

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 28, 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

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No. 94-1345-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LINDELL JOE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

GARTZKE, P.J. The State charged Lindell Joe with sexual assault, § 940.225(3), STATS., false imprisonment, § 940.30, STATS., and battery, § 940.19(1), STATS. A jury found him not guilty on the sexual assault charge but guilty on false imprisonment and battery.

Joe appeals from the judgment of conviction. He asserts that the trial court erred by excluding "other acts" evidence showing the complainant's motive to fabricate the charges against him. He also asserts that the trial court erred by excluding tape recorded messages that complainant made which also showed her motive to fabricate and which could, he claims, only be appreciated after hearing the tone of her voice and other verbal nuances. We conclude that if the court erred by excluding the "other acts" evidence, the error was harmless. We further conclude that the court erred in excluding the taped messages, but that the error was harmless. We therefore affirm.

1. Evidence

It is undisputed that on July 18, 1994, Joe and the complaining witness, Amy, had sexual intercourse in his university dormitory room. Other than that, few facts are undisputed. Joe claims the intercourse was consensual, and Amy later attacked him. Amy claims he forced her to have intercourse and battered and detained her.

The date Joe and Amy broke off their relationship is critical to the factual version of each and to the relevance of the evidence. He contends he terminated their relationship on July 10, a week before the alleged assault. He contends that her breaking into his room on that day when another woman, Jody, was with him, and her telephone messages to him later that day, are evidence of her motive to falsify the charges against him in retaliation for his having rejected her. She contends that they did not break up until July 18, the day she claims he committed the charged crimes.

Before the trial, Joe sought leave to present "other acts evidence" of the July 10 incident when Amy discovered Joe with Jody and broke into his room. He proposed to introduce that evidence through his own testimony and that of Jody for the purpose of showing Amy's motive to "get back at him for his actions prior to the 18th" by fabricating the criminal charges. The trial court ruled that the evidence was inadmissible under § 906.08(2), STATS., because specific instances of a conduct of a witness to attack the witness's credibility may not be proved by extrinsic evidence,¹ but that Joe could cross-examine

¹ Section 906.08(2), STATS., provides

Amy regarding the incident. The court ruled that Amy could be questioned regarding her motive but such testimony by other witnesses was inadmissible.

During the hearing on his pretrial motion, Joe also sought leave to put in evidence the tape recorded messages he claims Amy left on his telephone answering machine in his dormitory room. He contended that she left the messages on July 10, "right after" she broke into his room while Jody was with him, and that the content of the messages disclosed her extreme distress over the termination of their relationship. The trial court ruled that the tape itself was inadmissible as extrinsic evidence which could not be used to attack Amy's credibility under § 906.08(2), STATS., but that she could be cross-examined regarding the tape.

At trial, Amy testified that at 2:00 a.m. on July 18, after a night out with her friends, she arrived at Joe's dormitory and went to his room to end her relationship with him. Her decision upset him. When she walked out of the building, he followed her, crying and asking her to return to his room. About 2:45 a.m., she did return. They both undressed and laid on the divided bed in Joe's room, but she wanted no sexual intercourse. He nevertheless had intercourse with her without her consent. At some point he slapped her, hit her with his fists, picked her up by her neck, pulled her hair, and forced her to stay in his room until about 5:00 a.m. Amy denied that on July 10 Joe broke off their relationship. She admitted that she became upset about a week earlier when she found Joe in bed with Jody L. She told Jody she "wanted to kick her ass." She testified that by July 18 she and Joe "had resolved that situation." She believed that incident occurred about 2:00 a.m. on July 10.

(..continued)

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Joe testified that on July 10, he was in bed with Jody when Amy broke into his room, through the window. That same day he terminated his relationship with Amy. He testified without objection that also on July 10 Amy called and left emotional messages on his answering machine, pleading that he talk to her and spend time with her.

Joe testified that on July 18 Amy wanted to see him. He did not want to see her but she came anyway. He let her into the dormitory and they went to his room where they argued about Jody. Amy "stormed" out of his room and left the building. He thought he should check on her. He went to the front lobby and saw Amy standing and crying outside the door. He told her to calm down, and they returned to his room where they had intercourse. They later argued, mostly about Jody. The telephone rang. When he picked up the telephone she "attacked" him. They struggled, he slapped her and he told her to leave. She left, crying. He denied having detained her.

Joe's counsel recalled Amy. She admitted that she had called Joe "plenty of times and left messages" but she denied calling him on July 10 and between July 10 and July 18. She said that any messages she left on his answering machine would have been before July 7.

Jody testified that on July 10 about mid-day when she was in Joe's room, the light on his answering machine flashed and she "heard Amy on the telephone and the answering machine." The court prevented Jody from testifying to what she heard Amy say. She also testified that earlier that day, about 4:00 a.m., Amy had called, Joe had spoken to her, and Jody had heard Amy yelling at him.

The trial court then rejected Joe's renewed attempt to play the tape for the jury. The court had heard the tape. The court ruled the tape could not be played to impeach Amy, since it was not a prior inconsistent statement. She had already admitted that she made the taped statements but claimed she made them at a time different from July 9 or July 10. The court reasoned that the issue was when Amy made the taped statements. Since the tape itself did not disclose the date and time called, it must be excluded.

