

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2016AP2315-CR
2016AP2316-CR
2016AP2317-CR**

**Cir. Ct. Nos. 2013CF3481
2013CF5185
2014CM108**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANGUS MURRAY MCARTHUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. Angus Murray McArthur appeals from a judgment of conviction, entered upon a jury verdict, of multiple offenses committed against his

former girlfriend, K.W. He also appeals from the order denying his postconviction motion on the grounds of ineffective assistance of counsel. We affirm.

BACKGROUND

¶2 On August 2, 2013, McArthur was charged in Milwaukee County Circuit Court case No. 2013CF3481 with: (1) kidnapping; (2) false imprisonment; (3) aggravated battery; (4) two counts of misdemeanor battery; (5) second-degree sexual assault; and (6) strangulation and suffocation. According to the criminal complaint and facts adduced at trial, on July 14, 2013, K.W. went to work crying and asked her manager to take her to the hospital. K.W.'s manager took K.W. to the emergency room, where K.W. reported that her former boyfriend (McArthur) pulled her into his car, punched her repeatedly, threatened her, choked her, and sexually humiliated her. K.W. was admitted to the hospital with a severely lacerated spleen, which led to life-threatening internal bleeding, emergency surgery, and a five-day stay in the ICU.

¶3 On July 18, 2013, K.W. gave a statement to Wauwatosa Police Detective Paula Roberson. K.W. told Roberson that McArthur had given K.W. a list of “rules” to follow and that rule violations resulted in “punish[ments].” K.W. said that on July 14, 2013, McArthur confronted her (K.W.) about a voicemail and a text message that K.W. had received earlier in the day. McArthur drove K.W. home, but told K.W. she could not speak during the car ride. McArthur punched K.W. when she attempted to speak. K.W. agreed to meet McArthur later at a nearby bar so they could talk. K.W. went to the bar later, but McArthur did not show up. K.W. had drinks with an acquaintance at the bar named “Mike” and

smoked marijuana with him. K.W. went home and fell asleep sometime after 1:00 a.m. K.W. told Roberson that when she (K.W.) woke up, she was in McArthur's car, but did not know how she got there. McArthur told K.W. that he rented a car and was following her all night. He asked her what he could do differently so that his next relationship would not fail. When K.W. told McArthur that she needed time to adjust to her lifestyle with him, he began striking her in her ribs and her face. McArthur continued to strike K.W. for hours. McArthur also asked K.W. if she wanted to get out of the car. When K.W. said "yes" and opened the door, McArthur dragged her back into the car by the hair. At one point he put his hand around her throat with such force that she lost consciousness.

¶4 When K.W. regained consciousness, McArthur told K.W. that he was taking her to Chicago, where he planned to sell her to a man for \$1000 and she would be "drugged, fucked and left for dead." McArthur used a folding knife to cut K.W.'s shirt and bra straps and on multiple occasions told K.W. to choose between getting her wrist broken or getting hit in the ribs. Eventually, McArthur drove K.W. back to his house and asked K.W. if she wanted to go the hospital. When K.W. said "yes" McArthur told her that she gave the "wrong answer" and hit her in the ribs again. McArthur told K.W. not to make any noises before going into the house unless she wanted to die. Once inside, McArthur made K.W. remove her clothes, lay down on the side where she had been hit, and told K.W. that she would never forget the lesson he was giving her. McArthur then forced his penis into her mouth and urinated in her mouth. McArthur put his hand around her throat and threatened to choke her if she did not swallow his urine. The following morning McArthur drove K.W. to work. When K.W. winced in pain, McArthur called her a "pussy" and struck her in the ribs again.

¶5 McArthur was subsequently arrested and charged in case No. 2013CF3481. A no-contact order was issued and K.W. obtained a domestic abuse injunction against McArthur.

