## COURT OF APPEALS DECISION DATED AND FILED

April 8, 1998

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. 97-0645-CR

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND C. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

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

PER CURIAM. Raymond C. Williams appeals from judgments convicting him of two counts of felony battery, one count of misdemeanor battery, and one count of first-degree reckless injury relating to injuries suffered by his wife, Kathleen Williams. On appeal, Williams challenges the trial court's discretionary decision to admit evidence that he had abused Kathleen on prior

occasions and expert testimony regarding domestic violence. We conclude that the trial court properly exercised its discretion in both instances and affirm.

The evidence adduced at trial indicated that Williams kept Kathleen isolated at home from September 24 to October 4, 1994. Williams took Kathleen to the hospital on October 4 where she exhibited signs of physical abuse. Kathleen suffered permanent impairment as a result of the abuse. Although Kathleen had limited recollection of her ordeal due to the injuries she sustained, an emergency room physician testified that she appeared to have been beaten. Friends, relatives and coworkers stated that they tried to contact Kathleen, but Williams barred them from speaking with her or entering the house during that period. Williams made inconsistent statements about Kathleen's condition and the source of her injuries during this period. He variously claimed that she fell in the bathtub and sustained injuries while canoeing. The jury convicted Williams based on the circumstantial evidence that he caused Kathleen's injuries.

In a pretrial motion, the State moved the trial court to admit evidence that Williams physically abused Kathleen at previous points in their relationship in order to show intent and absence of mistake or accident. The trial court granted the motion over Williams' objection. The trial court also overruled Williams' objection to the testimony of an expert on domestic violence.

On appeal, Williams argues that the trial court did not individually consider and rule upon each item of other acts evidence proffered at the pretrial motion hearing and that evidence of past abuse was too remote and cumulative. He also argues that testimony from Kathleen's supervisor that she sometimes missed work due to "personal problems" was irrelevant and invited speculation by the jury.

We will affirm a trial court's decision to admit evidence if the court properly exercised its discretion. *See State v. Webster*, 156 Wis.2d 510, 514, 458 N.W.2d 373, 374-75 (Ct. App. 1990). In exercising its discretion, the trial court must apply accepted legal standards to the facts of record, and demonstrating a rational process, it must reach a reasonable conclusion. *See id.* at 515, 458 N.W.2d at 375.

As a preliminary matter, we reject Williams' claim that the trial court did not separately consider each instance of past abuse in ruling on its admissibility. The transcript reveals that the trial court discussed with counsel and considered each item of other acts evidence in making its evidentiary ruling. The trial court also considered the evidentiary and fairness issues raised by the State's motion to admit this evidence.

We turn to the merits of the trial court's decision to admit other acts evidence. Section 904.04(2), STATS., specifically excludes evidence of other crimes or acts when such evidence is offered "to prove the character of a person in order to show that he acted in conformity therewith." *See also State v. Shillcutt*, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). However, the statute does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2).

Here, the trial court performed the requisite analysis and properly exercised its discretion in admitting the evidence as relevant to intent<sup>1</sup> and absence

 $<sup>^{1}</sup>$  Intent was an element of the three battery charges against Williams. See §§ 940.19(1), 940.19(3) and 940.19(5), STATS.

of mistake or accident. We conclude that the proffered other acts evidence, which included evidence of injuries inflicted by Williams as far back as 1989, was not too remote. The question is whether there was a logical or rational connection between the other acts evidence and facts of consequence to the determination of the action being tried. *See State v. Alsteen*, 108 Wis.2d 723, 729-30, 324 N.W.2d 426, 429 (1982). Here, evidence of Williams' previous abuse of Kathleen had a logical or rational connection to whether he inflicted the injuries for which he was being prosecuted and to whether he had the intent to commit the charged offenses. *See Vanlue v. State*, 96 Wis.2d 81, 87-88, 291 N.W.2d 467, 470 (1980).