Because the issues involve the trial court's evidentiary rulings, our review is limited to whether the court erroneously exercised its discretion. See *State v. Kuntz*, 160 Wis.2d 722, 745, 467 N.W.2d 531, 540 (1991). A trial court generally properly exercises its discretion when making an evidentiary ruling when it bases its ruling in accordance with accepted legal standards and the facts of record. *Id.*

2. Extrinsic Evidence

The trial court made an error of law and therefore erroneously exercised its discretion when it ruled that extrinsic evidence of Amy's conduct on July 10 was inadmissible under § 906.08(2), STATS. Section 906.08(2) does not apply. "[E]xtrinsic evidence may be used to prove that a witness has a motive to testify falsely." *State v. Williamson*, 84 Wis.2d 370, 383, 267 N.W.2d 337, 343 (1978).

3. Other Acts Evidence

The trial court failed to undertake the appropriate analysis to determine whether testimony should be admitted regarding the July 10 incident to show Amy's possible motive to falsely charge Joe. Section 904.04(2), STATS., controls the admissibility of other acts evidence. It provides,

Evidence of other acts, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

When other acts evidence is offered, the trial court should make a three-step analysis. The first is to determine whether the evidence is relevant. If it is relevant, the court next determines whether it is admissible under § 904.04(2), STATS. If the evidence is admissible under that rule, the court

should determine whether its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues or by other considerations, as provided in § 904.03, STATS. *State v. Kaster*, 148 Wis.2d 789, 795-96, 436 N.W.2d 891, 894 (Ct. App. 1989).

Other acts evidence probative of a complainant's motive to make a false accusation is relevant. *State v. Johnson*, 184 Wis.2d 324, 338, 516 N.W.2d 463, 467 (Ct. App. 1994). Other acts evidence is admissible to show that the alleged victim had a motive for falsely accusing the defendant. Section 904.04(2), STATS., specifically allows evidence of other acts for the purpose of establishing motive. While the prosecutor asserted she was unfairly prejudiced by not having had the opportunity to have an expert examine the tape for tampering, no other consideration appears present to justify a finding that the danger of unfair prejudice outweighed the probative value of the taped messages. We need not, however, pursue this analysis. If error occurred, it was harmless.

Error is harmless if no reasonable possibility exists that the error contributed to the conviction. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Applying that test, we are satisfied that if the court erred, the error was harmless. The jury heard the other acts testimony. Joe testified regarding the July 10 incident. So did Amy.

Jody, the third person present at the July 10 incident, was not questioned regarding it, and no offer was made to prove what she would have testified to. We cannot predicate harm or prejudice on excluded evidence not of record and not covered by an offer of proof. Section 901.03(1)(b), STATS.

4. Recorded Messages Ruling

The trial court's rationale for its ruling that the jury would not hear the recorded messages was that Amy's credibility could not be attacked by extrinsic evidence of specific conduct under § 906.08(2), STATS. The tape of Amy's telephone calls is extrinsic evidence, because it was not obtained by cross-examination of Amy. *State v. Sonnenberg*, 117 Wis.2d 159, 168, 344 N.W.2d 95, 99-100 (1984). But Joe offered the tape to show that Amy had a motive to bring false charges against him. Extrinsic evidence may be used to prove motive to testify falsely. *State v. Williamson*, 84 Wis.2d at 383, 267

N.W.2d at 343. The court erroneously exercised its discretion in excluding the tape on extrinsic evidence grounds.

The trial court also reasoned that the taped messages were inadmissible because the issue was when Amy made them, not whether she made them, and Joe and Amy disputed whether she made the statements on July 10. The tape itself does not disclose the date or the time. It was, however, for the jury to determine whether the recording occurred on July 10. Like the trial court, we have listened to the tape. At least one of the recorded messages discloses that it was made after a "fight" between Joe and Amy. The jury could reasonably have inferred from the taped message that it was, as Joe claimed, made immediately after the July 10 incident.

The decision not to let the jury hear the tape was harmless error under the *Dyess* test. First, as we have said, Joe testified to its content. Second, the tone and content of the taped message disclose no vindictiveness, desire for revenge or even anger.² Excluding numerous vulgar interjections, the tone is sadness and the content is coaxing for a resumed relationship. The interjections are made so routinely as to indicate they are used for emphasis, like exclamation marks. The tone and content do not tend to substantiate Joe's claim that the tape is relevant to his claim that Amy was motivated to falsely accuse him of crimes. Because the jury's failure to hear the tape could not have contributed to Joe's convictions, the court's error in excluding it was harmless. *State v. Dyess*, 124 Wis.2d at 547, 370 N.W.2d at 233.

Our disposition of the issues regarding the tape makes it unnecessary for us to decide whether, as the State claims, admission of the tape would have been unfairly prejudicial because the tape was "surprise" evidence which violated a pretrial order requiring disclosure of, among other things, recorded statements concerning the charged offenses.

5. Conclusion

² The tape is comparable to documentary evidence. We may interpret such evidence without deference to the fact-finder. *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, 930 (8th Cir. 1976).

Because whatever errors the trial court made were harmless, we affirm the judgment of conviction.

By the Court.--Judgment affirmed.

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