COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2493

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TODD S. SINCOCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

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

PER CURIAM. Todd S. Sincock, *pro se*, appeals from a judgment entered after a jury convicted him of second-degree recklessly endangering safety, substantial battery while armed, and criminal damage to property, contrary to §§ 941.30(2), 940.19(2), 939.63, and 943.01(2)(d), STATS. He also appeals from an order denying his postconviction motion.

He claims: (1) the trial court violated his constitutional rights when it forced him to either testify or rest his case; (2) the trial court was biased against him as evidenced by its admission of § 904.04, STATS., evidence and decision to allow the testimony of a State witness who was not disclosed on the witness list; (3) the evidence was insufficient to convict on the substantial battery and criminal damage to property charges; and (4) the prosecutor engaged in misconduct. Because the trial court did not violate Sincock's constitutional rights; because the trial court's rulings did not evidence a bias against the defense; because the evidence is sufficient to support the convictions; and because the prosecutor did not engage in misconduct, we affirm.

I. BACKGROUND

On June 10, 1994, Leonard Schroth, Susan Krahn and her child were in Krahn's car. Krahn is Sincock's ex-wife. Schroth, Krahn and her child were driving in the area of North 39th Street and West Villard Avenue, when Sincock arrived in his truck. A confrontation ensued. Schroth and Krahn claimed that Sincock exited his vehicle and began swinging a tire iron at Krahn's car, breaking the window and injuring Schroth's arm. Sincock denied these accusations.

Subsequent to this initial confrontation, Schroth and Krahn drove off, but were followed by Sincock to the 4700 block of North Sherman Boulevard. The two vehicles collided at the intersection of Sherman Boulevard and Courtland Avenue. Another confrontation ensued until Sincock jumped back into his truck and drove off. Sincock returned, however, and a third confrontation occurred. Sincock left again, but then returned. At this point, Schroth, Krahn and her child were walking to an apartment building. Sincock drove his truck into the yard

Schroth and Krahn were crossing, nearly hitting them, before finally leaving the scene.

As a result of these incidents, Sincock was charged with the aforementioned crimes. His case was tried to a jury. Schroth testified that some of his wounds required stitches, but he elected to treat the cuts himself with a butterfly patch. An investigating officer, John Parker, also testified that in observing Schroth's injuries, he felt that Schroth's wounds required stitches.

The State also called Howard Melton as a witness. Melton is the owner of an auto salvage business and he testified that before the collision, Krahn's car was worth between $2,000 and $2,500, but that after the collision, the car was worth only $200. Sincock objected to this witness testifying as he was not on the witness list. The State explained that its original witness was sick and it had just located Melton to replace the original witness. The trial court allowed the testimony.

On January 18, 1995, the second day of trial, the State completed its case at approximately 2:00 p.m. Defense counsel looked around but was unable to locate any of his witnesses. The defense was granted a short recess so that telephone calls could be made to locate the witnesses. The trial court instructed defense counsel to call Sincock or rest. Defense counsel later asserted that the prosecutor or a representative of the State instructed his witnesses that they could go home. Sincock testified on January 18 and the remainder of his witnesses were called the following day.

The jury convicted. Judgment was entered. Sincock now appeals.

II. DISCUSSION

A. Constitutional Challenge.

Sincock claims that the trial court violated his constitutional rights when it forced him to testify or rest his case on the second day of trial. He asserts that at the time the trial court issued this ultimatum, he had not yet decided whether he was going to testify and that forcing him to testify before other defense witnesses was erroneous. We are not persuaded.

A trial court has the power to control the progress of a criminal case and "must have broad power to cope with the complexities and contingencies inherent in the adversary process." ***Geders v. United States***, 425 U.S. 80, 86 (1976). This is what the trial court did here. The State finished its case and the defense did not have any of its witnesses available to testify. The only defense witness present was Sincock. Thus, the trial court had two options: require the only defense witness who was present to take the stand or, dismiss the jurors without utilizing the remainder of the day. The trial court elected the first option to keep the trial from stalling in mid-afternoon. Such conduct is permitted as a trial court is given substantial latitude in conducting a trial. *See* ***United States v. Leon***, 679 F.2d 534, 538 (5th Cir. 1982).

