

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 28, 1999

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. 98-0136-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**PHILIP O. ROSE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marquette County:  
RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. Philip Rose appeals from a judgment convicting him of one count of child abuse. The issue is whether the trial court properly exercised its discretion in admitting evidence at trial of Rose's prior "bad act" involving his young child nine years before this offense occurred. We conclude that the trial court properly admitted the evidence and affirm.

Sixteen-month-old Briana W. was injured while in Rose's care. When taken to the emergency room two days after her injury, Briana had multiple bruises on her body and small red dots on her face that were consistent with suffocation, choking, or someone having placed duct tape over her mouth. Rose was charged with child abuse.

The State sought to introduce evidence at trial that nine years earlier, Rose had physically abused his then three-and-one-half-month-old daughter, Crystal. Rose had placed his hand, blankets and duct tape over Crystal's mouth in an attempt to stop her from crying. The trial court allowed the evidence to be admitted.

Section 904.04(2), STATS., governs admission of other acts evidence:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the supreme court reiterated the three-step analytical framework that trial courts must follow when determining the admissibility of other acts evidence under § 904.04(2), STATS. Those steps are as follows: (1) the evidence must be offered for an acceptable purpose such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident; (2) the evidence must be relevant; and (3) the probative value of the evidence must substantially outweigh the danger of unfair, confusion of the issues or misleading

the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *See Sullivan*, 216 Wis.2d at 772-73, 576 N.W.2d at 32-33.

Turning to the first two prongs of the analysis, the trial court concluded that the evidence was admissible to prove that the injury did not occur by accident or mistake and to show the “identity” of the perpetrator. Because Rose claimed that the child caused her own injuries, evidence that Crystal had previously sustained identical injuries made it more likely that Rose, not Briana, caused the injury. This is probative of the “identity” of the person who caused the injuries. The evidence is also relevant because it makes it less likely that Briana’s injuries occurred by accident. The evidence therefore falls under the exceptions provided in § 904.04(2), STATS., and is relevant under § 904.01, STATS.

Under the final prong of the analysis, we believe that the trial court did not misuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by its unfair prejudicial effect. The evidence was highly probative of whether the injuries happened by accident or were caused by the child herself. Although the evidence probably hurt Rose’s defense, the jury was instructed that the evidence was not introduced to show that Rose had a certain character or that he acted in conformity with his character. We conclude that the trial court properly exercised its discretion in admitting the evidence.<sup>1</sup>

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<sup>1</sup> Rose also argues that the evidence should not have been admitted because the court had to assume that Rose did, in fact, injure his daughter in a similar matter nine years earlier in order to find that there was similarity between the prior conduct and the charged conduct. We disagree. The trial court did not have to assume anything. Rose was convicted of child abuse for his prior actions and, had Rose and the State not stipulated to the facts of the prior conduct as they did, the State could have introduced evidence of the prior conviction.

*By the Court.*—Judgment affirmed.

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

