

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP571-CR

Cir. Ct. No. 2004CF39

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOREL T. NORWOOD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Jorel Norwood appeals a judgment convicting him of assault by a prisoner as a repeat offender. He also appeals an order denying his motion for postconviction relief. Norwood argues that the State failed to establish

an essential element of the offense and that the circuit court erroneously allowed other acts evidence. We disagree and affirm.

¶2 Norwood argues that the State failed to establish an essential element of the offense. WISCONSIN STAT. § 946.43(2m)(a) (2003-04)¹ provides: “Any prisoner confined to a state prison or other state, county or municipal detention facility who throws or expels ... saliva ... at or toward an officer ... is guilty of a Class I felony.” Pointing to the Wisconsin jury instructions, Norwood argues that the State was required to establish as an element of the offense that he was in prison *as a result of a violation of the law*. The Wisconsin jury instructions provide that the State must prove that “[t]he defendant was a prisoner confined to a [state prison] ... as a result of a violation of law.” See WIS JI—CRIMINAL 1779A.

¶3 We assume for purposes of this decision, but do not decide, that the jury instruction properly states the law. We conclude that a reasonable jury could have inferred as a factual matter that the reason Norwood was confined to a prison is because he violated the law. See *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990) (the jury is free to draw reasonable inferences from the evidence). In our view, most people believe that prisoners are in prison precisely because they have violated the law. Because a reasonable jury could have inferred Norwood was in prison for violating the law, we must uphold the jury’s verdict. See *id.* at 507 (we will affirm the verdict “unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.”).

¶4 Our opinion should not be construed as vindication for the prosecutor. In particular, the prosecutor should have carefully reviewed the elements as listed in the jury instruction and exercised care to present evidence on each element and each part of each element. In this case, it seems obvious that it would have been better to present direct evidence that Norwood was incarcerated for violating the law, rather than consciously or unconsciously relying on common knowledge.

¶5 Norwood next argues that the circuit court erroneously exercised its discretion in allowing evidence that he spit at a different guard shortly before the incident from which this charge stems. We use a three-step framework to determine the admissibility of other acts evidence: first, whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); second, whether the other acts evidence is relevant; and third, whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion, or delay. *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

¶6 It is undisputed that the evidence was offered for a permissible purpose, namely, intent. Moreover, we conclude that the evidence was relevant for purposes of proving intent. Norwood’s defense was that he did not intentionally spit at anybody, but rather spit involuntarily due to the way the correctional officers were holding his head to compel his compliance. To counteract this lack of intent view of the incident, the State introduced evidence that Norwood had spit in the direction of a different correctional officer earlier the

same day. The fact that Norwood had spit earlier in the day at a different guard tended to show that Norwood was acting intentionally when the saliva, in Norwood's words, "flew out of [his] mouth" the second time. Finally, although Norwood argues that any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, this balancing is committed to the circuit court's discretion. We think it obvious that the court did not misuse its discretion in admitting the other acts evidence.

By the Court.—Judgment and order affirmed.

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

