

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-2129-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

CANE, C.J. Matthew Gray appeals a judgment convicting him of first-degree intentional homicide of his eighteen-month-old son. He raises a single issue: whether the trial court erroneously admitted other acts of child abuse. We

conclude the record supports the trial court's exercise of discretion and error, if any, was harmless. We affirm the judgment.

Gray and Dawn Westenberger met when he was thirteen and she was seventeen years old. Over the next three years, they had three children. In February 1997, when Gray was sixteen, they were living in one room at a homeless shelter with their children, Shauna, and twins, Tyler and Matthew, who were eighteen months old. After dinner, Westenberger gave the children a bath. Gray was sleeping in their room. Westenberger put the children in their beds. She gave the twins each a bottle and went outside to smoke a cigarette.

Westenberger was outside approximately fifteen minutes. When she came back, Matthew appeared to be sleeping, but Tyler was crying. She went to the kitchen to get him another bottle. When she came back about five minutes later, Matthew was purple. She and Gray pulled him off his bunk bed, put him on the larger bed and called 911. Matthew was moved to the kitchen where they attempted resuscitation.

Green Bay police officer Ronald Schaden responded to the call. When he arrived, the baby had a whitish color, was not breathing and had no pulse. Another officer attempted resuscitation, and the ambulance took the baby to the hospital. Schaden asked Gray if he was the father, and he said he was and that his name was Thunder Caldwell. Gray was upset and crying, and Schaden gave him a ride to the hospital. At a later time, Schaden questioned Gray about what had happened. Gray said when he checked on Matthew, he found that Matthew was not breathing so he brought him out to the kitchen table to attempt CPR.

A member of the rescue squad testified that on arrival, she immediately picked up the baby and took him to the squad for transport to the hospital. In less than one minute, another paramedic established an airway into the trachea and placed him on a monitor. There was no heartbeat. The baby was lifeless. It took two minutes to arrive at the hospital.

The attending pediatrician testified that they were able to reestablish a heartbeat, but the baby needed to be on a ventilator. She decided that Matthew should be transferred to Children's Hospital in Milwaukee. The critical care unit transport pediatrician examined Matthew prior to transport. She testified that because he had extreme neurological injury, she feared he would die during transport. Due to weather conditions, Matthew was transported to Milwaukee by a two and one-half hour ambulance ride.

The pediatric critical care specialist at Children's Hospital also testified. Upon arrival, Matthew was on a ventilator and neurologically nonresponsive, except for occasional gasping respirations. The doctor determined that Matthew had suffered cardiopulmonary arrest and was starved of oxygen for a significant period of time. Records indicated that Matthew suffered inadequate blood flow for forty minutes. There was no evidence of trauma other than bruised ear lobes and no evidence of infection or toxins. After a few hours at the hospital, his condition deteriorated, the occasional respirations ceased, his brain was no longer functioning, and he was declared dead.

The doctor who performed the autopsy testified that Matthew was an otherwise healthy baby who had died of asphyxia due to upper airway obstruction. She testified that this means the nose and mouth were blocked.

Detective Robert Haglund of the Green Bay Police Department testified that he spoke to Gray at the hospital when Matthew was initially admitted. Gray, who again identified himself as Thunder Caldwell, told him that when he checked on Matthew, a pillow was partially covering his face and the baby was not breathing, so he pulled him out onto the larger bed, performed CPR and the child vomited.

Haglund later interviewed Gray at the station. Gray explained that he initially gave a false name because he was afraid that he would be found out to be a runaway. When confronted with medical information indicating that Matthew was smothered, Gray hung his head and started crying. He stated that he killed Matthew. Haglund testified that Gray stated that when the baby became fussy, Gray put the bottle in the baby's mouth and squeezed until milk ran out of his mouth. "It started running out of his nose, so he pinched his nose." Gray also stated that he held Matthew's mouth shut and blew in Matthew's nose. In his written statement, Gray described Matthew as "trying to roll over and his arms were grabbing the bottle trying to push it away." Gray stated that he "held the bottle in my right hand and was holding his mouth shut with my left while I was blowing in his nose." The baby stopped spitting milk out and stopped moving. Gray went and laid on his bed with his headphones on until Westenberger came back.

Westenberger testified that she was also questioned at the police department and, at one point, she was in an investigation room with Gray. He told her that he did it. When she asked him why he waited so long to tell her, he said "I thought I could get away with it."

The State offered the following “other acts” evidence: Penny Escalante testified that she is Gray’s great-aunt and that in September 1996, she stopped at Gray’s apartment. He was home with his three children. She testified that she saw Gray pick up baby Matthew by his head, cradling the head in his hands, and set the child down. The child did not fuss or cry. She further testified that a few minutes later, Matthew was walking toward an ashtray and that Gray picked him up by his wrist and “kicked him in the butt” three or four times. “His little head was going back. It was like snapping back and forth.” She reported the incident to the tribal social services department in February 1997, two weeks before Matthew died.

The trial court granted the State’s motion to admit other acts evidence. It concluded that the evidence was relevant to the question of intent and was sufficiently similar to the charged offense in that it involved the same child. It also concluded that the probative value was not outweighed by the prejudicial effect. Gray and his counsel specifically declined a cautionary jury instruction relating to the other acts evidence.¹ The jury returned a verdict finding Gray guilty of first-degree intentional homicide. Gray appeals the judgment of conviction.

Gray argues that the trial court erroneously admitted Escalante’s testimony of other acts of child abuse. We are satisfied that the record supports the trial court’s exercise of discretion and that error, if any, was harmless. The applicable standard for reviewing a circuit court’s admission of other acts evidence is whether the court exercised appropriate discretion. *State v. Sullivan*, 216

¹ To the extent Gray’s argument may be interpreted as a challenge based upon the lack of a cautionary instruction, this claim of error is waived. Section 805.13(3), STATS.

