COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1471-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSE DEJESUS FUENTES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: LEWIS W. CHARLES, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Jose De Jesus Fuentes appeals from a judgment convicting him of first-degree reckless homicide, contrary to § 940.02, STATS., and an order denying his motion for postconviction relief. He argues that: (1) he was prejudiced by the trial court's failure to obtain an on-the-record waiver of his right to testify; (2) he did not knowingly, voluntarily, and intelligently waive his

right to testify; (3) he received ineffective assistance of counsel; and (4) he is entitled to a new trial in the interests of justice. We reject these arguments and affirm.

BACKGROUND

On August 24, 1995, at 12:55 p.m., the Columbia County Sheriff's Department received a telephone call in reference to an ill infant at a trailer home in the Town of Otsego. When Deputy Roger Brandner and paramedics arrived at the trailer shortly after 1:00 p.m., the infant, Juan Carlos Ramirez, was dead. Juan was eleven months old at the time. An autopsy revealed that Juan's death was probably caused by a hit or a kick involving blunt force trauma to Juan's lower abdomen, causing Juan's lower intestine to sever.

Jose De Jesus Fuentes was charged with first-degree reckless homicide in connection with the death of Juan Carlos Ramirez. Since February 1995, Fuentes had lived with Juan's mother, Janice Ramirez, and Ramirez's two other children. After a jury trial, Fuentes was found guilty of the charged offense and sentenced to forty years in prison. Fuentes filed a motion for postconviction relief, which the trial court denied. Fuentes appeals.

ON-THE-RECORD WAIVER OF RIGHT TO TESTIFY

Fuentes argues that he was prejudiced by the trial court's failure to obtain an on-the-record waiver of his right to testify on his own behalf. The right to testify on one's own behalf in defense of a criminal charge is a fundamental constitutional right. ***State v. Flynn***, 190 Wis.2d 31, 49, 527 N.W.2d 343, 350 (Ct. App. 1994). Only the defendant may waive this right, and the defendant's waiver must be knowing and voluntary. ***Id.***

Fuentes cites ***State v. Wilson***, 179 Wis.2d 660, 508 N.W.2d 44 (Ct. App. 1993), in support of his argument that the court must obtain an on-the-record waiver at trial of the defendant's right to testify. In ***Wilson***, we concluded that "the record [must] support a knowing and voluntary waiver of the defendant's right to testify." ***Id.*** at 672, 508 N.W.2d at 48.

Although ***Wilson*** states that the record must show that the defendant knowingly and voluntarily waived the right to testify, it does not require that the court obtain an on-the-record waiver of the defendant's right to testify *during trial*. In ***State v. Simpson***, 185 Wis.2d 772, 519 N.W.2d 662 (Ct. App. 1994), we considered the totality of the record, including the transcript of the postconviction hearing, in determining whether the defendant appropriately waived his right to testify. *See* ***id.*** at 779-80, 519 N.W.2d at 664. During the postconviction hearing in ***Simpson***, defense counsel testified that he had discussed the right to testify with the defendant and encouraged the defendant to testify, but the defendant decided against testifying. ***Id.*** We concluded that the record supported the trial court's finding that the defendant knowingly and voluntarily waived his right to testify. ***Id.*** at 780, 519 N.W.2d at 664.

Similarly, Fuentes's trial counsel testified at the postconviction hearing that he informed Fuentes of the consequences of testifying and not testifying and left to Fuentes the decision of whether to testify. Counsel testified that near the end of the defense's case, he asked Fuentes whether he would testify, and Fuentes replied that he would not. Following ***Simpson***, we conclude that defense counsel's postconviction testimony is sufficient to establish that Fuentes knowingly and voluntarily waived his right to testify.

Fuentes argues that because he does not speak English, an on-the-record waiver was more imperative here than in cases involving English-speaking defendants. He contends that an English-speaking defendant could interject that he or she wanted to testify when his counsel stated, "the defense rests," but a defendant who did not speak English might not understand the translation of "the defense rests," and therefore might not know to interject that he or she had testimony to give.

