COURT OF APPEALS
DECISION
DATED AND RELEASED

June 10, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-3382-CR and 96-0105-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GLENNDALE R. BLACK,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. This is a consolidated appeal from two separate trials. In Case No. 96-0105-CR, Black appeals from a judgment of conviction after a jury found him guilty of first-degree reckless injury and false imprisonment. In Case No. 95-3382-CR, Black appeals from a judgment of conviction after a jury found him guilty of substantial battery, false imprisonment,

and bail jumping. He also appeals from orders denying his postconviction motion to modify his sentences in both cases.

Black raises five issues for review: (1) whether the trial court in the first trial erred in denying his request to sever a count of abortion from the remaining counts and to conduct a separate trial; (2) whether the trial court erroneously exercised its discretion by allowing Black's first wife (the victim in the first case) to testify in the second trial that Black had "head-butted" her previously; (3) whether the trial court erroneously exercised its discretion when it failed to sequester the jurors in his second trial; (4) whether the trial court erred when it commenced the second trial two days after the first trial ended, thereby allegedly commencing that case before his defense counsel was prepared; and (5) whether the trial court erroneously exercised its discretion in both trials by imposing excessive sentences, by deviating from the sentencing guidelines, and by sentencing him on all counts to maximum terms to be served consecutively to one another. We affirm.

I. BACKGROUND.

This case presents a very unusual fact situation. Black was convicted in two separate trials that were tried several days apart from one another. The victim in each conviction was a wife of Black at the time the offenses occurred.

On February 8, 1992, Black had an argument with his first wife, Tracy, who was then nine-months pregnant. The verbal argument escalated. Testimony at trial revealed that Black struck Tracy in her abdomen area. When she indicated that she needed medical treatment, Black, at first, refused to allow her to go to the hospital. Once she was hospitalized, doctors discovered that there

was no fetal heartbeat and the baby she was carrying was subsequently stillborn. The State charged Black with abortion under § 940.04(2)(a), STATS., along with charges of first-degree reckless injury and false imprisonment. Black challenged the abortion charge, arguing that ***Roe v. Wade,*** 410 U.S. 113 (1973), had struck down the crime of abortion. The trial court declined to rule on the constitutional issue, but did hold that the abortion statute was inapplicable to the facts of this case. The State then appealed the trial court's decision. While the appeal was winding its way through the court system, Black was released on bail and he and Tracy were divorced.

On October 3, 1994, Black became involved in an argument with his second wife, Saprina, culminating in Black striking his wife. After the fight had ended and tempers had cooled, Saprina indicated that she felt faint and she walked to a nearby hospital. The hospital personnel called the police after learning of the evening's events. As a result of a statement given by Saprina on the night of the incident, the State charged Black with substantial battery, false imprisonment and bail jumping. Saprina, however, subsequently refused to cooperate with the prosecution.

On December 14, 1994, the Wisconsin Supreme Court, in ***State v. Black,*** 188 Wis.2d 639, 526 N.W.2d 132 (1994), ruled that it was permissible to charge Black with abortion and remanded the case to the trial court. ***Id.*** at 642, 526 N.W.2d at 133. Accordingly, both prosecutions against Black proceeded and the trials were held.

Prior to the first trial, Black urged the trial court to sever the abortion count from the remaining counts and to permit him to have a separate trial on the

abortion charge.[1] The trial court denied his motion. This trial lasted from March 13 through March 18, 1995. The jury convicted Black of the first-degree reckless injury and false imprisonment charges, but acquitted him of the abortion charge. The second trial started on March 20, 1995, and lasted until March 22, 1995. Over Black's objection, the State was permitted to introduce the testimony of Black's first wife, Tracy, who testified that Black "head-butted" her years before. The jury convicted him of all three counts in the second trial.

At a combined sentencing, Black received ten years' imprisonment on the first-degree reckless injury count to Tracy and two years for falsely imprisoning her; the sentences were consecutive to one another. In the case arising out of the offenses with his second wife, Black received two years' imprisonment on the substantial battery count, two years on the false imprisonment count, and five years on the bail jumping count; each to be served consecutively to one another, and consecutively to the earlier sentences. Black then brought postconviction motions to reconsider his sentences, which the trial court denied.

II. ANALYSIS.

Black claims that the trial court erred when denying his motion to sever the abortion count from the other two counts in his first trial. He contends that the trial court erroneously exercised its discretion because the undue prejudice generated by the "emotional and highly publicized nature" of the abortion charge

[1] At the first trial, the court decided to use the term "feticide" rather than "abortion" to describe the crime.

could only be avoided by having two separate trials concerning the events dealing with his first wife. We disagree.

