

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 23, 1996

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. 95-1260-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHERMAN WILLIAMS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Sherman Williams appeals from a judgment entered after a jury found him guilty of one count of first-degree recklessly endangering safety, while armed, contrary to §§ 941.30(1), and 939.63, STATS. Williams claims the trial court erred when it admitted "other crimes" evidence pursuant to § 904.04, STATS. Because the trial court did not erroneously exercise its discretion in determining that the other crimes evidence was admissible for

purposes of identity and motive, and that the evidence was not unduly prejudicial, we affirm.

I. BACKGROUND

On October 14, 1993, Curtis Colbert, Anthony Nicholas, and Nicholas's father went to find their missing car. They located the car behind Williams's house. Colbert and Nicholas grabbed Williams and a struggle ensued. They forced Williams into their car and drove to the police station to have Williams arrested for stealing the car. No charges were issued. Shortly after Williams left the police station, a shooting occurred at the Nicholas home. One witness identified Williams as the shooter.

On November 1, 1993, Nicholas and Colbert were walking down the street when they heard someone yell. When they turned around, each observed a man standing there, who shouted: "Don't move, don't move." The man then started shooting at them. Colbert was shot in the left leg and the left knee. Nicholas picked Colbert up and carried him away. Both Nicholas and Colbert identified Williams as the shooter.

Williams was charged and the case was tried to a jury. Prior to trial, Williams moved to exclude reference to the October 14, 1993, shooting. The trial court eventually ruled that this evidence could be admitted to show identity and motive. The evidence was admitted only during Williams's cross-examination and during the State's rebuttal case. The State's purpose for introducing evidence of the October 14, 1993, shooting was to rebut Williams's testimony that he put the October 14 incident (where Colbert and Nicholas dragged him to the police station and accused him of stealing the Nicholas car) behind him and that he had forgotten all about it. The jury convicted Williams. Williams now appeals.

II. DISCUSSION

We review a trial court's determination of whether to admit § 904.04, STATS., evidence and its decision as to whether the evidence is unduly

prejudicial under the erroneous exercise of discretion standard. See *State v. Pharr*, 115 Wis.2d 334, 345, 340 N.W.2d 498, 503 (1983). Under this standard, we must affirm the trial court if it applied the proper law to the relevant facts and reached a reasonable conclusion. *State v. Alsteen*, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982).

In deciding whether to admit evidence of prior bad acts, the trial court must apply a two-part test. *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must determine whether the evidence is admissible under Rule 904.04(2), Stats., which provides:

Evidence of other crimes, 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.

Kuntz, 160 Wis.2d at 746, 467 N.W.2d at 540. If a trial court finds that the other-acts evidence falls under one of the § 904.04(2) exceptions, it must then consider whether the probative value of such evidence and the necessity for its admission are substantially outweighed by the danger of unfair prejudice. *Id.* at 748, 467 N.W.2d at 541.

In the instant case, the trial court determined that the “other crimes” evidence did fall under two of the exceptions contained in § 904.04(2), STATS.: identity and motive. The trial court reasoned that the October 14 shooting was admissible to show identity because the same caliber gun was used in both the October 14 shooting and the November 1 shooting. In addition, the trial court stated that the *timing* of the October 14 shooting, which occurred shortly after Williams was beat up by Colbert and Nicholas and dragged to the police station, was compelling. The trial court also found that this evidence was relevant to motive: to show some retaliatory motive on Williams's part. This reasoned conclusion by the trial court is based on the facts

of record in light of the applicable law and, therefore, does not constitute an erroneous exercise of discretion.

In addition, the trial court determined that this evidence should not be excluded on prejudicial grounds. The trial court determined that the probative value of this evidence outweighed its prejudicial effect for several reasons, but primarily because of Williams's direct testimony. Williams testified that he did not have any animosity or anger after the October 14 incident with Colbert and Nicholas – that he had put it behind him and immediately forgot all about it. On this basis, the trial court felt that the October 14 shooting would be highly probative of Williams's state of mind and credibility.

Again, from our review of the record, we cannot conclude that the trial court erroneously exercised its discretion in making this determination. Williams's testimony on direct that he had no motive to seek retribution for the October 14 incident increases the probative value of the October 14 shooting, which occurred shortly after Williams was released from the police station. In addition, both shootings were similar: the same caliber gun was used, both were firings from a distance, and both occurred at night.

We conclude that the trial court did not erroneously exercise its discretion in allowing the other crimes evidence into the record. The trial court applied the two-part test as stated in *Kuntz* and reached a reasonable conclusion with regard to the admission of this evidence.

By the Court. – Judgment affirmed.

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