COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2011

A. John Voelker
Acting 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. 2010AP1294-CR **Cir. Ct. No. 2008CF123**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH WAYNE EVANS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Joseph Evans appeals from a judgment of conviction for the first-degree intentional homicide of his estranged wife and criminal damage to property. Evans challenges the admissibility of other acts evidence and expert testimony. We reject Evans' arguments and affirm.

¶2 A criminal complaint alleged that Evans broke into the Marinette trailer house where his estranged wife, Dina, was staying with a friend, Brenda Vohs. Evans allegedly kicked in Dina's television set, sliced the arm of a couch, and splattered paint on the couch, love seat, hope chest, curtains and a clock. Three weeks later, Evans fatally shot Dina in the chest.

¶3 Evans was convicted following a jury trial of first-degree intentional homicide and criminal damage to property. The circuit court imposed a sentence of life imprisonment without the possibility of extended supervision on the homicide conviction. The court imposed a concurrent nine-month jail sentence on the criminal damage to property conviction. Evans now appeals.

¶4 Evans argues the circuit court erroneously exercised its discretion by admitting four other acts incidents involving a former girlfriend, Lorea S.[1] Evans dated Lorea when she was in eighth and ninth grade and he was eighteen years old.

¶5 The first other acts incident involved Lorea recounting an occasion when Evans told her to leave after she refused to make him dinner. After Evans told her to leave, she was walking down the street when Evans drove up and told her to get in the car. When she refused, Evans grabbed her by the back of the hair, and pulled her into the car, smashing her face against the rim of the car door. Evans told Lorea to tell her mother that she had slipped and fallen on some ice. At trial, Evans denied that this incident occurred.

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[1] Evans uses the phrase "abused its discretion." Since 1992, we have used the phrase erroneous exercise of discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

¶6 The second other acts incident occurred when Lorea told Evans the relationship was over. Evans parked his van in Lorea's mother's driveway, connected the garden hose to the van's exhaust pipe, and "tried to kill himself with carbon monoxide." Early in the morning, Lorea's mother discovered him hyperventilating on her couch. Lorea said that when a rescue squad attempted to put Evans on a gurney, he fought with them because he wanted to hold Lorea's hand. Lorea later received a call at school, asking her to come to the hospital because Evans would not comply with a blood draw unless Lorea held his hand. At the hospital, Evans told Lorea, "If I can't have you, nobody's going to have you." Lorea said Evans made a similar remark when she told Evans that she was tired of living "in danger" and "getting beat up all the time." At trial, Evans denied that these events took place.

¶7 In a third other acts incident, Evans drove up to Lorea while she was walking with a cousin and a classmate. Evans assumed that the classmate was Lorea's boyfriend, "jumped out of the car" and vowed to "jack [the classmate's] jaw." Evans called the classmate "a fuck[i]n' punk." At trial, Evans also denied this incident occurred.

¶8 In a fourth incident,[2] Evans' brother told police that Evans was "very depressed" over a break up with Lorea. Evans went outside and shot himself in the hand, severing the pinkie finger on his left hand. His brother informed police that Evans told their mother he "forgot the safety" on the gun.

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[2] Evans does not include this incident in his statement of issues but discusses it in passing in the argument section of his brief.

¶9 Whether to admit other acts evidence is within the circuit court's discretion. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). Moreover, if the circuit court fails to adequately set forth its reasoning, we "independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." ***Id.*** at 781. The question is not whether we would have allowed admission of the evidence in question. *See* ***State v. Kimberly B.***, 2005 WI App 115, ¶38, 283 Wis. 2d 731, 699 N.W.2d 641. Rather, the circuit court's decision will be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***State v. Payano***, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted).

¶10 In ***Sullivan***, our supreme court set forth a three-part analysis to determine the admissibility of other acts evidence: (1) the evidence must be offered for an admissible purpose under WIS. STAT. § 904.04(2);[3] (2) the evidence must be relevant; and (3) the probative value of the other acts evidence must not be substantially outweighed by the considerations set forth in WIS. STAT. § 904.03. *See* ***Sullivan***, 216 Wis. 2d at 772-73.

¶11 Under the first step of the ***Sullivan*** analysis, Evans concedes that the evidence was offered for an admissible purpose, to rebut Evans' claim of

[3] References to Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

accident.[4] *See* WIS. STAT. § 904.04(2). The other acts evidence involving Lorea was also relevant under the second step of the ***Sullivan*** analysis. The evidence that Evans smashed Lorea's face into the rim of the car door and the "jaw jacking" incident was relevant to rebut the claim of accident and make it more probable that Evans shot Dina intentionally. With respect to motive, the face smashing incident also reasonably suggested that Evans sought to exercise power and control over his intimate partners by employing physical violence against them. The "jaw jacking" incident reasonably suggested Evans was willing to attack anyone who jeopardized his "ownership" of an intimate partner.

