COURT OF APPEALS DECISION DATED AND RELEASED

OCTOBER 15, 1996

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(1), STATS.

NOTICE

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

No. 96-1146-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. DRAVES,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washburn County: WARREN WINTON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Donald Draves appeals a judgment and an order denying postconviction relief, convicting him of physical child abuse, contrary to § 948.03(2)(b), STATS., to which he was sentenced to three years probation with the condition that six months be served in the county jail. Draves argues that (1) he was unfairly prejudiced by erroneously admitted "other acts" evidence and (2) the prosecutor's closing arguments denied him a fair trial. We reject his arguments and affirm the judgment.

The underlying facts of the offense are uncontroverted. During a visit from Draves's four children from a prior marriage, his seven-year-old-son, J., had a tantrum after refusing to clean his room. Draves's wife, Pam, sent J. to his room and, when he refused to calm down, she spanked him. Later, when Draves went upstairs to see the child, the child said he did not have to listen. Draves pulled down the child's trousers and underpants and spanked him twice on his rear. J. then had a "fit of rage," throwing things around his room. Draves spanked him twice more on his rear. J. then cleaned up the room.

Draves then told J. to come downstairs for a bath, during which a handprint could be seen on his posterior. Draves's wife decided that J. should have a cool bath to reduce the redness. While in the bath, J. apologized to Pam for swearing.

After the bath, Draves talked to J. about why he was spanked. J. apologized for his behavior. Pam telephoned J.'s mother and told her of the spanking. When J.'s mother arrived to pick J. up, Draves asked her if she was "going to turn him in." He explained that after he spanked J. the first two times, J. said he was going to tell his mom and she would turn him in. Draves responded: "I'll give you something to tell them about" and administered the two final spankings.

The marks on J. turned into a large bruise with a white handprint in the center. A doctor who examined J. after the incident stated that in forty years of practice he never had seen a bruise more severe and that the amount of force necessary to cause a bruise of the sort would have to be considerable.

Draves's defense was parental discipline. *See* § 939.45(5)(b), STATS. On cross-examination, Draves testified that he agreed there were limits to how hard one can hit a child. However, Draves thought he had done the right thing and would do it again. At trial, the prosecution introduced photographs of the child's bruise. The jury returned a verdict of guilty and Draves appeals.

Draves argues that he was unfairly prejudiced by evidence that two years before he had used a plastic baseball in a disciplinary incident, causing bruises on the child's hip. During rebuttal closing argument, the prosecutor stated to the jury:

> This is a man who struck his child with a baseball bat, a plastic bat in the past and left a bruise. This is a man who does this to a child and this is a man who is going to do this again. This is not even a close call, ladies and gentleman. And it's not about the right to discipline. This is about abusing young children. That's what this case is about.

Evidence of prior bad acts are not admissible to show the defendant's bad character or propensity to misconduct. Section 904.04(2), STATS. The evidence may be admitted, however, for other purposes, including motive and intent. ***Id.***[1] The courts engage in a two-step process to determine whether evidence of other bad acts is admissible. ***State v. Alsteen,*** 108 Wis.2d 723, 729, 324 N.W.2d 426, 429 (1982). First, the court must determine whether the evidence fit within one of the exceptions in § 904.04(2) and, second, determine whether the probative value is outweighed by its prejudicial effect. ***Id***. Implicit in this analysis is the requirement that the evidence be relevant. ***Id.*** When we review an evidentiary ruling, we must defer to the trial court's exercise of discretion. ***State v. Pharr,*** 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). We must uphold the decision if it has a reasonable basis and if it was made in accordance with accepted legal standards and the facts of record. ***Id.***

Draves was convicted of violating § 948.03(2)(b), STATS., which provides: "Whoever intentionally causes bodily harm to a child is guilty of a Class D felony." Draves relies on ***State v. Danforth,*** 129 Wis.2d 187, 201, 385 N.W.2d 125, 131 (1986), which held that "specific intent ... is not an element of child abuse" under § 940.201, STATS., 1981-82,[2] and, therefore, alleged prior acts

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[1] Section 904.04(2), provides:

> Other crimes, wrongs, or acts. 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.

[2] Section 940.201, STATS., (1981-82) states:

> Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited to severe bruising, lacerations, fractured bones, burns,

of child abuse were erroneously admitted under § 904.04(2), STATS. ***Danforth*** held, however, that because there was no reasonable possibility that the error contributed to the verdict, the error was harmless. ***Id.*** at 204, 385 N.W.2d at 132.

Danforth is not instructive because it is based upon an earlier child abuse statute. As Draves states in his brief, "intent to cause bodily harm was an element of the crime charged here even if it was not controverted." Nonetheless, Draves argues that his theory of defense, the parental discipline privilege, rendered evidence on the issue of intent irrelevant. The defense theory was explained to the trial court as follows:

[Defense counsel]: We are not claiming that he didn't intentionally slap that kid on the butt. We claim that he's privileged to do that if he doesn't over do it ....

