

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

October 30, 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. 96-0801-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Appellant,**

**v.**

**DERICK D. BOSTICK,**

**Defendant-Respondent.**

APPEAL from an order of the circuit court for Kenosha County:  
S. MICHAEL WILK, Judge. *Affirmed and cause remanded.*

NETTESHEIM, J. The State appeals from a trial court order denying its motion for the admission of "other acts" evidence at the scheduled shoplifting trial of the defendant, Derick D. Bostick.<sup>1</sup> The State contends that the trial court misused its discretion by excluding the evidence

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<sup>1</sup> Section 974.05(1)(d)2, STATS., allows the State to directly appeal a trial court order suppressing evidence.

due to “unfair prejudice.” We conclude that the trial court did not erroneously exercise its discretion. Accordingly, we affirm the trial court’s order.

#### FACTS

On January 26, 1995, Dino Zagame, a loss prevention officer at Kohl’s department store, observed Bostick take a pair of pants and conceal them under a jacket which was draped over his shoulder. Bostick exited the store without paying for the merchandise. Zagame followed Bostick to the parking lot at which point Bostick ran to his vehicle and sped away. Bostick was later identified in a surveillance tape as the individual who was seen taking the pants. The surveillance tape shows Bostick leaving the store without making any attempt to pay for the pants concealed under his jacket. As a result, Bostick was charged with retail theft contrary to § 943.50(1m), STATS.

Prior to trial, the State filed a motion in limine seeking to admit evidence of two prior incidents of retail theft involving Bostick. Both incidents were strikingly similar to the facts alleged against Bostick in this case. The first incident occurred in 1992. Security personnel at a Kohl's department store in Racine county observed Bostick conceal several pairs of blue jeans under his jacket which was draped over his shoulder. Bostick exited the store without attempting to pay for the merchandise. The second incident occurred in 1994. Security personnel at a Kohl's department store in Fond du Lac county observed Bostick stuff several pairs of blue jeans in a bag and then conceal the bag under his jacket. In both instances, the security personnel followed Bostick

into the parking lot before Bostick entered a vehicle and sped away. In each incident, Bostick was eventually apprehended and convicted of retail theft.

Although the trial court determined that the prior incidents were admissible as “other acts” evidence under § 904.04(2), STATS., it nevertheless excluded the evidence under § 904.03, STATS., concluding that the probative value of the evidence was “substantially” outweighed by the danger of unfair prejudice. The State appeals this ruling.

#### DISCUSSION

Evidentiary rulings are committed to the discretion of the trial court. See *State v. Webster*, 156 Wis.2d 510, 514, 458 N.W.2d 373, 375 (Ct. App. 1990). We will affirm such a ruling if the trial court has correctly applied the accepted legal standards to the facts of record and, using a rational process, reached a conclusion that a reasonable judge could reach. *Id.* at 515, 458 N.W.2d at 375.

In deciding whether to admit “other acts” evidence, the trial court must apply a two-prong test. *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the court must determine whether the evidence is offered for a purpose admissible under § 904.04(2), STATS. *Kuntz*, 160 Wis.2d at 746, 467 N.W.2d at 540. If so, the court must then determine whether the probative value of such evidence is substantially outweighed by its prejudicial impact. *Id.*; § 904.03, STATS.

Here, the trial court determined that the State's "other acts" evidence was admissible pursuant to § 904.04(2), STATS., and Bostick does not dispute that determination. Thus, the appellate question narrows to whether the trial court misused its discretion by concluding that the prejudicial effect of the evidence outweighed its probative value under § 904.03, STATS.

In making its ruling, the trial court expressly analyzed the "other acts" evidence under the two-prong test set forth in *Kuntz*. The court first determined that the two prior shoplifting incidents were admissible under § 904.04(2), STATS., to demonstrate Bostick's plan, preparation, knowledge and absence of mistake in taking the clothing. The court, however, excluded the "other acts" evidence under the second prong because its "probative value [was] substantially outweighed by the danger of unfair prejudice." See § 904.03, STATS.