Under § 971.12(1), STATS., charges may be joined if they "are of the same or similar character or based on the same act or transaction." Once a defendant moves for severance, a trial court must weigh the potential prejudice of joinder "against the interests of the public in conducting a trial on the multiple counts." ***State v. Locke,*** 177 Wis.2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993).

We will uphold the trial court's decision unless it erroneously exercised its discretion and caused "substantial prejudice" to the defendant. ***Id***. In evaluating the potential for prejudice, courts have recognized that the risk of prejudice arising because of joinder is not significant when evidence of the counts sought to be severed would be admissible in separate trials. ***Id***. Therefore, an "other crimes" analysis is necessary. ***Id***. An "other crimes" analysis requires that we determine whether the evidence fits within one of the exceptions in RULE 904.04(2), STATS. ***Id.*** at 597-98, 502 N.W.2d at 894-95. If the RULE 904.04(2) step is satisfied, then we must engage in a RULE 904.03, STATS., balancing of whether any unfair prejudice from the evidence outweighs its probative value. ***Id.***

Here, there is no question that all three charged counts arose out of the same transaction or incident. Black struck Tracy twice in the abdomen with a closed fist. This was five days before her baby was due to be delivered. Black did not allow Tracy to leave and seek medical help for ten to fifteen minutes, even though she was experiencing severe pain. The injuries she received from the blunt force of Black's closed fist caused extensive internal hemorrhaging and damage to

her internal organs. Further, the baby she was carrying died because of the internal damage to Tracy. Therefore, the charges were properly joined.

We next address whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Black argues that the abortion charge was "emotional, controversial and highly publicized." Thus, he postulates that the jurors were prejudiced against him "because of what they had heard about the case before becoming jurors." Essentially, Black argues that the charges should have been severed, with the abortion charge being tried separately in order to avoid "substantial prejudice" to him in the remaining counts due to the nature of the abortion charge.

We disagree. Under our "other acts" analysis, it is clear that evidence of the abortion charge would have been admitted in a separate trial on the other counts. The evidence was necessary to "complete the story" of Black's crimes. The evidence surrounding the question of whether the blow to Tracy's abdomen caused her placenta to detach from her uterine wall was extremely relevant to both the abortion charge as well as the first-degree reckless injury charge because the detached placenta caused both the death of the baby as well as the hemorrhaging and internal injury to Tracy.

Finally, we also note that the jury acquitted Black of the abortion charge. In ***Tucker v. State,*** 56 Wis.2d 728, 202 N.W.2d 897 (1973), our supreme court, in another context, noted: "The 'nature of the verdict returned' removes any basis that might otherwise exist for claiming that this jury was in any way prejudiced against this defendant." ***Id.*** at 736, 202 N.W.2d at 901. Despite his acquittal on the abortion charge, Black contends that the abortion allegations unfairly prejudiced him on the remaining counts. The underpinnings for this

argument are, however, based entirely on speculation. Black has pointed to absolutely no evidence that the jurors were biased against him on the remaining counts. Thus, the trial court did not erroneously exercise its discretion when it denied Black's request for a severance of the abortion charge. *See* ***Locke,*** 177 Wis.2d at 597, 502 N.W.2d at 894.

Black next challenges the trial court's decision allowing Tracy to testify at his second trial. Black claims that her testimony violated the prohibition against admitting evidence of other crimes under RULE 904.04(2), STATS. We disagree.

At the second trial, Saprina testified that her injuries resulted from accidental contact with her husband. This was inconsistent with her statements to hospital personnel that Black forcefully "head-butted" her. She also related this version of the events to the investigating police officers. Accordingly, to counter Black's defense that the injuries to Saprina were accidental, the State wished to call Tracy to testify that in late February 1991, she suffered an injury when her husband butted her in the forehead with his head.

In reviewing evidentiary issues, "[t]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Wollman,*** 86 Wis.2d 459, 464, 273 N.W.2d 225, 228 (1979).

> [W]e have held that trial courts must apply a two-prong test in determining whether "other crimes" evidence is admissible. The first prong requires the trial court to find that the evidence fits within one of the exceptions stated in sec. 904.04(2), Stats. Under the second prong, the trial court must exercise its discretion to determine whether any

> prejudice resulting from such evidence outweighs its probative value.

State v. Alsteen, 108 Wis.2d 723, 729, 324 N.W.2d 426, 429 (1982) (citations omitted).