Sincock argues that the trial court's action was contrary to ***Brooks v. Tennessee***, 406 U.S. 605 (1972). In ***Brooks***, the Supreme Court struck down a statute which required a defendant who chooses to take the stand to testify as the first defense witness. *See* ***id.*** at 606. ***Brooks***, however, does not govern the instant case for several reasons. First, we are not faced with a statutory provision, as in ***Brooks***. Second, ***Brooks*** does not govern situations where the trial court elects to

take control of the progress of the trial. Accordingly, ***Brooks*** is inapposite under the circumstances presented here.

Finally, Sincock also claims that the trial court's action was erroneous because the defense witnesses were dismissed by the State. In other words, it was not the fault of the defense that witnesses were not available. The record in this regard is ambiguous. Defense counsel asserted that the witnesses reported they had left the courtroom because the prosecutor told the witnesses to go home. The prosecutor stated that she had merely released the witnesses from the State's subpoena, but that if the defendant needed them, they should be prepared to testify. The witnesses were also under defense subpoenas to appear. Unfortunately, when these witnesses did appear, they were not questioned with respect to this subject. Without any sworn testimony in this regard, and given the ambiguous state of the record, we cannot make any absolute conclusions as to why the witnesses were not available during the afternoon when the defense commenced presentation of its case.

Based on the foregoing, we conclude that the trial court acted within its authority to control the progress of the case when it required Sincock to testify or rest his case. Therefore, we reject Sincock's claim that his constitutional rights were violated by the trial court's action.

B. Trial Court Bias.

Sincock next argues that the trial court was biased against him. He argues that the bias was evidenced by several trial court rulings. We reject his claim.

He first claims that the trial court was biased because it admitted other acts evidence despite the absence of a proper motion to admit this other acts evidence. He claims that because the State's motion was not signed, the other acts evidence should have been excluded. The trial court's decision to admit the other acts evidence was not an erroneous exercise of discretion and, therefore, cannot support a bias claim. Further, there is no requirement dictating that an other acts motion must be signed.

Whether to admit other acts evidence is addressed to the trial court's discretion and will not be reversed by this court unless the trial court erroneously exercised its discretion in admitting the evidence. *See* ***State v. Peters***, 192 Wis.2d 674, 694, 534 N.W.2d 867, 875 (Ct. App. 1995). In order for other acts evidence to be admitted, a two-prong test must be satisfied. First, the evidence must fit under one of the exceptions contained in § 904.04(2), STATS. These exceptions include motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* ***State v. Mink***, 146 Wis.2d 1, 12 n.5, 429 N.W.2d 99, 103 n.5 (Ct. App. 1988). The second prong requires that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *See* ***Peters***, 192 Wis.2d at 695, 534 N.W.2d at 875. If both prongs are satisfied, the evidence is properly admitted. *See* ***id.***

Here, both prongs were satisfied. The evidence of two other acts where Sincock was physically violent with Krahn were admitted to show intent. The defense theory was that the incident was an accident or that Krahn and Schroth precipitated the events. The two other acts incidents, which involved Sincock slapping Krahn and throwing her to the ground, were admitted to show his intent with respect to the instant incident. Further, neither other acts incident was unfairly prejudicial to Sincock. Accordingly, the trial court did not

erroneously exercise its discretion in admitting the other acts evidence and this ruling cannot support Sincock's bias claim.[1]

Next, Sincock claims the trial court's ruling with respect to witness Melton evidenced bias. He also claims that the trial court erred in allowing this witness to testify despite the fact that he was not listed as a witness as required by § 971.23(1)(d), STATS.

We disagree. The admission of expert testimony is a matter of trial court discretion and the decision will not be overturned unless it constituted an erroneous exercise of discretion. *See* ***State v. Owen***, 202 Wis.2d 620, 636, 551 N.W.2d 50, 56 (Ct. App. 1996).

