

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-3039-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**CAROL A. DAVIS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Racine County:  
DENNIS J. FLYNN, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Carol A. Davis appeals from a judgment convicting her, as a party to the crime, of possession of cocaine with intent to deliver within 1000 feet of a school in violation of §§ 161.16(2)(b), 161.41(1m)(c)1, 161.49 and 939.05, STATS., 1991-92. The sole issue on appeal is whether the trial court erroneously exercised its discretion when it admitted other acts evidence. Because we conclude that the trial court properly exercised its discretion in admitting the evidence, we affirm the judgment.

Davis's conviction arose from the execution of a search warrant at a suspected drug house on August 13, 1993. Davis's brother and his girlfriend lived at the house, but Davis did not. At trial, an officer who participated in the execution of the warrant testified that while other officers knocked on the door of the house and attempted to enter, he looked through a window on the front porch and could see a front room, a middle room and a kitchen beyond the middle room. He testified that he observed a woman, whom he later identified as Davis, on her knees in the middle room. He testified that he observed her reach into a cabinet, remove a plastic bag, and hand it to another person in the doorway leading to the kitchen. Testimony further indicated that the kitchen provided access to the first-floor bathroom, and that police found an aluminum packet containing cocaine behind the toilet in that bathroom after entering the house. Other evidence of cocaine dealing was also found in the house, and Davis's brother admitted to police that he was selling cocaine.

Testimony at trial indicated that entry into the home was obtained only after the police announced their presence and, when no one responded by opening the door, battered it down. Both the front and the back door were subsequently discovered to have been barricaded.

The trial court also admitted evidence concerning the execution of a search warrant at Davis's home on August 5, 1992. Police officers testified that someone named "Carolyn" was the target of the search and that during the execution of the warrant one officer was positioned in such a way that he observed Davis run out onto the front porch of the house and put her right arm over the railing. The officer subsequently retrieved a bag of rock cocaine packaged in plastic from below the porch. In addition, an officer testified that after Davis was transported to the police station in a paddy wagon, he found two similar baggies of crack cocaine on the floor by the bench where she had been sitting in the vehicle.

Davis contends that the evidence regarding the August 1992 search of her home (the other acts evidence) was not relevant to any statutory exception under § 904.04(2), STATS., and even if relevant, was unduly prejudicial. Section 904.04(2) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. However, it does not exclude such evidence when offered for other purposes, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

The trial court's admission of evidence under § 904.04(2), STATS., involves the exercise of discretion and will not be disturbed where the trial court has acted in accordance with accepted legal standards and the facts of record. *State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). In determining whether to admit other acts evidence, a trial court must apply a two-pronged test. *State v. Johnson*, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). First, the court must determine whether the other acts evidence fits within one of the exceptions in § 904.04(2). *Johnson*, 184 Wis.2d at 336, 516 N.W.2d at 466. It must then determine under § 904.03, STATS., whether any prejudice resulting from the admission of such evidence substantially outweighs its probative value. *Johnson*, 184 Wis.2d at 337, 516 N.W.2d at 466. A threshold question implicit within the two-pronged analysis is whether the other acts evidence is relevant to an issue in the case. *Id.* at 337, 516 N.W.2d at 466-67.

The trial court admitted the other acts evidence in this case after determining that it was relevant to intent and knowledge and was not unduly prejudicial. We agree with the trial court's conclusions. In fact, because this evidence is directly relevant to Davis's intent and knowledge at the time she was observed removing material from the cabinet and transferring it to someone else, we believe this is a classic example of when other acts evidence is properly admitted.

As pointed out by the State, intent and knowledge are elements of the offense of being a party to the crime of possession of cocaine with intent to deliver. To convict Davis as a direct actor, the State had to prove beyond a reasonable doubt that Davis knew or believed that she possessed a controlled substance and acted with the specific intent to deliver it. *See* WIS J I—CRIMINAL 6035. To convict her as an aider and abetter, it had to prove that she acted with the knowledge that another person, such as her brother, possessed a controlled substance with the intent to deliver it, that she rendered aid to him in that endeavor, and that she consciously desired or intended to render such

assistance. See *State v. Hecht*, 116 Wis.2d 605, 620, 342 N.W.2d 721, 729 (1984). Moreover, Davis never conceded the elements of intent and knowledge, and kept them in dispute by arguing that her presence at her brother's house was purely innocent.

