COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-3528-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DOUGLAS P. BOURQUE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Douglas P. Bourque appeals from judgments convicting him of second-degree sexual assault, and two counts each of false imprisonment, threats to injure and substantial battery.[1] On appeal, Bourque

[1] We treat the appeal as taken from the February 9, 1998 judgment of conviction and the February 25, 1998 amended judgment of conviction.

challenges the admission of evidence of other acts of domestic violence and alleges prosecutorial misconduct. Because the circuit court properly exercised its discretion in admitting the other acts evidence and the prosecutor's conduct did not deprive Bourque of a fair trial, we affirm.

¶2 The amended information charged Bourque with two counts each of false imprisonment, substantial battery and threats to injure, and one count of second-degree sexual assault arising out of domestic violence incidents in May 1996 and February 1997 involving Christina G.[2]

¶3 The State moved in limine to introduce evidence that Bourque was convicted of battery to Katie B. in 1988 and 1989. The State argued that the evidence was relevant to Bourque's motive and intent in the offenses involving Christina G. After hearing argument, the court withheld a ruling on the motion until after Christina G. testified at trial.

¶4 After Christina G.'s testimony, the parties and the court revisited the other acts evidence involving Katie B. That evidence consisted of the following. In March 1988, Bourque was convicted in municipal court of battering Katie B. In that instance, Bourque pushed Katie B. to the floor and pounded her head against the floor. In October 1988, Bourque was convicted in municipal court of battery for knocking Katie B. to the ground, sitting on her and choking her. In April 1989, Bourque was convicted of battery for putting Katie B.'s head through a window, fracturing her jaw, punching her and knocking out three of her teeth during a three-hour beating. Katie B. was pregnant by Bourque at the time of this beating. In August 1989, Bourque was convicted of battery after ejecting Katie B. and their

[2] For ease of reference, we refer to this complex of offenses as abuse.

three children from the home in the middle of the night and punching Katie B. in the stomach.

¶5 Christina G. testified that she and Bourque arrived in Kenosha in May 1996. Christina G. was pregnant at the time. Christina G. testified to the following facts surrounding the May 1996 charges of false imprisonment, substantial battery and threats to injure. Bourque accused Christina G. of taking money from him, she denied it and Bourque threatened to kill her and began tearing their motel room apart. Bourque repeatedly prevented Christina G. from leaving the motel room, threatened her with a knife, battered her severely and threatened to kill her. Christina G. ultimately escaped and ran to the motel's front desk for help. Christina G.'s testimony was corroborated by a police officer who noted that Christina G. was upset and injured. The officer found the motel room in total disarray and found a knife in the bathroom. The officer also had a confrontation with Bourque in the motel parking lot.

¶6 As to the February 1997 charges of false imprisonment, substantial battery, sexual assault and threats to injure, Christina G. testified that she and Bourque were living in an apartment; their child was three weeks old. After Christina G. asked Bourque not to touch her because she was feeling unwell, Bourque held her down, battered and strangled her, threatened to kill her and injured her breast. The next day she was able to escape the apartment and seek help from a neighbor. The neighbor testified that Christina G. said Bourque had abused her. The landlord, who assisted Christina G. in reentering the apartment, found notes written by Bourque in which Bourque stated, "I know I said I will not hit or hurt you again." A police officer noticed injuries on Christina G. When arrested, Bourque was wearing the belt Christina G. described as the one he repeatedly tightened around her neck.

¶7 The court found Bourque's violence toward Katie B. and Christina G.:

> [V]ery, very similar in a number of respects. The woman is asking to leave. He has taken her across country. There is – their relationship has moved from just one of romantic interest to where there is actually a child brought into the picture. The fact that there is a similar incident involving locking out. And I could go on. I'm not going to. But it is far more similar than what was permitted by the Court [of appeals] before [in ***State v. Clark***, 179 Wis. 2d 484, 507 N.W.2d 172 (Ct. App. 1993)]. It certainly speaks volumes in this case, I think.

¶8 The court found the other acts evidence probative and that its prejudice did not outweigh its probative value. The court admitted Bourque's four convictions for domestic violence toward Katie B.

¶9 Whether to admit other acts evidence is within the circuit court's discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will sustain the circuit court's discretionary decision if that court examined the relevant facts, applied a proper legal standard and used a rational process to reach a conclusion that a reasonable judge could reach. *See* ***id.*** at 780-81.

¶10 In ***Sullivan***, our supreme court's most recent exposition on the admissibility of other acts evidence, the court set out a three-part test for the admission of such evidence under WIS. STAT. § 904.04(2) (1997-98).[3] The first step considers whether the other acts evidence is offered for a permissible purpose under § 904.04(2). *See* ***Sullivan***, 216 Wis. 2d at 783. Among those purposes are intent, motive and plan. *See* ***id.*** The second step determines if the other acts

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

evidence is relevant "to a fact or proposition that is of consequence to the determination of the action" and whether it is probative, i.e., "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 785-86. The final step is to determine whether the circuit court "erroneously exercised its discretion in weighing the probative value of the other acts evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence." ***Id.*** at 789.

