COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1351-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEON A. FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Affirmed.*

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

PER CURIAM. Leon A. Franklin appeals from judgments convicting him of two counts of felony child abuse, one count of false imprisonment of the children's mother, and misdemeanor battery contrary to §§ 948.03(2)(b), 940.30 and 940.19(1), STATS. On appeal, Franklin challenges the admission of evidence that he battered a child twelve years before the charged

crimes and the manner in which the jury was instructed regarding false imprisonment. We reject both challenges and affirm.

Franklin was charged with physically abusing the five- and three-year-old sons of the woman with whom he was living. He hit the children with a belt causing welts. He was also charged with falsely imprisoning and battering the mother when she tried to leave the apartment. The State moved in limine to admit other acts evidence of violence toward children which occurred in Illinois in 1984, twelve years before the charged crimes in this case. The State offered evidence that in February 1984, Franklin pled guilty to hitting a five-year-old child on the back with a rope causing welts. The State also offered evidence that Franklin injured a child in November 1984, although he was not charged in that incident.

The State argued that the 1984 incidents were relevant to Franklin's intent to harm the children in this case, to demonstrate that his conduct toward the children in the charged case created a high probability of bodily harm because Franklin was investigated and, in one case, convicted of similar conduct in 1984, and that he manifested a similar motive on each occasion (to punish the child for misbehaving). Franklin opposed the admission of the 1984 incidents on the grounds that they were irrelevant, too remote and prejudicial, and that the harm inflicted in 1984 was less severe than the harm allegedly inflicted twelve years later.

In ruling on the State's motion, the trial court[1] reviewed the legal standards for the admissibility of other acts evidence under § 904.04(2), STATS.,

[1] Judge Emily Mueller decided the motion in limine; Judge Wilbur W. Warren conducted the trial.

and noted that the State contended that the evidence was admissible to show, *inter alia*, motive, intent and absence of mistake or accident. The court reviewed the similarities between the charged conduct and the 1984 incidents and Franklin's statement to the police that his conduct constituted appropriate punishment. The court found that the incidents occurred in similar situations, i.e., Franklin lived with the mother of the children and hit the children to discipline them. Given this similarity, the trial court concluded that remoteness was not a factor which required excluding the evidence from trial. However, as to the uncharged November 1984 acts, the court was concerned that a mini-trial would have to occur as to those acts. Accordingly, the trial court excluded evidence of the uncharged incidents and permitted the State to present evidence of the 1984 battery conviction after concluding that its probative value outweighed its prejudicial effect and that any prejudicial effect could be addressed via a curative instruction.

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). Evidence of other acts committed by a defendant is admissible to place the charged crime in context or to provide background to the case. *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). The trial court must decide if there is a logical or rational connection between the other acts evidence and any fact that is 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). Remoteness of other acts is not a per se bar to admissibility if the other acts are sufficiently similar to the charged crimes. *See* ***State v. Mink,*** 146 Wis.2d 1, 16, 429 N.W.2d 99, 105 (Ct. App. 1988).

Here, the trial court applied the proper legal standards, performed the requisite analysis and properly exercised its discretion in admitting the evidence as relevant to intent and absence of mistake or accident. *See* ***State v. Plymesser,*** 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). The trial court had a reasonable basis for its decision to admit only one of the proffered other acts.

Franklin argues that the 1984 conviction was extremely prejudicial. However, nearly all evidence operates to the prejudice of the party against whom it is offered. *See* ***State v. Johnson,*** 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). The test is whether the resulting prejudice from relevant evidence is fair or unfair. *See* ***id.***

The court instructed the jury that the other acts evidence was admitted as being relevant to intent, preparation or plan and not to show that Franklin had a bad character and acted in conformity with it. By virtue of this instruction, any danger of unfair prejudice or of misleading the jury was 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.[2]

[2] We conclude that our disposition of Franklin's challenge to the admissibility of the 1984 conviction 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).

Franklin next argues that the trial court erroneously instructed the jury on the false imprisonment charge. The charge arose out of Franklin's refusal to permit the children's mother to leave the apartment. She testified that two hours after Franklin beat the children with a belt, she told Franklin that she was going to go to the police. Franklin blocked the apartment doors. She testified that the look on his face led her to believe that he was going to kill her. She felt she had no chance to escape that day. The next day she took the children to day-care and reported the matter to the police.

At the jury instructions conference, Franklin objected to an optional paragraph in the pattern false imprisonment instruction. To prove a defendant guilty of false imprisonment, the State must show that the defendant confined or restrained the victim without the victim's consent. *See* § 940.30, STATS. The disputed language in this case stated:

> Without consent means that there was no consent in fact, or that consent was given by [the victim] because of fear caused by the defendant's use or threat of imminent use of physical violence on [the victim] or a member of her family.

This language tracks the statutory definition of "without consent." *See* § 939.22(48), STATS. Franklin contended that the jury would be misled by the instruction because there was no evidence that the mother consented to remain in the apartment out of fear caused by Franklin's use or threat of imminent use of physical violence on her or a member of her family.

A trial court has wide discretion in instructing the jury based on the facts and circumstances of the case. *See* ***State v. Sartin***, 200 Wis.2d 47, 52, 546 N.W.2d 449, 451 (1996). Whether a particular instruction should be given depends

upon whether the evidence reasonably requires the instruction. *See* ***State v. Dyleski,*** 154 Wis.2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990).

The mother expressed her desire and intention to leave the apartment; Franklin blocked her exit and made her fearful. The trial court rejected Franklin's objection in light of the evidence of violence in the apartment directed toward the children and the mother's testimony that she feared for their safety if she left them in the apartment while she went to get help. We conclude that this evidence supported instructing the jury that Franklin confined or restrained the mother in the apartment, without her consent, by the use or threat of physical violence against her or a member of her family.[3] There was no risk of the jury being misled by the instruction.

By the Court.—Judgments affirmed.

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

[3] This court was aided in its review by the exceptionally detailed table of contents to the trial transcripts prepared by court reporter Kenneth J. Chovan. The court reporter is commended for his efforts.