challenges to portions of the $62,660.93 restitution order. Forester-Hoare objects to the amounts related to Timothy's and Lori's claims for lost pay for the time they were off work and to their out-of-pocket medical expenses.[3] He takes particular issue with the $6,003.67 ordered for medical expenses Corey incurred in January and February 2012.

¶22 A request for restitution is addressed to the trial court's discretion. *See* ***State v. Anderson***, 215 Wis. 2d 673, 677, 573 N.W.2d 872 (Ct. App. 1997). The restitution statute, WIS. STAT. § 973.20, is to be "broadly and liberally" construed to allow victims to recover their losses due to a defendant's criminal conduct. ***Anderson***, 215 Wis. 2d at 682. The trial court must order restitution "unless it finds substantial reason not to do so and states the reason on the record." *See* ***State v. Borst***, 181 Wis. 2d 118, 122, 510 N.W.2d 739 (Ct. App. 1993); WIS. STAT. § 973.20(1r). First, however, a causal nexus must be established between the offense and the disputed damage. ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147. The victim must prove the nexus by a preponderance of the evidence. WIS. STAT. § 973.20(14)(a).

[3] Forester-Hoare does not challenge the restitution ordered for funeral expenses, the claim on behalf of the Crime Victim Compensation Fund, or the amount to reimburse the Kwiatkowskis' home insurer for the costs it covered in the removal, repair, and cleanup of portions of the premises necessitated by Jonathan's significant blood loss.

¶23 The Kwiatkowskis did not appear at the restitution hearing because, as the prosecutor explained, "they found it too painful to come today[,] to even attend. They didn't want to testify, they did not want to be in the same courtroom as the Defendant." In lieu of attending, they submitted a packet of documents in support of their restitution request. Forester-Hoare objected on some level to it all.

¶24 Timothy and Lori corroborated their claims for lost pay in 2011 and 2012 with reports from their employers. The court found that Lori's eighty-six days off, documented as taken for "death in family," "personal illness," and "family medical leave," were reasonable and established by a clear preponderance of the evidence. It expressly found that Timothy's forty-four days off were for "the necessary meetings with the District Attorney's office, court appearances, including time spent at trial, and trial preparation. In addition it would appear he lost time off after the crime due to the family grieving and the subsequent burial and funeral time." Forester-Hoare argues that, as only fourteen of Timothy's days off were attributed to calendared court matters, the remaining thirty are inadequately substantiated because "[t]here is no way to determine what days [he] took off for trial preparation or for grieving." We reject that argument. "[A] restitution hearing is not the equivalent of a civil trial and does not require strict adherence to the rules of evidence and burden of proof." ***State v. Holmgren***, 229 Wis. 2d 358, 367, 599 N.W.2d 876 (Ct. App. 1999). As the trier of fact in the restitution hearing, the trial court is free to accept or reject evidence and to give the evidence it accepts the weight it considers appropriate. *See* ***State v. Boffer***, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990).

¶25 To substantiate their medical expenses the Kwiatkowskis submitted insurer explanations of benefits listing the health care provider's name, the date of service, a descriptor such as "prescription," "office visit," "therapy" or "diagnostic

services," and the cost of the service, including the patient-responsibility portion. Forester-Hoare contends the trial court made unsupported leaps in concluding that certain expenses were in or out of network, and that the records do not show the requisite nexus between a given expense and the offense, especially as to Corey's expenses, which first arose months after the incident. On this record, we disagree.

¶26 The court concluded that, in addition to the expenses noted to be "therapy," Timothy's and Lori's "office visits" and "prescriptions" also were "essentially for therapy." In their victim statements at sentencing, Timothy recounted "[s]leepless, nightmare-ridden nights" and "mornings filled with visions of this tragedy"; Lori described herself as "frightened of life" and unable to sleep; she reported nightmares, flashbacks, "[c]rying every day," "[g]etting sick and vomiting," losing weight, and clenching her teeth so hard that she broke a tooth. The trial court did not erroneously exercise its discretion in determining that Timothy and Lori sufficiently established a causal nexus between the offense and their medical expenses for 2011 and 2012. *See* ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983) (reviewing court may search record for reasons to sustain trial court's exercise of discretion).

¶27 The court also concluded, albeit with little explanation, that Corey's medical expenses, too, were "undoubtedly incurred for the reason stated as a result of the crime." As noted, Jonathan died in April 2011. The insurers' explanations of benefits relative to Corey reflect clusters of medical activity in early 2012. These expenses included visits to various medical professionals, ambulance transportation, inpatient medical services, and an unidentified surgery. The specific ailment is not identified.

¶28 The court heard Corey testify at trial that he saw his brother bleed to death in front of him. It heard Timothy state at the sentencing hearing that, in losing Jonathan, Corey lost his best friend. It heard Lori's account of the physical ailments she has suffered since Jonathan's death. A reasonable inference is that Corey's particular grief also would manifest itself in some fashion at some point and that Forester-Hoare's act necessitated that care.

¶29 Furthermore, when the court addressed Corey's early 2012 expenses, it already had addressed Timothy's and Lori's similarly documented medical expenses. Timothy and Lori submitted expenses through September and December 2012, respectively. The court found those reasonable. Corey's early 2012 medical attention likewise were reasonable especially since the trial, at which he would have to testify and face his brother's killer, still loomed ahead. On the record before us, we affirm the court's exercise of discretion.

*By the Court*.—Judgment affirmed.

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