¶11 Applying the first prong of ***Sullivan*** to this case, we note that the court instructed the jury that the evidence was relevant to Bourque's intent in the charged offenses. Intent is a reasonable purpose for other acts evidence under WIS. STAT. § 904.04(2).

¶12 While the court ruled that the evidence was relevant to Bourque's intent, which is a proposition that was of consequence to the trial,[4] *see* ***Sullivan***, 216 Wis. 2d at 785, we conclude that the evidence was related more to plan and motive, which also are permissible purposes for other acts evidence. *See* WIS. STAT. § 904.04(2).[5] The abuse of Katie B. and the alleged abuse of Christina G. highlight Bourque's modus operandi in his relationships with women and are relevant to his plan and motive to abuse Christina G.

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[4] Intent is an element of substantial battery, *see* WIS. STAT. § 940.19(6), false imprisonment, *see* WIS. STAT. § 940.30, second-degree sexual assault, *see* WIS. STAT. §§ 940.225(2)(a) and 940.225(5)(b), and threats to injure, *see* WIS. STAT. § 943.30(1).

[5] Although motive is not an element of any crime, *see* ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988), "[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent," ***State v. Johnson***, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984).

¶13 Under the second ***Sullivan*** prong, we conclude that the other acts evidence was relevant to Bourque's motive and plan. Evidence of Bourque's motive and plan has a tendency to make Bourque's intent more probable than it would be without the evidence. *See* ***Sullivan***, 216 Wis. 2d at 785-86.

¶14 The Katie B. evidence also had probative value, which "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. The abuse of Katie B. and Christina G. occurred while both women were isolated from family and friends, were travelling with Bourque, were under his control and were pregnant by him. The nature of the abuse was also very similar, i.e., punching and choking in the context of a domestic relationship. These similarities render the Katie B. evidence highly probative. *See* ***Clark***, 179 Wis. 2d at 494. "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Sullivan***, 216 Wis. 2d at 787. We disagree with Bourque that the acts involving Katie B. were too remote from the charged acts involving Christina G.

¶15 Finally, we conclude that the court properly exercised its discretion in weighing the probative value of the Katie B. evidence against the danger of unfair prejudice. *See* ***Sullivan***, 216 Wis. 2d at 789. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or … causes a jury to base its decision on something other than the established propositions in the case." ***Id.*** at 789-90. The concern is that a jury would conclude that because the defendant committed the prior acts, he or she necessarily committed the charged crimes. *See* ***id.*** at 790 n.19. We turn to the jury instructions.

¶16 The jury was twice instructed that evidence that Bourque abused Katie B. should be considered only with regard to Bourque's intent to abuse Christina G., and should not be the basis for a finding that because Bourque abused Katie B., he necessarily abused Christina G. Instructions of this type "go 'far to cure any adverse effect attendant with the admission of the [other acts] evidence,'" ***id.*** at 791 (citation omitted; alteration in original), particularly where the other acts evidence has not been inappropriately emphasized by the State, which can undermine the cautionary effect of the jury instructions. *See* ***id.*** at 791-92.

¶17 Even if we were to hold that the circuit court erred in admitting the Katie B. evidence, we would conclude that the error was harmless because there is no reasonable possibility that the error contributed to Bourque's conviction. *See* ***id.*** at 792. Bourque defended on the ground that he would never hurt Christina G. However, the record contains overwhelming evidence that Bourque abused Christina G. This evidence was corroborated by third parties and Bourque's own writings. There is no reasonable possibility that evidence that Bourque abused Katie B. contributed to his conviction for abusing Christina G.

¶18 We move on to Bourque's four claims of prosecutorial error. The first claimed error relates to photographs of Katie B. and was the subject of an objection by Bourque. On cross-examination, Bourque testified that he could not recall beating Katie B. while she was eight months pregnant. The prosecutor offered to show Bourque pictures of a battered Katie B. to refresh his recollection regarding the beating. In response to an objection from Bourque's counsel that he had already answered questions about the beating of Katie B., the court instructed the prosecutor that it did not intend for the trial to become sidetracked by the facts surrounding the beating of Katie B. The prosecutor continued trying to show

Bourque the photographs, Bourque objected again and the court suspended the use of the photographs. The court conceded that its earlier ruling had created the impression that the prosecutor could persist in using the photographs. The court firmly instructed the prosecutor that he was to move to a new area of questioning. Bourque did not ask for any instruction to the jury regarding the line of questioning dealing with the photographs.[6]

¶19 On appeal, Bourque argues that the prosecutor's use of the photographs of Katie B. was overkill and impermissibly expanded upon the use of the Katie B. evidence. The test to be applied is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). The remarks must be viewed in context to determine whether the prosecutor's conduct affected the fairness of the trial. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). We view the prosecutor's use of the photographs in the context of the court's discretionary decision to admit evidence that Bourque battered Katie B. and the allegations that he battered Christina G. Within this context and in light of Bourque's denial that he abused Katie B., the photographs were appropriate. We further note that the court acknowledged the lack of clarity in its initial ruling on the use of the photographs and that the prosecutor misunderstood the ruling.