Because intent and knowledge were elements of the crime charged, other acts evidence which tended to show intent and knowledge was properly admitted. See *Clark*, 179 Wis.2d at 493-94, 507 N.W.2d at 175. In this case, evidence that Davis had previously attempted to conceal controlled substances during the execution of a search warrant tended to establish that she knew what she was doing when she removed cocaine from the cabinet and handed it to someone else during the search of her brother's house, and that she intended to help conceal the cocaine from police. Cf. *State v. Bedker*, 149 Wis.2d 257, 263-64, 440 N.W.2d 802, 804 (Ct. App. 1989). Moreover, even if the cocaine did not belong to Davis and even if she had no intention of selling it herself, the other acts evidence was relevant to show that she intentionally and knowingly acted to aid her brother's cocaine dealing by trying to conceal evidence of such activity from the police during the execution of the warrant. It thus rebutted Davis's claim that she was an innocent bystander at the scene.

The probative value of other acts evidence is partially dependent on its nearness in time, place and circumstance to the alleged act sought to be proved. *Johnson*, 184 Wis.2d at 339, 516 N.W.2d at 467. Here, the other acts evidence related to a search which had occurred only one year earlier, and thus was clearly not so remote as to be irrelevant. See *Clark*, 179 Wis.2d at 494-95, 507 N.W.2d at 176. In addition, the circumstances underlying the other acts evidence and the charged crime were very similar, involving attempts to conceal or dispose of controlled substances to prevent their discovery when police arrived to execute a search warrant. While the searches occurred at different residences, that fact alone did not render the other acts evidence irrelevant.

While evidence concerning the August 1992 search of Davis's home was clearly prejudicial to her defense, the test for admission of relevant other acts evidence is whether it causes unfair prejudice. *Johnson*, 184 Wis.2d at 340, 516 N.W.2d at 468. Evidence is unfairly prejudicial when it tends to influence the outcome of the case by improper means. *Id.* In the context of other crimes evidence, prejudice refers to the potential harm in a jury

concluding that because a defendant committed other bad acts he necessarily committed the crime charged. *Clark*, 179 Wis.2d at 496, 507 N.W.2d at 177.

Here, the trial court instructed the jury that it could use the other acts evidence in considering intent and knowledge, but could not use it to conclude that Davis had a certain character or character trait and acted in conformity therewith with respect to the crime charged. The trial court gave this instruction twice during the presentation of the evidence and again at the close of trial. When an admonitory instruction of this nature is given, prejudice to a defendant is presumably erased from the jury's mind. *State v. Shillcutt*, 116 Wis.2d 227, 238, 341 N.W.2d 716, 721 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Based on this instruction and the obvious probative value of the evidence, the trial court properly exercised its discretion in admitting evidence of the August 1992 search.<sup>1</sup> *See id.*

*By the Court.*— Judgment affirmed.

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

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<sup>1</sup> Davis appears to contend that even if the evidence that she dropped a packet of cocaine off the porch during the August 1992 search was admissible, the evidence that she was the target of the search and that cocaine was found in the paddy wagon was unnecessary and unduly prejudicial. We disagree. Evidence that cocaine was found where she was sitting in the paddy wagon provided additional evidence of her intent to conceal or dispose of evidence of drug trafficking. In addition, the jurors heard testimony that the 1992 search warrant was directed at her residence without objection from Davis. They thus most likely inferred that she was the target of the search, even without direct testimony on that subject. In any event, inclusion of information about the purpose of the 1992 search assisted the jury in understanding the incriminating nature of Davis's actions during the execution of the 1992 warrant. It was thus relevant and not unduly prejudicial.