COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0526-CR **Cir. Ct. No. 99-CF-82**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT W. NAGEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Scott W. Nagel appeals a judgment convicting him of recklessly causing bodily harm to a child by conduct that creates a high probability of great bodily harm, as a habitual criminal, contrary to WIS. STAT.

§§ 948.03(3)(c) and 939.62(1)(b).[1] Nagel argues that the trial court erred by admitting other acts evidence and allowing what Nagel claims was inadmissible expert witness testimony. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In July 1999, the State charged Nagel, as a person responsible for the welfare of a child, with recklessly causing bodily harm to that child by conduct which creates a high probability of great bodily harm. The charge arose from allegations that Nagel injured his seven-week-old daughter, Melissa. Nagel claimed that in his attempt to console Melissa, he was holding her close to his face when she jolted forward suddenly, hitting her face against Nagel's face. When Melissa subsequently appeared to stop breathing, Nagel and his wife drove her to the Barron Medical Center.

¶3 Upon her admission to the emergency room, bruising, petechiae and a small laceration were noted as appearing on Melissa's head and facial area. Further examination suggested that Melissa was suffering from subdural hematoma and periodic "seizure like movements." The complaint alleged that Melissa's injuries were consistent with shaken infant syndrome.

¶4 Nagel was convicted upon a jury's verdict and sentenced to six years in prison. This appeal followed.

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

ANALYSIS

A. OTHER ACTS EVIDENCE

¶5 Nagel argues the trial court erred by admitting other acts evidence. Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶6 Here, the court admitted evidence regarding Nagel's 1993 conviction for battery of a child. In that case, Nagel was convicted of beating his then seven-week-old son. Detective Sergeant Mark Hanson testified regarding the injuries to Nagel's son that resulted in his 1993 conviction:

> I observed severe bruising on the face of the infant, particularly around the eyes. There were – there was bruising on both eyelids, upper and lower of the child. There was bruising on the right upper cheek of the child. The child's nose was swollen and bruised. I observed that he had smaller circular bruises on his abdomen, on his right upper arm, on his right calf, and then staff rolled him over and I observed severe bruising from the child's waistline down to mid-thigh on both sides, across both buttocks, including the child's scrotum, and the right testicle of the infant was also quite swollen.

Hanson also testified regarding his investigative interview with Nagel:

> I asked him for some specifics about how the child was injured and he said I did it. I did everything. Whatever you saw, I did. I lost my temper. … I attempted to get him to explain in detail what happened to the child. I asked him to say, you know, what happened and he said I hurt him. I hit him everywhere. I asked him how the bruising occurred on the child's face and he said I hit him, and then he told

> me that he hit him several times with his hands in the face … I next asked him about the bruising to the buttocks and he stated I spanked him. Look what I done to him.

¶7 In general, "evidence of other acts is not admissible because of the 'fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged.'" ***State v. Gray***, 225 Wis. 2d 39, 49, 590 N.W.2d 918 (1999) (quoting ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998)). Consistent with this fear, the courts of this state have held that "[o]ther acts evidence may not be introduced to show that the defendant has a certain character trait and, in the present charge, acted in conformity with that trait." ***Gray***, 225 Wis. 2d at 49; *see also* ***Sullivan***, 216 Wis. 2d at 781-82.

¶8 The ***Sullivan*** court propounded a three-part analysis for determining the admissibility of other acts evidence. The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Sullivan***, 216 Wis. 2d at 772-73. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant,[2] and finally, whether its probative value outweighs the danger of unfair prejudice. ***Id.***

[2] In assessing relevance, we must first consider 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 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. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶9 Here, the court admitted the other acts evidence for an acceptable purpose under WIS. STAT. § 904.04(2)—namely, to show the absence of mistake or accident in the present case. With respect to the relevance inquiry, Nagel intimated that he may have accidentally caused Melissa's injuries. In ***State v. Bustamante***, 201 Wis. 2d 562, 574-77, 549 N.W.2d 746 (Ct. App. 1996), this court concluded that evidence of a defendant's involvement in the physical abuse of another child was relevant to prove the absence of mistake or accident when the defendant claimed he committed the charged criminal act accidentally. Thus, evidence of Nagel's 1993 conviction was relevant to negate his statements and rebut his claim of accidental injury.

¶10 With respect to the third inquiry, Nagel argues that the trial court failed to properly assess the probative value of the other acts evidence and further failed to balance that probative value against the danger of unfair prejudice. We are not persuaded. The probative value of other acts evidence depends in part upon its "nearness in time, place and circumstance to the alleged crime or element sought to be proved." ***State v. Plymesser***, 172 Wis. 2d 583, 595, 493 N.W.2d 367 (1992).

