COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2004-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL V. DIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

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

HOOVER, J. Michael Diak appeals a judgment convicting him of second-degree sexual assault in violation of § 940.225(2)(a), STATS. Diak asserts that the trial court erred by admitting testimony concerning prior acts of violence toward the victim, Mary W. We conclude that the trial court did not misuse its discretion by admitting testimony of prior bad acts and therefore affirm.

On June 24, 1996, Diak was charged with second-degree sexual assault. The complaint stems from allegations that on November 16, 1995, at approximately 1:30 a.m., an intoxicated Diak telephoned his ex-girlfriend, Mary, from a tavern, and asked if he could sleep at her house. Mary was residing at her mother's home along with her step-father, brother, and daughter, who were sleeping at the time of the call. When Diak arrived, Mary told him to lay down and go to sleep. Diak refused, insisted that they talk about their daughter and pushed Mary down on the couch. He then asked her to have sex with him. When she refused, Diak punched her in the chest, referred to his past violent acts, removed her clothing and forced her to engage in intercourse.

Diak was bound over for trial after the preliminary hearing. Before trial, the State brought a motion to admit evidence of five prior incidents in which Diak had physically abused Mary. Those acts were: (1) in July 1990 during an argument at her mother's house, Diak dragged her by the hair to her bedroom, pulled her up on the bed and shoved her face into her waterbed mattress until she could not breathe; (2) on a trip to Wausau with friends in August 1990, Diak punched her three times while in the back seat of their friend's car until she passed out; (3) during an argument in February 1992, Diak continuously punched her in the face, grabbed her throat and threatened to kill her while they were sitting in a car at his mother's house; (4) in November 1993, Diak's ex-girlfriend called while she and Diak were engaging in sex and, when she refused to continue, Diak became angry and began beating her; (5) in January 1995, Diak began beating her after she noticed and commented on a hickey on his neck.

The trial court granted the State's motion to admit the other acts evidence. In a lengthy decision, the court concluded that the evidence was relevant to the issue of consent:

> [The] history of abuse and his reference to that history of abuse when the assault begins is very relevant. It is clearly another fact or circumstance that would allow the jury to determine whether or not she consented.
>
> ….
>
> … What her version of the story is that he didn't need to be particularly violent, because she was so afraid of him, that she offered almost no resistance and because she was so afraid that it was going to get more violent.

The court further determined that although the evidence is incriminating and prejudicial, "the prejudice to the State is enormous if I don't admit it for all of the reasons that [the State] referred to earlier, not only in terms of the actual incidents, but the victim's response to it and how she handled it."

Consequently, the State presented trial testimony concerning past incidents in which Diak engaged in violent behavior toward Mary. The trial court twice gave limiting instructions to the jury regarding the other acts evidence, once in its preliminary instructions and again in closing instructions. The jury found Diak guilty of second-degree sexual assault. The trial court sentenced him to an indeterminate term not to exceed five years. Diak appeals.

Diak argues that the trial court erred by admitting evidence of prior acts of violence between Diak and Mary. We review a trial court's decision to admit other acts evidence by determining whether the court exercised appropriate discretion. ***State v. Sullivan***, 216 Wis.2d 768, 780, 576 N.W.2d 30, 38 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id***.

Sections 904.04(2) and 904.03, STATS., govern the admissibility of other acts evidence. Section 904.04(2) provides:

> 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.

Section 904.03 states:

> Although 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.

The supreme court has set forth a three-step analysis to determine whether other acts evidence is admissible. ***Sullivan***, 216 Wis.2d at 771-72, 576 N.W.2d at 32-33. The first inquiry is whether the other acts evidence is offered for an acceptable purpose under § 904.04(2), STATS. ***Sullivan***, 216 Wis.2d at 772, 576 N.W.2d at 32. Second, the trial court considers whether the other acts evidence is relevant, considering the two facets of relevance set forth in § 904.01, STATS. ***Id***. at 772, 576 N.W.2d at 32. Third, the trial court determines whether the probative value of the other acts evidence 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. ***Id***. at 772-73, 576 N.W.2d at 33.

