

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 2009

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. 2009AP536-CR

Cir. Ct. No. 2006CF284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL DAVID MATTSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Mattson appeals a judgment convicting him of first-degree intentional homicide for the beating death of his girlfriend, Myrna Clemons. He argues that the court improperly exercised its discretion when it allowed the State to present Clemons' preliminary hearing testimony from

a substantial battery charge against Mattson. We conclude that the court properly exercised its discretion.

¶2 WISCONSIN STAT. § 904.04(2)¹ mandates the exclusion of evidence of other acts only when it is offered to prove propensity of the defendant to commit similar crimes. *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). Other crimes evidence is admissible if it is: (1) offered for an acceptable purpose such as proof of motive, intent, absence of mistake or accident or to provide context for the crime; (2) relates to a fact or proposition that is of consequence to the determination of the action; and (3) if its probative value is not substantially outweighed by the danger of unfair prejudice. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶3 The trial court properly considered all of the factors set out in *Sullivan* and admitted Clemons' preliminary hearing testimony into evidence. Mattson was charged with beating Clemons to death with a piece of firewood on the day he was released from jail after completing a sentence for battering Clemons. The State presented evidence that Mattson battered Clemons on two separate prior occasions. At the preliminary hearing on the second offense, Clemons described the attack in which Mattson threw her to the ground, kicked her with his boots in the back and once in the head, pinned her to the floor, pushed her head to the floor approximately ten times, placed paper on her chest and lit it on fire, stepped on her neck so that she could not breathe, and shoved toast in her mouth, telling her to eat it as that is what he had to eat when Clemons had him sent to jail after the first battery. He then gave her a cigarette suggesting it was her

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

last cigarette and told her that he could kick her head off her shoulders if he wanted to.

¶4 Clemons' preliminary hearing testimony was offered for acceptable purposes under WIS. STAT. § 904.04(2). Mattson's acts retaliating against Clemons for sending him to jail on the initial battery show his intent, motive, absence of mistake or accident, and provide context for the murder. Although Mattson confessed his involvement to the police, he subsequently withdrew the confession and made equivocal statements regarding his intent and motive. Evidence that a defendant intentionally committed an act is admissible at trial for a crime where intent is an element. *State v. Hammer*, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629.

¶5 Clemons' preliminary hearing testimony was also relevant because it made a consequential fact more probable. Relevancy is determined in part by nearness in time, place and circumstance. *Sullivan*, 216 Wis. 2d at 786. The batteries occurred approximately three months before Clemons' death and shortly after Mattson was released from jail. The batteries and murder occurred in the same house, and the circumstances were similar in that they involved head injuries and retaliation for sending Mattson to jail. The crimes are inextricably intertwined.

¶6 The probative value of Clemons' preliminary hearing testimony was not substantially outweighed by the danger of unfair prejudice. Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. The crime described in Clemons' testimony was highly probative of Mattson's motive and intent and was not unfairly prejudicial. The battery was not as serious an offense as the crime charged in this case. The prejudice was also minimized or eliminated by a cautionary jury instruction. *State v. Kourtidas*, 206 Wis. 2d 574, 582-83, 557 N.W.2d 858 (Ct. App. 1996).

By the Court.—Judgment affirmed.

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

