

**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

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

No. 96-2667-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DESHAWN L. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

CURLEY, J. Deshawn Harris appeals from a judgment of conviction after a jury convicted him of endangering safety by use of dangerous weapon. He raises four issues for review: (1) whether the trial court denied him his right to present a defense when it excluded evidence of the victim's alleged prior false accusations; (2) whether the trial court erroneously exercised its discretion when it allegedly applied the incorrect legal standard when it excluded

prior bad acts evidence; (3) whether the trial court erroneously exercised its discretion when it prohibited the impeachment of Robinson's testimony with allegedly "material evidence;" and (4) whether this court should grant him a new trial in the interest of justice because the real controversy had not been fully tried. This court rejects Harris's arguments on these issues and affirms.¹

I. BACKGROUND.

In May 1995, the State charged Harris with one count of battery and one count of endangering safety by use of a dangerous weapon. The victim of both offenses was Harris's sister, Lawana Robinson. According to the criminal complaint, Robinson and Harris were arguing when Harris "pushed her down onto a couch and began hitting her, with closed fists, to the head." The complaint alleged that Robinson stood up, that Harris knocked her down, and that he resumed hitting her in the face and kicking her in the side. Finally, the complaint alleged that Harris placed a handgun against Robinson's temple, stating, "If you weren't my sister, I'd kill you." Robinson ran downstairs and called the police.

Harris's defense at trial was that Robinson was lying and that the offenses never occurred. Before trial, he offered a motion *in limine*, seeking the admission of alleged false accusations made against him in the past by the victim. Specifically, he sought the admission of testimony by his and Robinson's mother, their brother, and his own testimony that Robinson had "called the police and made false accusations about ... Mr. Harris....[that] [t]hey have had troubles getting along over the years, and [that] she [did] this on a number of occasions."

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

The trial court, after analyzing the potential admissibility of the proffered evidence, reserved its ruling and informed the defense that it would be able to make an offer of proof later. Then, during the State's direct examination of Robinson, the following exchange took place:

Q. And you get along with your brothers and sisters?

A. Yes.

Q. Now have you ever called the police on Deshawn before?

A. No.

Q. That was the first time?

A. Yes.

Q. Have you ever fought with him before?

A. No.

Q. That was the first time you ever fought with him?

A. Yup.

Robinson was also asked whether she "would make this incident up to get back at Deshawn?" She answered, "No."

In motions heard outside the presence of the jury, Harris renewed his call to introduce the evidence of Robinson's alleged prior false accusations. Further, he now posited that he should also be allowed to impeach Robinson's testimony that she had never "called the police on Deshawn before," by introducing evidence of her alleged prior false accusations. Harris's counsel made an offer of proof by having Harris testify on these alleged accusations. In the offer of proof, Harris testified that he could not remember the exact time these alleged

false accusations were made, but instead gave vague time frames of the previous few years.

After the offer of proof, counsel argued that the incidents should be admitted under: (1) RULE 904.04(1)(b), STATS., as evidence of the character of the victim; (2) RULE 904.04(2), STATS., as “other act” evidence; and (3) RULE 906.08, STATS., as “specific instance” impeachment evidence. The trial court rejected Harris’s arguments on these points but allowed him to impeach Robinson’s credibility through reputation or opinion evidence. The jury acquitted Harris of the battery charge, but convicted him of the endangering safety by use of a dangerous weapon charge. This appeal follows.

II. ANALYSIS.

Harris first argues that the trial court’s evidentiary rulings violated his due process right to present a defense. Specifically, he contends that his constitutional right was violated when the trial court excluded evidence of Robinson’s alleged prior false accusations. He primarily argues that the proffered testimony was admissible as evidence of Robinson’s bias toward him. This court disagrees.

“The due process rights of a criminal defendant are ‘in essence, the right to a fair opportunity to defend against the State’s accusations.’” *State v. Evans*, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994) (citation omitted). “The right to present evidence, however, ‘is rooted in the Confrontation and Compulsory Process Clauses of the United States and Wisconsin Constitutions.’” *State v. Morgan*, 195 Wis.2d 388, 432, 536 N.W.2d 425, 441 (Ct. App. 1995) (citation omitted).

That right, however, is not absolute. While we recognize the trial court may not “deny a defendant a fair trial or the right to present a defense by the mechanistic application of the rules of evidence,” “[c]onfrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect.”

Evans, 187 Wis.2d at 83, 522 N.W.2d at 560 (citations omitted). While this court reviews a trial court’s evidentiary rulings under the “erroneous exercise of discretion” standard, whether a defendant’s constitutional right to present a defense was violated raises an issue of “constitutional fact” that this court reviews *de novo*. See *State v. Pulizzano*, 155 Wis.2d 633, 648, 456 N.W.2d 325, 332 (1990).