First, Diak contends that the other acts evidence was not admitted for a permissible purpose under § 904.04(2), STATS. Other acts evidence is

admissible under § 904.04(2) to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The list of permissible purposes, however, is neither exclusive nor exhaustive. ***State v. Kaster***, 148 Wis.2d 789, 797, 436 N.W.2d 891, 894 (Ct. App. 1989). Section 904.04(2) is permissive and not restrictive and therefore favors the admissibility of other acts evidence if it is not offered solely to prove the defendant's propensity to commit the act charged. *See* ***State v. Grande***, 169 Wis.2d 422, 434, 485 N.W.2d 282, 286 (Ct. App. 1992).

Here, the trial court first considered whether the evidence could even be construed as proving Diak's propensity to commit the act charged, because the evidence did not implicate his tendency to commit sexual assault, but rather related to his alleged acts of physical violence toward Mary. Assuming arguendo that the evidence could be misused to prove Diak's tendency to commit sexual assault, the trial court nevertheless concluded that the other acts evidence fit within a permissible purpose under § 904.04(2), STATS. The court held that the other acts evidence was admitted to prove the victim's nonconsent. The court stated that, "I think it is clearly being offered to allow the jury to determine whether or not the [victim] consented and whether or not there was a threat of force or violence." Following this analysis, we conclude that the trial court properly exercised its discretion by determining that the other acts evidence was admitted for a permissible purpose. Other acts evidence may be admitted if necessary for a full presentation of the case. ***State v. Shillcutt***, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983). This evidence was necessary to fully present the case, and it allowed the jury to conclude that Mary did not consent to intercourse.

Next, Diak maintains that the other acts evidence was not relevant. Under § 904.01, STATS., the court must apply a two-prong test to determine relevancy. First, the court must consider whether the evidence relates to a fact or proposition that is of consequence to the determination of the action. ***Sullivan***, 216 Wis.2d at 785, 576 N.W.2d at 38. Second, the court must determine whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence. ***Id***. at 785, 576 N.W.2d at 38. The probative value of the evidence "depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." ***Id***. at 786, 576 N.W.2d at 38.

> The determination of relevancy can never be an exact science because it necessarily involves that trial court's considered judgment whether a particular piece of evidence tends to establish a fact of consequence in a given set of circumstances. The issue of relevancy "must be determined by the trial judge in view of his or her experience, judgment and knowledge of human motivation and conduct."

State v. Pharr, 115 Wis.2d 334, 344, 340 N.W.2d 498, 502 (1983).

Diak concedes that the other acts evidence relates to a fact that is of consequence to the determination of the action. He disagrees, however, that the evidence makes it more or less likely that he had sexual intercourse with Mary without her consent, or that he did so by use of force or threat of force.

The trial court determined that evidence of prior physical violence between Diak and Mary was relevant to two elements of second-degree sexual assault. The court first concluded that the past acts were relevant to the issue of consent. It emphasized that,

> In deciding whether she agreed or did not agree, you should consider what she said, what she did, along with all other facts and circumstances.
>
> ….
>
> She did testify on cross-exam that she knew he was drunk. That she knew how he got when he was intoxicated. That he had beat her up in the past five other times when he was intoxicated. She indicated he almost killed her twice. And that she had been hospitalized once.
>
> ….
>
> She did testify on cross-exam that she was afraid that he would harm her family. But she also testified on direct and cross that she was afraid for herself, because he had been very violent to her in the past.
>
> She really, according to the account, did not offer a tremendous amount of physical resistance. The jury instruction says no amount of physical resistance is required in order for the state to meet its burden of proof.
>
> But it seems to me that the history of abuse and his reference to that history of abuse when the assault begins is very relevant. It is clearly another fact or circumstance that would allow a jury to determine whether or not she consented.

