

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2008

David R. Schanker
Clerk of Court of Appeals

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Appeal No. 2006AP2977-CR

Cir. Ct. No. 2004CF405

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICARDO R. GONZALEZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY E. GRAU, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. Ricardo Gonzalez appeals a judgment convicting him of second-degree sexual assault causing bodily injury and second-degree sexual assault while the victim was unconscious. Gonzalez offers five grounds for reversing the conviction and remanding the case for a new trial: (1) the circuit

court erred by permitting the State to present evidence that, several months earlier, Gonzalez initiated sexual intercourse with his then-wife without her consent while she was sleeping; (2) defense counsel's failure to impeach Gonzalez's ex-wife with a prior conviction constituted ineffective assistance of counsel; (3) the court erred when it instructed the jury that "bodily injury" was defined as "physical pain or harm;" (4) the charges against Gonzalez were multiplicitous; and (5) due to the cumulative effect of the errors at trial, a new trial is warranted in the interest of justice. We conclude that the circuit court erred when it admitted evidence of the prior sexual act with Gonzalez's ex-wife, and also when it instructed the jury on the definition of "bodily injury." We therefore, reverse and remand for further proceedings. Because we are remanding the matter, we also choose to address Gonzalez's multiplicity argument.

BACKGROUND

¶2 On Saturday, March 24, 2004, Ann Grizzle was celebrating her twenty-fifth birthday at Pikes Bar. By all accounts, she became extremely intoxicated. Grizzle consumed various alcoholic drinks at the bar, including a "shot" with Gonzalez, who was a friend. Grizzle's parents were also at the bar, and as the evening wore on, they concluded that Grizzle was "losing control." Around 11:30 p.m. they took her home and put her to bed in her basement bedroom.

¶3 At some point during the late evening hours, Grizzle's friends, Chad and Missy, came over and went to bed in a room off the main floor living room. Thereafter, Grizzle's boyfriend Trevor returned home and went to sleep in the bedroom with Grizzle.

¶4 During the night, Grizzle came upstairs to the bathroom and then entered the living room and sat on the couch. Soon thereafter, at around 2:30 or 3:00 a.m., Gonzalez arrived at the house. Grizzle's father went to sleep in a second room off the living room, while Grizzle and her mother stayed up with Gonzalez. Grizzle was having difficulty staying awake during this time. Around 4:30 a.m., Grizzle's mother went to sleep with her husband. When she left the living room, Grizzle was asleep on the sofa in the living room, and Gonzalez was sitting in a recliner in the same room drinking a beer.

¶5 A few minutes after his wife came to bed, Grizzle's father heard Grizzle say something like, "Richie, get off me." He testified that he "didn't think nothing of it" and thought maybe Gonzalez had been on the wrong couch. He testified that Grizzle's tone did not cause him any alarm, and that she said it in a kind of a "dozy way." Grizzle's mother did not hear this comment.

¶6 Grizzle remembered being on the couch saying, "Richie, get off me," and swinging her arm back over her shoulder. She could not remember what was said or done before or after the comment. She did not notice anything unusual about her clothing when she woke up the following morning; her underwear was in place and her jeans were pulled up and fully zipped. She noticed some blood on her jeans at that time, but attributed it to her menstrual bleeding. Later that day, she noticed pain in her rectum.

¶7 Grizzle continued to experience pain in her rectum and was concerned that she had been sexually penetrated. Grizzle went to work on Monday, and returned home at about 4:00 p.m. After first calling Gonzalez to determine if they had engaged in consensual sex and being told that they had not,

she told Trevor about her concerns. She and Trevor then went to the emergency room.

¶8 At the emergency room Grizzle complained of rectal pain and had some “slight vaginal bleeding.” There was no medical evidence of assault. Following the examination at the hospital, Grizzle was interviewed by the police. At that time, she indicated that she was not sure if anything had happened, and that part of the reason she went to the hospital was to attempt to discern if anything had happened to her on the night in question.

¶9 Physical evidence was taken from Grizzle. Swabs taken from her vagina and cervix were tested and contained blood but no semen. A rectal swab was tested and contained neither blood nor semen.

