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You are hereby notified that the Court has entered the following opinion and order:

2015AP2529-CR State of Wisconsin v. Octavius Jordan
(L.C. # 2014CF002407)

Before Brennan, P.J., and Kessler and Brash, JJ.

Octavius Jordan appeals from convictions for one count of second-degree sexual assault with threat of force and one count of substantial battery with the intent to cause bodily harm, contrary to WIS. STAT. §§ 940.225(2)(a) and 940.19(2) (2013-14).[1] The sole issue presented on appeal is whether the trial court erroneously exercised its discretion when it allowed the State to present certain other acts evidence at trial pursuant to WIS. STAT. § 904.04(2). We conclude at

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). We summarily affirm the judgment.

The criminal complaint stated that in May 2014, both Jordan and the victim, D.L., were homeless and living on the street. The complaint alleged that Jordan and D.L. stayed at the same location over a period of eighteen days, during which Jordan "frequently asked [D.L.] for mouth to penis sexual intercourse or penis to vagina sexual intercourse," and if D.L. refused, Jordan "would beat her." D.L. was diagnosed with broken ribs and received medical attention at a hospital. The complaint alleged that shortly after D.L. was released from the hospital, she was riding in a car with a pastor who was assisting her when they saw Jordan on the street. Jordan asked D.L. if she had gotten out of the hospital and then he told the pastor that he was the person who had beaten D.L.

The State filed a written motion to admit other acts evidence concerning a September 2012 incident with another homeless woman, L.N., that led to Jordan's conviction for two counts of fourth-degree sexual assault. According to the motion, Jordan met L.N. on the street, invited her to drink beer outside a nearby house, asked her for penis-to-mouth sexual intercourse, and hit and choked L.N. when she refused. Jordan then forced L.N. to engage in both penis-to-mouth sexual intercourse and penis-to-anus sexual intercourse. The State asserted that evidence concerning the incident with L.N. should be admitted at Jordan's trial pursuant to WIS. STAT. § 904.04(2).

The trial court held a pretrial motion hearing and ruled that L.N.'s testimony could be admitted to prove opportunity, intent, plan or scheme, and absence of mistake or accident.

See ***id.*** Both D.L. and L.N. testified at trial. Jordan's appellate brief summarizes D.L.'s key testimony as follows:

> During the Spring of 2014, [D.L.] was homeless and living under a bridge. She became involved in a romantic relationship with the appellant, Mr. Octavius Jordan. In the beginning, it was a consensual, sexual relationship. D.L. testified that during the timeframe of May 11 to May 29, 2014, Mr. Jordan was violent with her almost every day. It would mostly happen after he had been drinking. She suffered injuries including six fractured ribs, black eyes and a bruised face.
>
> D.L. and Mr. Jordan stayed together under the bridge in May of 2014. She testified that Mr. Jordan would request sexual intercourse or oral sex and if she said no, he would slap her. She testified that during the two week period of time, Mr. Jordan forced her to have sexual intercourse at least every other night.

(Record citations omitted.) Jordan's appellate brief also summarizes the testimony of L.N.:

> [L.N.] testified that she was homeless in September of 2012. She was also drinking at the time and on September 17, 2012, she met Mr. Jordan. She met him on the street, he had some beer and offered her some. He then went to get drugs and when he came back, they smoked crack together. According to L.N.[,] Mr. Jordan demanded oral sex and when she started crying, he hit her in the face four times. Mr. Jordan then made her take off her pants and put his penis in her butt. A couple walked by and that distracted Mr. Jordan, so L.N. grabbed her pants and ran away. She then called 911.

(Record citations omitted.)

The jury found Jordan guilty of both counts as charged in the information. The trial court sentenced Jordan to twenty years of initial confinement and ten years of extended supervision for the sexual assault, and it imposed a concurrent sentence of three and one-half years for the substantial battery. This appeal follows.

On appeal, Jordan argues that the trial court erroneously exercised its discretion when it admitted L.N.'s testimony at trial. He asserts that the evidence was not relevant because his

defense to the sexual assault was that D.L. consented, and consent is unique to the individual. He also argues that there were differences in the incidents involving L.N. and D.L.