¶11 Here, Nagel's son and daughter were extremely close in age (both around seven weeks old) at the time of the incidents leading to their respective injuries. At the time of their injuries, both children were in Nagel's physical care and both were crying and fussing. Finally, both infants received serious injuries requiring emergency medical attention. Although the incidents were five years apart, other acts evidence is not rendered irrelevant if the remoteness is balanced by the similarity of the two incidents. *See* ***State v. Mink***, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988).

¶12 Finally, the trial court properly concluded that the probative value of the evidence outweighed the danger of unfair prejudice. "Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means." ***Sullivan***, 216 Wis. 2d at 789-90. The concern is that a jury may conclude that because the defendant committed the prior acts, he necessarily committed the charged crimes. ***Id.*** at 790. In ***State v. Davidson***, 2000 WI 91, 236 Wis. 2d 537, ¶75, 613 N.W.2d 606, our supreme court recognized, however, that "similarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." Moreover, the jury was twice instructed that evidence of Nagel's 1993 conviction could be considered only with regard to the absence of mistake or accident. The jury was specifically told not to consider the other acts evidence as proof "that the defendant is a bad person and for that reason is guilty of the offense charged." We presume the jury followed the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). We therefore conclude that the trial court reasonably exercised its discretion by admitting the other acts evidence.

B. ADMISSION OF EXPERT WITNESS TESTIMONY

¶13 Nagel argues that the trial court erred by allowing what Nagel claims was inadmissible expert witness testimony. The admission of expert testimony is within the trial court's discretion. ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995). This court will not reverse the trial court's decision to admit or exclude expert testimony if the decision was reasonable and if "it was made 'in accordance with accepted legal standards and in accordance with the facts of the record.'" ***Id.***

¶14 At trial, the State sought to introduce Dr. Janice Ophoven as a trial witness. Ophoven, a forensic pathologist, had issued a written opinion stating: "Based on the medical records and investigative reports provided to me, it is my opinion that [Melissa] suffered her serious and probably permanent injuries at the hand of her father." Nagel objected to the State's request to call Ophoven at trial, arguing that Ophoven's opinion as to who committed the acts would invade the province of the jury and that Ophoven's expertise "goes to medical issues and not issues of who may have caused the certain condition." In response, the State argued that Ophoven would testify "that the shaking would have occurred just moments before the child stopped breathing," and that evidence, combined with the fact that Nagel was the only person with the child at the time of her injury would allow Ophoven to opine that Nagel inflicted the injuries on his daughter. The circuit court agreed, noting that the underlying facts supporting Ophoven's opinion could be attacked on cross-examination.

¶15 On direct examination, Ophoven testified that Melissa suffered severe, nonaccidental head trauma as the result of intense shaking and possible impact. Ophoven further opined that a seven-week-old child is not sufficiently developed to "head-butt" or lunge forward with enough force to cause the injuries she sustained. Ultimately, Ophoven testified: "It's my opinion based on the materials that I've been provided and my examination and my experience and training as a forensic pathologist, that this child suffered head injury during the time that she was in the custody of her father."

¶16 On cross-examination, defense counsel asked: "Doctor, make sure I got this right. Did you just tell us that you suffered—indicated you felt she suffered head injuries at the hand of her father?" Ophoven responded: "While she was in the custody of her father, yes, while she was with her father."

¶17 Nagel claims the trial court erroneously allowed Ophoven "to testify as to a factual determination traditionally made by the jury." In other words, Nagel believes Ophoven's testimony was tantamount to an expert opinion that Nagel was guilty of the charged crime. We disagree.

¶18 First, Nagel's cross-examination resulted in Ophoven's testimony that Melissa's injuries were caused by Nagel. On direct examination, the State limited Ophoven's opinion to the nature and timing of Melissa's injuries. Although this testimony supports the inference that Nagel caused Melissa's injuries, it was defense counsel that asked whom Ophoven believed actually inflicted the injuries. Because Nagel caused the evidence to be introduced on cross-examination, he cannot now claim reversible error as a result of the admission. *See* ***Ohler v. United States***, 529 U.S. 753, 755 (2000).

¶19 Moreover, Nagel fails to appreciate the distinction between opinions regarding guilt and opinions regarding cause. Ophoven did not opine that Nagel was guilty of the charged crime; rather, she testified that in her opinion, Nagel caused Melissa's injuries. The jury was still left with the task of applying the facts of record to the controlling principles of law to determine whether Nagel was guilty. We discern no error.

By the Court.—Judgment affirmed.

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