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**DISTRICT IV**

September 3, 2015

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP2421-CR

State of Wisconsin v. Eric P. Engen (L.C. # 2012CF2207)

Before Lundsten, Higginbotham and Sherman, JJ.

Eric Engen appeals judgments convicting him, after a jury trial, of two counts of stalking and two counts of violating a harassment restraining order, contrary to WIS. STAT. §§ 940.32(2) and 813.125(7) (2011-12).<sup>1</sup> On appeal, Engen argues that the circuit court erred when it denied his motion in limine seeking to exclude certain evidence proffered by the State. For the reasons set forth below, we affirm the judgments.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The charges of stalking and violating a restraining order in this case stem from correspondence, primarily over Facebook and email, between Engen and a woman we will refer to as L.T. Prior to trial, Engen filed motions in limine seeking to exclude certain evidence. Among that evidence was an audio recording that Engen's middle-school-aged son surreptitiously made while in the car with Engen. In the recording, Engen yells and swears and mentions L.T.'s name in conjunction with himself and his sons, as if she were part of their family. Engen's motion in limine also sought to exclude posts made on L.T.'s Facebook wall in which Engen said he hoped to spend Thanksgiving with his two sons and L.T. On the same day, he also uploaded a Word document to her Facebook wall that appears to be a travel itinerary. Finally, Engen sought to exclude certain writings seized from a search of his residence pursuant to a search warrant, including a letter to L.T. in which he says he loves her and wants to spend the rest of his life with her, a letter in which he asks L.T. to contact him at a bowling alley in Sauk City, and an enumerated to-do list that includes plans to get her in his life, marry her, and "knock up" L.T.

After a hearing, the circuit court denied Engen's motions to exclude the recording, the Facebook posts, and the writings seized from Engen's home. The evidence was admitted at trial, and the jury returned a guilty verdict as to two counts of stalking and two counts of violating a harassment injunction. Engen now appeals, arguing that the circuit court erred in denying his motions in limine as to the recording, the Facebook posts, and the writings.

The question of whether a circuit court erred when it admitted or excluded evidence is subject to an erroneous exercise of discretion standard. *State v. Nelis*, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619. A reviewing court may not substitute its discretion for that of the circuit court. *State v. Rhodes*, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850. An appellate

court may, however, review the record independently to determine whether there is any reasonable basis for the circuit court's discretionary decision. *Id.*

Engen argues on appeal that the recording, the Facebook posts, and the writings seized from his home are other acts evidence under WIS. STAT. § 904.04(2). He argues that they should not have been admitted because they do not satisfy the requirements for admissibility under *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We disagree, and we affirm the circuit court's decision to admit the evidence in question.

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.” WIS. STAT. § 904.04(2). However, § 904.04(2) does not require the exclusion of other acts evidence when the evidence is “offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” In other words, when other acts evidence is offered for a purpose not associated with proving an individual's character and propensity to act in conformity therewith, the evidence is not prohibited by § 904.04(2). *State v. Payano*, 2009 WI 86, ¶62, 320 Wis. 2d 348, 768 N.W.2d 832. When deciding whether to allow other acts evidence, Wisconsin courts apply the three-step analytical framework set forth in *Sullivan*, 216 Wis. 2d at 772-73, under which a court considers: (1) whether the evidence is offered for an acceptable purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay.

We turn first to the audio recording. We affirm the circuit court's decision to admit the recording, but on grounds other than those relied upon by the circuit court.<sup>2</sup> Under the first prong of the *Sullivan* analysis, we are satisfied that the recording potentially serves an acceptable purpose of showing Engen's motive to stalk and harass L.T. See *Sullivan*, 216 Wis. 2d at 772; see also WIS. STAT. § 904.04(2). Turning to the second prong, we are satisfied that the recording is relevant to the issue of Engen's motive. See *Sullivan*, 216 Wis. 2d at 772. In the recording, Engen refers to L.T. as if she is a member of the family, along with himself and his two sons. The recording is probative of Engen's strong desire to include L.T. in his life and his family circle, thus demonstrating an obsession with L.T. as motivation for his stalking behavior. As to the third prong, we are satisfied that the recording's probative value is not substantially outweighed by the danger of unfair prejudice, thus satisfying the third *Sullivan* prong. The recording is short and, although Engen swears and uses harsh language, that language is not directed at L.T. or at his son, but more generally at life circumstances. Thus, the prejudicial effect of the recording is outweighed by its probative value which, as stated above, highlights Engen's obsession with L.T. as a motivating factor in the stalking crimes.

Similarly, the Facebook posts and writings seized from Engen's residence satisfy the requirements of the *Sullivan* analysis and, therefore, were properly admitted into evidence. See *id.* at 772-73. As to the first two requirements, the posts and the writings serve the permissible purpose of showing Engen's motive and are relevant to show his continued obsession with L.T.

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<sup>2</sup> On appeal, we may affirm on different grounds than those relied on by the circuit court. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). Furthermore, when we affirm on other grounds, we need not discuss our disagreement with the circuit court's chosen grounds of reliance. See *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

as motivation for stalking her and violating a harassment injunction. *See id.* at 772. The Word document posted to L.T.'s Facebook wall by Engen is entitled "Arizona Trip ELAJ" and appears to be a travel itinerary. It was posted on November 9, 2012, during the time period when the harassment injunction issued against Engen as to L.T. was in effect. L.T. and Engen's ex-wife both testified that they interpreted the initials to refer to the first names of Engen, L.T., and Engen's two sons. The itinerary makes reference to "all 4 of us" and includes what appears to be a packing list that references the need for lingerie, a two-person sleeping bag, and backpack "to be fitted for a 5'5" woman," which is L.T.'s height. These detailed plans, as well as the letters and to-do list found in Engen's home, reflect his continued obsession with L.T. and his desire for her to be a part of his life and his family and, therefore, are probative of his motive for stalking and harassing her.

The circuit court concluded that the Facebook posts and the writings were prejudicial, but not unfairly so. We agree. We are satisfied that the probative value of the evidence, in showing Engen's motive and the extent to which his obsession with L.T. permeated his life, outweighs any unfair prejudice to Engen, thus satisfying the third requirement for admissibility under *Sullivan*.

In sum, we conclude that the circuit court did not err in allowing the audio recording, the Facebook posts, and the writings seized from Engen's home to be admitted into evidence. Because we conclude that the circuit court did not err in admitting the evidence, we need not address Engen's argument that the error was not harmless.

IT IS ORDERED that the judgments of conviction are summarily affirmed under Wis. STAT. RULE 809.21(1).

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