Although defense counsel agreed that his theory was that Draves didn't intend to "hurt" the child, Draves now argues that pain is an integral part of a spanking. Because § 939.22(4), STATS., defines "[b]odily harm" to mean "physical pain or injury," Draves contends that his parental discipline defense essentially admitted the elements of the crime, but claimed privilege. As a result, he contends, evidence of intent was irrelevant and its admission was error, citing ***Alsteen,*** 108 Wis.2d at 730, 324 N.W.2d at 429.

Alsteen involved a sexual assault prosecution where the defendant admitted the sexual intercourse but defended on the basis that it was consensual. ***Alsteen*** held that evidence of the defendant's prior sexual assaults "has no probative value on the issue of [the victim's] consent." ***Id.*** at 730, 324 N.W.2d at 429. Because the evidence had no tendency to prove a material fact, it was wrongly admitted. ***Id.***

Alsteen is not instructive here because the defense of consent, which is unique to the victim, is sharply distinct from the defense of privilege, which is unique to the defendant. The defense of privilege can be claimed:

(..continued)

internal injuries or any injury constituting great bodily harm under s. 939.22(4), is guilty of a Class E felony. In this section, 'child' means a person under 16 years of age.

When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

Section 939.45(5)(b), STATS.

Because "reasonable discipline may involve only such force as a reasonable person believes is necessary," the issue of intent did not altogether drop out of the case when Draves raised the defense of parental discipline. At issue was not whether Draves intended to inflict "bodily harm," an element of 948.03(2)(b), STATS., defined as pain, § 939.22, STATS., but whether he intended to inflict such force as would be unreasonable, which would negate his defense. The other acts evidence refutes the claim implicit in Draves's defense that he did not intentionally use excessive force.

Other acts evidence should be used sparingly because of the potential for prejudice. ***State v. Plymesser,*** 172 Wis.2d 583, 595, 493 N.W.2d 367, 373 (1992). Nonetheless, the State has the burden to prove all elements of a crime and to negate defenses. *Cf.* ***id.*** at 594, 493 N.W.2d at 372 ("The state must prove all the elements of a crime beyond a reasonable doubt, even if the defendant does not dispute all of the elements.").[3] Because the issue of intent related to Draves's defense, we are satisfied the trial court reasonably admitted other acts evidence. We decline to grant Draves's request for a new trial in the interest of justice.

Next, Draves argues that he was denied a new trial because of the prosecutor's closing argument:

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[3] Although language in ***State v. Alsteen***, 108 Wis.2d 723, 324 N.W.2d 426 (1982), suggests that the evidence of elements of the offense that are not disputed is immaterial, we follow ***State v. Plymesser***, 172 Wis.2d 583, 493 N.W.2d 367 (1992), the later case. ***State v. Locke***, 177 Wis.2d 590, 598, 502 N.W.2d 891, 895 (Ct. App. 1993).

> [Defense counsel] has asked that an instruction be given to you that a parent has a privilege to discipline their children and that's not true. ... [W]here the discipline becomes abusive, then its my job to protect the children of this county, and that's why we are here today.
>
> ....
>
> You need to send a message to him as well as to the people throughout this county that we don't tolerate this.

Draves did not object to any of these statements. Draves agrees that failure to make contemporaneous objection or to move for a mistrial in the trial court waives the issue. *See* ***State v. Goodrum,*** 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). Nonetheless, Draves argues that we should grant a new trial because this error prejudiced his right to a fair trial. *See* ***State v. Neuser,*** 191 Wis.2d 131, 137, 140, 528 N.W.2d 49, 51, 53 (Ct. App. 1995).

We are unconvinced that the prosecutor's comments deprived Draves of a fair trial. A prosecutor may strike "hard blows" although not "foul ones." ***Id.*** at 139, 528 N.W.2d at 52. The prosecutor's argument could be fairly interpreted that Draves's claimed defense did not apply under the facts of this case. "Closing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion." ***State v. Draize,*** 88 Wis.2d 445, 455-56, 276 N.W.2d 784, 790 (1979). The prosecutor may not, however, suggest that the jury arrive at their verdict by considering factors other than the evidence. ***Id.*** at 454, 276 N.W.2d at 789. The prosecutor's argument stressed the photographic evidence in the case. Taken in context, the prosecutor's "protect the children" and "send a message" remarks were not so far afield to exceed the bounds of propriety. The court's instructions to the jury that counsel's arguments were not evidence but rather opinions of the attorneys put the comments in proper perspective.

By the Court.—Judgment and order affirmed.

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