COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2015AP648-CR **Cir. Ct. No. 2014CF204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTON R. DORSEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Anton Dorsey appeals a judgment of conviction for one count of misdemeanor battery, one count of disorderly conduct, and one count of aggravated battery, with the latter two counts having been charged as acts of

domestic abuse, pursuant to WIS. STAT. § 973.055(1).[1] The jury acquitted Dorsey of a charge of strangulation and suffocation. Dorsey's sole challenge on appeal is the circuit court's admission of certain other-acts evidence. This issue requires us to address recent legislative changes in WIS. STAT. § 904.04(2)(b)1. Because we hold the circuit court properly admitted the other-acts evidence, we affirm the judgment of conviction.

BACKGROUND

¶2 Dorsey's charges all involved his actions against C.B., who was Dorsey's girlfriend at the relevant times. Dorsey's actions resulting in the charge of strangulation and suffocation occurred on the morning of October 12, 2013. C.B. testified that on evening of October 11, 2013, she and Dorsey left a bar together and went to a gas station where they began quarreling over what happened in the bar. Dorsey asked C.B for money, and she responded by telling him that "all I'm good for is money." They argued for a while in the car, then C.B. exited the car and began walking home. On the street, Dorsey came up to her, placed both his hands on either side of her neck with his thumbs in the middle, and applied pressure to her windpipe. She testified that afterward he kept apologizing to her about what just happened. On cross-examination she admitted that she did not report the incident to the police until March 17, 2014, nor did she discuss the incident with friends or coworkers before that date.

¶3 The charge of misdemeanor battery arose from Dorsey's conduct in December 2013 or January 2014; C.B. testified Dorsey was at her home and he became upset. C.B. was on her bed, facing away from Dorsey because she did not

[1] All references to the Wisconsin statutes are to the 2013-14 version unless otherwise noted.

want to talk to him. Dorsey insisted on discussing their disagreement, turned C.B. around, and "flipped" his finger at her lip, causing her to bleed. He then threw a Kleenex box at C.B. and asked her why she lies to him all the time. Dorsey then grabbed C.B. by the arm and the waist to force her to make eye contact with him, at which point he spat in her face. When C.B. tried to turn away, Dorsey hit her with an open hand on the side of her head.

¶4 The charges of disorderly conduct and aggravated battery arose from Dorsey's actions in March 2014. C.B. testified Dorsey began living with her in February 2014. Dorsey and C.B. had planned to go out for a drink when Dorsey began to question why she was talking to her husband, from whom she was separated. While still in the car outside the bar, Dorsey demanded to see C.B.'s phone and began to read her text messages. He discovered some messages between C.B. and a male friend and then accused C.B. of sleeping with that male friend. Out of fear, C.B. exited the car and tried to get the attention of a person in a nearby office. Dorsey followed her and pushed her against the side of the building. At that time, some people walked by, and Dorsey and C.B. returned to the car to talk briefly. Dorsey then stayed at the bar, while C.B. returned home.

¶5 When Dorsey returned home that night, there was no discussion of what had occurred earlier. The next morning, C.B. awoke to find Dorsey's face approximately four inches from her face. Dorsey was noticeably upset with C.B., but C.B. attempted to ignore him. She knew Dorsey would not hurt her while her two sons were still in the home. However, she was unable to leave the home before they left for school, and after her sons had left, Dorsey hit C.B. in the head with his fist. When C.B. tried to leave, Dorsey pulled her back towards him by her hair and then hit her in the head again, this time with an open hand. The blows to the head caused ringing in C.B.'s ear, gave her a headache, and made her feel sick to her stomach. Dorsey again accused C.B. of seeing someone else, asked why she kept lying to him, and hit her again. The conversation continued for a while

until C.B. convinced Dorsey that she had to call into work before someone came looking for her. Dorsey had C.B.'s cell phone and threw it at her chest, which resulted in a bruise to her chest. C.B. grabbed the phone and ran out of the house. She was able to drive away and call her friend, Lori.

