

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 17, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 99-3279-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN ROBERT RYBKA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

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

¶1 PER CURIAM. John Robert Rybka appeals from a judgment of conviction for burglary, following a jury trial. He argues that the trial court erred in admitting other acts evidence and police testimony about his failure to surrender

when they arrested him six days after the burglary. Because we conclude that any arguable error was harmless, we affirm.

## I. BACKGROUND

¶2 Most of the essential facts are undisputed. Trial evidence established that on Thanksgiving weekend 1998, the home of Thomas and Michele Wozniak was burglarized. The Wozniaks had purchased the home from Michele's aunt, Donna Cherek in the spring of 1997. Donna's daughter Lisa had been married to Rybka until their divorce in 1995.

¶3 During their investigation, the police determined that the burglar entered the home by breaking a downstairs bedroom window, where they found one latent fingerprint on the inside casement. Officer Douglas Williams testified that he asked Mrs. Wozniak if she had any idea who might have burglarized her home. In response, she mentioned Rybka, explaining that he had attempted to burglarize her father's home on Thanksgiving Day 1996. Based on this information, police compared Rybka's fingerprints to the print found at the scene. They matched.

¶4 Trial testimony also established that Rybka had not been in the Wozniaks' home for several years. Cherek stated that although Rybka had frequented her home during his marriage to Lisa, he had not been in the residence since September 1994. Thomas Wozniak and Michele Wozniak also testified that Rybka had not been in the home since they bought it in May 1997. The Wozniaks also testified that the window through which the burglar entered had been thoroughly washed during their initial house cleaning, and that the woodwork in the room had recently been sanded and painted, before the burglary. Expert

testimony established that any cleaning or painting of the window would have destroyed any previously deposited fingerprints.

¶5 The State also introduced testimony that Rybka failed to surrender to police. Officer Rafael Rivera testified that, six days after the burglary, when police were dispatched to investigate a domestic dispute involving Rybka, Rybka ignored police orders and hid in the back bedroom of his apartment. On appeal, Rybka challenges the trial court’s evidentiary rulings.

## II. DISCUSSION

¶6 Trial courts have broad discretion in determining whether to admit or exclude evidence. *State v. Larsen*, 165 Wis. 2d 316, 319-320, 477 N.W.2d 87 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised discretion. *Id.* at 320 n.1. We will not overturn a trial court’s evidentiary ruling unless it has no reasonable basis. *State v. McConnohie*, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983).

¶7 Rybka first argues that the trial court erred in admitting other acts evidence—testimony that Michele Wozniak told police she suspected Rybka committed the burglary, in part, because he had attempted to burglarize her father’s home two years earlier. WISCONSIN STAT. § 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.

To determine whether evidence of “other acts” is admissible, the trial court must engage in a three-step analysis. *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576

N.W.2d 30 (1998). First, the trial court must determine if the evidence fits within one of the exceptions of § 904.04(2) (1997-98).<sup>1</sup> Second, the trial court must determine if the other-acts evidence is relevant under WIS. STAT. § 904.01.<sup>2</sup> Third, pursuant to WIS. STAT. § 904.03,<sup>3</sup> the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. See *Sullivan*, 216 Wis. 2d at 772-73.

¶8 In this case, the trial court allowed the reference to the prior, alleged attempted burglary concluding that it was relevant to motive and identity. Rybka challenges that rationale and, on appeal, the State does not support it. Instead, the State contends that, under *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984), the evidence helped to furnish part of the context of the crime and to provide a full presentation of the case. The State maintains that the evidence was admissible “to show why the witness identified [Rybka] as being a possible perpetrator.” Elaborating the somewhat complicated factual background, the State explains:

On cross-examination of Donna Cherek, the defense brought out that the divorce between her daughter and the defendant was bitter and that in the past Donna strongly disliked the defendant. On cross-examination of Michele

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

<sup>2</sup> WISCONSIN STAT. § 904.01, provides: “‘Relevant evidence’ means evidence having any 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.”

<sup>3</sup> WISCONSIN STAT. § 904.03, provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Wozniak, the defense established that she was part of a close family and that some people in the family strongly disliked the defendant after he was divorced from Lisa Cherek. The defense also brought out that the defendant had been the driver of a vehicle in which Michele Wozniak and her father were injured and that her father had filed a lawsuit as a result of the accident. The defense tried to show that there was animosity towards the defendant as a result of the accident. In his closing argument, defense counsel noted that the Wozniaks had testified that they had cleaned and painted the house but then pointed out that Michele Wozniak and Donna Cherek were members of a tight family and that there was animosity within the family towards his client.