¶6 On November 13, 2013, McArthur was charged in Milwaukee County Circuit Court case No. 2013CF5185 with two counts of knowingly violating a domestic abuse order and two counts of felony intimidation of a witness and conspiracy to commit perjury. The complaint alleged that McArthur placed two phone calls to K.W. from jail in which he attempted to dissuade her from cooperating in his prosecution and told K.W. to provide a false statement to authorities regarding the events of July 14, 2013. Case Nos. 2013CF3481 and 2013CF5185 were consolidated for trial.

¶7 On December 16, 2013, the State filed a motion to introduce “other acts” evidence “to demonstrate the defendant’s method of operation, and possibly to establish identity.” The State sought to introduce the following evidence that McArthur tormented four previous girlfriends in a manner similar to his torment of K.W.:

- M.M.: In 1994, McArthur shot his then-live-in girlfriend, M.M., after hearing a male voice on their answering machine. McArthur claimed that he shot M.M. accidentally. During the course of their relationship, McArthur would put a gun in M.M.’s mouth and wondered out loud what it would feel like to die. He would force M.M. to handle his guns, telling her that he wanted her fingerprints on the guns so that if he shot her, it would look like M.M. committed suicide. He would also verbally abuse M.M. and “play” with her by grabbing her throat and pinning her

to the floor. McArthur was convicted of first-degree endangering safety and two counts of endangering safety by use of a dangerous weapon.

- C.C.: McArthur dated C.C. in 1998 while on parole for the case against M.M. On one occasion, McArthur became angry that C.C. was going out with friends. He handcuffed C.C., stuffed a sock in her mouth, and beat her head. McArthur put a guitar wire around C.C.'s neck, strangling her, and mockingly asked "Do you like this?" Before releasing C.C., McArthur put a plastic bag around her head, told her she would convulse from a lack of air, and told her he "heard it was the worst way to die." McArthur began stalking C.C., calling her with death threats, and told her she had a "choice" as to which of her family members McArthur should kill. McArthur was subsequently convicted of being a felon in possession of a firearm.
- J.D.: McArthur dated J.D. in 2002. In February 2002, J.D. called the police, reporting that McArthur punched her in the stomach during an argument and tried to prevent her from leaving by twisting her wrist. McArthur also strangled her with a pair of pants he was ironing and threatened to "bash her head in" with the iron. McArthur also threatened to "gut her" after making her watch him hang her parents. McArthur was charged with battery and disorderly conduct. While that case was pending, he began calling J.D. to convince her to drop the charges.
- R.S.: McArthur dated R.S. in 2003 and 2004. During that time, McArthur punched R.S. multiple times, once after discovering she was

in contact with an ex-boyfriend. McArthur followed R.S. while she drove, keyed her car, and at one point drove her car into traffic, turned the car off, and left it there. When he was angry, McArthur drove his car into R.S.'s car on multiple occasions. McArthur was charged with hit and run for one of those instances; the charge was later dismissed. He was, however, convicted of disorderly conduct.

¶8 The State's motion also alleged that at some point, M.M., J.D., and R.S. all indicated that they did not wish to continue with prosecution. The motion argued that the other acts showed that McArthur had a particular method of controlling his girlfriends which included death threats to the victims and their family members, stalking, extreme methods of physical control, and posing violent "choices" as to how the victims wished to be punished. The State also argued that because McArthur may have convinced K.W. to retract her statement to Roberson, evidence of McArthur's behavior with previous girlfriends established McArthur's identity and mindset.

¶9 The trial court held a hearing, in which it granted the State's motion, finding that McArthur's actions demonstrated an escalation of behavior in controlling his girlfriends and engaging in violent behavior. The court analyzed the "other acts" in accordance with *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), and found McArthur's behavior with his girlfriends to "basically [be] a signature and a footprint of those tactics." The court found the other acts relevant and probative and found that under the totality of the circumstances, there was no danger of unfair prejudice.

¶10 The State also informed the trial court and trial counsel that McArthur had been sending K.W. letters through an intermediary and that the State would be issuing additional charges. McArthur was subsequently charged with four counts of knowingly violating a domestic abuse order in Milwaukee County Circuit Court case No. 2014CM108. Case No. 2014CM108 was consolidated with the two cases already before the trial court.