¶6 Dorsey pleaded not guilty to all the charges. Dorsey testified at trial, denying the incidents against C.B. ever occurred, and claimed C.B. was injured in March 2014 because she fell while in the shower.

¶7 Before trial, the State moved to admit evidence that Dorsey committed acts of domestic violence against his previous girlfriend, R.K. The State sought to admit the evidence to establish Dorsey's "intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship." The State believed the other-acts evidence was relevant because the acts of domestic violence against R.K. were similar to the charged acts in this case and the evidence related to Dorsey's intent and motive to harm C.B.

¶8 At a hearing on the State's motion, R.K. testified that in June 2011, she was pregnant with Dorsey's child. R.K. was sure Dorsey was the father, but she did not want him to disclaim the child in the future if he became angry with R.K. She asked Dorsey to take a paternity test so there would be no question that he was the father. Dorsey became upset at the request and accused R.K. of being unfaithful. Dorsey left, but later that night R.K. picked him up. At that time, Dorsey spat on R.K. When she and Dorsey reached their home, the argument continued and he dragged her down the stairs and out of the home. This resulted in trauma to her abdomen, for which she sought medical treatment.

¶9 In October 2011, R.K. was on the phone with a doctor or nurse regarding R.K. and Dorsey's infant daughter. Dorsey became upset with her because she did not discuss with him the issue of their daughter before calling a

doctor. Dorsey struck R.K. with an open hand, causing her to fall down and suffer a black eye and a cut lip.

¶10 R.K. testified that later that same month, Dorsey became upset with her because their baby kicked off her blankets during the night. Dorsey accused R.K. of not wrapping the baby tight enough and threatened to kill R.K. He said no one would care if she died and he would go on with his life like nothing happened.

¶11 R.K. further testified that in November 2011, she and Dorsey got into an argument because he felt she was not respecting him. Dorsey told R.K. to leave, and as she was leaving, he threw a baby's bottle and a shoe at her. He then got up and pulled R.K. back by her hair, locked the door to the home, hit her in the head with a shoe, pushed her to the floor, and kicked her after she fell to the floor.

¶12 Dorsey argued the following in opposition to admission of the other-acts evidence:

> Mr. Dorsey's case is that he committed none of these offenses. ... We're not saying that there was any type of accident, there was any type of striking or pushing that was accidental or any type of mistake. He said it didn't occur at all. There's not an identity issue. The State's witness is going to say that Mr. Dorsey is the -- the aggressor. Mr. Dorsey will say that, no, I was not the aggressor and it did not happen.
>
> ....
>
> But if the theory of the defense is that there was no physical contact, not accidental, not that he didn't intend to harm, that there was no physical contact, then this doesn't apply to our case. It's not as if the persons are in the home and there was a -- a grabbing and such that the person's wrist was sprained or broken or anything like that. We're saying none of that happened at all. So intent is not really a defense. It's not part of our defense. We're saying it didn't happen at all.

¶13 In its decision on admission of the other-acts evidence, the circuit court applied the "greater latitude rule" in the context of addressing WIS. STAT. § 904.04(2)(b)1. and the ***Sullivan*** factors. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998). The circuit court held the other-acts evidence concerning Dorsey's actions against R.K. was admissible, explaining:

> I'm looking at this and I want the record to be clear, because this might be the case where the enlightened ones will enlighten all of us as to what this language means. I read this language providing greater latitude to be similar into the serious sex offense business and making it available more to be able to be used in the case in chief than I would provide. I find that using that greater latitude that the three-prong analysis of ***Sullivan*** is met. It does have probative value in that it does go to, because of the similarity, the motive to control. Although it is not very, very, very near in time, it's within two years and in a period of time in which the clock kind of stops ticking a little bit because the defendant is on probation for a period of that time. And while they're similar, they do not involve the same victim, there is some case law that it doesn't need to involve the same victim, but the clear statutory language indicates that it does not need to involve the same victim. And is the probative value substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury, needless presentation of cumulative evidence, and then the court's consideration of delay and waste of time, I do not find that it is. That with a cautionary instruction, it can be provided that this information goes only to evaluate the defendant's motive and intent elements. There's going to be no claim of mistake or what have you. So for those reasons, I'll allow it in.