We reject Fuentes's argument. Fuentes does not cite any case which requires that defendants who do not speak English must waive their right to testify on their own behalf during trial. Under ***Simpson***, we may consider the totality of the record, including the transcript of the postconviction hearing, in determining whether the defendant appropriately waived his right to testify. ***Simpson*** does not distinguish between defendants who do and do not speak English. Moreover, it is defense counsel, not the trial court, who "bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." ***United States v. Teague***, 953 F.2d 1525, 1533 (11th Cir. 1992).[1] Therefore, trial counsel's postconviction testimony that he informed Fuentes of the consequences of testifying or not testifying and that Fuentes chose not to testify is sufficient to establish that Fuentes knowingly and intelligently waived this right.

[1] We previously cited ***Teague*** in ***State v. Flynn***, 190 Wis.2d 31, 50, 53, 527 N.W.2d 343, 351-52 (Ct. App. 1994).

KNOWING, VOLUNTARY AND INTELLIGENT WAIVER

Fuentes argues that he did not knowingly, voluntarily and intelligently waive his right to testify. Fuentes argues that his waiver was not knowing and voluntary because it was based on incorrect legal advice that he received from his attorney.

Fuentes's claim that his right to testify was violated by defense counsel's conduct is properly framed as a claim of ineffective assistance of counsel. *See* ***Flynn***, 190 Wis.2d at 50, 527 N.W.2d at 350-51. To establish that he received ineffective assistance of counsel, Fuentes must satisfy a two-part test. First, he must show that his counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, he must show that he was prejudiced by the deficient performance. ***Id.***

To prove deficient performance, Fuentes must show that specific acts or omissions of counsel were "outside the wide range of professionally competent assistance." ***Id.*** at 690. We strongly presume that defense counsel rendered adequate assistance. ***Id***. To prove prejudice, Fuentes must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

We will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). Whether Fuentes has proven deficient performance and prejudice, however, are questions of law that we review *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

Fuentes argues that he did not testify because his counsel advised him that if he did testify, the State could introduce a pending criminal charge against him involving his five-year-old nephew for impeachment or rebuttal purposes. Fuentes contends that his counsel's advice was incorrect because only prior criminal convictions, not pending criminal charges, can be used for impeachment purposes under § 906.09, STATS.

At the postconviction hearing, Fuentes's trial counsel testified that he told Fuentes he "could not guarantee" that the pending criminal charge would not be used to impeach or rebut Fuentes's direct testimony if Fuentes chose to testify. In deciding Fuentes's postconviction motion, the trial court stated that it would tend to believe trial counsel's testimony over the testimony of Fuentes. The trial court's determination on credibility is not subject to review. *See* ***Turner v. State***, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Accordingly, we will accept defense counsel's version of the facts, not Fuentes's version, in reviewing Fuentes's claim that he received erroneous legal advice from his trial attorney.

Fuentes correctly asserts that the pending criminal charge would not have been admissible as a prior conviction under § 906.09, STATS. However, § 906.09 is not the only section under which prior acts are admissible for impeachment or rebuttal purposes. Depending on the scope and content of Fuentes's direct testimony, he could have opened the door for the use of the pending charge for impeachment or rebuttal under, for example, § 904.04(2), STATS.,[2] or § 906.08(2), STATS.[3] Because Fuentes's direct testimony could have

[2] Section 904.04(2), STATS., states:

> OTHER CRIMES, WRONGS, OR ACTS. 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

(continued)

opened the door for the State to use the pending criminal charge to impeach or rebut his testimony, we conclude that defense counsel correctly informed Fuentes that he "could not guarantee" that the pending criminal charges would not come into evidence.

Fuentes argues that his attorney could have limited the scope of direct examination so that the pending criminal charge could not be used for rebuttal purposes. We agree that, through trial preparation and careful questioning, Fuentes's attorney could have limited the likelihood that the pending charge would become admissible. Through no amount of care and preparation, however, could trial counsel eliminate the possibility that Fuentes's answers on direct examination would allow for the admission of the pending charges, either on cross-examination or rebuttal. Therefore, we conclude that counsel did not perform deficiently by informing Fuentes that he "could not guarantee" that the pending charge would not be brought forth if Fuentes testified on his own behalf.

> 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.

