COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1500-CR **Cir. Ct. No. 99 CF 6129**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERMAINE V. DANTZLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Jermaine V. Dantzler appeals from a judgment entered on a jury verdict convicting him of one count of first-degree reckless

homicide, contrary to WIS. STAT. § 940.02(1) (1999-2000)[1] He also appeals from an order denying his postconviction motion. Dantzler claims that he is entitled to a new trial, or in the alternative, an evidentiary hearing because: (1) the trial court erroneously exercised its discretion when it admitted other-acts evidence of Dantzler's alleged physical abuse of the victim; (2) the State misstated key facts that were relevant to the court's analysis of whether to admit the other-acts evidence; and (3) his trial counsel was ineffective for failing to properly object to the admission of the prior injuries. We affirm.

I. BACKGROUND

¶2 Jermaine V. Dantzler was tried for the death of his three-month-old son, Davion. Dantzler cared for Davion approximately thirty to thirty-five hours a week while Davion's mother, Ternisha Wilks, worked. Dantzler testified that, on the morning of Davion's death, Dantzler went into the bedroom to check on Davion when he noticed that Davion was not breathing. Dantzler claimed that he panicked and shook Davion twice. Davion did not respond, so, according to Dantzler, he laid Davion on the bed and tried to perform CPR. When CPR did not work, Dantzler picked Davion up and ran into the street to look for help. A neighbor called the paramedics. When the paramedics arrived, they performed CPR on Davion and took him to the hospital, where, despite further efforts to resuscitate him, he died.

¶3 An autopsy revealed that Davion died from trauma to his chest, caused by hard squeezing or punching. The squeezing or punching compressed

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Davion's heart and caused it to rupture. The pathologist who conducted the autopsy testified that another possible factor in Davion's death was a subdural hematoma, or bleeding in the brain. She opined that this injury was also caused by hitting or shaking. The autopsy also revealed other injuries to Davion including a burn on Davion's forehead, a subdural hematoma that occurred at least two weeks before Davion's death, and several rib fractures, one of which occurred at or around the time of Davion's death. The pathologist concluded that Davion suffered from "battered child syndrome" based on a "constellation" of non-accidental injuries.

¶4 A pediatric radiologist also testified at Dantzler's trial. He testified that x-rays of Davion's ribs showed at least nineteen rib fractures that were in various stages of healing. He also testified that there was one fresh rib fracture that occurred at the time of death and that it was "extremely unlikely" that the new fracture was caused by CPR. The radiologist opined that it was "virtually impossible" for the older rib fractures to have been the result of accidental trauma because "[a]ccidental rib fractures, even isolated rib fractures are rare in children, and multiple rib fractures of different stages of healing just do not occur with accidental injury." The radiologist also reviewed an x-ray showing fractures to Davion's right arm. He testified that the broken right arm was the result of twisting, and that type of injury was "very common with inflicted injury and extremely rare with accidental injury."

¶5 In his defense, Dantzler claimed that the fatal injuries to Davion's ribs and chest were accidentally caused when he tried to perform CPR on Davion. Dantzler also told his father that he broke Davion's arm when he accidentally kicked Davion out of bed. Dantzler further claimed that the burn on Davion's forehead occurred when he accidentally spilled boiling water on Davion's face.

¶6 Before the trial, Dantzler argued that the prior injuries to Davion were impermissible other-acts evidence. He alleged that the evidence was inadmissible because the State could not show a nexus between Dantzler and the prior injuries. Dantzler also claimed that the evidence was not relevant and that it was unduly prejudicial. The trial court found that the prior injuries to Davion were relevant to show that Davion suffered from battered child syndrome. The court concluded that the other injuries were relevant and admissible to prove that the fatal injuries were not accidentally inflicted and to prove that Dantzler, while not the only caretaker, had the opportunity to inflict the injuries.