Black's position at trial was that the testimony was unreliable. He now argues on appeal that the incident with his first wife was too remote to be admissible under the exceptions found in RULE 904.04(2), STATS. He also submits that given the paucity of evidence in the case—the State's only other witnesses were Saprina, who claimed it was an accident, and the charging prosecutor, who testified that it was common for victims of domestic abuse to later recant their testimony—it was an erroneous exercise of discretion for the trial court to admit Tracy's account of Black's "head-butting" three and one-half years earlier. We disagree.

First, his argument runs counter to the numerous cases permitting the introduction of other acts evidence which occurred thirteen, sixteen and even twenty-two years before the act charged. *See generally* ***State v. Plymesser***, 172 Wis.2d 583, 493 N.W.2d 367 (1992); ***State v. Kuntz***, 160 Wis.2d 722, 467 N.W.2d 531 (1991); ***State v. Mink***, 146 Wis.2d 1, 429 N.W.2d 99 (Ct. App. 1988). Here, only three and one-half years separated the two acts. Additionally, the circumstances here are uncannily similar. Both victims were married to the appellant. Both victims became engaged in arguments with Black which led to violence. Each woman was injured in an identical and unusual fashion. As stated by the trial court in adopting the State's argument:

> [T]hey're saying the lack of mistake or accident, saying he used a head-butt in 1991, which is not your standard type of striking that a man usually does to a woman … and that he had a head-butt against the victim on October 3rd, 1994,

> saying it's such a different type of act that there couldn't have been a mistake.

The trial court correctly determined that the evidence clearly fit into a RULE 904.04(2) exception and thus passed the first prong.

As noted, to admit other acts evidence requires the additional conclusion that the probative value of the evidence is not substantially outweighed by any unfair prejudice. *See* RULE 904.03, STATS. Evidence is unfairly prejudicial if it has a tendency to influence the outcome of the proceeding by improper means, usually though not necessarily, an emotional appeal. ***State v. Bedker,*** 149 Wis.2d 257, 266, 440 N.W.2d 802, 805 (Ct. App. 1989).

One of the elements of the charged crime of substantial battery is intent. Saprina's trial testimony claimed that the cause of her injuries was unintentional. Tracy's testimony of a similar injury caused by Black, in the same manner, to a former wife is proof, if believed, that Black's actions were not accidental. The trial court concluded that the testimony was admissible under RULE 904.03, STATS. We agree. Not only was the two-prong test met here—the evidence fell within an exception to the general prohibition of other acts evidence—but it also addressed one of the key elements of the crime, intent. Additionally, we note the trial court gave a cautionary instruction to the jury limiting the use of Tracy's testimony. The trial court properly exercised its discretion in admitting the evidence.

Black next contends that the trial court erred in not sequestering the second jury because of the enormous publicity that the first trial generated. Black premises his argument on his belief that the jurors disregarded the trial court's

admonition not to watch or read any news reports about the case. We reject his argument.

Whether to sequester a jury falls within the discretion of the trial court. *See* ***State v. Wilson,*** 149 Wis.2d 878, 908, 440 N.W.2d 534, 546 (1989). This court, however, will not find an erroneous exercise of discretion when the defendant did not ask the trial court to exercise its discretion. *See* ***State v. Gollon,*** 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983). Inasmuch as Black never requested that the second jury be sequestered, he has waived his right to appeal this issue.

Next, Black contends that he was "denied a fair trial by being denied the best representation possible." His contention evolves out of the fact that his trial counsel was apparently unaware that the second trial was to start the Monday following the first trial. Admittedly, there was confusion about the date the second trial would begin. The trial court and the prosecutor were under the impression that it was to start on the Monday following the first trial, while defense counsel thought it would start a day later, on Tuesday. Originally defense counsel protested the starting of the case. Later counsel advised the trial court that he was ready to proceed as he had prepared quickly. Black argues that regardless of the fact that his attorney proceeded, the fact that his preparation was rushed is sufficient to require a new trial. We disagree.

As the State correctly points out, Black is not entitled to "the best representation possible;" rather, under the law, "'[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate.'" ***State v. Williquette,*** 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993) (citation omitted), *aff'd by* 190 Wis.2d 677, 526 N.W.2d 144 (1995). Further, Black has not

combined his complaint with an ineffective assistance of counsel claim. He bases his request for a new trial solely on the allegation that his attorney had to speed up his preparation. He has cited no case law to support his position. Thus, there has been no showing of any deficiency which mandates a new trial.

