

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 27, 1997

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.

NOTICE

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No. 96-1699-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT BASS, JR.,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Robert E. Bass, Jr. appeals from a judgment of conviction, following a jury trial, for first-degree sexual assault of a child, contrary to § 948.02(1), STATS., and from an order denying his post conviction motion. Bass claims that the trial court erred (1) in admitting "other acts" evidence; (2) in

limiting his cross-examination of one of the State's witnesses; and (3) in allowing a juror to be excused. We affirm.

I. FACTUAL BACKGROUND

On July 26, 1995, Bass was convicted of touching the vagina of seven-year-old Brianna, the daughter of his long-time companion, Gladys. At trial, Brianna testified, describing the assault. Gladys also testified, stating that she saw Bass insert his hand into Brianna's pajama bottoms and move it to make contact with her vagina. The State also offered prior act evidence through the testimony of Brittany, the foster child of Brianna's grandmother. Brittany testified that Brianna had told her about a previous time Bass had had sexual contact with her and that, shortly thereafter, she (Brittany) informed Brianna's grandmother, who then told Gladys.

The jury also heard testimony about the turbulent relationship Bass had with Gladys. Gladys testified, detailing Bass's history of drug abuse and its resulting violence and his stealing from her to support his addiction. Ella, Brianna's grandmother, testified that despite Bass's 1994 conviction for sexual abuse of Brianna, Gladys chose to continue her relationship with him.

Finally, the State introduced expert testimony to assist the jury in its understanding of the complexities inherent in child sexual abuse cases. Raelene Freitag, a social worker with the Child Protection Center of Children's Hospital, testified about the effect a violent and abusive household would have on a child who has been sexually abused, and the distrust that a child has when her mother sides with the abuser.

II. ANALYSIS

A. Other Acts Evidence

Bass first argues that the trial court committed prejudicial error by allowing the State to introduce evidence of his history of domestic violence, drug abuse and stealing. He claims that this testimony was inadmissible character evidence that was collateral to the issue at trial. The State counters by noting that the evidence was offered not as character evidence, but as context evidence in accordance with *State v. Shillcutt*, 116 Wis.2d 227, 235-36, 341 N.W.2d 716, 719 (Ct. App. 1983). While acknowledging that "the trial court's initial ruling on the admissibility of this evidence was less than a model of judicial clarity," the State argues that the ruling was nevertheless a proper exercise of the trial court's discretion. We agree.

A trial court's decision to admit or exclude evidence is a discretionary determination. *State v. Schaller*, 199 Wis.2d 23, 39, 544 N.W.2d 247, 254 (Ct. App. 1995). "A court exercises discretion when it considers facts of record and reasons its way to a rational, legally sound conclusion. It is 'a process of reasoning' in which the facts and applicable law are considered in arriving at 'a conclusion based on logic and founded on proper legal standards.'" *Burkes v. Hales*, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations and quoted sources omitted). We will not reverse a trial court's discretionary decision absent an erroneous exercise of discretion. *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). If there is a reasonable basis for the trial court's decision, it will be upheld. See *State v. Plymesser*, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992).

[T]o determine whether the trial court properly exercised its discretion in a particular manner, we look first to the court's on-the-record explanation of the reasons underlying its decision.... [W]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.

Burkes, 165 Wis.2d at 590, 478 N.W.2d at 39 (citations and footnote omitted).

In deciding whether to admit other acts evidence, a trial court must apply a two-part test. *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must determine whether the evidence is offered for an admissible purpose under RULE 904.04(2), STATS. *Id.* If so, then the trial court must determine whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *See* RULE 904.03, STATS.

A question implicit within this two-part test is whether the other acts evidence is relevant to an issue in the case. Relevant evidence means evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

State v. Bustamante, 201 Wis.2d 562, 570, 549 N.W.2d 746, 749 (Ct. App. 1996) (citation omitted). Other acts evidence is inadmissible when the only inference that can be drawn from the evidence is that, because the defendant committed the earlier acts, he must be of sufficiently low character to have committed the charged crime. *Plymesser*, 172 Wis.2d at 592, 493 N.W.2d at 371. When, however, an inference can be drawn from the prior act that relates to a relevant matter, the evidence is admissible "subject only to the general structures limiting admissibility" *Id.* (quoting *Huddleston v. United States*, 485 U.S. 681, 691 (1988)).