¶10 Ricardo Gonzalez was charged with second-degree sexual intercourse without consent causing injury contrary to WIS. STAT. § 940.225(2)(b) (2005-06),¹ and second-degree sexual intercourse while the victim was unconscious contrary to WIS. STAT. § 940.225(2)(d).²

¹ WISCONSIN STAT. § 940.225(2)(b) provides:

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class C felony: (b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² WISCONSIN STAT. § 940.225(2)(d) provides:

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class C felony: (d) Has sexual contact or

(continued)

¶11 Prior to trial, the State moved to admit other acts evidence. The motion alleged that in early December 2003, Gonzalez’s then-wife, Amanda Gonzalez, took some cold medicine and went to sleep with her three-year-old son, who was also sick. She was pregnant at the time. Later in the evening, she awoke to find Gonzalez having vaginal sex with her. Her underwear had been cut in two locations. The State argued this evidence was admissible under WIS. STAT. § 904.04(2)³ because it was relevant to “demonstrate [Gonzalez’s] motive and intent to have sexual intercourse with Ann Grizzle without her consent and with knowledge that she was unconscious, for purposes of his sexual arousal or gratification.” Defense counsel objected to its admission.

¶12 The circuit court determined that Amanda Gonzalez’s testimony was admissible “for the purpose of motive and for the purpose of showing that the defendant became sexually aroused by engaging in sexual intercourse with an unconscious woman when another person or other people were nearby.” Defense counsel sought and received permission to impeach Amanda Gonzalez with evidence of a prior misdemeanor theft two years earlier.

¶13 Consistent with the court’s ruling, at trial the State presented Amanda Gonzalez, who testified about the alleged intercourse with Gonzalez

sexual intercourse with a person who the defendant knows is unconscious.

³ WISCONSIN STAT. § 904.04(2)(a) provides in pertinent part:

[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. 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.

while she was asleep. Although defense counsel cross-examined her, counsel did not raise the issue of her prior conviction. At the close of the case, the court read the standard cautionary instruction to the jury regarding the permissible use of her testimony.⁴

¶14 After jury deliberations began, the jury requested that the court provide a definition of “bodily injury,” an element of Count One. Over defense counsel’s objection, the court formulated its own definition: “bodily injury means physical pain or harm, illness, or any impairment of physical condition.” The jury returned verdicts of guilty on both counts. Gonzalez appeals.

DISCUSSION

I. Admission of “Other Acts” Evidence

¶15 Gonzalez contends, as he did in the circuit court, that Amanda Gonzalez’s testimony was not admissible because the State did not establish that the requirements for the admission of other acts evidence were met.

⁴ The circuit court instructed the jury as follows:

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.

Specifically, evidence has been presented that the defendant had sexual intercourse with his wife without her consent.

If you find this conduct did occur, you should consider it only on the issue of motive.

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

¶16 WISCONSIN STAT. § 904.04(2) prohibits the admission of evidence of other acts “to prove the character of a person in order to show that the person acted in conformity therewith” but not when the evidence is offered for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

¶17 The three-step analysis for determining whether prior acts of a defendant are admissible inquires: (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2)? (2) Is the other acts evidence relevant under WIS. STAT. § 904.01? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion, or delay under WIS. STAT. § 904.03? *State v. Sullivan*, 216 Wis. 2d 768, 783-90, 576 N.W.2d 30 (1998).

¶18 Because the admission of other acts evidence is committed to the circuit court’s discretion, we affirm the decision on appeal if the circuit court reviewed the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. *State v. Davidson*, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606. If the circuit court failed to articulate its reasoning, on appeal we review the record independently to determine whether there is any reasonable basis for the court’s decision. *Id.*

¶19 We conclude that Amanda Gonzalez’s testimony was not relevant to any of the reasons proffered by the State justifying admission.

¶20 Motive: The State maintains that the other acts evidence was properly admitted to establish Gonzalez’s motive for assaulting Grizzle.⁵ Turning to the first *Sullivan* step, we consider whether the other acts evidence was offered for an acceptable purpose. Motive is specifically listed in WIS. STAT. § 904.02(2) as a permissible purpose. Thus, the first *Sullivan* step is satisfied.

¶21 We then turn to the second *Sullivan* step, which requires an inquiry into the relevance of the evidence. This inquiry has two components: the evidence must relate to some fact that is of consequence to the determination of the action, and it must have some tendency to make that fact more or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772.

