

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 4, 2008**

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. 2007AP2812-CR**

**Cir. Ct. No. 2004CF1013**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KEVIN J. ZARM,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
VINCENT K. HOWARD, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Kevin Zarm appeals a judgment convicting him of first-degree intentional homicide, burglary and theft. He argues that the trial court improperly exercised its discretion when it allowed evidence of other burglaries, arsons and reckless endangerment committed by Zarm, and that the State failed to

present sufficient evidence to support the convictions. We reject these arguments and affirm the judgment.

## BACKGROUND

¶2 Silvia Grade's body was found in her garage. The circumstances strongly suggested that she interrupted a burglary and was beaten to death by the burglar. The State presented witnesses who established Zarm's motive and opportunity to commit the crimes. Zarm had previously lived near Grade's house and had spoken with Grade on several occasions. Zarm was a collector and seller of deer antlers, old fishing lures, antique guns and other miscellaneous collectibles. Four days after the Grade burglary, Zarm offered to sell another collector a porcelain Quaker State Oil sign comparable to a sign that had been in Grade's garage. The sign was manufactured in the 1950s, a time when Grade's family owned a gas station. Zarm indicated he purchased the sign at a neighborhood garage sale. The neighbor testified he did not sell Zarm that sign. Three days later, Zarm swapped the sign with another collector.

¶3 Other witnesses placed Zarm in the vicinity of Grade's home on the night she was killed. Records from a cab company showed that Zarm was dropped off at 12:13 a.m. in a parking lot less than one block from Grade's home. Another witness who knew Zarm saw him in the vicinity between 1 and 2 a.m.

¶4 A fellow inmate in the county jail testified that Zarm told him Grade came into the garage and asked who was there. Zarm told him "the old bitch knew too much and she had to go," and he hit her over the head with a crowbar. He later threw the crowbar in the Wisconsin River.

¶5 The State also presented evidence that Zarm committed numerous other burglaries on the east side of Wausau in which collectibles were stolen. Zarm started fires at many of these locations in an effort to conceal the burglaries. Some of the fires endangered the lives of people sleeping nearby, showing the burglar's willingness to use extreme measures to conceal his crimes.

## DISCUSSION

¶6 Other crimes evidence is not admissible to prove the character of a person or to show that the person acted in conformity with that trait. WIS. STAT. § 904.04(2).<sup>1</sup> However, it is admissible when offered for other purposes. *Id.* Here, the court instructed the jury that it could consider Zarm's burglary and arson convictions to prove his motive and to identify the burglar who killed Grade.<sup>2</sup> Whether evidence of other crimes can be introduced requires application of a three-part test: (1) the evidence must be offered for a permissible purpose under WIS. STAT. § 904.04(2)(a); (2) it must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. *See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). When evidence of other crimes is offered to prove identity of a perpetrator, the standards of relevancy are more strict. *See Whitty v. State*, 34 Wis. 2d 278, 294, 149 N.W.2d 557 (1967). Identifying a criminal by the unique nature of other crimes he committed depends

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

<sup>2</sup> At a pretrial hearing, the court initially concluded the evidence would be admissible to show motive and plan. Because the jury was instructed on motive and identity, we need not consider whether the other burglaries and arsons establish Zarm's plan.

on nearness of time, place and circumstances. *See State v. Kuntz*, 160 Wis. 2d 722, 746-47, 467 N.W.2d 531 (1991). Whether there is a concurrence of features is generally left to the sound discretion of the trial court. *Id.*

¶7 Evidence of Zarm's previous burglaries and arsons that endangered inhabitants of buildings was admissible to show motive and identity. Zarm's previous crimes shared several characteristics in common with the Grade burglary. He arrived by taxi to a scene on the east side of Wausau in the late night or early morning hours, entered detached garages, stole collectibles that he later sold for financial gain, and used extreme measures to attempt to conceal his crime. In each instance, Zarm was familiar with the victim. The similarity of circumstances establish Zarm's motive for burglarizing Grade's garage and his motive for killing her when she interrupted the burglary, and the common features are relevant to establish Zarm's identity as the perpetrator.

¶8 The probative value of the other crimes evidence is not substantially outweighed by its prejudicial effect. The danger of introducing evidence of other crimes arises from the possibility that the jury will believe a defendant is guilty merely because he is a person likely to commit such acts or the tendency to condemn because he has escaped punishment for other offenses. *Whitty*, 34 Wis. 2d at 292. At the time of trial, Zarm had been convicted of the other burglaries and arsons. The jury had no basis for believing he would escape punishment for those offenses. In addition, the court twice instructed the jury on its obligation to consider the earlier crimes only on the issues of motive and identity. A cautionary instruction can go far to cure any adverse effect attendant with admission of other crimes evidence. *See State v. Fishnick*, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985). The jury is presumed to have followed the court's instruction. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App.

1989). In light of the substantial probative value of the evidence, we cannot conclude that it improperly appealed to the jury's sympathies, aroused the jury's sense of horror, or provoked its instinct to punish or base its decision on anything other than the established propositions of the case. *See State v. Jackson*, 216 Wis. 2d 646, 667, 575 N.W.2d 475 (1997).

¶9 The State presented sufficient evidence to support the convictions. This court must defer to the jury's findings of fact if they are supported by any reasonable view of the evidence, and must review the evidence in the light most favorable to the verdicts. *See State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998). Zarm admitted that he knew Grade and was in the vicinity of Grade's home on the night of the crimes. He wore shoes similar to the shoes that left prints at the crime scene. He possessed a sign shortly after the crime that was similar to a sign that had been in Grade's garage, and his explanation for how he obtained the sign proved false. The pattern of burglaries establish that Zarm was involved in a series of burglaries in the vicinity of Grade's home, and he was willing to endanger the lives of others to conceal his crimes. Finally, another inmate testified that Zarm admitted the crimes to him, although Zarm attempted to impeach his credibility. It is the jury's function to decide the credibility of witnesses. *See State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). We cannot conclude that the evidence was so lacking in probative value that no reasonable jury could find guilt beyond a reasonable doubt. *See id.* at 507.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