II. ANALYSIS

A. Other-Acts Evidence

¶7 First, Dantzler alleges that the trial court erred when it allowed the State to present evidence of Davion's other injuries, including: nineteen broken or fractured ribs, a broken arm, a burn on Davion's face, and a subdural hematoma that occurred at least two weeks before Davion's death. Dantzler claims that this evidence was inadmissible because the State did not show a nexus or a connection between Dantzler and the prior injuries. Dantzler also claims that this evidence was inadmissible because the trial court never conducted the three-step ***Sullivan*** analysis to determine whether the other-acts evidence was admissible.[2] Therefore, he argues that the evidence of Davion's other injuries was not admissible because: it did not satisfy an exception in WIS. STAT. RULE 904.04(2); it was irrelevant; and

[2] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32-33 (1998).

its probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

¶8 First, there was sufficient evidence to connect Dantzler to Davion's injuries. Other-acts evidence passes the initial hurdle of admissibility when a trial court examines all of the relevant evidence and decides that a reasonable jury could find by a preponderance of the evidence that the defendant committed the other acts. ***State v. Schindler***, 146 Wis. 2d 47, 53–54, 429 N.W.2d 110, 112–113 (Ct. App. 1988). This is a question of law that we review *de novo*. *See* ***id.***, 146 Wis. 2d at 54, 429 N.W.2d at 113.

¶9 Here, the trial court determined that there was a nexus between Dantzler and the prior injuries and we agree. Dantzler was the only adult with Davion when the fatal injuries occurred. Dantzler was also the only adult with Davion for thirty to thirty-five hours per week while Davion's mother, Ternisha Wilks, worked. The fatal injuries to Davion, a broken rib, a subdural hematoma, and trauma caused by shaking or hitting, were consistent with prior injuries to Davion, namely nineteen broken ribs and a subdural hematoma. Furthermore, two expert witnesses testified that it was highly unlikely that any of Davion's injuries was accidental. Thus, the similarity of the injuries and the circumstances surrounding them strongly imply that Dantzler, the person who admittedly caused Davion's fatal injuries, also caused the prior injuries.

¶10 Moreover, Ternisha Wilks was the only other primary caregiver for Davion. Wilks claimed that she never caused any harm to Davion. Dantzler, however, admitted that he caused a burn on Davion's face, admitted to his father that he broke Davion's arm, and testified that he shook Davion on the day of Davion's death. This evidence strongly suggests that Dantzler, not another

caregiver for Davion, inflicted Davion's injuries. *See* ***Schindler***, 146 Wis. 2d at 55, 429 N.W.2d at 113–114. Accordingly, the trial court correctly determined that there was enough evidence for the jury to conclude by a preponderance of the evidence that Dantzler inflicted Davion's prior injuries.

¶11 Second, the record shows that the trial court examined the correct factors when it admitted the other-acts evidence. The supreme court articulated a three-part test to use in determining the admissibility of other-acts evidence in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998):

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence 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? *See* WIS. STAT. § (RULE) 904.03.

Id., 216 Wis. 2d at 772–773, 576 N.W.2d at 32–33 (footnote omitted). We review a trial court's determination to admit or exclude other-acts evidence for an erroneous exercise of discretion. ***State v. Gray***, 225 Wis. 2d 39, 48, 590 N.W.2d 918, 925 (1999). Accordingly, if there is a reasonable basis for the trial court's

determination, it will be upheld. ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426, 428 (1982).

¶12 Here, the trial court concluded that the other-acts evidence of Davion's injuries was relevant and admissible to prove the absence of accident. We agree. The prior injuries tend to show that Dantzler did not accidentally injure Davion when he allegedly "panicked" and tried to administer CPR. The prior injuries were similar to the fatal injuries. There was expert testimony that the prior injuries were not accidentally inflicted. Thus, the evidence of the prior injuries suggests that it is more probable than not that Dantzler did not accidentally cause the fatal injuries to Davion. *See* ***Sullivan***, 216 Wis. 2d at 784, 576 N.W. 2d at 37 ("Evidence of other acts may be admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct.").