¶22 The State argues that the other acts incident involving Gonzalez’s former wife is relevant to prove motive because it tends to prove that Gonzalez is aroused by having sexual intercourse with an unconscious woman when other people are nearby. There are, however, significant differences between the scenario involving Gonzalez’s former wife and the scenario involving Grizzle. First, one involved vaginal sex with a spouse, and the second involved anal sex with a person in the absence of a prior sexual relationship. Second, there is a distinct difference between having sex at home with one’s wife when a three-year-old son or daughter is nearby, and having sex with someone other than one’s wife when other adults are sleeping in nearby rooms. We fail to discern how

⁵ We view the circuit court’s statement that the other acts evidence was admissible to “demonstrate [Gonzalez’s] motive and intent to have sexual intercourse with Ann Grizzle without her consent and with knowledge that she was unconscious, for purposes of his sexual arousal or gratification” as a way of referring to motive, rather than motive and intent as separate purposes. Neither the circuit court nor the State provide a reason why the other acts evidence would be relevant on the topic of intent.

Gonzalez's act of having vaginal sex with his sleeping wife with a child nearby shows that Gonzalez is particularly aroused by the idea of having sex with unconscious women with other adults in close proximity. Rather, we conclude that, at most, the prior act shows that Gonzalez is the sort of person who is not reluctant to attempt sexual intercourse with sleeping women with whom he has a sexual relationship.

¶23 Plan: The State briefly suggests that the evidence was admissible to show a plan. Like "motive," "plan" is specifically listed in WIS. STAT. § 904.04(2) as a permissible purpose, and the first *Sullivan* step is therefore satisfied.

¶24 Turning our attention to relevance, we observe that the State does not present a developed argument as to why the other acts incident is relevant to show plan. The supreme court has addressed the concept of "plan" as follows:

The word "plan" in § 904.04(2) means a design or scheme formed to accomplish some particular purpose.... Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. As Wigmore states, there must be "such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations.

State v. Spraggin, 77 Wis. 2d 89, 99, 252 N.W.2d 94 (1977) (citing 2 Wigmore, *Evidence* § 304 (3d ed. 1940)). Similarity of facts is not enough. Instead there must be some evidence that the prior acts actually constituted a step in a plan leading to the charged offense, or some other result of which the charged offense was but one step. *State v. Cofield*, 2000 WI App 196, ¶13, 238 Wis. 2d 467, 618 N.W.2d 214.

¶25 The linkage is not present here. There is no indication that the prior act involving Gonzalez's ex-wife was a step in a plan leading up to the Grizzle

incident. Further, as Gonzalez points out, it was happenstance that he was left alone with an unconscious Grizzle, and no evidence suggests that he engaged in any significant planning.

¶26 Lack of consent: In cursory fashion, the State also argues that the other acts evidence was admissible to show lack of consent. We disagree. Although lack of consent satisfies the first *Sullivan* step, the second relevance step is not satisfied. While lack of consent is an element of Count One, other acts evidence may not be admitted to show lack of consent because consent is unique to the individual. See *State v. Alsteen*, 108 Wis. 2d 723, 730, 324 N.W.2d 426 (1982). The fact that one complainant did not consent does not tend to prove that a different complainant did not. *Id.* Additionally, consent was not at issue in this case because the jury was instructed that it could find lack of consent based on unconsciousness. Thus, Amanda Gonzalez’s testimony was not relevant to prove lack of consent.

¶27 Context: Also in cursory fashion, the State suggests that the other acts evidence was properly admitted to establish context. As Gonzalez observes, “context” is not meant to be a catch-all exception. Instead, other acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case. *State v. Hunt*, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771. Thus, although context is a permissible purpose under the first *Sullivan* step, it is not relevant to any material issue in this case. The evidence regarding Gonzalez’s prior sexual act with his wife did not contribute to a more complete understanding of the events surrounding the charged crime.

¶28 In sum, we conclude that the other acts evidence was not relevant to any material issue in this case under any theory advanced by the State. We

therefore conclude that the circuit court erroneously exercised its discretion when it determined that Amanda Gonzalez’s testimony was admissible under WIS. STAT. § 904.04(2). Because we conclude that the other acts evidence is not relevant, we need not discuss the court’s determination with respect to whether the danger of unfair prejudice in admitting the proffered evidence substantially outweighs the probative value of the evidence.⁶ See *State v. Rushing*, 197 Wis. 2d 631, 648, 541 N.W.2d 155 (Ct. App. 1995).