[3] Section 906.08(2), STATS., states:

> SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

INEFFECTIVE ASSISTANCE OF COUNSEL

Fuentes argues that his trial counsel provided ineffective representation in five areas. We review claims of ineffective assistance of counsel to determine whether counsel's performance was deficient and whether the deficient performance was prejudicial to the defense. ***Strickland***, 466 U.S. at 687. We will address each of Fuentes's arguments in turn.

Advice on Defendant's Right to Testify

Fuentes argues that his counsel performed ineffectively by incorrectly informing him of the consequences if he chose to testify. He argues that counsel's advice that evidence of a pending charge could be introduced to impeach or rebut his testimony is erroneous. We have already concluded that trial counsel correctly informed Fuentes that he "could not guarantee" that evidence of the pending criminal charge would not come in if Fuentes chose to testify on his own behalf. Accordingly, we conclude that trial counsel did not perform deficiently in giving this advice.

Admissibility of Defendant's Statements Translated by Interpreter

Fuentes argues that his trial counsel performed ineffectively by failing to object to a police officer's testimony as double hearsay. At trial, Officer Darrell Kuhl testified to the substance of what Fuentes told him during his interviews of Fuentes. Because Fuentes does not speak English, Kuhl interviewed him through an interpreter, Adela Brown. Fuentes concedes that his statements to Brown were admissible under § 908.01(4)(b), STATS., as an admission by a party opponent. However, Fuentes argues that § 908.01(4)(b) would only allow for the admission of the interpreter's testimony, not the officer's testimony. Fuentes

argues that the officer's testimony based on the interpreter's translation constitutes inadmissible hearsay.

We faced a similar question in ***State v. Robles***, 157 Wis.2d 55, 458 N.W.2d 818 (Ct. App. 1990), *aff'd*, 162 Wis.2d 883, 420 N.W.2d 900 (1991). In ***Robles***, the defendant made certain admissions against his interests when speaking to a police officer through an interpreter. When the State sought to introduce the defendant's admissions through the police officer's testimony, the defendant objected. The defendant argued that his statements to the officer were inadmissible double hearsay because the State offered the admissions through the interrogator, a police officer, instead of through the interpreter. ***Id.*** at 61, 458 N.W.2d at 821. We disagreed, concluding that "a defendant's statements made to an interpreter which, in turn, are relayed to an interrogator are not barred by the hearsay rule when the interrogator testifies." ***Id.*** The interpreter, in effect, becomes the defendant's agent, and therefore the translation is attributable to the defendant as his own admission. ***Id.*** at 61-62, 458 N.W.2d at 821.

In not all situations, however, does the translator act as the defendant's agent. "In some situations, the facts will negate an agency relationship. Examples are where the interpreter is unqualified, harbors a motive to falsify or gives an inaccurate translation." ***Id.*** at 63, 458 N.W.2d at 822.

Fuentes tries to establish that Brown was unqualified, harbored a motive to falsify, and was inaccurate. First, Fuentes argues that only trained police interpreters can act as a defendant's agent and notes that Brown was not a trained translator or a police officer. But ***Robles*** does not state that only trained police interpreters have the requisite agency relationship with the defendant. Rather, ***Robles*** states that the facts will negate an agency relationship when the

interpreter is "unqualified." At trial, Brown testified that she was fluent in both English and Spanish and that she has acted as a translator in the past. In ruling on the postconviction motion, the trial court stated that it had no problem with Brown's English and found that she translated accurately. This finding is not clearly erroneous. The facts do not establish that Brown was unqualified to act as an interpreter.

Second, Fuentes observes that Brown was married to a police officer, that Brown was paid by the sheriff's department to translate for Detective Kuhl, and that Brown's limited experience as a translator has been primarily for law enforcement agencies. But the fact that Brown was married to a police officer, paid by the sheriff's department, and had experience in acting as a translator for law enforcement agencies, without more, does not establish that she had a motive to falsify. Police interpreters are not presumptively disqualified from acting as such. ***Robles***, 157 Wis.2d at 63, 458 N.W.2d at 822. In ruling on the postconviction motion, the court stated that it was "satisfied that [Brown] acted as an interpreter, not as an interrogator; and the Court is further satisfied that she translated truthfully and accurately." This finding is not clearly erroneous.