The State called Melton to testify as to the amount of damage done to Krahn's car. Sincock objected because Melton was not disclosed as a witness. The prosecutor asserted that Melton was being called because the person who made the original damage estimate was ill and Melton had been found only within the last day or two. The trial court allowed the testimony, despite the defense request that the State should be sanctioned by exclusion of this surprise witness's testimony.

The imposition of a sanction for a discovery violation is again a matter for trial court discretion. *See* ***State v. Wild***, 146 Wis.2d 18, 28, 429 N.W.2d 105, 109 (Ct. App. 1988). In determining what sanction is appropriate, the trial court balances the quality or nature of the State's conduct against the degree of

[1] Sincock also claims that the prosecutor misrepresented that the other acts both involved pulling Krahn out of a vehicle in order to gain admission of the evidence. We decline to address this contention because we have already concluded that the evidence was not erroneously admitted.

prejudice to the defendant. *See* ***id.*** at 29, 429 N.W.2d at 109. Here, Sincock knew that he had been charged with criminal damage to property greater than $1,000. Therefore, he was aware that the State would have to prove the reduced value of the car. Thus, the degree of prejudice to Sincock was not great.

Further, our statutes provide the trial court with the discretion to allow the testimony of a witness who was not disclosed if "good cause is shown for failure to comply." Section 971.23(7m)(a), STATS. The trial court accepted the State's explanation as "good cause," and we have not been presented with anything demonstrating that the decision constituted an erroneous exercise of discretion.

Finally, Sincock argues that the trial court's ruling regarding Melton was particularly biased in light of its earlier ruling granting the State a continuance to investigate Sincock's late-disclosed alibi witness. The record does not support this contention. The trial court allowed Sincock's late-disclosed alibi witness to testify despite the State's objection. The State did not get a continuance. Rather, the trial court merely gave the State an "opportunity to talk to [the witness] if they can" before making its final ruling that the alibi witness would be permitted to testify.

Based on the foregoing, Sincock has failed to show any bias on the trial court's part. Accordingly, we reject this claim.

C. Insufficient Evidence.

Sincock next claims the evidence is insufficient to support the substantial battery and the criminal damage to property charges. We reject his claim.

When reviewing a challenge based on insufficiency of the evidence:

> This court must affirm if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt. The function of weighing the credibility of witnesses is exclusively in the jury's province, and the jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.

State v. Alles, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (emphasis and internal quotation marks omitted).

Sincock claims that because the statute defines substantial battery as "a laceration that requires stitches" § 939.22(38), STATS., and because Schroth did not actually have his lacerations stitched, there is insufficient evidence to support the substantial battery conviction. We are not convinced.

As argued by the State, there is evidence that the lacerations Schroth received were of a severe enough type that they would require stitches. This testimony came from both Schroth, who indicated he knew the difference between a laceration that requires and does not require stitches, and from the investigating officer who gave similar testimony. Given the clear language of the statute, we cannot conclude that a substantial battery results only if the victim actually receives stitches. The testimony of Schroth and the officer is sufficient evidence under our standard of review to uphold the conviction.

Next, Sincock argues that there was insufficient evidence to support the criminal damage to property charge because the only evidence as to the value required under the statute came from an auto salvage expert. Sincock argues that

because Melton did not testify as to how much it would cost to repair the damage done to Krahn's car, there is no evidence to satisfy the statute. We disagree.

Sincock was charged with criminal damage to property of more than $1,000. Melton testified that before the damage, Krahn's car was worth between $2,000 and $2,500, and that after the damage, the car was only worth $200. This is sufficient to satisfy the value element of the statute. The statute does not require a showing as to the specific cost to repair the damage. Rather, it simply requires a showing that there was more than $1,000 worth of damage done to the property. Melton's testimony is sufficient to sustain the conviction.

D. Prosecutorial Misconduct.

Finally, Sincock claims the prosecutor engaged in a course of prejudicial conduct. He asserts that this included dismissing the defense witnesses, calling a surprise witness without listing the witness, and introducing other acts evidence. This argument simply re-asserts the foregoing claims which we have already rejected. Accordingly, we reject this claim. "Adding this claim adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

By the Court.—Judgment and order affirmed.

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