Using the guidance set forth in *Shillcutt*, the trial court concluded that the jury needed a context—a background against which to view the complex relationships among Brianna, Gladys and Bass—to assist the jurors in their understanding why, despite a prior sexual assault of Brianna, Gladys would allow Bass back into their lives. As the State's offer of proof explained:

Because of Gladys' ... dysfunctional relationship with Bass and his apparent ability to manipulate her into taking him back under any circumstances[,] this child was assaulted by Bass a second time. It is the State's theory that Bass exercises control over this family in every way he can, including victimizing the child sexually.

....

The relationship also is the backdrop against which one must assess Bass's behavior. One might legitimately question the boldness involved in assaulting a child while the mother is in another part of the home. Yet, as the history of this relationship reveals, there is virtually nothing that Bass has done, either to Gladys ... or her child, which has prompted [Gladys] to disengage her life from Bass'[s]. In the context of a relationship where limits of tolerance have been extended to encompass physical abuse, verbal violence, theft, substance abuse and accusations by a child of sexual abuse, the "boldness" of Bass in sexually assaulting the child again is more understandable.

....

Finally, these "other acts" also fill out the picture with respect to the judgments and actions of Gladys.... In order to understand why a woman would even permit a man who had been accused of molesting her child back into her home, allowing access to that same child, one must grasp the total picture of the manipulative and controlling aspects of the relationship. Further, one must also recognize the apparent dysfunction involved in the relationship as it has developed.

Evidence of Bass's drug use, his theft of goods to support his addiction, and his physical abuse of Gladys was relevant and admissible for the

purpose of establishing the background of the relationships, and placed the charged crime of sexual abuse in context for the jurors. *See State v. Chambers*, 173 Wis.2d 237, 255-56, 496 N.W.2d 191, 198 (Ct. App. 1992) (reiterating standards set forth in *Shillcutt*). In light of the fact that jurors otherwise might not understand that a mother would fail to protect her child from her (the mother's) paramour's sexual advances, particularly when, as here, the paramour was convicted of sexually assaulting the child during the preceding year, the trial court concluded that, under the facts of this case, the evidence was admissible.

Recognizing the potential for unfair prejudice, the trial court took care to summarize the evidence and instruct the jury that the evidence was admitted to establish the context or circumstances of the relationship among Bass, Gladys, and Brianna, and could be used for no other purpose. The trial court further explained that the evidence could not be used to "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...." Thus the trial court addressed any possible unfair prejudice. This court must assume that the jury followed the admonition. *See State v. Pitsch*, 124 Wis.2d 628, 644-45 n.8, 369 N.W.2d 711, 720 n.8 (1985) (citing *State v. Leach*, 124 Wis.2d 648, 673, 370 N.W.2d 240, 253 (1985)). Accordingly, we conclude that the trial court properly exercised discretion.

B. Cross-Examination

Bass next claims that the trial court erred when it precluded cross-examination of Brittany about her sexual past. Bass contends that this ruling prevented him from presenting an alternative basis for Brianna's sexual knowledge. Relying on *Michael R. B. v. State*, 175 Wis.2d 713, 499 N.W.2d 641

(1993), in which the supreme court held that the victim's friend's sexual past was highly relevant because it could provide an alternative source of sexual knowledge that might have led the victim to fabricate the assault, Bass insists that this court should reverse. *See id.* at 730, 499 N.W.2d at 648-49.¹

The State concedes that the trial court erroneously ruled that evidence of Brittany's prior sexual conduct was inadmissible under § 972.11(2), STATS. The trial court erroneously applied that statute to Brittany when, by its terms, the statute applies only to the complainant in the case in which the evidence is offered. As the State correctly argues, however, the trial court's error was harmless.

Trial court error does not warrant automatic reversal of a criminal court conviction. *State v. Fink*, 195 Wis. 2d 330, 342 n.4, 536 N.W.2d 401, 405-06 n.4 (Ct. App. 1995) (citing *State v. Dyess*, 124 Wis.2d 525, 544-45, 370 N.W.2d 222, 228 (1985)). An evidentiary error is subject to a harmless error analysis and requires reversal or a new trial only if the improper ruling has affected the substantial rights of the party seeking relief. *State v. Britt*, 203 Wis.2d 25, 41, 553 N.W.2d 528, 534 (Ct. App. 1996); *see also* § 805.18(2), STATS. "We reverse only where there is a reasonable possibility that the error contributed to the final result." *State v. Kourtidias*, 206 Wis.2d 573, 585, 557 N.W.2d 858, 863 (Ct. App. 1996). In making this determination, we weigh the

¹ The State claims that Bass has waived his right to challenge the correctness of the trial court's ruling by failing to preserve the substance of Brittany's potential testimony in an offer of proof. Bass correctly replies, however, that under § 901.03(1)(b), STATS., an offer of proof is not required "if the substance of the evidence was made known to the judge by an offer of proof or was apparent from the context within which questions were asked." We conclude that the substance was apparent from the context.