Finally, Fuentes contends that Brown acted as more than a language conduit because she altered Kuhl's questions and Fuentes's answers to explain them better. But the fact that Brown at times avoided a word-for-word translation of Kuhl's questions and Fuentes's answers does not make her translation inaccurate. At the postconviction hearing, Brown testified that she would give her own explanations of questions and answers because they could not be translated directly. We see nothing wrong with Brown's attempt to translate questions and answers for their true meaning instead of giving a word-for-word translation that may not accurately convey what Kuhl or Fuentes was trying to say.

Testimony Regarding the Defendant's Credibility

Fuentes also argues that trial counsel was ineffective for failing to object when Officer Kuhl testified as to Fuentes's credibility. Prior to trial, defense counsel filed a motion in limine to prevent the State from introducing the investigating officers' opinions on whether Fuentes was telling the truth during interrogations. The State stipulated to the exclusion of this evidence. Fuentes argues that the prosecutor breached this stipulation during trial and that defense counsel was ineffective for failing to challenge the breach. Whether testimony constitutes an improper comment on the credibility of another witness is a question of law that we review *de novo*. ***State v. Davis***, 199 Wis.2d 513, 519, 545 N.W.2d 244, 246 (Ct. App. 1996).

Fuentes challenges the following two questions that were asked of Officer Kuhl by the prosecutor:

> Q Were there times when you would ask [Fuentes] questions and he would be nonresponsive?
>
> A There was times I asked him questions that he was slow in responding and more evasive to the point where I'd ask a question and he would say something that had nothing to do with the question I was asking and this continued on for periods of time. And then he would finally answer a question or I'd go on to another topic because he would not answer the question I was asking.
>
> Q Between the two interviews, did you ever find that the defendant was giving either any inconsistencies or where he was changing his stories?
>
> A Several inconsistencies which I brought up to him during both interviews that he did not have an explanation for.

Fuentes argues that this testimony is inadmissible under ***State v. Romero***, 147 Wis.2d 264, 432 N.W.2d 899 (1988), and ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984). In ***Haseltine***, we stated that "[n]o

witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96, 352 N.W.2d at 676. This type of testimony is improper because it usurps the jury's role to determine the credibility of witnesses. ***Id.***

We reject Fuentes's argument because the testimony given by Officer Kuhl is distinguishable from the testimony found to be inadmissible in ***Haseltine*** and ***Romero***. In ***Haseltine***, the complainant alleged that her father had sexually abused her, and an expert testified that there "was no doubt whatsoever" that the complainant was an incest victim. ***Id.*** at 95-96, 352 N.W.2d at 675-76. In ***Romero***, a police officer testified that the victim "was being totally truthful with us," and a social worker testified that the victim "was honest with us." ***Romero***, 147 Wis.2d at 277, 432 N.W.2d at 904. In both ***Haseltine*** and ***Romero***, one witness expressly vouched for the truthfulness of another. Here, Officer Kuhl did not expressly testify as to Fuentes's truthfulness of lack thereof.

We acknowledge that Kuhl did testify that Fuentes's answers contained several inconsistencies for which Fuentes did not have an answer. But Kuhl was not expressly commenting on Fuentes's truthfulness. This testimony is similar to the testimony found to be admissible in ***State v. Smith***, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992). In ***Smith***, a police detective testified that during the interrogation of a witness, the witness initially gave him one story, but later changed his story to reflect what the detective perceived to be the truth. ***Id.*** at 706, 490 N.W.2d at 42-43. We concluded that the effect of this testimony was not to attest to the witness's truthfulness, in part because the jury would have received the same inference from other testimony. ***Id.*** at 718-19, 490 N.W.2d at 48. Here, Kuhl testified as to the substance of Fuentes's inconsistent answers. The jurors

would have realized that Fuentes's answers were inconsistent without Kuhl explicitly telling them so.

