

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

November 6, 1996

**NOTICE**

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.

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

**No. 95-0892-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RAMIRO VILLAREAL,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Racine County:  
NANCY E. WHEELER, Judge. *Affirmed.*

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

PER CURIAM. Ramiro Villareal has appealed from a judgment convicting him after a jury trial of one count of first-degree reckless homicide in violation of § 940.02(1), STATS.; one count of aggravated battery in violation of § 940.19(2), STATS., 1991-92; and six counts of first-degree recklessly endangering safety in violation of § 941.30(1), STATS., all as a party to the crime. All of the sentences were subject to enhancement pursuant to §§ 939.62 and 939.63, STATS., based on Villareal's prior convictions and the use of a dangerous weapon during the crimes. We affirm the judgment in its entirety.

The evidence at trial indicated that in the early morning hours of November 7, 1993, Villareal and Sammy Ramirez walked from a party they were attending (the Racine Street party) to another party one block away (the Mead Street party). While standing together outside the house where the Mead Street party was being held, either Villareal or Ramirez fired two shots from a revolver through a closed-curtain window of the house. Villareal and Ramirez each accused the other of being the shooter. The shots killed Argenry Mitchell and wounded Carlos Azcoitia. The jury also found that the shots endangered the safety of Azcoitia and five other people. Evidence indicated that these other five people were sitting or standing within a few feet of Mitchell and Azcoitia.

Villareal's first argument is that he was denied a fair trial because the trial court introduced other acts evidence regarding a battery and threats made by him against Tina Marquez, his former girlfriend and the mother of his child, in November 1992, one year before the shootings at the Mead Street party. The evidence indicated that Villareal struck Marquez on November 6, 1992, when he came to visit his son. It also indicated that on November 30, 1992, he struck her, threw a car seat at her, spit on her, and threatened to kill her if she reported him to the police and he went to jail. In addition, the trial court admitted evidence that one month prior to the Mead Street party, Villareal hit Marquez's current boyfriend, Jamie Garcia, over the head with a bottle with sufficient force to break the bottle. Evidence further indicated that Villareal belonged to a gang and that Garcia was the leader of a rival gang.

Other acts evidence must pass a two-step test before being admitted. *State v. Shillcutt*, 116 Wis.2d 227, 235, 341 N.W.2d 716, 719 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). First, the trial court must find that the evidence fits within an exception under § 904.04(2), STATS. *Shillcutt*, 116 Wis.2d at 235, 341 N.W.2d at 719. Second, the trial court must determine whether any prejudice arising from its admission substantially outweighs its probative value. *State v. Mink*, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103 (Ct. App. 1988). Implicit in this analysis is the requirement that the evidence is relevant to an issue in the case. *State v. C.V.C.*, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). Our review of this issue is governed by

the erroneous exercise of discretion standard. *State v. Jones*, 151 Wis.2d 488, 492-93, 444 N.W.2d 760, 762 (Ct. App. 1989).<sup>1</sup>

The trial court admitted the other acts evidence after determining that it was relevant to motive, plan and intent. Without resolving whether the evidence was properly admitted on these grounds, we conclude that the evidence was relevant and admissible because it furnished part of the context of the case and was necessary to a full presentation of the case. See *Shillcutt*, 116 Wis.2d at 236, 341 N.W.2d at 720.<sup>2</sup>

Testimony at trial indicated that in the evening before the shootings, Villareal and four other people were in a car that stopped briefly near the Mead Street party. Testimony indicated that while they were there, Garcia came out on the porch at the Mead Street residence and exchanged words, gang signs or both with Villareal. Witnesses further testified that when Villareal returned to the Racine Street party, he stated that he wanted to go back to the Mead Street party to fight Garcia and ultimately went back, leading to the shootings. Additional testimony indicated that while Villareal was at the Racine Street party, Marquez came there from the Mead Street party and told him that Garcia was saying that Villareal's son had a "pussy" for a father and that Garcia was "going to kick [Villareal's] ass."

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<sup>1</sup> We now use the phrase "erroneous exercise of discretion" rather than "abuse of discretion" when reviewing a trial court's discretionary act. However, the meaning remains the same. *State v. Plymesser*, 172 Wis.2d 583, 585-86 n.1, 493 N.W.2d 367, 369 (1992).

<sup>2</sup> We recognize that the trial court did not rely on this ground in admitting the evidence. However, we are free to consider an evidentiary basis other than that relied on by the trial court if the alternative ground results in affirmance of the judgment. *State v. Bustamante*, 201 Wis.2d 562, 577 n.9, 549 N.W.2d 746, 752 (Ct. App. 1996); see also *State v. Shillcutt*, 116 Wis.2d 227, 235-36, 341 N.W.2d 716, 719-20 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984).

Based on this record, the evidence regarding Villareal's prior batteries of Garcia and Marquez and his prior threat to Marquez was relevant. It established the background relationship between the three of them and was necessary to fully understand the context of the case. *Cf. id.* at 236-37, 341 N.W.2d at 720. It established that Villareal had a history of hostility toward Marquez and Garcia and permitted the inference that this underlying hostility was further aggravated by the events on the night of the parties. It thus also permitted the inference that the events of the night so incensed Villareal as to cause him to go to the Mead Street party with a gun and with the intention to shoot it.<sup>3</sup>

In considering the probative value of the evidence, we also note that the assault by Villareal on Garcia occurred only one month before the shooting. In addition, while the attacks on Marquez occurred one year before the shootings, the record indicated that Villareal was incarcerated throughout many of the intervening months. Thus, the evidence was not so remote as to lack probative value. *See State v. Clark*, 179 Wis.2d 484, 494-95, 507 N.W.2d 172, 176 (Ct. App. 1993). Based on the substantial probative value of the evidence, we also conclude that the trial court properly exercised its discretion in determining that its probative value was not outweighed by any risk of unfair prejudice. *See State v. Johnson*, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994).