However, as the State concedes, it was error to admit evidence that Williams abused children in the household. One of Kathleen's children testified that Williams disciplined the children with a leather belt. This evidence was not relevant to an issue at trial. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See State v. Denny*, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). That Williams abused children does not make it more likely that he abused Kathleen as charged. It was also error to admit the supervisor's testimony that Kathleen missed work due to "personal problems" because it encouraged juror speculation. Nevertheless, we conclude that these errors were harmless in light of the other evidence adduced at trial.

An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). We consider whether there is a reasonable possibility of a different outcome, or a "probability sufficient to undermine confidence in the outcome" of the proceeding." *Id.* at 544-45, 370 N.W.2d at 232 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

"Where the error affects rights of constitutional dimension or where the verdict is only weakly supported by the record, the reviewing court's confidence in the reliability of the proceeding may be undermined more easily than where the error was peripheral or the verdict strongly supported by evidence untainted by error."

\*Dyess\*, 124 Wis.2d at 545, 370 N.W.2d at 232-33. Here, the jury's verdict was strongly supported by other evidence of Williams' guilt, the sufficiency of which Williams does not contest on appeal.2

Finally, we note that when a jury is instructed that other acts evidence may be used for a permissible purpose and not to show that the defendant had a bad character and acted in conformity with it, any danger of unfair prejudice or of misleading the jury is cured. *See State v. Grande*, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286-87 (Ct. App. 1992). Juries are presumed to follow all of the instructions given. *See id.* at 436, 485 N.W.2d at 286.<sup>3</sup>

Williams challenges the trial court's admission of expert testimony relating to domestic violence on two grounds: (1) the trial court did not state its reasons for admitting the evidence, and (2) the testimony was not necessary or beneficial for the jury. We reject both challenges.

<sup>&</sup>lt;sup>2</sup> Although we have upheld the trial court's discretionary decision to admit evidence of Williams' past abuse of Kathleen, we note that such evidence would have been admissible independently of the rules governing other acts evidence because it places the charged crimes in the context of a long-term abusive relationship and gave the jury background and context for the circumstantial evidence it heard that Williams injured Kathleen on the dates charged. *See State v. Hereford*, 195 Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995), *cert. denied*, 516 U.S. 1183 (1996).

<sup>&</sup>lt;sup>3</sup> We conclude that our disposition of Williams' challenge to the admissibility of evidence that he abused Kathleen in the past is unchanged by the supreme court's recent decision in *State v. Sullivan*, No. 96-2244-CR, slip op. at 3-25 (Wis. Mar. 25, 1998).

The admissibility of expert testimony is discretionary with the trial court. *See State v. Richardson*, 189 Wis.2d 418, 424, 525 N.W.2d 378, 381 (Ct. App. 1994). Expert testimony is admissible under § 907.02, STATS., if the testimony will assist the jury in understanding the evidence or determining a fact in issue. *See Richardson*, 189 Wis.2d at 423, 525 N.W.2d at 380. Here, the trial court admitted the testimony without explaining its reasoning. However, we may independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *See State v. Pharr*, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

The case law recognizes that an expert on domestic violence may offer the jury information about such relationships to assist it in evaluating such a relationship when it is relevant to an issue at trial. *See State v. Bednarz*, 179 Wis.2d 460, 464-65, 507 N.W.2d 168, 171 (Ct. App. 1993). The expert testified regarding the cycles of domestic violence and why victims remain in relationships with abusers. We agree with the State that such testimony assisted the jury in evaluating the context in which the charged incidents occurred: a long-term relationship in which there was a history of abuse. The expert limited her testimony to this information and let the jurors draw their own inferences and conclusions about the parties in this case in light of the evidence presented.

The record before the trial court supports its discretionary decision to permit the expert to testify. The expert testimony was offered for a permissible purpose: to advise the jury of the characteristics of abusive relationships. The prosecutor cited the relevant case law in this area in arguing for the admissibility of the testimony.

By the Court.—Judgments affirmed.

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