¶29 Finally, we note that the State assumes, without discussion, that the “greater latitude rule,” which permits greater latitude in determining whether other acts evidence should be admitted in sexual assault cases, applies in the present matter. As Gonzalez points out, however, in none of the cases cited in the State’s brief⁷ did the court apply the greater latitude rule to anything other than a child sexual assault. Furthermore, the greater latitude rule should not be employed to salvage the circuit court’s error in admitting evidence. See, e.g., *Davidson*, 236 Wis. 2d 537, ¶52.

II. Jury Instruction Regarding Bodily Injury

¶30 Gonzalez contends that the circuit court gave the jury an erroneous definition of the term “bodily injury.” Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review.

⁶ The State does not argue that the admission of the Amanda Gonzalez evidence, if error, was harmless error.

⁷ See *State v. Hunt*, 2003 WI 81, ¶¶83-88, 263 Wis. 2d 1, 666 N.W.2d 771; *State v. Veach*, 2002 WI 110, ¶¶51-52, 85, 255 Wis. 2d 390, 648 N.W.2d 447; *State v. Hammer*, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613 N.W.2d 629; and *State v. Davidson*, 2000 WI 91, ¶¶36-44, 236 Wis. 2d 537, 613 N.W.2d 606.

State v. Ziebart, 2003 WI App 258, ¶16, 268 Wis. 2d 468, 673 N.W.2d 369. Relief is not warranted unless the court is “persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury.” *Id.*

¶31 The circuit court defined “bodily injury” to mean “physical pain *or* harm, illness, or any impairment of physical condition.” (Emphasis added.) The court explained that it had come up with this language by looking to the statutory definition of “bodily harm” under WIS. STAT. § 939.22(4), which states that “[b]odily harm’ means physical pain or injury, illness, or any impairment of physical condition,” and by referring to dictionary definitions. By providing this language, the court instructed the jury that the “injury” element may be satisfied by evidence of temporary “pain” alone. Gonzales argues that this definition is inconsistent with the plain language of the statutory definition and misdirected the jury. We agree.

¶32 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. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We are satisfied that the word “injury” has a common and ordinary meaning that refers to something more than temporary pain.

¶33 This definition is consistent with WIS. STAT. § 939.22(4), which defines bodily harm to mean “physical pain *or* injury....” (Emphasis added.) The use of the disjunctive “or” suggests that pain is something other than injury. The legislature is presumed to choose its terms carefully and with precision to express its meaning. *Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). Furthermore, whatever the

complete definition of bodily injury in the sexual assault context, we are persuaded that injury does not encompass temporary pain with no detectable physical damage to the victim's body. Accordingly, we conclude that the circuit court erred when it defined "bodily injury" as including pain alone.⁸

III. Multiplicity of Charges

¶34 The double jeopardy provisions of the state and federal constitutions prohibit the filing of multiplicitous charges. Charges are multiplicitous when a single offense is charged in more than one count. *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Determining whether multiple convictions violate the constitutional protection against double jeopardy is a question of law that this court reviews de novo. *State v. Kanarowski*, 170 Wis. 2d 504, 509, 489 N.W.2d 660 (Ct. App. 1992).

¶35 We are to apply a two-part test to determine whether a charge is multiplicitous. The first inquiry is whether the charged offenses are identical in law and fact. *Anderson*, 219 Wis. 2d at 746. The second inquiry, which applies if the charged offenses are not identical in law or fact, focuses on whether the legislature intended the multiple offenses to be brought as a single count. *Id.* at 751.

¶36 Gonzalez concedes that the charges are not identical in law or fact. When the charges are different in law or fact, we apply the presumption that the legislature intended multiple punishments. *See id.* at 751. In order to rebut this presumption, the defendant must show a clear indication of legislative intent to the

⁸ The State does not argue that the error was harmless.

contrary. *Id.* Gonzalez argues only that “[n]othing in the language of the statute indicates that the legislature intended to punish a defendant twice for one act of sex” This argument is conclusory and does not overcome the presumption set out in *Anderson*. We conclude that Gonzalez has not demonstrated that the charges against him are multiplicitous.

CONCLUSION

¶37 For the above reasons, the judgment is reversed and the case is remanded for a new trial consistent with the holdings in this opinion.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