We also acknowledge that Kuhl testified that Fuentes was at times slow in responding and evasive. This testimony is more akin to the demeanor testimony given in ***State v. Davis***, 199 Wis.2d 513, 545 N.W.2d 244 (Ct. App. 1996), than the testimony given in ***Haseltine*** or ***Romero***. In ***Davis***, a police officer was asked to describe the demeanors of two prosecution witnesses. The officer responded: "Very cooperative. They were not intoxicated from what I could tell. Gave very good statements and I found them to be excellent witnesses." ***Davis***, 199 Wis.2d at 519, 545 N.W.2d at 246. We concluded that the officer's statement was not a comment on the witnesses' credibility, but rather related to their demeanors. ***Id.*** at 521, 545 N.W.2d at 247. Similarly, we conclude that Kuhl's testimony that Fuentes was at times slow in responding and evasive was admissible because it was a comment on Fuentes's demeanor, not his credibility. Because Kuhl's testimony was admissible, his trial counsel did not perform deficiently by failing to object to this testimony.

Jury Instruction on Witness's Immunity

Fuentes next argues that his trial counsel performed ineffectively by failing to request the court to instruct the jury to assess Janice Ramirez's credibility in light of the fact that she had been granted immunity. Fuentes argues that such an instruction could have been vital to his defense because Ramirez was a crucial witness.

We conclude that trial counsel was not ineffective for failing to request such an instruction for two reasons. First, the immunity agreement was

limited to immunizing Ramirez from liability for her failure to act.[4] Therefore, it would not have as great an impact on Ramirez's credibility as would an agreement that absolutely immunized her from further criminal liability with regard to Juan's injuries. Second, the instruction would have been cumulative to what was already known by the jury. Ramirez's immunity was already well-known and communicated to the jury. Ramirez testified about the immunity agreement at trial, and the immunity agreement was submitted to the jury as an exhibit. In addition, defense counsel emphasized the immunity agreement and its impact on Ramirez's credibility during closing argument, and therefore the jury was already informed that the agreement could have a bearing on credibility. Finally, the jury was instructed about determining the credibility of witnesses. The instruction stated:

> You should … take into consideration the apparent intelligence of each witness, the possible motives for falsifying, and all other facts and circumstances appearing on the trial which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.

[4] The agreement states in relevant part:

> Janice Ramirez agrees to cooperate fully in the investigation of this case and the prosecution of this baby killer. She will meet with law enforcement officials as requested, provide truthful and complete answers to all questions asked of her, and testify truthfully. If Janice cooperates in this manner, the State agrees that it will not use (1) any statements given by her to law enforcement officials after the date of this letter, (2) any of her testimony in the above-matter, and (3) any evidence derived from such statements and testimony against Janice Ramirez in any criminal or civil proceeding in which she is alleged to have harmed Juan Ramirez by failing to act in violation of a legal duty imposed upon a parent.

This instruction communicated to the jurors that they were permitted to take the immunity agreement into account when assessing Ramirez's credibility.

Admissibility of Prior Acts Evidence

Finally, Fuentes argues that his trial counsel was ineffective for failing to object to prior acts evidence. Specifically, Fuentes argues that counsel was ineffective for failing to object to the testimony of Drs. Norman Fost, Robert Huntington and Ayaz Samadani regarding prior injuries suffered by Juan.

Dr. Huntington testified that he conducted the autopsy of Juan's body. In addition to the injuries to Juan's abdomen, Huntington noticed that several of Juan's ribs had been broken, both of Juan's legs had been broken, and Juan's brain had been bruised. Huntington noted that the abdominal injuries were very fresh, but the fractures and brain bruising had been around long enough to start healing. Huntington did not believe that Juan's pattern of injuries could have been caused by a child, but instead were caused by "battered child syndrome." Huntington described "battered child syndrome" as the situation in which a child receives a pattern of injuries that are not accidental.

Dr. Fost testified as to the injuries noted in Dr. Huntington's autopsy report and opined that a young child could not have caused the pattern of injuries suffered by Juan. In Fost's opinion, the collection of fractures was unquestionably caused by an adult, not by household accidents.

Dr. Samadani testified that on April 5, 1995, Janice Ramirez brought Juan to his office. Ramirez told Samadani that Juan's two lower teeth had been knocked out by a bottle thrown by his three-year old brother. Samadani testified that it was very unlikely that a three-year old could throw a plastic bottle with

sufficient force to knock out the lower two teeth of a six-and-a-half-month-old infant. He also testified that he did not see injuries consistent with Juan being punched.