The defense was trying to show that the present and prior owners of the house had a motive to target the defendant as the perpetrator of the burglary because of the family animosity towards him. The defense could establish that the defendant had been in the house before and therefore could argue that the defendant's fingerprint, which was found in the house, was made at a time prior to the burglary. *The evidence as to the reason that Michele Wozniak named the defendant as a possible perpetrator refuted the defense claim that he was targeted because of that animosity and that Michele Wozniak lied about cleaning the house after he was last in the house in order to frame him because of that animosity.* Thus, the evidence related to the consequential fact that the defendant was truly the person who committed the burglary.

(Emphasis added; citations omitted).

¶9 While the State's explanation supports its argument that evidence of the family animosity was relevant, the explanation fails to support the specific reference to an alleged *attempted burglary*. Further, the State failed to establish the critical link between Michele's suspicions and the testing of Rybka's fingerprints. Because Rybka's fingerprints were already in the fingerprint data base, the police did nothing more than use Michele's tip to expedite their investigation. Obviously, Rybka soon would have been identified as a suspect based on the discovery of the latent fingerprint.

¶10 Whether the reference to the alleged burglary was relevant does not conclude the analysis. See *Sullivan*, 216 Wis. 2d at 772-73 (evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice). Here, in an intra-family burglary prosecution, the potential prejudice produced by a reference to an earlier intra-family attempted burglary by the same person is obvious. Whether, in this case, as the State argues, the trial court's cautionary instructions were sufficient to eliminate or minimize the risk of unfair prejudice is difficult to discern. However, we leave this issue unresolved because we are satisfied that any such error was harmless.

¶11 Rybka next argues that the trial court erred in allowing testimony about his failure to surrender to police. Officer Rivera testified that, six days after the burglary, he was dispatched to Rybka's apartment in response to a complaint of a man and a woman fighting. Officer Rivera testified that upon arrival at the scene, he attempted, for approximately twenty minutes, to get Rybka to come out of the apartment. Officer Rivera said that after forcing entry into the apartment, he and the other officers repeatedly announced their presence and ordered Rybka to leave the bedroom and enter the living room. Rybka failed to comply. Ultimately, a police officer apprehended Rybka in the back bedroom of the apartment.

¶12 The trial court permitted this testimony, concluding that the evidence was relevant to Rybka's consciousness of guilt. Rybka contends that because this police contact was not connected to the burglary, the testimony should not have been admitted as evidence of flight or consciousness of guilt. He points out that no evidence showed that, six days after the burglary, he knew or suspected that he was a suspect in the burglary. Rybka maintains, therefore, that absent such evidence, his behavior during the domestic dispute call was irrelevant to show his consciousness of guilt for the burglary.

¶13 Rybka's challenges to both lines of evidence are strong. The State's responses, however, also are tenable. We acknowledge the difficulty in determining whether the challenged evidence was relevant and, even if relevant, whether its probative value was substantially outweighed by the danger of unfair prejudice. We need not resolve these issues, however, because, we conclude, any erroneous admission of this evidence was harmless.

¶14 An error is harmless if "there is no reasonable possibility that the error contributed to the conviction." *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Here, any possible evidentiary error did not contribute to the conviction because the other trial evidence of Rybka's guilt was overwhelming.

¶15 Evidence established that Rybka's fingerprint from the little finger of his right hand was found on the window through which the burglar entered the residence. Fingerprint expert Peter Schienbein testified that the print was in an upright position on the inside casement of the window. Schienbein noted that given the print's position, he could discern that the hand from which the print came must have been pushing up on the window from outside the house. Evidence also established that Rybka had not been admitted as a guest in the house since September 1994. The Wozniaks testified that they purchased the home in 1997 and that Rybka had not been in the home since they had owned it.

¶16 Evidence also established that the window casement where Rybka's fingerprint was found was sealed with brown varnish prior to the time Donna Cherek sold the home to the Wozniaks. Michele Wozniak testified that after she bought the house, she and her mother washed all the windows, window screens and storm windows. She said she had also redecorated the downstairs bedroom in which Rybka's fingerprint was found. She testified that shortly after she had

moved in she sanded down the window frames to bare wood and painted them with three coats of white paint. Schienbein testified that no fingerprints would survive having been painted over or having been wiped with a dust rag or wash cloth. Based on the strength of this evidence, we conclude that any error in the admission of the other evidence was harmless.

*By the Court.*—Judgment affirmed.

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