¶11 On April 25, 2014, McArthur submitted a notice of alibi, listing witnesses who would testify that McArthur was with them on the night of July 14, 2013.

¶12 The matter proceeded to trial. On the first day of trial, the State filed a motion in limine seeking to introduce K.W.'s testimony about the history of her relationship with McArthur, including McArthur's "rules" for their relationship and his patterns of abuse and violence. Trial counsel objected to the motion. The trial court granted the State's motion, finding that K.W.'s testimony about her history with McArthur was relevant for a full determination of the facts.

¶13 Multiple witnesses testified at trial, including C.C., J.D., and R.S., all of whom testified consistently with the events described in the State's other acts motion.

¶14 K.W. testified consistently with the facts alleged in the criminal complaint. She further told the jury that she continued to text McArthur while she was in the hospital, that she visited McArthur while he was in jail, that the two exchanged letters while he was in jail, and that she gave McArthur her new phone number. She admitted that McArthur wanted her to change her story, so they

began communicating through other people's phones and addresses to circumvent the domestic abuse order. She testified that she agreed to recant her story.

¶15 Roberson also testified. As relevant to this appeal, the State asked Roberson whether K.W. provided Roberson with a “complete narrative start to finish beginning with the events that occurred on July 13[th] leading up to the incident during the early morning hours of July 14[th].” Roberson responded in the affirmative. The State also asked Roberson about whether K.W. described her relationship with McArthur, generally. Roberson again responded in the affirmative and then was asked to read a portion of the report detailing K.W.'s narrative of K.W.'s history with McArthur. Roberson proceeded to read from her report. The report described how K.W. met McArthur, her initial happiness with the relationship, McArthur's rules and expectations of K.W., McArthur's mental and physical abuse of K.W., and K.W.'s description of the events of July 13th and July 14th. Trial counsel did not object.

¶16 McArthur testified in his own defense, telling the jury that he was with friends the night and morning of the incident at issue and that K.W. made up the allegations because McArthur threatened to have K.W. committed for alcohol rehabilitation. He admitted that the allegations of his former girlfriends were “[m]ostly true,” but told the jury that he was reformed.

¶17 Prior to closing arguments, the trial court instructed the jury on how it was to consider the other acts evidence:

Evidence has been presented regarding other conduct of the defendant [for] which the defendant is not on trial. Specifically, the evidence has been presented that the defendant was verbally and physically abusive to prior girlfriends.

If you find that this conduct did occur, you should consider it only on the issues or issue of Mr. McArthur's state of mind to show his method of operation, plan to show on the escalation of his behavior, to show motive, and to establish his identity as a person who committed the crime.

You may not consider this evidence and conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

....

You may consider this evidence only for the purpose or purposes I described.... It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged.

The jury found McArthur guilty of all of the charged offenses, except kidnapping.

¶18 McArthur filed a postconviction petition for a new trial pursuant to WIS. STAT. RULE 809.30 (2015-16),¹ alleging that trial counsel was ineffective in multiple respects. The postconviction court denied the motion without a hearing. McArthur appeals.

DISCUSSION

¶19 On appeal, McArthur argues that the trial court erroneously exercised its discretion in admitting the testimony of McArthur's prior girlfriends and in admitting K.W.'s testimony about "other acts" McArthur allegedly committed prior to the charged offenses. He also argues that the postconviction court erroneously denied his motion for a new trial without an evidentiary hearing because his trial counsel was ineffective for: (1) failing to object to the State's cross-examination of certain defense witnesses regarding "other acts" McArthur

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

allegedly perpetrated against his previous girlfriends; and (2) failing to object to Roberson's reading of K.W.'s narrative history of K.W.'s relationship with McArthur.

I. The trial court properly admitted the testimony of McArthur's former girlfriends and K.W.'s testimony.

¶20 The decision whether to admit other acts evidence rests within the trial 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 trial 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. *See Sullivan*, 216 Wis. 2d at 780-81.