The test under § 904.03, STATS., is not whether evidence is prejudicial but whether it is unfairly prejudicial. *State v. Mordica*, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992). Evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. See *Bittner v. American Honda Motor Co., Inc.*, 194 Wis.2d 122, 147-48, 533 N.W.2d 476, 486 (1995).

Here, the trial court reasoned that, "It would be difficult to imagine the defendant being able to come into court and try to defend the claim

of retail theft of the Kohl's store with "other acts" evidence demonstrating that he had done exactly the same thing on two other occasions at a Kohl's store and has been convicted." These remarks reflect the very kind of balancing test required by the law. The court reasonably saw the risk that the "other acts" evidence might so dominate the proceedings such that the jury would convict on the basis of such extraneous evidence to the exclusion of the evidence bearing directly on the charged offense.

"Other acts" evidence is admissible if its relevance hinges on something other than the forbidden character inference proscribed by § 904.04(2), STATS. *State v. Johnson*, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994). Although the trial court's ruling was premised on the balancing test required by § 904.03, STATS., that determination rested on the court's reasoning that the "other acts" evidence demonstrated Bostick's propensity to shoplift and that he was acting in conformity with that propensity as to the charged offense. That, of course, is exactly what § 904.04(2) prohibits.

In further support of its determination, the trial court noted that the "other acts" evidence was not essential to the State's case because the facts and other evidence available, including the videotape, were sufficient to prove Bostick's guilt. The court stated: "The Court is mindful of the fact that the facts, as alleged in the case in chief, do not long for this extra support .... Kohl's personnel observed the defendant bend down and conceal the pants under a jacket draped over his left shoulder .... [Bostick], apparently, has been positively identified by store personnel, and the defendant was identified on the

video tape by the store personnel. On that issue, it appears that the motion should be denied.”

The case law supports this further reasoning by the trial court. When deciding whether to admit “other acts” evidence, the court may look to the existing evidence available to the State. See *State v. Harris*, 123 Wis.2d 231, 236, 365 N.W.2d 922, 925 (Ct. App. 1985) (“[t]he availability of other evidence ... is a factor relevant to determining the admissibility of other wrongs evidence .... [Other acts evidence] is not favored and ought not be used if other proof is available.”).

In summary, the record shows that the trial court applied the correct legal standard to the facts and, using a rational process, reached a reasonable conclusion. See *Webster*, 156 Wis.2d at 515, 458 N.W.2d at 375. Accordingly, we affirm the trial court’s ruling.

We add a concluding observation. “Other acts” evidentiary issues are common to the appellate courts of this state. Usually this issue comes to us via an appeal by a convicted defendant complaining that “other acts” evidence was improperly admitted. Recently, we had occasion to examine the multitude of appellate decisions on this issue. See *Johnson*, 184 Wis.2d at 341 n.4, 516 N.W.2d at 468. We noted that, with a few exceptions, we have routinely adopted the State’s argument that the trial court properly exercised its

discretion by admitting the disputed evidence. *Id.* We have done so despite the concern expressed by some members of this court as to the direction of the law in this area. *See, e.g.*, the concurring opinion in *Johnson* at 348-54, 516 N.W.2d at 471-74; and the dissenting opinions in *State v. Tabor*, 191 Wis.2d 482, 497-500, 529 N.W.2d 915, 921-23 (Ct. App. 1995), and *State v. Clark*, 179 Wis.2d 484, 497-500, 507 N.W.2d 172, 177-78 (Ct. App. 1993).

Here, however, we have the rare case in which the State is appealing the trial court's exercise of discretion in choosing to exclude "other acts" evidence. Despite the differing result, our analysis is essentially the same as in the more traditional case—did the trial court apply the correct law and engage in a rational process which produced a reasonable conclusion. We are no less likely to uphold the trial court's use of discretion when it excludes "other acts" evidence as when it admits it.

*By the Court.*—Order affirmed and cause remanded..

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.