COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0603-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRYSTAL GLYNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Crystal Glynn appeals from a judgment convicting her of first-degree reckless homicide and first-degree reckless endangering safety.[1]

[1] Glynn also pleaded guilty to two counts of bail jumping. Her appeal does not involve those two counts.

The issues are whether the trial court erroneously exercised its discretion when it gave the standard jury instruction on utter disregard for human life and when it allowed testimony of a prior act. We affirm.

THE JURY INSTRUCTION

Glynn contends that the standard instruction for utter disregard for human life given by the trial court does not adequately state the law. The instruction given by the trial court was: "In determining whether the conduct showed utter disregard for human life, you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why she was doing it; how dangerous the conduct was; and whether the conduct showed any regard for human life." WIS J I—CRIMINAL 1020 and 1345.[2]

On appeal, Glynn revives the argument she made to the trial court that the instruction should be changed by eliminating the word "and" prior to the last factor and replacing it with: "But, if the defendant's conduct showed any regard for human life, you should not find the conduct to be an utter disregard for human life." The trial court refused to change the standard instruction, stating that when the jury is instructed to find beyond a reasonable doubt on the utter disregard element, one of the factors they are directed to consider is whether the conduct showed any regard for human life. We agree that this is sufficient.

A trial court has wide discretion to issue jury instructions. ***State v. Roubik***, 137 Wis.2d 301, 308, 404 N.W.2d 105, 108 (Ct. App. 1987). This court

[2] The utter disregard for human life element is part of the two crimes charged: First-Degree Reckless Homicide, § 940.02(1), STATS., and First-Degree Recklessly Endangering Safety, § 942.30(1), STATS. The jury instruction for this element of both crimes is the same.

will not find error in the refusal to give an instruction as long as the given instructions adequately cover the law applicable to the facts. ***Id.*** at 308-09, 404 N.W.2d at 108. Glynn argues that ***Balistreri v. State***, 83 Wis.2d 440, 265 N.W.2d 290 (1978), requires that the court change the instruction to state that any evidence showing a regard for human life must defeat the utter disregard standard.

In ***Balistreri***, the supreme court did not create a new standard for determining whether a defendant's conduct showed utter disregard for human life. The court there simply considered whether the facts of that case established that the defendant had acted with utter disregard for human life.[3] The court concluded that the evidence did not establish that the defendant had acted with utter disregard for human life. The court stated that while the defendant's conduct was imminently dangerous, it could not conclude that the conduct was devoid of some regard for the life of the victim. ***Balistreri***, 83 Wis.2d at 458, 265 N.W.2d at 298. Consequently, the court ruled that the conviction had to be set aside. ***Id.*** The court merely applied the established standard to the facts before it to determine that the State had not met its burden of proof.

Glynn attempts to draw a comparison between the facts of ***Balistreri*** and those of her own case to support her argument that ***Balistreri*** requires a change in the language of the jury instruction. The facts of ***Balistreri***, however, are significantly different from these facts. The defendant in ***Balistreri*** was involved in a high speed police chase. ***Balistreri***, 83 Wis.2d at 452, 265 N.W.2d at 295. There was evidence offered, however, that he swerved to avoid

[3] The crime charged there was the former § 941.30, STATS., Endangering Safety By Conduct Regardless of Life. The third element of this crime was "conduct evincing a depraved mind," the predecessor to the utter disregard for human life element. *See* WIS J I—CRIMINAL 1020, n. 5.

pedestrians, honked his horn, flashed his headlights, and at the time of the collision he had slowed to a speed of five to ten miles per hour. ***Id.*** at 452-53, 265 N.W.2d at 296. The person with whom he collided suffered only minor damage both to himself and his vehicle. ***Id.*** at 453, 265 N.W.2d at 296. The defendant testified that he was paying "pretty close attention" as he drove through the streets. ***Id.*** at 454, 265 N.W.2d at 296. All of this evidence, the supreme court concluded, demonstrated some regard for human life. ***Id.*** at 458, 265 N.W.2d at 298.