At the trial, the circuit court gave a cautionary instruction, WIS JI—CRIMINAL 275 (2003), instructing the jury to consider R.K.'s testimony only for purposes of Dorsey's motive and intent. Dorsey now appeals.

DISCUSSION

¶14 The decision whether to admit other-acts evidence rests within the circuit court's sound discretion. ***State v. Payano***, 2009 WI 86, ¶¶40-41, 320

Wis. 2d 348, 768 N.W.2d 832; ***Sullivan***, 216 Wis. 2d at 780-81. We will uphold the circuit court's exercise of its discretion in admitting other-acts evidence if it applied the relevant facts to the proper legal standards and it reached a conclusion that a reasonable judge could reach. ***Sullivan***, 216 Wis. 2d at 780-81.

¶15 Generally, other-acts evidence is not admissible, for the reasons explained in ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967):

> The character rule excluding prior crimes evidence as it relates to the guilt issue rests on four bases: (1) The over strong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

However, other-acts evidence may be used in any criminal prosecution if the evidence is not used to show that the defendant acted in conformity with his or her character and: (1) the evidence is offered for an acceptable purpose; (2) the evidence is relevant; and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. ***Sullivan***, 216 Wis. 2d at 772-73; *see also* WIS. STAT. § 904.04(2)(a).

¶16 In April 2014, the legislature amended the other-acts evidence rule in WIS. STAT. § 904.04(2)(b)1. 2013 Wis. Act 362 § 38.[2]

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[2] We note the effective date of this act was April 24, 2014. In this case, the State moved in August 2014 to admit other-acts evidence regarding Dorsey's acts against R.K., and that motion was heard on August 26, 2014. While the conduct leading to the charges against Dorsey occurred before April 24, 2014, he does not challenge application of the new law here as an *ex post facto* law.

That section now provides:

> (b) *Greater latitude*. 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or *of domestic abuse, as defined in s. 968.075(1)(a)*, or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and *is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act*.

(Emphasis added.)

¶17 The issue raised in this appeal involves statutory interpretation of the current version of WIS. STAT. § 904.04(2)(b)1. and application of that statute to the facts in this case. Those are questions of law, and our standard of review therefore is de novo. ***Bryhan v. Pink***, 2006 WI App 111, ¶13, 294 Wis. 2d 347, 718 N.W.2d 112.

¶18 Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** We interpret statutory language in the context in which it is used, in relation to the language of surrounding or closely related statutes, and reasonably, to avoid absurd or unreasonable results. ***Id.***, ¶46. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." ***Id.***, ¶46 (quoting ***Bruno v. Milwaukee Cty.***, 2003 WI 28, ¶20, 260 Wis. 2d 633, 660 N.W.2d 656).

¶19 First, it is clear from the plain language of WIS. STAT. § 904.04(2)(b)1. that the other-acts evidence applies to the domestic abuse charges

as defined in WIS. STAT. § 968.075(1)(a), and to offenses subject to the domestic abuse surcharge under WIS. STAT. § 973.055. Section 968.075(1)(a) defines "domestic abuse" to mean

> any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of s. 940.225(1), (2) or (3).
>
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Sec. 968.075(1)(a). Here, the charges of disorderly conduct and aggravated battery against Dorsey resulted from alleged conduct that occurred in March 2014, when he was living with C.B. Dorsey's alleged actions clearly resulted in physical pain and injury to C.B. In addition, those charges were subject to the domestic abuse surcharge under § 973.055.[3]