Harris presents case law that he suggests supports his contention that testimony on Robinson’s alleged prior false accusations should have been admitted as relevant evidence of her bias toward him. He is correct that “[t]he bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely.” *State v. Williamson*, 84 Wis.2d 370, 383, 267 N.W.2d 337, 344 (1978). The specific instances he wishes to introduce, however, are not really probative of any “bias” that Robinson may harbor toward Harris. Harris contends that “[w]here proffered evidence informs the jury of the relationship between the victim and the defendant *and explains why the victim is falsely accusing the defendant*, the evidence is relevant and admissible.” (Emphasis added.) None of the testimony that Harris wished to introduce explained why Robinson was falsely accusing him in this case. Instead, it merely was being used to support Harris’s theory of defense that Robinson had lied in the past and she was doing it again in this case. This is just the type of propensity inference on Robinson’s character that is forbidden by RULE 904.04(1),

STATS. Further, any probative value derived from the testimony—such as showing that Robinson had been angry at Harris in the past—was slight given the vague nature of the alleged prior allegations, while the danger of unfair prejudice was high. Accordingly, the trial court could properly exclude the evidence under RULE 904.03, STATS. In turn, Harris had no constitutional right to present such evidence when its probative value was outweighed by its unfairly prejudicial effect. *See Evans*, 187 Wis.2d at 83, 522 N.W.2d at 560.

Evans next argues that the trial court erroneously exercised its discretion by applying the wrong legal standard when it excluded Robinson's alleged false accusations under RULE 904.04(2), STATS. This court concludes that the trial court properly excluded the evidence under a RULE 904.03 balancing test.

RULE 904.04(2) provides:

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.

The decision to admit or exclude evidence under RULE 904.04(2) is within the trial court's sound discretion, *see State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983), and will not be upset on appeal absent an erroneous exercise of discretion. *See State v. Jenkins*, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App.), *cert. denied*, 506 U.S. 1002 (1992). The proponent of the evidence has the burden to show that it is relevant to an issue other than propensity. *See State v. Speer*, 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993). Once that burden has been met, the evidence is admitted unless the opponent can show that the

probative value of the other crimes evidence is “substantially outweighed by the danger of unfair prejudice.” RULE 904.03, STATS.; see *Speer*, 176 Wis.2d at 1114, 501 N.W.2d at 433.

Harris argues that the trial court applied the wrong legal standard when it applied the first prong of the “other act” test—that is, the trial court incorrectly concluded that the prior false accusations were insufficiently proven to be admitted as probative of a material issue other than Robinson’s character. This court need not address this contention, however, because the trial court could properly exclude the evidence under the second prong of the “other act” test—that is, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See *State v. Holt*, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (stating appellate court must affirm trial court’s exercise of discretion if the trial court reached the correct result albeit for the wrong reason).

Here, the trial court concluded that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. This court acknowledges that the trial court’s ruling was not as extensive as this court would like, but this was due, in part, to the less-than-clear arguments made by Harris’s trial counsel on why the evidence should have been admitted. Nonetheless, the trial court considered that the vague and unspecified nature of the proffered testimony—as evidenced by Harris’s testimony in his offer of proof—when balanced against the danger of unfair prejudice arising out of such evidence, justified its exclusion. This court agrees; consequently, the trial court’s evidentiary ruling need not be reversed.

Next, Harris argues that his testimony, his mother’s testimony, and his brother’s testimony on specific issues of Robinson’s alleged past accusations

should have been admitted to impeach Robinson's testimony under RULE 906.08, STATS. This court disagrees.

The trial court allowed the witnesses to testify on Robinson's character for truthfulness through reputation and opinion evidence under RULE 906.08(1), STATS. Harris argues that he should be allowed to elicit testimony on Robinson's specific instances of conduct under RULE 906.08(2), STATS., which provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime or an adjudication of delinquency, as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Consequently, the trial court properly excluded the proffered testimony because extrinsic evidence of Robinson's alleged specific conduct in the past could not be introduced on Harris's direct examination of the three witnesses; he was the proponent of the evidence. Moreover, Harris repeatedly introduced opinion and reputation evidence from the witnesses that attacked Robinson's character for truthfulness. The witnesses testified that Robinson was "a big liar," that "[s]he just tell[s] lies," that "[s]he's a very untruthful person," and that it was "everybody's opinion who knows her." The State never attempted to rebut this testimony. Accordingly, the trial court properly excluded the specific conduct evidence. There was no erroneous exercise of discretion.

Lastly, Harris argues that he should be granted a new trial in the interest of justice because the real controversy has not been fully tried. He offers

nothing new on this point from those issues that we have all ready discussed and rejected. Thus, his call for a new trial in the interest of justice is also rejected.

By the Court.—Judgment affirmed.

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