¶21 Generally, other acts evidence is inadmissible; 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. *Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967); *Sullivan*, 216 Wis. 2d at 772-73; *see also* WIS. STAT. § 904.04(2)(a).

¶22 Like the trial court, we are guided by the dictates of *Sullivan*, which set forth a three-step analytical process to be applied in determining the admissibility of other acts evidence: (1) the evidence must be offered for an admissible purpose under WIS. STAT. § 904.04(2); (2) the evidence must be relevant; and (3) the probative value of the other acts evidence must not be

substantially outweighed by the considerations set forth in WIS. STAT. § 904.03. See *Sullivan*, 216 Wis. 2d at 772-73.

¶23 As to the first question, the State argues that evidence of McArthur’s conduct with previous girlfriends was offered for multiple permissible purposes including identity, motive and state of mind. The trial court agreed, noting that the evidence “show[ed] basically an escalation of different methods of operation by [McArthur]. Which does, in fact, develop [McArthur’s] state of mind, which is connected to his motive.... And all these other acts reveal a striking pattern of controlling and violent behavior by the defendant of his girlfriends.” The trial court identified multiple permissible purposes for admitting the testimony and explained its rationale. Accordingly, the trial court’s findings that this testimony was offered for multiple permissible purposes were not erroneous.

¶24 The testimony was also relevant. McArthur’s girlfriends testified about a disturbing pattern of conduct involving: controlling behavior, punching, strangulation, gruesome death threats to the girlfriends and/or their family members, stalking and harassment. McArthur’s violent behavior towards his previous girlfriends stemmed from what he perceived to be defiance of his rules and was often motivated by jealousy. These assaults are strikingly similar to the assault K.W. suffered on the night of July 13, 2013, and the morning of July 14, 2013. The testimony of McArthur’s former girlfriends was therefore relevant to establishing McArthur’s motive for his assault of K.W., as well as his state of mind and his identity. Specifically, McArthur’s motive to control K.W.’s drinking habits and her contact with other men; his anger and jealousy when K.W. broke his rules; and his identity as her attacker, as McArthur claimed he was with friends on July 13 and July 14, 2013. As the trial court noted, McArthur’s actions

are “basically a signature and a footprint.” The trial court properly determined that the other acts evidence was relevant.

¶25 Lastly, the trial court correctly determined that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. McArthur himself made the other acts testimony necessary. When the State filed its motion to admit the evidence, it appeared from McArthur’s jail house phone calls and letters to K.W. that he was attempting to convince K.W. to recant her allegations. *See State v. Hunt*, 2003 WI 81, ¶59, 263 Wis. 2d 1, 666 N.W.2d 771 (Other acts evidence is permissible to show the victims’ state of mind, to corroborate information provided to the police, and to establish the credibility of victims and witnesses when a victim recants initial statements to police.). McArthur claimed that he did not attack K.W., but rather, K.W. was attacked by “Mike,” whom she met at a bar shortly before her attack. Thus, McArthur put the issue of his identity before the jury himself.

¶26 Moreover, the trial court issued a cautionary instruction to the jury, instructing the jury that the other acts testimony was not be used as character evidence. Rather, the court told the jury that the testimony could only be used for one of the permissible purposes discussed. We assume juries follow instructions. *See State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994).

¶27 Accordingly, we conclude that the trial court did not err in admitting testimony from McArthur’s former girlfriends.

II. The trial court properly admitted K.W.’s testimony about the history of her relationship with McArthur.

¶28 McArthur contends that the trial court erroneously admitted K.W.’s testimony about her relationship history with McArthur, which included testimony about McArthur’s relationship “rules” and acts of violence that occurred prior to July 13, 2013. The trial court did not find the testimony to constitute “other acts,” but determined that the testimony was necessary to give the jury a “full and fair determination of the facts.” However, the court noted that even if the testimony could properly be characterized as other acts evidence, it would still be admissible.