¶20 Second, under WIS. STAT. § 904.04(2)(b)1. "evidence of any similar acts by the accused … is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." Thus, other-acts evidence regarding Dorsey's abuse against C.B. is

[3] Dorsey and C.B. first began living together in February 2014. Consequently, the incidents from October 12, 2013, and from December 2013 or January 2014, were not charged as domestic abuse pursuant to WIS. STAT. §§ 973.055(1) and 968.075. On appeal, Dorsey does not challenge whether the other-acts evidence in this case was properly admitted in a trial that included the two non-domestic abuse charges with the domestic abuse charges. Therefore, we decline to address that issue. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for the parties.).

admissible without regard to the fact that the victim of the other crime, R.K., is not the victim in the present proceeding. Therefore, the circuit court properly considered crimes against R.K. even though she was not Dorsey's victim in this case.

¶21 The circuit court's decision stated that it applied the "greater latitude rule" in allowing the other acts evidence to be used in this case. The greater latitude rule is a court-created doctrine. It simply functions as a mechanism for the "more liberal admission of other crimes evidence …." ***State v. Davidson***, 2000 WI 91, ¶52, 236 Wis. 2d 537, 613 N.W.2d 606. More specifically, the rule allows courts to permit a "greater latitude of proof as to other like occurrences." ***Id.***, ¶36 (citations omitted). Historically, the greater latitude rule was used almost exclusively in cases concerning sexual offenses against children. ***Id.***, ¶¶ 36, 51.

¶22 We note that current WIS. STAT. § 904.04(2)(b)1. includes the subtitle "*Greater latitude*." That subtitle might indicate a legislative intent that the court-created, so-called "greater latitude rule" now applies to domestic abuse cases. "Although titles are not part of statutes, WIS. STAT. § 990.001(6), they may be helpful in interpretation. Nevertheless text must control over title." ***Aiello v. Village of Pleasant Prairie***, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996). The text of § 904.04(2)(b)1. does not indicate any clear legislative intent to make the greater latitude rule, as developed through our state's case law, now applicable to domestic abuse cases. Under the statute, the only greater latitude provided in admission of evidence in domestic abuse cases is the ability to admit other acts evidence "without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." Therefore, we decline to otherwise interpret the statute to provide for greater latitude in the admissibility of other acts evidence in domestic abuse cases merely because of the subsection title.

¶23 Without using the greater latitude rule, we now analyze whether the State met its burden on the first two prongs of ***Sullivan***; that is, whether: (1) the evidence is offered for an acceptable purpose; and (2) the evidence is relevant. If the State met its burden, we will address whether Dorsey then met his burden to show the probative value of the evidence was substantially outweighed by the risk or danger of unfair prejudice.

I. Acceptable purpose of other-acts evidence

¶24 WISCONSIN STAT. § 904.04(2)(a) sets forth a non-exhaustive list of acceptable purposes for the admission of other-acts evidence:

> 2. Other crimes, wrongs, or acts. (a) General admissibility. Except as provided in par. (b)2., 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.

(Emphasis added.) As long as the proponent identifies at least one acceptable purpose for admission of the evidence that is unrelated to the forbidden propensity inference, the first step is satisfied. ***Payano***, 320 Wis. 2d 348, ¶63.

¶25 The State sought to admit the other-acts evidence concerning the June and November 2011 assaults of R.K. to establish Dorsey's "intent and motive" to cause bodily harm to his current victim, C.B., and to control her within the context of a domestic relationship. Dorsey contends the circuit court misapplied the greater latitude rule under WIS. STAT. § 904.04(2)(b)1. and the ***Sullivan*** factors in concluding the State's proffered other-acts evidence could be admitted.

