

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 3, 2004**

Cornelia G. Clark  
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. 02-2558-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 01 CF 1336**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KATRINA D. CAMPBELL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Katrina D. Campbell appeals from a judgment entered after a jury found her guilty of two counts of physical abuse of a child in violation of WIS. STAT. § 948.03(2)(b) (2001-02).<sup>1</sup> Campbell claims the trial court

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

erroneously exercised its discretion: (1) in allowing evidence in as to Campbell's "consciousness of guilt;" (2) in instructing the jury; (3) in allowing evidence in of prior abuse; (4) in allowing testimony that "child abuse" occurred; and (5) in denying Campbell's motion for a mistrial. Because the trial court's evidentiary admission constituted harmless error, because the challenge to the jury instruction was waived, and because Campbell inadequately briefed the remaining issues, we affirm.

## I. BACKGROUND

¶2 Campbell was charged with two counts of physical abuse of a child. The charges stemmed from an incident which occurred at her home on March 7, 2001. The first count related to her ten-year-old daughter, Kayshawn, and the second count related to her eight-year-old son, Kevin. Both children were getting ready to go to school, when Campbell heard what she believed to be evidence that they were hitting their three-year-old sister. As a result, Campbell "whooped" both Kayshawn and Kevin with an extension cord.

¶3 Kevin reported the incident to school personnel. As a result, both children were taken to the Child Protection Center, where medical exams were conducted. Michael Scahill, a nurse practitioner, examined Kevin. Scahill testified that Kevin had red linear marks on his left arm and his back, and a red oval mark on his right shoulder. All were fairly fresh wounds and consistent with Kevin's account that his mother whipped him with an extension cord. Scahill also noted a mark on Kevin's left arm that showed recent scabbing and an old scar on his upper right leg, which Kevin stated resulted from earlier "whoopings" by his mother.

¶4 Dr. Judy Guinn, a pediatrician, examined Kayshawn. Guinn testified that Kayshawn had two red linear marks on her left arm and six red linear marks on her legs. Guinn also observed a red linear mark on Kayshawn's right arm and a smaller scabbed linear mark on the same arm. Kayshawn reported that the red marks were from the "whooping" her mother had inflicted on March 7 and that her mother had also "whooped" her on March 2. Guinn testified that the marks were the result of physical abuse.

¶5 At trial, photographs depicting the children's injuries were introduced into evidence. Campbell's defense was that her conduct was permissible corporal punishment. Campbell did not testify in her own defense, but presented her case through the statement she gave to an investigating police officer. Her statement indicated that she whipped her two children with a switch because they were hitting and punching their three-year-old sister while Campbell was in the shower.

¶6 During the trial, Police Officer James Zastrow testified that he went to speak with Campbell at her apartment on March 9, 2001. When asked about Campbell's demeanor, he responded that she was "storming around the apartment, throwing things. There came a point where the officers ... made the decision ... to handcuff her, to prevent injury to us and her." Defense counsel objected to this testimony. The trial court allowed the testimony to stand, agreeing with the State that it was probative of Campbell's consciousness of guilt. The trial court gave the jury a cautionary instruction relative to this testimony.

¶7 Ultimately, the jury found Campbell guilty of both counts. She was sentenced to two years' initial confinement and eight years' extended supervision on the first count and on the second count, sentence was withheld with an eight-

year concurrent probation imposed. Judgment was entered. Campbell now appeals.

## II. DISCUSSION

¶8 Campbell's first contention is that the trial court erroneously exercised its discretion when it allowed the police officer to testify about Campbell's bad behavior when the police arrived at her apartment. She argues that this evidence constituted prior bad acts and should have been excluded because it did not satisfy the requisites of WIS. STAT. § 904.04. We are not persuaded by Campbell's contention because even if the evidence was inadmissible, its admission constituted harmless error.

