COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2686-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUDY A. WENDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL T. KIRCHMAN, Judge. *Affirmed.*

EICH, C.J.[1] Rudy Wendt appeals from a judgment, entered on the jury's verdict, convicting him of knowingly violating the terms of a domestic abuse injunction which barred him from having any contact with J.R. He argues

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

that the trial court erroneously exercised its discretion when it allowed "other-acts" evidence. We see no error and affirm the judgment.

The State's case against Wendt was based on allegations that, while subject to a court order barring him from having any contact whatsoever with J.R., he in fact contacted her at a local filling station, engaged her in conversation and attempted to pass two notes to her.

Prior to trial, several hearings were held with respect to the State's contention that it wanted to bring "other-acts" evidence before the jury. The trial court held at least two hearings on the parties' motions in limine with respect to such evidence, and a series of pretrial orders were issued on the subject. Wendt claims that the trial court improperly allowed three types of evidence at trial: (1) evidence that, several times when he was subject to the injunction, he followed J.R. between home and work; (2) evidence that he contacted her at her place of employment; and (3) evidence of his statement to another witness that he would "never leave [J.R.] alone." He argues that this evidence was so remote in time from, and so dissimilar in nature to, the acts giving rise to the charge for which he was being tried, that its admission was error. We disagree.

Section 904.04(2), STATS., governs admission of "other-wrongs" evidence and states that "[e]vidence 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." Exceptions exist, however. For example, the statute does not exclude evidence "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id***.

Admission of other-wrongs evidence is, like other evidence, committed to the sound discretion of the trial court. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). The court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 915, 541 N.W.2d 225, 228-29 (Ct. App. 1995). Stated another way, "We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citation and footnote omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39 (citation omitted).

The trial court employs a two-step process in determining the admissibility of other-acts evidence. The first determination, of course, is whether the proffered evidence is relevant. If it is, the court then considers whether "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury." ***State v. La Bine***, 198 Wis.2d 291, 299, 542 N.W.2d 797, 800 (Ct. App. 1995).

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence." ***State v. Bustamante***, 201 Wis.2d 562, 570, 549 N.W.2d 746, 749 (Ct. App. 1996) (citing § 904.01, STATS.). If the evidence is relevant, the trial court must employ a balancing test to determine whether its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. ***State v. Landrum***, 191 Wis.2d 107, 119, 528 N.W.2d 36, 41 (Ct. App. 1995). The probative value of other-acts evidence "depends partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved." ***State v. Tabor***, 191 Wis.2d 482, 494, 529 N.W.2d 915, 920 (Ct. App. 1995) (citation and internal quotation omitted). While remoteness in time is an important factor, it does not render the evidence automatically inadmissible. ***Id***. at 495, 529 N.W.2d at 920.

As to prejudice, we have recognized that "[n]early all evidence operates to the prejudice of the party against whom it is offered." ***State v. Johnson***, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994) (citation omitted). "The test is whether the resulting prejudice of [this] relevant evidence is *fair or unfair*." ***Id***. (citation omitted) (emphasis in the original). We have thus said:

> In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect. Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by "improper means."

Id. (citation omitted) (emphasis in the original). The unfair prejudice which must be avoided is the harm that would result from a jury's conclusion that because the defendant committed a "bad act" at some time in the past, he or she must necessarily have committed the charged crime. ***La Bine***, 198 Wis.2d at 299, 542 N.W.2d at 800.

Like other discretionary determinations, the trial court should state the reasons underlying its decision because they form the basis of appellate review. We have said, however, that when the trial court's explanation is incomplete or inadequate, or the evidence is insufficient that the court specifically employed the balancing test, we may independently review the evidence to determine whether it supports the trial court's ruling. ***Johnson***, 184 Wis.2d at 337, 516 N.W.2d at 467. Unfortunately, the State's brief does not refer us to the trial court's decision on the admission of this evidence so that we might properly assess it.

Wendt first argues that evidence that he followed J.R. at home and work is remote from the incident at the filling station. He points out that the charged incident did not occur at J.R.'s home or place of employment. The trial court stated that, in its view, the following incidents were relevant because they appear "to have occurred between the time of the injunction and the alleged offense," and thus were not remote in time from the charged incident. We agree with the trial court that the evidence was relevant. As to whether its probative value is outweighed by the danger of unfair prejudice, we are satisfied that the evidence was highly probative of "intent, … knowledge, or absence of mistake or accident," within the meaning of § 904.04(2), STATS.

Admitting that the complained-of contact occurred, Wendt testified that his encounter with J.R. on the date in question was pure happenstance, and he argues on appeal that he did not know that such contact violated the injunction. J.R., on the other hand, testified that Wendt had followed her to the station and, once there, intentionally harassed her. There was also testimony from which a reasonable jury could infer that even if Wendt had accidentally come to the station at the same time as J.R., he lingered at the cash register until she came in, when the complained-of contact ensued. Thus, the testimony relating to Wendt's following J.R. after

issuance of the injunction, in the weeks leading up to the incident, was relevant as tending to show the encounter at the filling station was not chance and his actions at that time were not unintended or unknowing, as he maintained. We are not persuaded that the context in which that evidence was presented to the jury created any cognizable danger of unfair prejudice to Wendt's case.

We believe the same is true with respect to the testimony of one of the State's witnesses that Wendt had told her he would "never leave [J.R.] alone." The trial court felt this evidence went to Wendt's "state of mind," and we agree that it was probative on whether Wendt's contact with J.R. at the time in question was, as he argued, accidental, or whether it was something else. While the fact that Wendt made the statement several months earlier is relevant to the weight of the evidence, it is not *per se* inadmissible.

The only other specific instance Wendt complains of is the testimony of one of the State's witnesses that she overheard him say to J.R.: "I'm going to kill you." Here, too, the State does not refer us to the trial court's decision in the record, and Wendt argues that the court provided no explanation when it overruled his objection to the statement. However it came in, we believe this statement must be considered in light of the abundant evidence of a contact between Wendt and J.R. at the filling station, where conversations and perhaps arguments ensued, and where Wendt apparently succeeded in passing two notes to J.R. Wendt does not deny that this happened; he concedes in his brief that the incident at the filing station occurred. According to Wendt, "The incident itself and whether it occurred [is] not in question ...." As indicated, he suggests that the encounter was accidental on his part and that he did not "knowingly" violate the injunction by having the contact with J.R. But Wendt cannot deny that he was subject to an injunction plainly ordering him to have no contact with J.R., whether in person, by telephone or in writing, and stating in

large bold-face letters that violation of the order is a crime punishable by fine and/or imprisonment. We cannot say on this record that there is a reasonable possibility that, absent the witness's statement, the result of the trial would have been different. In short, if it was error to admit that single statement, the error was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

By the Court.–Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.