¶26 Proving intent and motive are clearly proper purposes to admit other-acts evidence under WIS. STAT. § 904.04(2)(a). Again, even without our

permitting a "greater latitude of proof as to other like occurrences," ***Davidson***, 236 Wis. 2d 537, ¶36, we agree with the State that the other-acts evidence could be admitted to show a specific motive and purpose to "control [C.B.] within the context of a domestic relationship." There certainly was evidence of Dorsey's efforts to control both R.K. and C.B. Dorsey does not, and cannot, argue that motive and intent are improper purposes to allow other-acts evidence under § 904.04(2)(a).

¶27 Rather, Dorsey contends that unless motive is an element of the crime charged, other-acts evidence of motive is inadmissible as a forbidden character inference prohibited by WIS. STAT. § 904.04(2). We disagree. As Dorsey points out in his brief:

> Other crimes evidence may be admitted to establish motive for the charged offense if there is a relationship between the other acts and the charged offense, or if there is a purpose element to the charged crime. ***State v. Cofield***, 2000 WI App 196, ¶12, 238 Wis. 2d 467, 618 N.W.2d 214 (citations omitted).

Dorsey submits that neither condition can be satisfied in this case. However, the cited case law stands for an "either/or" test—that is, other-acts evidence may be admitted to establish motive for the charged offense *either* if there is a relationship between the other acts and the charged offense, *or* if there is a purpose element to the charged crime. "[T]here is no requirement that the purpose for which evidence of another act is proffered be an element of the crime …." ***State v. Normington***, 2008 WI App 8, ¶30, 306 Wis. 2d 727, 744 N.W.2d 867 (citing ***Sullivan***, 216 Wis. 2d at 772). Thus, even though motive is not an element of any of the charges against Dorsey, motive is a proper purpose under the statute.

¶28 Dorsey argues the incidents between him and R.K. did not provide a *specific* motive for him to commit an act of domestic abuse upon C.B. Indeed, R.K. was unaware of C.B.'s existence prior to March 2014. While Dorsey is

correct on that point, he misses the relevant aspect of the rule. WISCONSIN STAT. § 904.04(2)(b)1. expressly allows the admission of evidence of similar acts committed by Dorsey against a different victim. Accepting Dorsey's reasoning would directly conflict with the express language of § 904.04(2)(b)1.

¶29 Moreover, proving intent is a proper basis for admission of other-acts evidence, and intent is an element of the two battery charges. Thus, even if motive was not a properly stated purpose, intent was, even under Dorsey's "elements of the crime" argument. Again, as long as the State identifies one acceptable purpose for admission of the evidence, the first step of the ***Sullivan*** analysis is satisfied. ***Payano***, 320 Wis. 2d 348, ¶63.

¶30 The State argues that the other-acts evidence from R.K. supports C.B.'s credibility over Dorsey's credibility. We decline to address whether, in a case involving domestic abuse of an adult, credibility alone is a sufficient purpose to allow other-acts evidence (as opposed to a case involving sexual abuse of a young child). We hold that the motive and intent purposes put forth by the State, and accepted by the court, are dispositive on the issue. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not address every issue raised by the parties when one is dispositive).

¶31 In addition, at the time R.K. testified, Dorsey had not yet testified nor made a final decision as to whether he would testify. Thus, at the time of R.K.'s testimony, her testimony could not possibly have been admitted on grounds that it impeached the credibility of Dorsey's testimony. For that reason, we view this case as inappropriate to take up the issue of whether credibility alone is a permissible purpose for the admission of other-acts evidence in an adult domestic abuse case.

¶32 Finally, under WIS. STAT. § 904.04(2), absence of mistake or accident are also proper purposes. Dorsey denied all of the charges against him

and, at trial, claimed C.B. was injured in March 2014 because she fell in the shower. He therefore claimed only an accident occurred. We first note that under the wording of § 904.04(2), "absence of … accident" is not limited to an accident caused by a defendant, such as a defendant's claimed accidental, as opposed to intentional, touching of another person inappropriately. The State argues that absence of an accident, under the plain meaning of the statute, could also involve a claimed accidental injury to a victim without involvement by a defendant, such as C.B.'s alleged fall in the shower. While somewhat closely related to credibility, the alleged accident would ordinarily bring into play § 904.04(2) because absence of an accident is a proper purpose for admitting other-acts evidence. However, we also decline to address that issue. ***Turner***, 268 Wis. 2d 628, ¶1 n.1. Dorsey's attorney did not mention the alleged fall in the shower in his opening statement. Dorsey testified after R.K. Thus, when R.K. testified, proving the absence of an accident would not have been a known purpose to admit R.K.'s testimony. For that reason, we also decline to decide whether absence of an accident was an additional proper purpose in this case.