¶13 Additionally, the trial court concluded that the probative value of the evidence was not substantially outweighed by any unfair prejudical effect. Again, we agree. The probative value of other-acts evidence depends on its nearness in time, place, and circumstance to the alleged crime. ***State v. Speer***, 176 Wis. 2d 1101, 1117, 501 N.W.2d 429, 434 (1993). Here, the prior injuries were relevant to prove that Dantzler "recklessly cause[d] the death of … [Davion] under circumstances which show utter disregard for human life." *See* WIS. STAT. § 940.02(1). Some of the prior injuries were very similar to the fatal injuries. There is expert testimony that the prior injuries were inflicted intentionally. Moreover, all of the injuries occurred within a very short time frame—Davion was only three months old when he died. Thus, the prior injuries are high in probative value. They tended to show that Davion's injuries were not accidental. We cannot conclude that the danger of unfair prejudice substantially outweighed the significant probative value. Accordingly, the trial court's determination that the

other-acts evidence should be admitted had a reasonable basis and the trial court did not erroneously exercise its discretion.[3]

B. Misstatement of Facts

¶14 Dantzler also claims that he is entitled to a new trial because the State misrepresented key facts during a pretrial hearing to determine whether the other-acts evidence was admissible when it represented to the trial court that: (1) Dantzler was Davion's "primary caretaker"; and (2) the subdural hematoma that occurred at least two weeks before Davion's death actually occurred on the day of Davion's death. Dantzler claims that these comments "contributed to the confusion evident between the parties and the trial court as to the admissibility of the prior injuries." We disagree.

¶15 We review the prosecutor's remarks to determine whether they so infected the trial with unfairness as to make the resulting conviction a due process violation. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements … must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." ***United States v. Young***, 470 U.S. 1, 11 (1985).

[3] Dantzler also claims that his trial counsel was ineffective because he did not "sufficiently object" to the admission of the other-acts evidence. The record shows otherwise. At a pretrial hearing, Dantzler's attorney objected to the admission of the other-acts evidence. Dantzler's attorney presented several grounds for his objection, including: (1) the State could not show a nexus between Dantzler and the prior injuries; (2) the evidence was not relevant; and (3) the evidence was unduly prejudicial. Accordingly, we conclude that Dantzler's trial attorney acted reasonably under "prevailing professional norms," *see* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984), and Dantzler's claim that his trial counsel was ineffective is without merit.

¶16 First, the results of the pretrial hearing were not prejudiced by the prosecutor's statement that Dantzler was Davion's primary caregiver. While Dantzler was not necessarily "the" primary caregiver for Davion, he was "a" primary caregiver. Dantzler cared for Davion for approximately thirty to thirty-five hours a week and admitted on cross-examination that "sometimes" he was a primary caregiver. Moreover, the trial court acknowledged during the hearing that Davion's mother, Ternisha Wilks, was also a primary caregiver: "[O]bviously there is a mother involved … Needless to say, she is obviously a caretaker as well, so there is some kind of inference that someone connect[ed] to the child caused … these injuries." Thus, it is evident that the court was not "confused" by the State's comment. The court considered all of the relevant evidence, including evidence that Davion had more than one primary caregiver, when it ruled that the other-acts evidence was admissible.

¶17 Second, the State did not affirmatively misrepresent the subdural hematoma evidence to the trial court. At the pretrial hearing, the State argued that a subdural hematoma that occurred on the day that Davion died was admissible. This statement is correct—Davion suffered from a subdural hematoma at or near the time of his death. The State never discussed the earlier subdural hematoma or tried to represent that the earlier injury occurred at the time of death.

¶18 Furthermore, the earlier subdural hematoma was admissible under ***Sullivan***, as discussed extensively above. Thus, Dantzler was not prejudiced and the prosecutor's comments did not affect the fairness of the trial.[4]

[4] Dantzler devotes a section of his appellate brief to an argument that that the trial court erred when it denied his postconviction motion. Because Dantzler's postconviction motion presented the same arguments as this appeal, the trial court correctly denied his motion.

By the Court.—Judgment and order affirmed.

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