effect of the [trial court's error] against the totality of the credible evidence supporting the verdict. *See id.*

The jury heard eyewitness testimony that Bass inserted his hand into Brianna's pajama bottoms. The jury also received powerful circumstantial evidence of Bass's consciousness of guilt, including Bass's post-assault behavior—striking and threatening Gladys. *See State v. Bettinger*, 100 Wis.2d 691, 698, 303 N.W.2d 585, 589 (1981). The jury learned that Bass had sexually assaulted Brianna previously. Given the strength of this evidence, and given the marginal and speculative probative value of evidence of an alternative basis for Brianna's sexual knowledge, we conclude that there is no reasonable possibility that the error contributed to the result. Accordingly, we hold that the error was harmless.

C. Juror Dismissal

Finally, Bass argues that the trial court denied his right to a fair trial by excusing the only African-American male juror, after he called in sick the morning the trial was to begin. Bass claims that the trial court failed to make a careful inquiry or exert reasonable effort to avoid discharging the juror. We disagree.

A trial court may dismiss a juror who seeks to be excused, and that decision will not be upset on appeal absent an erroneous exercise of discretion. *See State v. Lehman*, 108 Wis.2d 291, 299-301, 321 N.W.2d 212, 216-17 (1982) (holding that trial court committed reversible error in allowing substitution of a

juror after deliberations had begun on the responsibility issue in bifurcated trial).² The court is required "to make careful inquiry into the substance of the request and to exert reasonable efforts to avoid discharging the juror.... The circuit court's efforts depend on the circumstances of the case." *Id.* at 300, 321 N.W.2d at 216-17.

The record establishes that as soon as the judge learned of the juror's absence, she directed the bailiff to call the juror, ask about his health, and advise him to see a doctor. The bailiff informed the judge that the juror said he had food poisoning and intended to call his physician at 9:30 a.m. Later that morning, the bailiff informed the court that the juror had not contacted his doctor, but still maintained that he was too ill to report for duty. Aware of both Bass's desire to have the African-American male juror as well as its own authority to issue a warrant for his appearance, the trial court noted:

[The juror's] condition, plus his response to his condition to the Court, puts us in such a position that I believe that, at this juncture, it is in the best interest of both the defendant and the state to proceed with the twelve jurors that are remaining.

....

... I don't want to use tactics against [the juror] that would result in his appearance here, but would render him unfit to serve as a juror.

² As a result, the legislature enacted § 972.10(7), STATS., which "requires the court to reduce the size of the jury panel to the proper number immediately prior to final submission of the cause. Unneeded jurors must be determined by lot and these may not participate in deliberations," 1983 Wis. Act 226 § 6 (quoting Judicial Council Committee Note, 1983, § 972.10(7), STATS.).

Bass contends that the trial court should have permitted him to question the juror and should have personally inquired about the juror's illness, rather than simply relying on the bailiff's conversations. He argues that, under the standards set forth in *Lehman*,³ the trial court misused its discretion, and this misuse denied him "a fundamentally fair trial by a jury." Bass is incorrect.

The record reflects a reasonable basis for the juror's discharge—poor health—and reflects the trial court's careful exercise of discretion. While Bass now identifies steps he believes the trial court should have taken, his defense counsel never asked the court to take these steps. See *Heims v. Hanke*, 5 Wis.2d 465, 471, 93 N.W.2d 455, 459 (1958), *overruled on other grounds by Butzow v. Wausau Mem'l Hosp.*, 51 Wis.2d 281, 187 N.W.2d 349 (1971) (trial court cannot fairly be expected to identify all possible statutes and principles of law without assistance of counsel); see also *State v. Ledger*, 175 Wis.2d 116, 135, 499 N.W.2d 198, 206 (Ct. App. 1993) (party must raise and argue issues with sufficient prominence to address issues and take appropriate action). Under the circumstances, the trial court acted reasonably.

By the Court.—Judgment and order affirmed.

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

³ In *State v. Lehman*, 108 Wis.2d 291, 321 N.W.2d 212 (1982), the supreme court concluded that the trial court "abused its discretion" when it discharged a *regular juror during deliberations* because: "The record [was] totally devoid of any indication of how [it made its decision]." *Id.* at 300, 321 N.W.2d at 217 (emphasis added). In Bass's case, however, the juror was excused prior to opening arguments. Moreover, a thirteen-member panel had been sworn; thus, Bass still had a twelve-person jury. See §§ 972.04(1) & 972.10(7), STATS.