II. Relevance of the other-acts evidence

¶33 The second prong of the ***Sullivan*** analysis addresses whether the proffered other-acts evidence is relevant. ***Sullivan***, 216 Wis. 2d at 772-73; *see also* WIS. STAT. § 904.04(2)(a). Two factors are used to assess relevance: (1) whether the other acts relate to a fact or proposition that is of consequence to the determination of the action; and (2) whether the evidence has probative value, *i.e.*, whether the evidence has a tendency to make a consequential fact more or less probable than it would be without the evidence. ***Davidson***, 236 Wis. 2d 537, ¶64 (citing WIS. STAT. § 904.01; ***Sullivan***, 216 Wis. 2d at 772).

¶34 We first address whether the other acts are relevant because they relate to a fact or proposition that is of consequence to the determination of this

action. The State asserted the other-acts evidence was relevant because the acts of domestic violence against R.K. were similar to the charged acts in this case and the evidence related to Dorsey's intent and motive to harm C.B. Dorsey was charged with strangulation and suffocation, felony battery, and misdemeanor battery, all requiring the State to prove intent. Since the other-acts evidence was offered to prove intent and motive, the circuit court held that the evidence did relate to a fact or proposition of consequence to the action. We agree.

¶35 Dorsey argues he never offered an innocent explanation of the incidents with C.B. that would negate a criminal intent for his acts, but simply denied the acts ever occurred. Consequently, Dorsey argues, R.K.'s testimony could not be offered to prove intent. Dorsey is wrong. "[T]he State is required to prove all elements of the crime beyond a reasonable doubt even if an element is not disputed." ***State v. Veach***, 2002 WI 110, ¶77, 255 Wis. 2d 390, 648 N.W.2d 447 (citing ***Davidson***, 236 Wis. 2d 537, ¶65); *see also* ***State v. Hammer***, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629). "Evidence relevant to any element is admissible even if the element is undisputed." ***Veach***, 255 Wis. 2d 390, ¶77. Quite simply, the State was obligated to prove intent before Dorsey testified to the alleged innocent explanation through accident unrelated to his conduct.

¶36 The second relevance inquiry under ***Sullivan*** is whether the other-acts evidence is probative. The probative value of the other-acts evidence depends upon the other acts' nearness in time, place, and circumstances to the alleged crime. ***Whitty***, 34 Wis. 2d at 294. The probative value of the other-acts evidence is not dependent on identical prior offenses; rather, it is assessed based on the similarities between the offenses. ***Davidson***, 236 Wis. 2d 537, ¶72.

¶37 The State emphasizes that the acts share a number of similarities, as follows:

1. The arguments that preceded the assaults against R.K. and C.B. generally concerned Dorsey's allegations that his partners were unfaithful or disrespectful;

2. All of the assaults to R.K. and C.B. occurred when the victim was isolated in her home or vehicle or when no other persons were in the area;

3. In both the June 2011 and February 2014 incidents, the assaults occurred well after the arguments had ended, and in both incidents Dorsey had spent time at a bar after the arguments;

4. In both the November 2011 and the October 2013 incidents, Dorsey attempted to lock both of his victims under his control;

5. In both the June 2011 and January 2013 incidents, Dorsey spat on his victims;

6. In both the November 2011 and February 2014 incidents, Dorsey threw objects at his victims and pulled and dragged his victims back under his control by their hair; and

7. Both victims had similar responses to Dorsey's assaults and maintained their relationships with Dorsey for an extended period after the abuse began.