In contrast, the evidence presented at Glynn's trial established that she was traveling at a speed of between forty and seventy miles per hour. The accident reconstructionist testified that at the time of impact, Glynn was traveling at speed of fifty-seven to sixty-three miles per hour, that there was no evidence that she braked prior to impact, and that she hit the other car at nearly a ninety-degree angle indicating that she did not swerve prior to impact. There was disputed testimony that Glynn may have applied her brakes sometime in the block before the intersection where the collision occurred, and some indication that she may have swerved.[4] There was no evidence, however, indicating why these actions may have occurred or that they were anything other than erratic driving caused by intoxication. In addition, Glynn, who had a .255 BAC an hour after the accident, testified that she did not remember anything that happened and shortly after the accident she told a police officer that she had not been driving. The driver of the car that Glynn hit was killed on impact. Based on these facts, a jury could reasonably conclude that Glynn's conduct did not show any regard for human life. These facts are not analogous to those of ***Balistreri***.

[4] As the State points out in its brief, this evidence would not affect the reckless endangering safety conviction because these things all occurred in the block after the intersection where the reckless endangering safety incident occurred.

The standard jury instructions given by the trial court on utter disregard required the State to prove beyond a reasonable doubt all of the elements of the crime charged, including whether the conduct showed utter disregard for human life. In defining this last element, the instruction directed the jury to consider whether the conduct showed any regard for human life. Implicit in this instruction is the direction that if the defendant's conduct showed regard for human life, then the State has not met its burden. Since this instruction adequately states the law, the additional instruction Glynn requested is not required. Therefore, we affirm.

OTHER ACTS EVIDENCE

Glynn also contends that the trial court erroneously admitted evidence that two and one-half weeks before the accident, she was arrested for Operating While Intoxicated and asked the police why they were picking on her and not out arresting murderers.

Admission of other acts evidence is committed to the sound discretion of the trial court and this court will sustain the trial court's ruling if there is a reasonable basis in the record. ***State v. Kuntz***, 160 Wis.2d 722, 745-46, 467 N.W.2d 531, 540 (1991). Other crimes evidence is admissible when offered for some purpose other than to prove the character of the accused. *See* § 904.04(2), STATS. The trial court employs a two-prong test to determine the admissibility of the other acts evidence. ***State v. La Bine***, 198 Wis.2d 291, 299, 542 N.W.2d 797, 800 (Ct. App. 1995). The court must first determine whether the proffered evidence is relevant. ***Id.*** If it is, then the court must determine whether the probative value is substantially outweighed by the danger of unfair prejudice. ***Id.*** While the obvious purpose of all relevant evidence is to prejudice the

individual against whom it is offered, unfair prejudice refers to the risk that a jury may conclude that because the actor committed one bad act, he or she necessarily committed the charged crime. ***Id.***

Evidence of other incidents of driving while intoxicated is admissible to show that the defendant was aware of the dangers of driving while intoxicated. ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 856 (Ct. App. 1990). This is a permissible purpose under § 904.04(2), STATS. ***Id.*** *See also* ***United States v. Fleming***, 739 F.2d 945 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985) (prior drunk driving convictions relevant to show that a defendant charged with murder by intoxicated use of a motor vehicle was aware of the danger of driving while intoxicated). In this case, the trial court found that the other acts evidence was relevant to show Glynn's awareness of the dangers of driving while intoxicated, attitude, consciousness of guilt, and willingness to take chances without regard to the consequences. The court further found that this was relevant to establishing recklessness and Glynn's utter disregard for human life. Thus, the evidence was admissible under § 904.04(2).

The next step is whether the probative value is outweighed by undue prejudice. The rules favor admissibility. ***Lievrouw***, 157 Wis.2d at 350, 459 N.W.2d at 856. The probative value of other acts "depends partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved." ***State v. Tabor***, 191 Wis.2d 482, 494, 529 N.W.2d 915, 920 (Ct. App. 1995). In this case, the other act took place merely two and one-half weeks prior to the crime being proved. Both involved driving while intoxicated. This is sufficiently close in time, place and circumstance.

Glynn argues that the evidence was prejudicial and that the trial court did not conduct the proper balancing of the probative value against the prejudice to her. The record indicates, however, that the trial court did weigh the probative value of the evidence against any unfair prejudice to Glynn. The trial court concluded that the potential for undue prejudice did not outweigh the probative value. We conclude that the trial court properly exercised its discretion in reaching this decision and hence we affirm.

By the Court.—Judgment affirmed.

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