Section 904.04(2), STATS., provides for the admissibility of other acts evidence in a limited number of circumstances:

> OTHER CRIMES, WRONGS, OR ACTS. 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.

Courts apply a two-part test in deciding whether to admit other acts evidence. ***State v. Bustamante***, 201 Wis.2d 562, 569, 549 N.W.2d 746, 749 (Ct. App. 1996). First, the court must determine whether the evidence is offered for an appropriate purpose under § 904.04(2). ***Id.*** Second, the court must determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. ***Id.***; *see* § 904.03, STATS.[5]

The State argues that the evidence was relevant and admissible under § 904.04(2), STATS., because it was offered to prove that Juan's injuries were not accidentally caused. Fuentes argues that the other acts evidence was not relevant or admissible in this case because defense counsel conceded during opening argument that Juan's death was not accidental. During his opening

[5] Section 904.03, STATS., 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.

statement, Fuentes's trial counsel commented: "There's no question that the injuries to this baby were done purposefully by someone."

A similar argument was offered in ***State v. Wallerman***, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996). Wallerman was charged with attempted sexual assault. At trial, testimony was offered that on June 10, 1994, Wallerman rang the doorbell at the house of one of his friends, and his friend's mother, Deborah, answered the door. ***Id.*** at 160-61, 552 N.W.2d at 130. Wallerman forced his way into the house and knocked Deborah down. Wallerman pulled out a knife, waived it in Deborah's face and tried to stab her, but Deborah was able to fend Wallerman off. ***Id.*** at 161, 552 N.W.2d at 130. Another woman, Kristen K., testified that she had been attacked by Wallerman about four years earlier. She testified that on February 6, 1990, she was walking down the road when Wallerman grabbed her from behind, pulled her into a backyard and groped at her breasts and genitals. Wallerman flashed a knife to Kristen, but she was able to fight him off. ***Id.*** at 162, 552 N.W.2d at 130.

The State argued that Kristen's testimony was admissible under § 904.04(2), STATS., to show that the purpose of Wallerman's attack on Deborah was to get sexual gratification. ***Id.*** Wallerman, on the other hand, argued that as the case developed, the defense did not affirmatively contest motive and intent, but instead contended that Deborah had identified the wrong assailant. ***Id.*** Accordingly, Wallerman argued that the other acts evidence was irrelevant and unfairly prejudicial. ***Id.*** at 163, 552 N.W.2d at 130-31.

We concluded that the use of other acts evidence under § 904.04(2), STATS., "is subject to 'general strictures' against using this evidence when the defendant's concession or offer to stipulate provides a more direct source of

proof." ***Id.*** at 166, 552 N.W.2d at 132. However, we concluded that a defendant must meet certain requirements to prevent the admission of other acts evidence:

> To prevent the admission of bad acts evidence, a defendant's offer to concede knowledge and/or intent issues must do two things. First, the offer must express a clear and unequivocal *intention* to remove the issues such that, in effect if not in form, it constitutes an offer to stipulate. Second, notwithstanding the sincerity of the defendant's offer, the concession must cover the necessary substantive ground to remove the issues from the case.

Id. at 167, 552 N.W.2d at 132 (quoting ***United States v. Garcia***, 983 F.2d 1160, 1174 (1st Cir. 1993)).

We do not believe that defense counsel's comment during his opening statement expresses a clear and unequivocal intention to remove the issue of intent from trial. This comment was not a binding concession by defense counsel, and nothing would have prevented him from later asserting that the State failed to prove that Juan's fatal injuries were not accidentally caused. The State must prove all of the elements of a crime, regardless of whether the defendant affirmatively disputes the elements. ***State v. Plymesser***, 172 Wis.2d 583, 594, 493 N.W.2d 367, 372 (1992). Because Fuentes did not clearly and unequivocally express his intention to remove the issue of intent from trial, the other acts evidence was admissible to establish that Juan's fatal injuries were not caused by accident.