We agree the similarities between the other acts and the charged crimes in this case are striking.

¶38 Dorsey concedes there are similarities between R.K.'s and C.B.'s testimony. However, here again, Dorsey argues the other acts are not probative because he was not offering an innocent explanation for the harm to C.B. and therefore he did not contest intent. As indicated above, "[t]he State is required to prove all elements of the crime beyond a reasonable doubt even if an element is not disputed." ***Veach***, 255 Wis. 2d 390, ¶77.

¶39 There was an approximate two-year gap between the last act against R.K. and the acts against C.B. While Dorsey does not directly argue that remoteness in time between the prior acts and the charged crimes renders the other

acts irrelevant, he does refer in passing to remoteness. Remoteness alone would not alter the relevancy determination in this case. Remoteness in time diminishes relevancy if it "negate[s] all rational or logical connections between the fact to be proven and the other[-]acts evidence." ***State v. Opalewski***, 2002 WI App 145, ¶20, 256 Wis. 2d 110, 647 N.W.2d 331.

¶40 Here, the gap in time does not diminish all rational or logical connection between the acts against R.K. and those against C.B. Dorsey fails to provide us with a reason why the gap of only two years is significant enough for this court to hold there is no rational or logical connection. We note Dorsey was on probation for much of the two years and may have purposefully waited until his probation expired to engage in further domestic abuse, so as to avoid probation revocation. In addition, relationships often take time to establish and to deteriorate. We agree with the circuit court that two years is not a significant enough period of time to hold the other-acts evidence irrelevant. In sum, the State established that the other-acts evidence would be probative—indeed, highly probative—to the issue of motive and intent, and is relevant in that sense.

III. Whether the probative value outweighs the prejudice to Dorsey

¶41 "Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." ***State v. Hurley***, 2015 WI 35, ¶58, 361 Wis. 2d 529, 861 N.W.2d 174 (quoting ***Marinez***, 331 Wis. 2d 568, ¶19). Thus, the final issue is whether Dorsey met that burden. The circuit court held that he did not. We agree.

¶42 Almost all evidence is prejudicial. ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994). The test is whether the resulting prejudice is fair. ***Id.*** The more probative the evidence is, the fairer its prejudicial

effect will be. ***Id.*** "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.***

¶43 Dorsey asserts that the evidence was unfairly prejudicial because he was not contesting intent or motive, so it must have been introduced as prohibited prejudicial character evidence. However, as explained above, Dorsey's argument fails to acknowledge that the other-acts evidence was highly probative of intent, and the State had the burden to prove intent beyond a reasonable doubt. Dorsey concedes there are similarities between R.K.'s and C.B.'s testimony. Those similarities, which we view as significant in quality and quantity, weigh against his argument the other acts evidence was offered to influence the outcome of the case by improper means. Finally, we note that any prejudicial effect could be mitigated through the use of the cautionary instruction given by the circuit court. Juries are presumed to have followed the court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Dorsey fails to make any other argument to support his claim that admission of the other-acts evidence was unfairly prejudicial.

¶44 We have already held the other-acts evidence was highly probative of intent, and the State had the burden to prove intent beyond a reasonable doubt. *See supra* ¶43. Balancing the high probative value against potential unfair prejudice, we note that Dorsey was acquitted of strangulation and suffocation. That is some indication that the other-acts evidence was not unfairly prejudicial. The jury apparently did not assume Dorsey was a bad character for all purposes in the case because of the other-acts evidence, and thus guilty of all charged offenses.

¶45 In all, we conclude the circuit court correctly applied the recently revised version of WIS. STAT. § 904.04(2)(b)1., which includes allegations of

domestic abuse, and it did not erroneously exercise its discretion by admitting the other-acts evidence.

By the Court.—Judgment affirmed.

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