Finally, Black posits that the trial court erroneously exercised its discretion when it deviated from the sentencing guidelines and sentenced him to consecutive maximum terms of imprisonment on all of the counts. We disagree.

In reviewing whether a trial court erroneously exercised its sentencing discretion, we consider whether the trial court considered appropriate factors and whether the trial court imposed an excessive sentence. *See* ***State v. Glotz,*** 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). Our review is tempered by a strong policy against interfering with the sentencing discretion of the trial court. *See* ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Further, the trial court is presumed to have acted reasonably, and the defendant bears the burden of showing unreasonableness from the record. *See* ***State v. Echols,*** 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640, *cert. denied*, 510 U.S. 889 (1993).

Our review is limited to a two-step inquiry. We first determine whether the trial court properly exercised discretion in imposing sentence. If so, we then consider whether the trial court imposed an excessive sentence. *See* ***Glotz,*** 122 Wis.2d at 524, 362 N.W.2d at 182. When a defendant argues that a sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the

circumstances." ***Ocanas v. State,*** 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

With respect to Black's argument that the trial court improperly deviated from the sentencing guidelines and sentenced him to the maximum penalty, a defendant may not complain on appeal that a sentence exceeds the guideline–thus, we need not address his claim. *See* ***State v. Halbert,*** 147 Wis.2d 123, 129-30, 432 N.W.2d 633, 636-37 (Ct. App. 1988); *see also* ***State v. Elam***, 195 Wis.2d 683, 538 N.W.2d 249 (1995) (discussing continuing viability of ***Halbert***).

With respect to his remaining claims of sentencing error, we note that the sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. *See* ***State v. Harris,*** 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The trial court may also consider: the defendant's record; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation reports; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and the length of the defendant's pretrial detention. *See* ***State v. Jones,*** 151 Wis.2d 488, 495-96, 444 N.W.2d 760, 763-64 (Ct. App. 1989). Additionally, the weight given to each of these factors is within the trial court's discretion. *See* ***State v. Curbello-Rodriguez,*** 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984).

Here, the trial court determined that the offenses committed by Black were aggravated. The trial court noted: "As to the gravity of the offenses, as to the first[-]degree reckless injury which deals with the great bodily harm caused to Tracy…, it's an extremely serious charge, … Tracy nearly died." Black contends that the sentence is evidence that the trial court disregarded the expert testimony presented by Black that the severity of the injury was caused by preexisting medical conditions. Black fails to acknowledge that by electing to strike a victim who was nine-months pregnant, he struck a very vulnerable victim. The trial court could properly determine that Black's victim's delicate health due to her advanced pregnancy was an aggravated factor. With respect to the false imprisonment of Tracy, the trial court again properly concluded that Black's conduct was aggravated because he refused to allow a nine-month pregnant woman, who had just been struck in the abdomen to seek medical assistance.

Concerning the substantial battery count in the second trial, the trial court remarked: "[W]e're talking about a head-butt here, we're talking about a broken nose, and it's not an isolated incident." The court also found the false imprisonment was aggravated. Finally, with regard to the bail jumping charge, the trial court concluded that "[I]t isn't just that he absconded, that's not the charge, he was arrested for a domestic violence charge of substantial battery and false imprisonment while out on bail …. it's all serious – these are all serious charges."

In sum, the trial court explained why it considered Black's actions aggravated. The trial also court determined that Black had "strong rehabilitative needs." Turning to the issue of the need to protect the public, the trial court stated: "I think that the public has to be protected from someone who cannot control their [sic] tempers and basically attacks women and is an individual who's not involved

in just an isolated domestic violence incident but in numerous domestic violence incidents."

Although Black implies that the trial court's sentences were punishment for the fact that he was acquitted of the abortion charge, the record does not support his contention. In fact, the trial court apparently supported the jury's decision to acquit when stating, "I think it's reasonable to infer that the jury couldn't find that the defendant did intentionally destroy the life of the child." There are adequate reasons in the record supporting the trial court's sentencing rationale.

We conclude that the trial court properly exercised its sentencing discretion. We now examine whether the sentences imposed were unduly harsh. As the State argued in its brief: "Considering everything Glenndale Black did and the irreparable harm he has caused, no reasonable person would consider a cumulative sentence of only twenty-one years too severe. Many, in fact, would deem it too lenient." We agree. Black committed five felonies against two different wives over the span of several years. The first wife was seriously injured and was hospitalized where she gave birth to a stillborn child. The record amply supports the trial courts sentencing decisions.

By the Court.—Judgments and orders affirmed.

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