

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 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. 98-0148-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DENNIS M. MAKOVSKY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Dennis Makovsky appeals a judgment convicting him, after trial to the court, of burglary and theft of items from his ex-wife's home. He argues that the State presented insufficient evidence to support the convictions

and that the court improperly exercised its discretion by admitting other acts evidence.¹ We reject these arguments and affirm the judgment of conviction.

This court may not reverse a conviction unless the evidence, viewed most favorably to the State and conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The trial court is the sole judge of the witnesses' credibility and the weight to be accorded their testimony. *See Leciejewski v. Sedlack*, 116 Wis.2d 629, 637, 342 N.W.2d 734, 738 (1984).

The State presented sufficient evidence to convict Makovsky of burglary and theft. Makovsky's ex-wife testified that someone broke into her home, stole jewelry, guns and personal items and left behind a flashlight. The burglar's knowledge of hiding spots and the fact that entry was not forced tend to show that it was an "inside job." Some of the items taken, such as blood pressure medication, underwear, medical expense records, a car registration, tax papers and phone and address books appear to have been taken for the purpose of harassing the victim because they were of no value to a thief. The State presented other acts evidence showing that Makovsky had a motive to harass his ex-wife. Some of the jewelry that was stolen was discovered by Makovsky's daughter in a bag that she

¹ In the process of arguing sufficiency of the evidence, Makovsky also argues that the trial court shifted the burden of proof and applied a standard of proof more like preponderance of the evidence. He also argued that the trial court prejudged the case, drew irrational and illogical inferences, engaged in speculation and conjecture, and "bent over backwards in this case to adopt a formula to convict the Defendant." These arguments are based on statements taken out of context, misrepresentations of fact and gross exaggeration, and are offensive in the manner in which they attack the trial judge. We will not independently review those issues except to note that the record does not support these allegations and, applying the correct standard and burden of proof, does support the guilty verdicts.

brought from his house. Finally, Makovsky borrowed a flashlight from his brother the night before, similar to the flashlight found in his ex-wife's bedroom. Makovsky could not locate the flashlight after the theft, and told police that it was stolen from his truck but that he never reported it to the police. This circumstantial evidence, and the inferences reasonably drawn from the evidence, are sufficient to support the guilty verdicts.

Makovsky contends that the trial court ignored evidence as to the victim's motives for implicating her ex-husband. As the arbiter of the witnesses' credibility, the trial court was free to resolve conflicts in the testimony and draw reasonable inferences from the evidence presented. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). The court's acceptance of the victim's testimony does not demonstrate that the court ignored any evidence or refused to recognize the victim's potential motivation. Rather, it reflects the court's finding that the victim was a credible witness.

The court properly exercised its discretion when it admitted "other acts evidence." Other acts evidence must pass a two-step process before admission. First, the evidence must be relevant to one of the statutory exceptions in § 904.04(2), STATS. Second, the court must apply § 904.03, STATS., and determine whether any prejudice resulting from the admission of evidence substantially outweighs its probative value. *See State v. Ingram*, 204 Wis.2d 177, 184, 554 N.W.2d 833, 836 (1996). Evidence that Makovsky harassed his ex-wife after the divorce was admissible to prove motive. *See State v. Speer*, 176 Wis.2d 1101, 1113, 501 N.W.2d 429, 432-33 (1993). The harassment motive was particularly relevant in this case because the burglar left behind valuable items and stole items that were of little value to him, but whose loss would greatly inconvenience the victim. Because the trial was to the court, the danger of unfair

prejudice was minimal. Nothing in the trial court's lengthy findings suggests any improper use of the other acts evidence.²

By the Court.—Judgment affirmed.

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

² Makovsky also contends that the court improperly considered “opinion evidence.” This argument is not sufficiently developed to require an individual response. The court granted a motion in limine to prevent the victim from giving her opinion that Makovsky was the perpetrator. The trial court independently reached the same conclusion.