We begin with the applicable law. Other acts evidence may be used in a criminal prosecution provided the evidence is not used to show that the defendant acted in conformity with his character and the evidence satisfies the following three-prong test: (1) the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2);[2] (2) the evidence is relevant; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the jury or needless delay. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). A trial court's decision to admit or exclude other acts evidence is reviewed "under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the trial court's decision if it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Id.***

Here, Jordan argues that the other acts evidence was not relevant because Jordan "never disputed that he had sexual relations with D.L.," and his defense to the sexual assault charge was that D.L. consented to the sexual acts. Citing ***State v. Alsteen***, 108 Wis. 2d 723, 324 N.W.2d 426 (1982), and ***State v. Cofield***, 2000 WI App 196, 238 Wis. 2d 467, 618 N.W.2d 214, Jordan argues: "[C]onsent is unique to an individual and therefore other acts evidence would not be relevant when the only issue is consent."

[2] "As long as the proponent identifies one acceptable purpose for admission of the evidence that is not related to the forbidden character inference, the first step is satisfied." ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832 (footnote omitted).

In response, the State argues there is a legal theory upon which the trial court could have relied to admit the other acts evidence to rebut Jordan's claim that D.L. consented to sexual relations, but first the State asserts that L.N.'s testimony was properly admitted "as proof that Jordan intended to cause bodily harm" to D.L. (Bolding omitted.) The State explains:

> To convict Jordan of substantial battery, the State had to prove beyond a reasonable doubt that he intended to cause bodily harm to [D.L.]. *See* [WIS. STAT.] § 940.19(2); [WIS JI—CRIMINAL] 1222 (2005). The State had to prove Jordan had either (1) the mental purpose to cause bodily harm to [D.L.], or (2) the awareness that his conduct was practically certain to cause her bodily harm. ***Id.***
>
> At trial, Jordan suggested [D.L.] injured herself in drunken falls. But the State may use other acts evidence to undermine a defendant's innocent explanation for what occurred. Evidence of Jordan's prior assaultive behavior against [L.N.] was highly relevant to prove that he intended to cause [D.L.] bodily harm during those episodes of assaultive behavior.

(Citation and record citations omitted; bolding added.)

We agree that L.N.'s testimony concerning the assault was properly admitted as proof of Jordan's intent to cause bodily harm to D.L. *See* WIS. STAT. § 904.04(2). At the pretrial motion hearing, the State pointed out that Jordan offered an alternative explanation for D.L.'s injuries: "that she gets drunk all of the time and falls down." The defense pursued that argument at trial, with trial counsel noting in closing argument that there was testimony D.L. "could've fallen into a hard object or some assault could've occurred, [and medical personnel] couldn't tell the difference." L.N.'s testimony about Jordan's assault was properly admitted because it "'tends to undermine the defendant's innocent explanation'" for D.L.'s injuries. *See* ***State v. Roberson***, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990) (citation omitted).

In part, we conclude that L.N.'s testimony was properly admitted to show Jordan's intent to cause bodily harm to D.L. because we agree with the trial court's assessment that the two assaults were sufficiently similar. The trial court ruled:

> The intent element clearly goes to the intent to cause bodily harm, and in this case the circumstances are similar to the extent they both involve the defendant bringing women who were met on the street to certain locations as indicated outside a residence [and] although [L.N.] was a single incident, and [D.L.] had been staying with the defendant for a period of time, they still are similar in that circumstance.

The State in its appellate brief points out numerous additional similarities in the two assaults, including the fact that both women were homeless and had their judgment compromised by alcohol or drugs, and Jordan isolated both women from other people.

Jordan argues that the differences in the incidents involving L.N. and D.L. are "profound" because "Jordan had a relationship with [D.L.] that continued over several months [which] sets it apart from the allegations of L.N., who only met [Jordan] the night of the assault." We are not convinced that the fact Jordan was involved with D.L. over a period of several months negates the similarities in the assaults, including that Jordan used violence against both homeless women so that they would acquiesce to sexual relations.

In conclusion, we reject Jordan's argument that the trial court erroneously exercised its discretion when it admitted L.N.'s testimony. For the reasons explained above, we conclude that L.N.'s testimony was properly admitted as evidence of Jordan's intent to cause bodily harm to D.L. Having identified one acceptable purpose for the introduction of the other acts evidence, we need not address the State's alternative arguments that there was a valid legal theory supporting the admission of L.N.'s testimony to refute Jordan's claim that D.L. consented to

sexual relations and that admission of the other acts evidence was harmless error. *See* ***State v. Hammer***, 2000 WI 92, ¶29 n.4, 236 Wis. 2d 686, 613 N.W.2d 629 (Other acts evidence can be admitted if proponent demonstrates "'one' acceptable purpose.") (citation omitted); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals