

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 12, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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. 98-0682-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DANIEL M. BUCHEGER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Snyder, P.J., Anderson and Mawdsley,<sup>1</sup> JJ.

PER CURIAM. Daniel M. Bucheger appeals from a judgment of conviction of false imprisonment. He argues that the trial court improperly denied

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<sup>1</sup> Circuit Judge Robert G. Mawdsley is sitting by special assignment pursuant to the Judicial Exchange Program.

him the opportunity to present certain evidence, that a photo of the victim was improperly admitted and that justice has miscarried because the verdict rests on inherently incredible and contradictory evidence. We reject his claims and affirm the judgment.

On August 6, 1996, at approximately 6:00 p.m., Dana Smith was waiting by a friend's stranded vehicle on the side of an interstate freeway. Smith and two friends had attempted to refuel the vehicle only to discover that the keys had been left behind. Smith's friends had taken her car to retrieve the keys.

Bucheger pulled his vehicle off the road and parked in front of the stranded car. Smith testified that she informed Bucheger that she did not need assistance but that he followed her and eventually grabbed her and pushed her up against the stranded car. Bucheger tried to disengage Smith from the hold she had on the car. When another motorist stopped and approached the two, Bucheger released his hold of Smith.

Bucheger left the scene believing that Smith had overreacted to what had been a simple touching of her shoulder to get her attention. From his cellular phone, Bucheger called 911 and reported his encounter with Smith. Smith went to the sheriff's department to report the incident. Later that same evening, Bucheger went to the sheriff's department and completed a written statement. He was later arrested and charged with false imprisonment and battery.<sup>2</sup>

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<sup>2</sup> Bucheger was also charged with a second offense of operating while intoxicated on August 6, 1996, operating after suspension on August 6, 1996, and a second offense of operating with a blood alcohol level exceeding 0.10% on August 21, 1996. These charges were severed for trial from the false imprisonment and battery charges. Bucheger entered a no contest plea to the severed charges, as reduced, and those convictions are not challenged in this appeal.

At trial, Bucheger wanted to introduce evidence that he had a habit of stopping to assist stranded motorists. Bucheger was attempting to show that he had not stopped to aid Smith with any nefarious motive but to help as he had a habit of doing. Bucheger's offer of proof consisted of counsel's statement that either Bucheger's brother or fiancée would testify that Bucheger is in the habit of stopping to help stranded motorists. One witness testified that Bucheger stopped in December 1995 to help him pull his vehicle out of a ditch. The man did not know Bucheger but Bucheger had stopped on the roadway when he saw the man's disabled vehicle. Bucheger's attorney explained that a female witness would testify that her vehicle broke down on the road sometime in 1996 and that she flagged Bucheger down as he drove by. Bucheger stopped, determined he could not fix the vehicle, and drove the woman to retrieve another vehicle.

The trial court denied admission of the evidence. It concluded that Bucheger could not attempt to prove through habit evidence a negative—that he would stop to help people without assaulting them. It also held that the evidence really went to an issue that was not an issue in this case—that is, Bucheger's motive for stopping.

Evidentiary rulings are addressed to the trial court's discretion. *See State v. Plymesser*, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. *See id.* If the trial court fails to adequately explain its evidentiary ruling, this court will independently review the record to determine whether a reasonable basis exists for the ruling. *See State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

Section 904.06, STATS., provides that “evidence of the habit of a person or of the routine practice of an organization ... is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” Specific instances of conduct are admissible as habit evidence if there is a sufficient number of instances to warrant a finding that the habit existed. See *Steinberg v. Arcilla*, 194 Wis.2d 759, 768, 535 N.W.2d 444, 447 (Ct. App. 1995); § 904.06(2). The predicate evidence must be sufficient to permit a finding that there is a “regular response to a repeated situation.” *Steinberg*, 194 Wis.2d at 769, 535 N.W.2d at 447-48 (quoted source omitted).