Fuentes also argues that the probative value of the evidence was substantially outweighed by its prejudicial value. *See* § 904.03, STATS. We disagree. Because the State needed to prove all of the elements of first-degree reckless homicide beyond a reasonable doubt, we do not believe that it was

unfairly prejudicial to admit evidence of prior injuries suffered by Juan to show that the fatal injuries incurred by him were not accidentally inflicted.

Fuentes also argues that there is insufficient evidence to establish that he caused Juan's prior injuries. Other acts evidence is admissible only when relevant, and other acts evidence is relevant only when a reasonable jury could find by a preponderance of the evidence that the defendant committed the other acts. *See* ***Bustamante***, 201 Wis.2d at 570, 549 N.W.2d at 749. We conclude that a reasonable jury could find by a preponderance of the evidence that Fuentes caused the prior injuries.

Fuentes lived with Janice Ramirez and her three children since February of 1995, and Janice Ramirez denied ever causing physical harm to baby Juan. Ramirez testified that it was not unusual for Fuentes to watch Juan when she left the trailer park or was doing other things. Ramirez testified about two incidents in which Juan was injured while under Fuentes's care. On one occasion, Fuentes took Juan to put him in the car seat, then came back to the trailer with Juan to tell Ramirez that Juan needed his diaper changed. Ramirez noticed that Juan's right leg was swollen and asked Fuentes to tell her what had happened. Fuentes replied that Juan's leg was probably like that before, but that Ramirez did not notice. Ramirez told Fuentes that she had just changed Juan and that his leg was not like that when she changed him. On another occasion, Ramirez, her three children and Fuentes went for a ride in the van. Ramirez got out of the van to pick up her mail at the post office, and when she returned, Juan was bleeding from the mouth and his bottom two teeth were missing. Fuentes explained that one of the children had thrown a plastic bottle and hit Juan in the mouth. After examining Juan's mouth, Dr. Samadani expressed the opinion that it was very unlikely that

Juan's two teeth were knocked out in this manner. Finally, Drs. Fost and Huntington testified that Juan's injuries were caused by an adult, not by a child.

This evidence is sufficient to permit a reasonable jury to find, by a preponderance of the evidence, that Fuentes caused Juan's prior injuries. Accordingly, we conclude that the prior acts evidence was relevant and therefore admissible under § 904.04(2), STATS. Because the prior acts evidence was admissible, defense counsel did not perform deficiently by failing to object to its admission.

Fuentes also argues that his trial counsel was ineffective for failing to ask the court to instruct the jury about the permissible and impermissible uses of prior acts evidence. In support of his argument, Fuentes cites ***State v. Spraggin***, 77 Wis.2d 89, 252 N.W.2d 94 (1977), in which the court considered the absence of a limiting instruction in finding that the admission of prior acts evidence constituted reversible error. *See* ***id.*** at 100-01, 252 N.W.2d at 99.

We reject Fuentes's argument. ***Spraggin*** does not set forth a *per se* rule requiring us to find that counsel is ineffective in every instance in which prior acts evidence is admitted and counsel does not request a limiting instruction. In ***Hough v. State***, 70 Wis.2d 807, 817, 235 N.W.2d 534, 539 (1975), the court acknowledged that defense counsel may fail to request such a jury instruction as a trial tactic, for example, to prevent the prior act from again being called to the jury's attention. The defendant has the burden of proving that his trial counsel performed deficiently. *See* ***Strickland***, 466 U.S. at 688. Fuentes has not met his burden to prove that his trial counsel performed deficiently by failing to request a limiting instruction.

NEW TRIAL IN THE INTERESTS OF JUSTICE

Fuentes argues that he is entitled to a new trial in the interests of justice because the real controversy has not been fully tried and because justice has probably miscarried. He raises the same arguments that we already addressed and asks us to exercise our power of discretionary reversal under § 752.35, STATS. We have already concluded that Fuentes knowingly and voluntarily waived his right to testify and was not deprived of effective assistance of counsel. Therefore, we decline to exercise our power of discretionary reversal.[6]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] Fuentes also requests that we analyze some of his trial counsel's alleged deficiencies under the plain error rule. Because Fuentes does not cite to any legal authority to support this argument, we will not address it. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-546, 292 N.W.2d 370, 378 (Ct. App. 1980) (we disregard arguments unsupported by references to authority).