¶9 In reviewing an evidentiary decision, our standard of review is deferential. Whether to admit or exclude evidence is a ruling within the discretion of the trial court. *State v. Hammer*, 2000 WI 92, ¶21, 236 Wis. 2d 686, 613 N.W.2d 629. If there is a reasonable basis for the trial court's decision, we will not disturb the trial court's ruling. *Id.* "Other acts" evidence is not admissible as character evidence to show the defendant acted in conformity therewith. WIS. STAT. § 904.04. This type of evidence may be admitted, however, if relevant, for other purposes—such as motive, opportunity, intent, preparation, plan, knowledge, identification or absence of mistake or accident. WIS. STAT. § 904.04(2). Our supreme court set forth a three-part test to use in analyzing whether other acts evidence should be admitted: (1) the evidence must be offered for a permissible purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be outweighed by the danger or unfair prejudice. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶10 Campbell’s contention rests on her belief that the demeanor testimony constituted improper WIS. STAT. § 904.04 or “other acts” evidence. The State does not dispute that there was an inadequate analysis relative to § 904.04 or the *Sullivan* factors. The State suggests that the trial court did not need to engage in the other acts analysis because this evidence does not fall into the § 904.04 category, citing case law declaring that evidence which tends to show “consciousness of guilt” is not evidence of other acts pursuant to § 904.04. *State v. Neuser*, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995); *see also Gauthier v. State*, 28 Wis. 2d 412, 420, 137 N.W.2d 101 (1965) (Flight, resisting arrest, concealment and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.).

¶11 Here, the challenged evidence was Zastrow’s testimony that Campbell was “storming around the apartment, throwing things” when the officers came into her apartment to question her about the allegations. As a result, the officers felt compelled to handcuff Campbell for safety reasons. The State argued that this testimony demonstrated “consciousness of guilt”—that a person not guilty of physical abuse to a child would not respond in such a manner when the police express a desire to investigate the incident. The trial court agreed and failed to complete the *Sullivan* analysis.

¶12 As an alternative argument, the State contends that permitting Zastrow’s testimony as to Campbell’s demeanor constituted harmless error. We resolve this issue on the alternative argument and hold that the admission constituted harmless error. An error is harmless if there is no reasonable possibility that the error contributed to the result in the case. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Here, the objectionable testimony was brief. The trial court gave a cautionary instruction regarding the testimony

instructing the jury of the limited purpose of the testimony. Moreover, the State's case was very strong. Both children testified at the trial. Scahill and Guinn corroborated the children's testimony with medical evidence. Campbell admitted whipping the children, but claimed it was because they were misbehaving. Even if the jury accepted Campbell's defense of corporal punishment, it is clear on this record that Campbell's actions exceeded any semblance of reasonable discipline. Her conduct was excessive and constituted physical abuse. This decision would have been reached even without Zastrow's testimony regarding Campbell's conduct on March 9. Accordingly, the admission, even if erroneous, was harmless. Because we have concluded the admission was harmless, we need not engage in any further analysis on this issue. *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938). In addition, Campbell failed to reply to the State's response brief, and therefore concedes the point. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶13 Campbell also challenges the jury instruction, which was given as a curative instruction to ensure that the jury did not use the challenged evidence as character evidence. Undoubtedly, the trial court muddled the jury instruction somewhat by stating that "you are not to consider her conduct as any character evidence or predisposition toward committing a crime other than the one charged." Nonetheless, in the context of the entire instruction, it was clear that the jury was being told not to use this evidence as character evidence, but rather that it was admitted solely as evidence on consciousness of guilt.

¶14 Moreover, the State contends that Campbell waived the right to raise this issue by failing to object during the instruction conference. Campbell failed to reply to the waiver argument and, therefore, concedes it. *Id.*

¶15 Campbell raises three additional claims of error: that the trial court erred in allowing testimony of prior abuse; that the trial court erred in allowing opinion testimony that “child abuse” occurred; and that the trial court should have granted the motion for mistrial. The State responds that each of these arguments is inadequately briefed and lacks any citation to authority. We agree and decline to address Campbell’s last three issues. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address the merits of arguments inadequately briefed and without reference to legal authority).

¶16 Moreover, Campbell failed to reply to the State’s statement that the last three issues were inadequately briefed and, therefore, concedes these issues. *See Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109.

*By the Court.*—Judgment affirmed.

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