¶12 Furthermore, all of the Lorea evidence was relevant to establish the "context" in which the shooting death of Dina occurred. As the circuit court noted, the case could not be fairly evaluated unless the jury had a better picture of the entire relationship in determining whether this was an accidental death or an intentional homicide. "Intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988). The other acts evidence taken in context tended to show that domestic abuse characterized Evans' relationships with intimate partners, and that the shooting death of Dina

[4] Although Evans concedes the first step of the analysis is satisfied for purposes of showing absence of mistake or accident, the prosecutor also properly offered the evidence to suggest motive or intent. The State's theory of the case was that Evans was motivated by a desire for power and control over Dina, who was in the process of divorcing him at the time of the murder, just as Evans used violence for power and control over Lorea S. when she was his girlfriend. *See* ***Plymesser***, 172 Wis. 2d at 594. The Lorea evidence was also properly offered to establish the context in which the shooting death of Dina occurred as an intentional act of domestic abuse. In effect, evidence of Evans' acts and threats of violence during his relationship with Lorea provide insight into Evans' relationships with intimate partners, especially how Evans handled rejection and jealousy.

represented Evans' ultimate act of power and control over an intimate partner who was leaving a relationship with him.

¶13 Under the third step of the ***Sullivan*** analysis, the circuit court reasonably rejected Evans' argument that the probative value of the other acts evidence was substantially outweighed by the risk of unfair prejudice under WIS. STAT. § 904.03. "The probative value of [other acts] evidence is a function of its nearness in time, place and circumstances to the crime sought to be proved." ***State v. Clark***, 179 Wis. 2d 484, 494, 507 N.W.2d 172 (Ct. App. 1993).

¶14 Here, the other acts evidence is undeniably remote. Remoteness in time does not per se render the other acts evidence irrelevant, but it may do so when the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and the other acts evidence. *See* ***State v. Mink***, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988). The Lorea other acts incidents occurred in 1983-84, while the charged crimes against Evans occurred in July 2008. However, we concluded in ***Mink*** that a gap of twenty-two years between the prior acts and the charged crime of child sexual assault was not too remote for admitting other acts evidence. ***Id.*** at 16.

¶15 Furthermore, there are many similarities in circumstances between the incidents at issue. As mentioned, the other acts evidence tended to show that domestic abuse characterized Evans' relationship with intimate partners. Evans' relationships with Lorea and Dina bore parallel similarities marked by threats and violence, including gun violence, especially when the intimate partner had rejected Evans and he believed they had found a replacement for him. Furthermore, Evans sought in each relationship to excuse his conduct or hide responsibility by

claiming an accident.[5] The other acts evidence in this case was therefore highly probative of whether Evans intentionally shot Dina.

¶16 Other acts evidence is prejudicial by nature, but exclusion is warranted only when the evidence would appeal to juror sympathy, arouse the jury's sense of horror, or promote a desire to punish. *See* ***Sullivan***, 216 Wis. 2d at 789-90. The circuit court in this case minimized the risk of unfair prejudice to Evans by instructing the jurors that they could not consider the other acts evidence to conclude that Evans was of bad character or had acted in conformity therewith to commit the charged crimes. The jury was instructed to give the evidence the weight "you determine it deserves" and not to use the evidence to conclude "the defendant is a bad person, and for that reason is guilty of the offenses charged." Jurors are presumed to follow such cautionary instructions, which "eliminate or minimize the potential for unfair prejudice." ***State v. Hammer***, 2000 WI 92, ¶36, 236 Wis. 2d 686, 613 N.W.2d 629; ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Accordingly, the circuit court did not err by concluding the probative value was not substantially outweighed by the risk of unfair prejudice to the defendant.

¶17 Regardless, even if we could assume error in admitting the other acts evidence, we would conclude the error was harmless. In this regard, Evans fails to

[5] In determining whether the earlier act was too remote in time to be probative, the court also considers "the opportunities presented over that period for the defendant to repeat the acts." *See* ***State v. Clark***, 179 Wis. 2d 484, 494-95, 507 N.W.2d 172 (Ct. App. 1993). Even by Evans' own reckoning, he began his longstanding and stormy relationship with Dina in approximately October 1984, only a month after the "hand-shooting" incident that marked his break-up with Lorea. Apart from the occasions when Evans and Dina were separated or first divorced in 2001, Evans had limited opportunities to establish other intimate relationships. Therefore, it is unlikely that he had many opportunities to engage in domestic violence when relationships were terminated. *See* ***id.*** at 495.

reply to the State's harmless error argument, and we therefore deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). But even on the merits, we agree with the State's harmless error analysis.

¶18 First, the other acts evidence was limited in scope, encompassing only a small amount of testimony over a four-day trial. As mentioned previously, the circuit court also instructed the jurors to consider the evidence only for limited purposes and not to conclude that Evans was acting in conformity with a bad character. In addition, the other acts involving Lorea resembled other acts of domestic violence against Dina herself, which Evans does not challenge. In that regard, Evans himself testified, "We fought a lot, bust[ed] things up." Evans recalled "four [or] five restraining orders." Evans' daughter testified that Evans threatened Dina's safety "[a]ll the time," and that Evans told Dina "[s]he would go six feet under."