The second issue raised by Villareal is whether the trial court erred when it denied his motion to dismiss five counts in the information which alleged that, as a party to the crime, he recklessly endangered the safety of Marquez, Margaret Reynosa, Daniel Orta, Demosthenis Alevizo and Gina Orta. He contends that no evidence regarding these crimes or victims was presented at the preliminary hearing and that the evidence therefore was insufficient to support his bindover on these counts.

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<sup>3</sup> Villareal argues that the evidence regarding his prior batteries of Marquez was irrelevant because Marquez testified that she and Villareal were friendly at the time of the shootings. He contends that no basis therefore existed to conclude that animosity between them played any part in the shootings. We disagree. By providing the background relationship between Villareal, Marquez and Garcia, the evidence of the prior altercations could assist the jury in evaluating what occurred on the night of the shootings and why.

A circuit court's sole obligation at the preliminary hearing is to determine whether there is probable cause to believe that some felony has been committed by the defendant. *State v. Williams*, 198 Wis.2d 479, 490, 544 N.W.2d 400, 404 (1996). Once the circuit court does this for each count in a complaint, it is then the responsibility of the district attorney to prepare the information, subject only to an abuse of discretion review under the "transactionally related" test of *State v. Richer*, 174 Wis.2d 231, 496 N.W.2d 66 (1993). *Williams*, 198 Wis.2d at 490, 544 N.W.2d at 404. Pursuant to *Richer*, charges may be included in an information if they are transactionally related to charges which were supported by evidence at the preliminary hearing. *Williams*, 198 Wis.2d at 488-89, 544 N.W.2d at 404. This test is met if the counts included in the information are not "wholly unrelated" to those for which the defendant is bound over. *Id.* at 489, 544 N.W.2d at 404.

Factors to consider in determining whether counts in an information are "wholly unrelated" include the parties involved, the witnesses involved, geographical proximity, time, physical evidence, motive and intent. *Id.* These seven factors are relevant in determining whether there is a transactional nexus between the counts, but there is no requirement that all of them be satisfied. *Richer*, 174 Wis.2d at 250 n.13, 496 N.W.2d at 73.

Under these standards, the five challenged counts of recklessly endangering safety were properly included in the information. The complaint charged Villareal and Ramirez with one count of first-degree intentional homicide in violation of § 940.01(1), STATS., and one count of aggravated battery in violation of § 940.19(2), STATS., 1991-92, both as parties to the crime. Testimony at the preliminary hearing indicated that Villareal and Ramirez traveled from the Racine Street party to the Mead Street party and fired two shots through the window, striking Mitchell in the head and Azcoitia in the shoulder. One witness testified that he saw Villareal discharge the gun into the window.

Villareal objects that the five challenged counts alleged both additional crimes and additional victims who were not mentioned in the testimony at the preliminary hearing. However, it is clear that the charges were transactionally related to the intentional homicide and aggravated battery charges for which he was bound over. The charges shared common witnesses and occurred at the same time and place. In addition, the motive and intent

which led Villareal and Ramirez to go to the Mead Street party and fire a gun through the window were the same for all of the charges. While the information alleged that victims were endangered by the conduct in addition to those about whom testimony was presented, this distinction, standing alone, did not render the additional counts wholly unrelated to the counts on which Villareal was bound over.

The third issue raised by Villareal is whether the evidence was sufficient to support his conviction for recklessly endangering the safety of Alevizo. In reviewing the sufficiency of the evidence, the test is whether the evidence, viewed most favorably to the State, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The credibility of the witnesses and the weight of the evidence are for the trier of fact. *Id.* at 504, 451 N.W.2d at 756. If more than one reasonable inference can be drawn from the evidence, the one which supports the jury's finding must be accepted by this court. *Id.*

The jurors were instructed that to convict Villareal of endangering safety by conduct regardless of life, they had to find beyond a reasonable doubt that: (1) he endangered the safety of another human being; (2) that he did so by criminally reckless conduct, requiring that his conduct created an unreasonable or substantial risk of death or great bodily harm to another person and that he was aware of this risk; and (3) that the circumstances of his conduct showed utter disregard for human life. Testimony by Azcoitia indicated that when the two shots were fired, Alevizo was standing near the edge of the window, about a foot away from Mitchell, who was struck in the head and fatally wounded. A second witness, Orta, testified that Alevizo was further away from the window, but only two feet away from Mitchell when the shots were fired. The testimony of Azcoitia and Orta thus clearly placed Alevizo in the line of fire when Mitchell was struck in the head and instantly killed. The jury reasonably found that Villareal endangered Alevizo's safety by conduct which created an unreasonable and substantial risk of death or great bodily harm to him and that he was guilty of the charged offense.

*By the Court.* — Judgment affirmed.

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