The court further concluded that the past acts were relevant to the second element of use or threat of force or violence. The court stressed that Diak's comments before the sexual assault that "you would know if I hit you. I have done it in the past. You remember what it is like" could be construed by the jury as a threat of force or violence. Based on the court's analysis, we conclude that the court properly exercised its discretion by finding the other acts evidence relevant to the issues of consent and force or threat of force. The evidence tends to make more probable the truth of the State's claim that Mary did not consent to

the sexual assault and explains Mary's reaction to the alleged assault, a reaction perhaps otherwise inconsistent with a claim of sexual assault.[1]

Last, Diak asserts that the probative value of the other acts evidence exceeded the risk of unfair prejudice. He claims that the other acts evidence permeated the trial and influenced the jury to convict him by showing he was a bad man.

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis.2d at 789, 576 N.W.2d at 40.

Here, the court concluded that any unfair prejudice was outweighed by its "extremely high probative value" and by the enormous prejudice that would result to the State if it were not allowed to present the evidence and complete the story of the crime. Relying on case law, the court emphasized that,

> "Other crimes evidence is admissible to complete the story of the crime on trial. The Supreme Court has recognized the state's right to a fair trial and the opportunity to convict." There is another citation. "Withholding

[1] Diak also argues that the evidence is irrelevant because there is no similarity between the other acts and the charged offense. Similarity is not a requirement, however, and only provides a stronger case for the admission of the other acts evidence.

> The required degree of similarity between the other act and the charged offense and the required number of similar other acts cannot be formulated as a general rule. The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence.

State v. Sullivan, 216 Wis.2d 768, 787, 576 N.W.2d 30, 39 (1998).

> admissible evidence from the jury on the basis of unfair prejudice or misleading the jury, where that evidence is the only evidence of an element of an offense, precludes a conviction of the offense charged. Consequently, the state would be unfairly prevented from prosecuting a serious criminal allegation."
>
> It is, you know probably distinguishable to the extent that the prior incidents of physical abuse are not the only evidence of the two elements that I have previously referred to. But they are clearly very strong evidence, if it is to be believed. And that is not the question for me today … whether the jury is going to believe it or not. But if it is believed, it is the best evidence of whether or not she consented and whether there was a threat of force or violence.
>
> I agree that it is incriminating to the Defendant and prejudicial. But I don't see that it is an unfair prejudice under the circumstances. I think it has extremely high probative value. And I think the prejudice to the State is enormous if I don't admit it for all of the reasons that [the State] referred to earlier.

Moreover, the court gave the jury two precise and accessible limiting instructions. Prior to trial the court informed the jury that:

> Evidence will be received … regarding other conduct of the Defendant for which he is not on trial. Specifically, evidence will be received that the Defendant engaged in acts of physical violence toward the victim in this case. If you find that this conduct did occur, you should consider that evidence only on the issues of [Mary's] state of mind and the reasonableness of her acts at the time of the alleged crime in this case.
>
> You may not consider any evidence of the Defendant's physical violence toward [Mary] for any other purpose. You may not consider it to conclude that he has a certain character or a certain character trait and that he acted in conformity with that trait or character with respect to the offense charged.
>
> Again, you are to consider that evidence solely for the purpose of assessing the alleged victim's state of mind and the reasonableness of her acts.

The court again gave a similar limiting instruction during its final charge to the jury. The court stressed that the evidence "is not to be used to conclude that the Defendant is a bad person and for that reason is guilty of the offense charged."

We conclude that the trial court did not misuse its discretion by determining that the probative value of the evidence outweighed any unfair prejudice to Diak. We will not disturb the court's thorough reasoning set forth on the record. Moreover, we conclude that the court's multiple limiting instructions to the jury cured any prejudice to Diak. Juries are presumed to follow the court's instructions, thus, when the jury is instructed that it cannot use other acts evidence to conclude that the defendant had a bad character and acted in conformity therewith, any danger of unfair prejudice or misleading the jury is cured. ***Grande***, 169 Wis.2d at 436, 485 N.W.2d at 286-87.

Accordingly, we conclude that the trial court did not misuse its discretion by admitting the other acts evidence. The court's decision examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach.

By the Court.—Judgment affirmed.

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