¶20 Bourque's other three claims of prosecutorial error are characterized by his failure to object at the time of the prosecutor's conduct. Failure to object at the time of the alleged improprieties waives review. *See* ***State v. Goodrum***, 152

[6] We do not mean to suggest that an instruction was necessary.

Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989). However, we may overlook waiver where the error is so plain or fundamental as to affect the defendant's substantial rights. *See* ***Neuser***, 191 Wis. 2d at 140. A plain error is one that is "'both obvious and substantial' or 'grave,' and the rule is 'reserved for cases where there is a likelihood that the [error] … has denied a defendant a basic constitutional right." ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994) (citations omitted; alterations in original). Bourque alleges that he did not receive a fair trial.

¶21 Bourque argues that the prosecutor improperly cross-examined him about his claim that he was removing snow and could not have prevented Christina G. from appearing in court on January 2, 1997, to pursue her request for a restraining order against him. The prosecutor posited that weather data indicated that the temperatures were not conducive to snowy conditions.

¶22 Bourque did not object to the lack of foundation for evidence of the weather during the relevant time period. Therefore, we must analyze this claim under the plain error rule, and we must be satisfied that the absence of foundation deprived Bourque of his right to a fair trial. We conclude that this alleged error does not rise to the level of plain error. Bourque disagreed with the prosecutor's premise that the weather was not conducive to snow when he stated that he was removing snow piled high from previous plowing efforts. Bourque offered an explanation for his snow removal activities even though the prosecutor did not offer a foundation for his theory that the weather was not conducive to snowy conditions. We do not agree that this exchange denied Bourque a fair trial.

¶23 Bourque also complains that the prosecutor made disparaging remarks about him during closing argument. Counsel is allowed considerable latitude in closing argument. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d

784 (1979). The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him or her and should convince the jurors. *See* ***id.*** "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***Id.***

¶24 During his closing argument, the prosecutor referred to Bourque as a "miserable excuse for a human being." Bourque did not object, but the court sua sponte stated that the prosecutor's remarks were "on the strident side." Although the prosecutor apologized, he went on to say that he was "raised to believe that men who strike women are cowards, are bullies and are not fit to sit in the company of other men." Bourque contends that the prosecutor exceeded the bounds of permissible argument. Because Bourque did not object, we review the prosecutor's remarks for plain error.

¶25 While the prosecutor's remarks were improper, we do not conclude that they rendered Bourque's trial unfair. We note that the reported cases have tolerated far more disparaging remarks about a defendant than those made in this case. *See* ***Shepard v. Lane***, 818 F.2d 615, 621-22 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987) (defendant still received a fair trial even though prosecutor referred to him as a "dog" and an "animal," stated that it was "too bad" that the officers had not broken defendant's skull, and said that officer would have done taxpayers a favor by killing defendant); *see also* ***United States v. Cook***, 432 F.2d 1093, 1106 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971) (defendant referred to as a "true monster" and "sub-human … with a rancid, rotten mind").

¶26 Finally, we note that the court instructed the jury that counsels' arguments were not evidence and that the jury should base its decision on the evidence presented and inferences drawn therefrom. This ameliorated any error arising from the prosecutor's harsh remarks. *See* ***State v. Hoffman***, 106 Wis. 2d 185, 220, 316 N.W.2d 143 (Ct. App. 1982). Finally, even if the statements were improper, reversal is not justified in an otherwise fair proceeding. *See* ***United States v. Young***, 470 U.S. 1, 11-12 (1985).

¶27 For his final unobjected-to claim of prosecutorial misconduct, Bourque complains that the prosecutor remarked that Bourque could have been charged with more counts of threats to injure and false imprisonment in light of Christina G.'s testimony about Bourque's daily threats and detention of her. At the end of his argument, the prosecutor urged the jury to find Bourque guilty of the charged offenses and said that "we will let the other ones go." Bourque argues that these statements diverted the jury's attention from the proof of the charged crimes and were unfair. We do not find error, let alone plain error. The argument was based on testimony that there was an ongoing daily pattern of abuse of Christina G. by Bourque.

By the Court.—Judgments affirmed.

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