COURT OF APPEALS
DECISION
DATED AND RELEASED

March 26, 1997

No. 96-2244-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN P. SULLIVAN,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

NETTESHEIM, J. Kevin P. Sullivan appeals from judgments of conviction for battery and disorderly conduct. The issue on appeal is whether the trial court properly admitted "other acts" evidence against Sullivan at the jury trial. Applying current other acts law, we conclude that the evidence was admissible to show Sullivan's propensity to commit the charged offenses. We therefore uphold the trial court's evidentiary ruling and we affirm the judgments of conviction.

FACTS AND PROCEDURAL HISTORY

The criminal complaint charged four counts against Sullivan: false imprisonment (§ 940.30, STATS.), battery (§ 940.19, STATS.), disorderly conduct (§ 947.01, STATS.) and intimidation of a victim (§ 940.44, STATS.).[1] The charges stemmed from an incident between Sullivan and his girlfriend, Diane Bonham.

On October 2, 1994, Bonham reported to the police that some hours earlier, Sullivan had physically assaulted her at her residence. Bonham's complaint was processed by Deputy Robert Hallisy. According to Bonham's statement given to Hallisy, Bonham and Sullivan had been at a bar in Burlington. While there, Sullivan became intoxicated. Bonham became angry about this because she and Sullivan had met while receiving addiction treatment and they had promised each other that they would not consume alcoholic beverages. Bonham left the bar and went to her residence. There, she went to sleep but later awoke to find Sullivan standing over her.

Bonham stated that Sullivan was angry. Fearing a fight, Bonham stated that one of them would have to leave. Sullivan replied that he would not leave. When Bonham tried to get up from the bed, Sullivan pushed her back down. Twice again she tried to get off the bed. The first time, Sullivan punched her in the mouth; the second time, he punched her in the cheek causing her to fall back onto the bed and strike her head against a dresser. Bonham then threatened to call the police. In response, Sullivan unplugged the phone from the wall.

[1] Sullivan was also charged and convicted as a repeat offender pursuant to § 939.62, STATS.

Eventually, Sullivan fell asleep and Bonham ran from the residence and drove to the American Legion Hall in Silver Lake. There, she stated that Sullivan had beaten her. Someone at the Legion Hall called the police and Hallisy responded. During his interview with Bonham, Hallisy observed that Bonham was hysterical, crying and shaking. He also observed that she had blood on her lips, teeth and gums and that her left cheek was swollen.

Bonham testified at the preliminary hearing and at the later jury trial. However, her testimony was different from her statement to Hallisy. Instead, she sought to exonerate Sullivan. While she acknowledged that she and Sullivan had argued, Bonham testified that she had initiated the physical contact by pushing Sullivan, causing her to accidentally fall backwards onto a dresser. She also stated that while driving from her residence, she had driven her car through a ditch, causing her head to hit the steering wheel. Bonham stated that these two events caused her injuries. She stated that she made her false report to the police because she wanted Sullivan out of her residence.

Prior to trial, the State sought the trial court's permission to introduce evidence of ten prior episodes involving Sullivan and his former wife, Ruth Ann Sullivan. These episodes occurred between July 25, 1992, and August 11, 1993. During these episodes, Sullivan had verbally abused Ruth, made threatening phone calls to her, violated court orders directing that he not have contact with her, and threatened persons associated with her.

The trial court rejected all of the State's proffered other acts episodes, save the one which inspires this appeal. The court ruled that one of the episodes between Sullivan and Ruth was relevant to Sullivan's motive, intent and knowledge in this case. In addition, in light of Bonham's claim that her injuries were accidental, the court also ruled that the evidence was admissible on the question of absence of mistake.

Accordingly, Ruth testified at the jury trial that on July 24, 1992, an intoxicated Sullivan refused to leave her home, insisting that he wanted to talk with her. Ruth refused and repeatedly asked Sullivan to leave. He still refused, called her a "bitch," and threatened to physically assault her. Eventually, the police were summoned.

The jury returned a verdict finding Sullivan guilty of battery and disorderly conduct and not guilty of false imprisonment and intimidating a victim. Sullivan appeals from the ensuing judgments of conviction.

ANALYSIS

Before turning to the specifics of this case, we first address the current state of the law governing other acts evidence.

In the seminal other acts decision of ***Whitty v. State***, 34 Wis.2d 278, 297, 149 N.W.2d 557, 565-66 (1967), our supreme court cautioned that other acts evidence should be used sparingly, only when reasonably necessary, and that such evidence normally carried a calculated risk. However, since that landmark case, the Wisconsin decisions both from the court of appeals and the

supreme court have chipped away at the ***Whitty*** principle. Except for an isolated few, those decisions have consistently approved the use of such evidence.[2] Some have done so while mouthing the ***Whitty*** rule. Others have simply not addressed ***Whitty***.

This trend has been noted and, at times, criticized by some members of both the court of appeals and the supreme court. *See, e.g.*, ***State v. Plymesser***, 172 Wis.2d 583, 598-99, 493 N.W.2d 367, 374 (1992) (Bablitch J., dissenting); ***State v. Johnson***, 184 Wis.2d 324, 352-53, 516 N.W.2d 463, 472-73 (Ct. App. 1994) (Anderson J., concurring); ***State v. Tabor***, 191 Wis.2d 482, 497-500, 529 N.W.2d 915, 921-23 (Ct. App. 1995) (Nettesheim J., concurring in part, dissenting in part); ***State v. Rushing***, 197 Wis.2d 631, 650-52, 541 N.W.2d 155, 163 (Ct. App. 1995) (Myse J., concurring).