Wis.2d 768, 780-81, 576 N.W.2d 30, 36 (1998). We will sustain an evidentiary ruling if we conclude that the circuit court examined the relevant facts, applied a proper legal standard and, using a demonstrative rational process, reached a reasonable conclusion. *See id.* If a circuit court fails to articulate its reasoning, we independently review the record to determine whether it provides a rational basis for the circuit court's exercise of discretion. *See id.* at 781, 576 N.W.2d at 36.

The admissibility of other acts evidence is governed by §§ 904.04(2) and 904.03, STATS.² Section 904.04(2) bars proof that an accused committed some other act for the purpose of showing he had a corresponding character trait and acted in conformity with that trait. *Sullivan*, 216 Wis.2d at 781-82, 576 N.W.2d at 36.

Although § 904.04(2), STATS., bars character trait or propensity evidence, it permits other acts evidence if its relevance does not hinge on an accused's propensity to commit the act charged. *Sullivan*, 216 Wis.2d at 783, 576 N.W.2d at 37. For example, the following evidentiary propositions do not violate

² Section 904.04(2), STATS., provides as follows:

OTHER CRIMES, WRONGS, OR ACTS. 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.

Section 904.03, STATS., provides as follows:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the propensity inference: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This list is not exhaustive or exclusive. *Id.*

In determining whether to admit other acts evidence, counsel and courts should engage in a three-step analytical frame work outlined as follows:

(1) Is the other acts evidence offered for an acceptable purpose under ... § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in ... § 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* ... § 904.03.

Id. at 772-73, 576 N.W.2d at 32-33. If the other acts evidence was erroneously admitted in this case, the second issue presented is whether the error is harmless or prejudicial. *Id.*

The other acts evidence was offered for the acceptable purpose of showing intent because Gray's defense was that Matthew's death was accidental. *See Kasieta v. State*, 62 Wis.2d 564, 575-76, 215 N.W.2d 412, 418 (1974). Gray concedes that the State met its burden of showing a permissible purpose and that the evidence met the first step of the relevancy test because intent was a key

element to be determined in the case. Gray argues, however, that the other acts evidence lacks probative value due to remoteness in time, place and circumstance.

We disagree. “The probative value of the other acts evidence in this case depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved.” *Sullivan*, 216 Wis.2d at 786-87, 576 N.W.2d at 38-39. “Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense.” *Id.* “The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence.” *Id.* “In other words, ‘if a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable.’” *Id.* (citation omitted).

Gray’s “other act” occurred six months before the crime charged. A six-month time span is not remote. *See State v. Clark*, 179 Wis.2d 484, 494-95, 507 N.W.2d 172, 176 (Ct. App. 1993) (three years between prior act and crime charged). Also, both acts involved abuse of the same child and occurred in their living quarters. Although Gray’s prior act involved a different type of abuse, it was sufficiently similar to be probative of absence of mistake or accident. *See id.* One prior act is sufficient to satisfy relevancy. *See id.* at 496-97, 507 N.W.2d at 177; *State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611, 613 (Ct. App. 1990). We conclude the other acts evidence satisfied relevancy requirements.

Gray also argues that undue prejudice arose from an appeal to the jury’s sympathies and an attempt to influence it to punish Gray for being a bad father. We are unpersuaded.

Unfair prejudice results when the proffered evidence 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.

Sullivan, 216 Wis.2d at 789-90, 576 N.W.2d at 40. We are satisfied that the single incident to which Escalante testified was not an unfair appeal to the jury's sympathies or instinct to punish. The record demonstrates that the trial court reasonably exercised its discretion by admitting the other acts evidence.

Although we determined that the trial court did not err when it admitted the other acts evidence, we further conclude that even if it was error, it would have been harmless in this case.

When it is clear that error has been committed, we should be sure that the error did not work an injustice. The only reasonable test to assure this result is to hold that, where error is present, the reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be *de minimus*.

State v. Dyess, 124 Wis.2d 525, 541-42, 370 N.W.2d 222, 230-31 (1985), *cited in State v. Sullivan*, 216 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1998).

Even without the admission of Escalante's testimony, there was overwhelming evidence supporting the verdict. In his statement to the police, Gray admitted that he was the only adult in the room, that he was "getting really mad and shoving [the] bottle" at Matthew. He admitted pinching the baby's nose shut while squeezing milk into his mouth, and "pressing his jaw up so he couldn't spit the milk out." Matthew "was trying to roll over and his arms were grabbing at the bottle trying to push it away." Gray stopped when the baby "laid there without moving."

In addition to his statement to the police, Gray admitted to others that he had killed his son and, when asked why he did it, stated that he could not take it anymore and that he thought he could get away with it. The autopsy results supported the charge of an intentional homicide. The doctor testified that Matthew had been a healthy, well-nourished and well-developed baby who had suffered irreversible brain damage as a result of asphyxiation. He testified that this damage occurs when the brain is deprived of oxygen for four or five minutes. He further testified that he counted forty bruises and abrasions on the baby and that while some may have occurred during resuscitation, many were inconsistent with resuscitation and were indicative of abuse.

Gray presented expert testimony that the bruises and abrasions were not necessarily indicative of abuse but may have occurred during resuscitation and at the hospital where intravenous solutions were injected. Nonetheless, the expert stated that Matthew's cause of death was consistent with Gray's statement with the understanding that the mechanism was aspiration rather than asphyxia due to obstruction of the upper airway.

We are satisfied that that there is no reasonable possibility that the other acts evidence contributed to Gray's conviction. We conclude the record supports the trial court's exercise of discretion and that error, if any, was harmless. Therefore, we affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

