

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2007

David R. Schanker
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. 2006AP1376-CR

Cir. Ct. No. 2005CF193

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. VALLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. John Valles appeals from a judgment of conviction of first-degree sexual assault as a repeat offender. He argues it was error to admit evidence of four prior incidents of violence committed against the victim, his

estranged wife. We conclude that the evidence was properly admitted as part of the context of the crime. We affirm the judgment.

¶2 At the time of the crime, May 11, 2005, Valles and his wife, Heidi V., were not living together. Earlier in the day Valles talked to Heidi about getting back together. Valles cried when she stated that the relationship was over. Much later in the evening, Heidi woke to find Valles standing over her with a mallet in his hand. He told her that if she was not quiet he was going to kill her and her son. While the couple talked in the dining room, Valles would pick up the mallet and wave it front of her face. During the conversation Heidi learned that he had been hiding in the basement of the home and overheard her tell her son earlier that evening that she did not want anything to do with Valles again. Valles also told her he intended to kill himself with his blood pressure medication and she was not supposed to call the police to stop him. Valles picked up a knife in the kitchen and said if the pills did not work he would use the knife to kill himself. Valles did not threaten Heidi with the knife but did tell her if he could not have her no one would have her. The couple returned to the living room and Valles told Heidi to lie on the floor with him where he had placed a blanket and pillow. Their son was asleep on the couch. When Valles tried to put his fingers in her vagina, Heidi told him “no.” Valles then sexually assaulted Heidi.

¶3 At trial there was evidence of four prior violent incidents between Valles and Heidi. Heidi testified that in June 2001, before they were married, Valles would not let her leave the house after an argument. He took her purse and cell phone and threw her keys. Heidi had her son go next door and call the police. Valles locked himself in the house and said, “Someone’s going to die tonight.” She also testified about an incident in February 2002 where Valles slapped her across the face resulting in a black eye and bloody nose. The blow also landed on

her son's head. She related that in December 2003 they argued and she called the police. Valles took a kitchen knife and slit his arm open and told their son that Heidi had done it to him. Finally, on May 1, 2005, Valles had pulled Heidi from bed when she refused to talk with him. He threatened to push her out the window. Heidi indicated that all four incidents occurred after Valles had been drinking.

¶4 The decision to admit or exclude evidence is reviewed for a proper exercise of discretion. *State v. Hereford*, 195 Wis. 2d 1054, 1065, 537 N.W.2d 62 (Ct. App. 1995). We will not reverse a discretionary determination where it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *Id.* The admissibility of other-acts evidence is determined by using a three-step test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) (2005-06)¹; whether the evidence is relevant under § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay under § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998).

¶5 Valles first argues that despite the prosecutor's claim that the other-acts evidence was being offered only to show motive, intent and absence of mistake, the evidence was truly admitted for the improper purpose of establishing that Valles is a violent person. He further argues that intent, motive and absence of mistake were not issues of consequence.

¹ Acceptable purposes under WIS. STAT. § 904.04(2) are proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 The trial court determined that the evidence was admissible to show absence of mistake or lack of consent. We conclude the evidence was admissible for the purpose of establishing the context of the crime and the parties' relationship. We may consider acceptable purposes for the admission of the other-acts evidence other than those considered by the trial court; we may also affirm the trial court's decision admitting this evidence for reasons other than those stated by the court. *State v. Hunt*, 2003 WI 81, ¶52, 263 Wis. 2d 1, 666 N.W.2d 771, *reconsideration granted on other issues*, 2003 WI 140, 266 Wis. 2d 68, 671 N.W.2d 853. "Other-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case." *Id.*, ¶58. *See also State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983) (other-acts evidence permissible to show the context of the crime and provide an explanation of the case), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