Our purpose here is not to lobby for or against the wisdom of this direction in the law. However, we do observe that this evolution has occurred without any express overruling or modification of ***Whitty*** by our supreme court. As a result, many of these decisions pretend to follow ***Whitty*** but actually do violence to it. These are awkward decisions because they force the "square peg" of the evidence into the "round hole" of ***Whitty***. *See* ***Tabor***, 191 Wis.2d at 499, 529 N.W.2d at 922.

This development has also freed up the trial and appellate courts of this state to follow either ***Whitty*** or the subsequent different law which has

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[2] In ***State v. Johnson***, 184 Wis.2d 324, 341 n.4, 516 N.W.2d 463, 468 (Ct. App. 1994), this court had occasion to examine the over one hundred post-***Whitty*** appellate decisions.

followed it. Thus, we have no established law in this area. Instead, we have choices of law which produce inconsistent rulings from case to case and from court to court depending upon the philosophy of the particular judge or court speaking to the matter.

We, of course, are duty bound to follow the standing decisions of our supreme court, and it is not within our power to overrule such a decision. *See* ***State v. Carviou***, 154 Wis.2d 641, 644-45, 454 N.W.2d 562, 564 (Ct. App. 1990). But the question here is which body of reported supreme court law do we follow. In order to answer the appellate issue in this case, we must first address this question. To do so, we analyze some of the supreme court's post-***Whitty*** decisions.

In ***State v. Friedrich***, 135 Wis.2d 1, 28, 398 N.W.2d 763, 775 (1987), the supreme court wrote:

> Juries must have all the relevant facts before them. A past history of … a defendant's plans, scheme and motives is relevant. Many judges in this State and a majority of this court have been aware for years of the need to place all relevant evidence … before the factfinder. … The fact that the evidence also most certainly shows a propensity to commit such crimes should not deny its admission into evidence.

Later, in ***Plymesser***, the supreme court endorsed this language and added the following:

> Our cases do not take such a narrow view of motive …. The use of motive in this case parallels its use in ***Friedrich***: a motive in an earlier crime is used to show a common

> cause for both the earlier and a later crime. The same motive caused both the prior act and the charged act.

Plymesser, 172 Wis.2d at 594, 493 N.W.2d at 372.

By these holdings, the supreme court has signaled that a defendant's motive to commit the charged offense can be established by prior acts which demonstrate the defendant's propensity to commit such acts. That seems contrary to ***Whitty*** and § 904.04(2), STATS., which say that other acts evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith." ***Id.***; *see also* ***Whitty***, 34 Wis.2d at 291-92, 149 N.W.2d at 563.

In addition, in ***State v. Speer***, 176 Wis.2d 1101, 1114-15, 501 N.W.2d 429, 433 (1993), the supreme court declared that neither its prior decisions on this topic nor the other acts statute carries a presumption against admission of other acts evidence. Again, this seems contrary to the ***Whitty*** statement that the use of such evidence carries a calculated risk and should be used "sparingly." Instead, ***Speer*** holds that the question is governed by the trial court's neutral exercise of discretion under the well-established rules of evidence. *See* ***Speer***, 176 Wis.2d at 1116, 501 N.W.2d at 434.[3]

When decisions of our supreme court conflict, we properly follow the more recent cases. *See* ***Bruns Volkswagen, Inc. v. DILHR***, 110 Wis.2d 319,

[3] Sullivan contends that any relaxation of the rules against other acts evidence is limited to cases involving sexual offenses against minors. While ***Plymesser*** and ***Friedrich*** were such cases, ***Speer*** was not. We therefore reject Sullivan's argument.

324, 328 N.W.2d 886, 889 (Ct. App. 1982). Based on the post-***Whitty*** cases, we conclude that ***Whitty*** is no longer the law.

With that threshold determination in place, we uphold the trial court's ruling admitting the other acts evidence. Sullivan's prior act displayed that when women with whom he has a relationship seek to rebuff Sullivan, he has a propensity to react violently while intoxicated. Under the post-***Whitty*** decisions, this propensity qualifies as proper other acts evidence pursuant to § 904.04(2), STATS. This is so whether we categorize Sullivan's "propensity" as evidence of his motive, intent or knowledge. We also observe that the evidence was relevant to rebut Sullivan's theory of defense which hinged on Bonham's testimony that her injuries were the result of an accident.

We also reject Sullivan's further argument that, even if admissible, the prejudicial effect of the evidence outweighed its probative value. ***Speer*** clarifies that if the probative value of the other acts evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted. *See* ***Speer***, 176 Wis.2d at 1115, 501 N.W.2d at 433. The evidence is inadmissible only if the prejudicial effect of the evidence *substantially* outweighs its probative value. *See* § 904.03, STATS.

Here, the State was required to prove all elements of the charged offenses, including Sullivan's intent to cause injury to Bonham. To counter this element, Sullivan contended that Bonham's injuries were accidental. Given that

sharp dispute between the State's and Sullivan's theories of the case, we see the other acts evidence as highly probative.[4]

We conclude that the trial court did not misuse its discretion by concluding that the evidence qualified as admissible other acts evidence pursuant to § 904.04(2), STATS., and by further concluding that the probative value of the evidence outweighed its prejudicial effect pursuant to § 904.03, STATS.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

[4] We also note that the trial court limited the other acts evidence to only one of the ten similar episodes offered by the State. By this limitation, the court additionally exercised its discretion by minimizing the prejudice to Sullivan.