We read the trial court’s ruling to embrace its duty to determine whether the predicate evidence was sufficient. See *id.* at 768-69, 535 N.W.2d at 447. Bucheger’s proof of two instances of stopping to help a stranded motorist within one year of the Smith incident is not of sufficient frequency to rise to the level of a habit. Additionally, there is no indication of the number of times such situations arose so as to permit a finding that Bucheger would consistently stop to aid a stranded motorist. The predicate evidence to establish a habit was insufficient. The trial court properly exercised its discretion in excluding the habit evidence.<sup>3</sup>

At trial, three photographs of Smith were admitted into evidence. The photographs were taken after her treatment by emergency medical technicians at the sheriff’s department. Two showed Smith’s injured fingers resting on her knee. The third showed Smith with her arm in a sling. The examining physician

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<sup>3</sup> Because the evidence does not rise to the level of a habit under § 904.06, STATS., we need not address Bucheger’s argument that the evidence was relevant and had sufficient probative value to outweigh any prejudicial effect. We also do not address Bucheger’s claim that the evidence was admissible as character evidence because he raises that claim for the first time on appeal. See *State v. Rogers*, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995).

found no physical injury to Smith's shoulder but diagnosed a sprained shoulder based on her complaint of pain. Bucheger claims that it was prejudicial error to admit the photo depicting Smith's arm in a sling because the physician did not observe any physical signs of injury to Smith's shoulder. He argues that in the absence of any medically observable injury, the photograph lacked any probative value and was unfairly prejudicial by engendering sympathy for Smith by depicting a "dejected-looking Smith with her left arm in a sling."

Whether photographs are admitted is a matter within the trial court's discretion. *See State v. Lindvig*, 205 Wis.2d 100, 108, 555 N.W.2d 197, 200 (Ct. App. 1996). We will not disturb that determination "unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." *Id.* (quoted source omitted).

The photograph of Smith was not inflammatory. It merely showed how Smith appeared after her treatment at the sheriff's department. Within the context of the trial, the photograph was reasonable to complete the description of the events occurring after the roadway incident. We cannot agree with Bucheger's assessment that the photograph lacked any probative value because the physician did diagnose a sprained shoulder. Therefore, the trial court properly exercised its discretion. Moreover, the nature and extent of Smith's injuries were relevant to the battery charge, a charge of which Bucheger was acquitted. Any error in admitting the photograph was harmless.

Bucheger's final claim is that a discretionary reversal is appropriate because justice has miscarried. *See* § 752.35, STATS. His claim is based on his description of the trial testimony as riddled with contradictions and inherent

improbability. He attacks Smith's credibility. Thus, his claim is really a challenge to the sufficiency of the evidence.

Our review of the sufficiency of the evidence is to determine whether the evidence, "viewed most favorably to the state and the 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." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). It is the function of the jury to decide issues of credibility, weigh the evidence and resolve conflicts in the testimony. *See id.* at 506, 451 N.W.2d at 757.

Smith's version of the incident was sufficient to support the false imprisonment conviction. We need not consider Bucheger's theory that Smith's version was incredible because she could not have hung on to the vehicle's rain trough in the manner she described and been able to resist Bucheger's tugging. *See id.* at 507-08, 451 N.W.2d at 758 ("[A]n appellate court need not concern itself in any way with evidence which might support other theories of the crime."). The improbability Bucheger posits does not render Smith's testimony incredible as a matter of law. *See Haskins v. State*, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). Moreover, Smith's description that Bucheger "bear hugged" her legs was corroborated by the other motorist who stopped. He saw Bucheger and Smith struggling and that Bucheger had Smith's legs in a "bear hug."

The evidence was sufficient to prove beyond a reasonable doubt that Bucheger had falsely imprisoned Smith. Because there was sufficient evidence, Bucheger's claim that confidence in the verdict is undermined by inadequate investigation fails. Given the eyewitness accounts, investigators were not required to document the alleged absence of abrasions on Bucheger's knees from the

gravel. Moreover, Bucheger explored at trial the potential inadequacy of the investigation. We are not persuaded that justice miscarried.

*By the Court.*—Judgment affirmed.

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