¶29 K.W.’s testimony of her history with McArthur, including how they met, his rules for their relationship, his escalating violent behavior, and his threats, were all necessary for the jury to understand the offenses charged. “The evidence involved the relationship between the principal actors ... and traveled directly to the State’s theory as to why” McArthur’s version of events was not credible as to why K.W. would recant her story. *See State v. Jensen*, 2011 WI App 3, ¶85, 331 Wis. 2d 440, 794 N.W.2d 482. In essence, for “the finder of fact to arrive at the truth, it was proper not to limit the evidence to a frame-by-frame presentation.” *Id.*, ¶86. Accordingly, the trial court properly admitted the testimony.

III. Trial counsel was not ineffective.

¶30 McArthur contends that his trial counsel was ineffective for: (1) failing to object when the State asked defense witnesses about the other acts evidence; and (2) failing to object to Roberson’s reading of K.W.’s statement. We disagree.

¶31 To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel’s representation fell below “an objective standard of reasonableness.” *Id.*, at 688. Showing prejudice means showing that counsel’s alleged errors actually had some adverse effect on the defense. *State v. Koller*, 2001 WI App 253, ¶9, 248 Wis. 2d 259, 635 N.W.2d 838. The defendant must show the alleged deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (citation omitted). “The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome.” *Id.* Instead, the defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (citation omitted).

¶32 We affirm the trial court’s findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985).

A. Cross-examination of defense witnesses

¶33 The State questioned two defense witnesses—George Bregar and Stephen Hughes—regarding their knowledge of McArthur’s behaviors with previous girlfriends. The State asked Bregar, McArthur’s roommate in July 2013, whether McArthur ever discussed his abusive behavior towards previous girlfriends. Trial counsel objected, but the objection was overruled. The State

also asked Hughes, McArthur's friend, whether McArthur ever discussed his previous abusive behavior. McArthur contends that counsel was ineffective for not objecting to these lines of questioning.

¶34 We note first, that counsel did object to the State's questioning of Bregar, but the objection was overruled. McArthur cites no reason to believe that additional objections would have been sustained. Moreover, a review of the record shows that the purpose of the State's questions was to attack the defense witnesses' credibility, as both claimed to know McArthur well. Counsel was not ineffective for failing to continuously object to the State's questions.

B. Roberson's reading of K.W.'s statement

¶35 As stated, Roberson read a statement from K.W. which detailed K.W.'s history of her relationship with McArthur, including how the two met, McArthur's relationship rules, his escalating violence, and ultimately, the events of July 13, 2013, and July 14, 2013. Trial counsel did not object. McArthur contends that counsel was ineffective for failing to object to Roberson's reading of K.W.'s statement. We disagree and conclude that Roberson's reading was admissible as a prior consistent statement.

¶36 Prior consistent statements of a witness are admissible as an exception to the hearsay rule if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *See* WIS. STAT. § 908.01(4)(a)2.; *State v. Mares*, 149 Wis. 2d 519, 525-26, 439 N.W.2d 146 (Ct. App. 1989). The rationale underlying the prior

consistent statement exception to the hearsay rule is that if a witness related a version of the events consistent with his courtroom testimony prior to testifying in court, the existence of a prior consistent statement rebuts the suggestion that the courtroom testimony is not trustworthy. See *State v. Peters*, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991).

¶37 McArthur’s defense theories were that K.W. lied about McArthur being her attacker, that “Mike” was most likely the perpetrator, and that K.W. was not credible. K.W.’s statement was therefore admissible to rebut the defense’s contention that K.W. fabricated the story of her attack. Moreover, we reject McArthur’s implication that the determining factor in the verdict was Roberson’s reading of K.W.’s statement. The evidence against McArthur was overwhelming and included testimony from K.W., his former girlfriends, and medical staff. McArthur himself admitted to abusing his former girlfriends and told the jury that K.W. “broke[] the cardinal rule” by having him arrested. The jury was also privy to text messages and letters between McArthur and K.W.

¶38 Because K.W.’s statement was admissible, and because McArthur cannot realistically contend that he was prejudiced by the statement, counsel was not ineffective for failing to object to the statement.

¶39 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