¶7 Valles testified that despite the no-contact condition, he and his wife had consensual sexual intercourse five times in the days before the assault. He indicated that what occurred on May 11, 2005, was more of the same—a rendezvous after the signal was given that the children had gone to sleep and consensual intercourse. However, the other-acts evidence demonstrated that their marriage was far from amicable. It showed the nature of the parties' relationship and explains Heidi's reaction to Valles's conduct on the night of the assault, particularly her fear that his conduct would escalate to physical violence.² *See*

² Actually the evidence was not other-acts evidence but just part of the panorama of the evidence necessary to put the incident into context. *See State v. Seefeldt*, 2002 WI App 149, ¶21, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822; *State v. Johnson*, 184 Wis. 2d 324, 349-50, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring). The evidence is admissible for that purpose without applying the three-part other-acts analysis.

Hunt, 263 Wis. 2d 1, ¶58. It provides an explanation for why Heidi agreed to talk with Valles in the dining room, laid on the floor with him, and did not engage in greater physical resistance to the sexual assault.

¶8 Having examined the proper purpose for admitting the other-acts evidence, we may easily conclude that the evidence was relevant and highly probative for that purpose. Evidence is relevant if it has “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.” WIS. STAT. § 904.01. Valles’s theory of defense made the parties’ history relevant in terms of showing why Heidi acted as she did. Probative value is measured by comparing the similarity between the charged offense and the other acts in terms of nearness of time, place, and circumstance. *Hunt*, 263 Wis. 2d 1, ¶64. The trial court found that the other incidents occurred over a period of just a few years and toward the end of the marriage. Only one incident predated the parties’ marriage. The incidents are similar in circumstance, including precipitating events, and similar in place and participants. The second prong of the other-acts analysis was satisfied.

¶9 The final consideration is whether the probative value of the evidence was outweighed by unfair prejudice. Unfair prejudice results when the evidence has a tendency to influence the jury by improper means, appeal to its sympathy, arouse its sense of horror, promote its desire to punish or otherwise cause the jury to base its decision on extraneous considerations. *Sullivan*, 216 Wis. 2d at 789-90. Valles bears the burden of establishing that the probative value is outweighed by unfair prejudice. See *Hunt*, 263 Wis. 2d 1, ¶69. The evidence must be more than merely prejudicial. *Id.*

¶10 The circuit court acknowledged that the evidence would raise sympathy from the jury. However, it determined that the evidence would not confuse the issues or cause the jury to decide the case on something other than the established propositions and elements of the offense. It further concluded that the evidence did not suggest a propensity to commit a sexual assault. We concur with the trial court’s assessment that the evidence was not unfairly prejudicial.

¶11 A cautionary instruction was given at the first instance where evidence of Valles’s prior domestic violence was introduced.³ The instruction cautioned the jury to consider the evidence only as to issues of “motive, opportunity, intent, preparation or plan, absence of mistake or accident and context or background.” The jury was told not to consider the evidence to conclude that Valles acted in conformity with some character trait or was otherwise a bad person. The jury was reminded of the cautionary instruction when Heidi started her testimony about the prior incidents. The same cautionary instruction was repeated in the final instructions to the jury. The cautionary instructions substantially mitigated any unfair prejudicial effect caused by the admittance of the other-acts evidence.⁴ *See id.*, ¶¶73-75. We conclude that the trial court properly exercised its discretion in admitting the other-acts evidence.

By the Court.—Judgment affirmed.

³ Heidi’s son testified first about fights between Heidi and Valles that he witnessed.

⁴ Valles argues that the cautionary instruction was too broad because it was not tailored to the facts of the case and referenced many permissible uses, none of which were issues of consequence in the case. *See State v. Sullivan*, 216 Wis. 2d 768, 791, 576 N.W.2d 30 (1998). Valles did not object to the cautionary instruction when the trial court revealed at the start of trial how it intended to instruct the jury. Moreover, the cautionary instruction authorized use of the evidence for the purpose of providing context and background, the very purposes for which the evidence was properly admitted.

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