¶19 The evidence of first-degree intentional homicide was otherwise also overwhelming.[6] By way of example, a neighbor heard arguing inside Evans' trailer just before hearing a gunshot. The neighbor also testified that after the shooting, Evans' daughter drove up while Evans was outside, and Evans swore at her and told her to leave. Jurors also heard evidence that Evans was especially angry on the day of the shooting, because he had just been served with a temporary restraining order on Dina's behalf.

[6] Evans admitted damaging Dina's property, and any error in admitting the other acts evidence could not have reasonably affected the guilty verdict on that count.

¶20 Evans also believed that Dina was involved with another man. Evans admitted, "I told [Dina] if she's with him, I'll go in here and punch him right in the fuck[i]n' mouth." Evans also admitted leaving "pretty nasty messages" on Dina's phone. The messages were played to the jury.[7] Dina had recently moved out, and was planning to divorce him. Dina's sister testified that Evans said, "he had a pistol, and he was going to hunt [Dina] down." Although Evans denied making this comment, he admitted telling Dina's sister, "sometimes that bitch [Dina] can get me so pissed off … that I could kill her."

¶21 After the fatal shooting, Evans also gave inconsistent statements to police. Evans first said that Dina "was around when [he] was cleaning his gun," but later claimed that Dina was shot when she grabbed his arm or hand as he purportedly was placing the gun on a speaker. Jurors also knew that the gun was purchased only a week before the fatal shooting, with Evans going to the trouble of enlisting his stepbrother to make the purchase for him, because Evans had been unable to buy a gun himself one month earlier. Jurors also heard that after the shooting death of Dina, Evans struck up a relationship with another woman named Jessica Heinze and vowed to harm anyone who came between them.

¶22 Evans next argues the circuit court erroneously exercised its discretion in admitting expert witness testimony from Darald Hanusa, Ph.D. Evans contends that Hanusa "set forth a personality profile of persons who commit domestic violence," by telling the jury that the risk for lethal violence increases

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[7] Neither the tape recordings nor the transcripts of the voicemail messages are part of the record on appeal. However, the prosecutor reminded jurors of Evans' words at closing argument. For example, the prosecutor noted that Evans "said he was going to put the cell[]phone in Tom Wittock's rectum and have it on vibrate and call him so he could vibrate his rectum, and how he's going to punch him."

seventy-five percent when an abused partner tries to leave the batterer. Evans also claims Hanusa's testimony "was nothing if it was not an expression of Hanusa's opinion that Joseph Evans was lying about accidentally shooting Dina …." Evans insists, "Though he was not specifically asked the question, this evidence certainly invited the jury to infer that Hanusa disbelieves Evans' testimony that the shot was fired accidentally."

¶23 As a threshold matter, Evans does not dispute that Hanusa was eminently qualified as an expert witness to testify on the "lethality" risk factors associated with violent domestic abusers, including relevant research data. Hanusa is a clinical psychologist at the University of Wisconsin who has worked with thousands of domestic batterers and demonstrated at trial fingertip familiarity with research in the field.

¶24 Hanusa also testified regarding information beyond the ken of lay jurors. Hanusa explained that women stay in abusive relationships out of fear that their partners will make good on threats to kill them, their children or themselves. He described the relationships as built on the male partner's "possessiveness and control" of the female through violence and threats, with homicide being the ultimate form of control. Hanusa also testified there is a progression from destruction of property to physical abuse. He noted that in these circumstances "when women leave their partner, they're at a 75 percent greater risk of being killed and 75 percent greater risk of the most severe kinds of violence." Hanusa stated that domestic batterers are masters of manipulation and good at making excuses about their abusive behavior. Hanusa also gave examples of "lethality" factors commonly found among the most risky domestic batterers, including prior acts and threats of violence, weapon access, victim access, dehumanizing the victim and lack of remorse.

¶25 Hanusa neither impermissibly usurped the jury's determination on Evans' credibility, nor offered an impermissible opinion on whether Evans fit the profile of a lethal domestic abuser. In fact, Hanusa refrained from providing an opinion on Evans' credibility or whether he met the "lethality" risk criteria. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Hanusa simply provided a framework for evaluating properly admitted other acts evidence relating to a defendant's state of mind at the time of the alleged crime. An appropriate balance was reached by providing jurors information about the "lethality" risk factors characteristic of violent domestic abusers, so that the jurors could themselves evaluate whether such factors applied to Evans. The circuit court properly exercised its discretion in admitting Hanusa's expert testimony.[8]

By the Court.—Judgment affirmed.

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

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[8] We need not reach the State's argument that any error that could be assumed in admitting the expert testimony was harmless in any event. Evans does not reply to this argument, and we deem the issue conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Nevertheless, we re-emphasize that Hanusa cautioned jurors that he was offering no predictions as to whether Evans exhibited characteristics of violent domestic abusers, or whether he intentionally killed Dina. Moreover, the circuit court instructed jurors that they "are not bound by any expert's opinion." We also emphasize that the relevance of Hanusa's expert testimony depended to a large extent upon other acts of violence toward Dina, which Evans does not challenge.