

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2648-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE SANCHEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
SUE E. BISCHER, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jesse Sanchez appeals his judgment of conviction for one count of delivery of cocaine, as a party to a crime, contrary to WIS. STAT.

§§ 961.41(1)(cm)1 and 930.05.¹ Sanchez argues that the trial court erred by permitting the State to present other acts evidence discovered during a search of Amado Servias's home. We agree with Sanchez and reverse and remand.

BACKGROUND

¶2 On October 28, 1999, a police informant contacted Servias for the purpose of purchasing cocaine. Servias instructed her to go to Sanchez's apartment on Webster Street. When the informant arrived, Servias answered the door and let her in. There was a small party going on. The informant asked Servias for the drugs. According to the informant, Servias instructed Sanchez to get the cocaine. After she had purchased the cocaine, the informant left the apartment. The transaction took approximately fifteen minutes.

¶3 On December 1, 1999, Sanchez moved in with Servias at Servias's home on Crooks Street. On December 28, police executed a search warrant of the home. The police found surveillance cameras and monitors, an alarm system, handguns, ammunition, marijuana and drug paraphernalia.

¶4 Sanchez was then charged with delivery of cocaine in connection with the October 28 drug sale. During the jury trial, the State offered evidence about the surveillance system and the other items found during the December 28 search of Servias's home. Sanchez objected. The trial court overruled the objection. The State was allowed to present testimony regarding the evidence found during the search.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless noted otherwise.

¶5 Sanchez was convicted of delivery of cocaine and party to a crime. This appeal followed.

STANDARD OF REVIEW

¶6 The issue in this case is whether the trial court erroneously exercised its discretion when it admitted the other acts evidence. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). We will sustain an evidentiary ruling if the trial court examined the relevant facts, applied the pertinent law, and reached a rational conclusion. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

DISCUSSION

¶7 Sanchez argues that the other acts evidence found during the search of Servias's home: (1) was not admitted for an acceptable purpose under WIS. STAT. § 904.04(2); (2) is not relevant to whether he aided and abetted Servias during the October 28 drug sale; and (3) had a prejudicial effect that substantially outweighed any probative value. We agree.

I. CIRCUMSTANTIAL EVIDENCE

¶8 As a preliminary matter, the State argues that the evidence found in the December 28 search of Servias's residence is not other acts evidence at all, but circumstantial evidence. The State relies heavily on *State v. Wedgeworth*, 100 Wis. 2d 514, 302 N.W.2d 810 (1981). In *Wedgeworth*, the defendant was charged with possession with intent to deliver heroin and marijuana. The drugs were discovered during a search of the defendant's apartment. Also found during that same search were large amounts of cash, a scale, drug paraphernalia, and firearms.

Id. at 517. The defendant’s defense was that the drugs belonged to his live-in-girlfriend, and that he was unaware of their presence.

¶9 Our supreme court held that the non-narcotic items were not other acts evidence because they were not evidence of another crime. *Id.* at 529-30. Rather, it held that the discovered items were circumstantial evidence that the defendant was intending to sell drugs. The court believed “the testimony and other evidence relating to the weapons found in the defendant’s residence were part of a chain of facts by which the state sought to have the jury infer that the defendant possessed heroin with the intent to deliver it.” *Id.* at 532.

¶10 The present case is distinguishable from the holding in *Wedgeworth*. If the search had been conducted at Sanchez’s apartment in October and the items were found, there would have been a chain of facts making the evidence circumstantial, rather than other acts. However, items found in the search of Servias’s home two months later cannot be considered circumstantial. The October sale did not involve the use of or even the presence of surveillance and alarm systems, guns, cash, or other drug related items. Sanchez was not charged with or alleged to have been involved in drug sales at Servias’s home. Therefore, we conclude that the items found in the December 28 search are other acts evidence and are subject to WIS. STAT. § 904.04(2).

II. OTHER ACTS EVIDENCE

¶11 A trial court decides the admissibility of other acts evidence under WIS. STAT. § 904.04(2)², by applying a three-prong test. *State v. Sullivan*, 216

² WISCONSIN STAT. § 904.04(2) reads as follows:

(continued)

Wis. 2d 768, ¶4, 576 N.W.2d 30 (1998). First, the trial court must determine whether the evidence is offered for an acceptable purpose. *Id.* at ¶6. Second, it must determine whether the proposed other acts evidence is relevant. *Id.* at ¶7. Third, the trial court must determine whether the prejudicial effect of the other acts evidence substantially outweighs its probative value. *Id.* at ¶8.

A. Acceptable Purpose

¶12 The first step in determining the admissibility of other acts evidence necessitates that it be offered for an acceptable purpose. The list of acceptable purposes set forth in WIS. STAT. § 904.04(2), is illustrative and by no means exclusive. *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983) *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

¶13 Additional acceptable purposes noteworthy for our current analysis are to show the context in which the charged crimes took place, to show the full presentation of the case, and "to complete the story of the crime on trial by proving its immediate context of happenings" *State v. Bettinger*, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981). However, the evidence of an individual's other acts is not admissible to prove the character of the individual in order to show that the individual acted in conformity with that character. WIS. STAT. § 904.02(2). Here, the State argues that the other acts evidence found at Servias's home was

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.

admissible to prove Sanchez's intent to commit the crime and for completion of the story.

1. Intent

¶14 Other acts evidence is admissible to show intent because it tends to undermine a defendant's innocent explanation for his or her act. *State v. Roberson*, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990). A defendant opens the door to other acts evidence when the defendant places intent in issue with testimony that his or her presence at the crime scene was coincidental and innocent. *State v. Rutchik*, 116 Wis. 2d 61, 68, 341 N.W.2d 639 (1984). Here, Sanchez claimed he was present but unaware of the drug sale. Therefore, he opened the door to other acts evidence. We conclude that the State offered the other acts evidence of intent for an acceptable purpose.

2. Completing the Story

¶15 The State additionally argues that the other acts evidence was admissible to complete the story by showing the relationship between Sanchez and Servias. See *Shillcutt*, 116 Wis. 2d at 236. The State contends that Sanchez living at Servias's home, apparently a drug house, helps to better explain the relationship the two had and also undermines Sanchez's present but innocent defense. We disagree.

¶16 In some cases, the context or complete story of the crime may not be fully understandable without information about the relationship between the accused and another party. *Id.* at 236-37. The State relies heavily on *Shillcutt* to support its argument. However, *Shillcutt* dealt with background. Here, we are

dealing with subsequent acts. While subsequent acts can show consciousness of guilt, they do not show background in this case.

¶17 The State does not make any allegations that Sanchez participated in any drug transactions after October 28. The State does not allege that the October 28 drug sale was a complicated conspiracy to distribute drugs. Sanchez's criminal charge stemmed from a single drug sale on October 28. The State is attempting to assert that because Sanchez lived with Servias in December, and Servias's home had technology and other items tied to drug dealing, Sanchez participated in a drug sale on October 28. We conclude that this is not completing a story, rather it is making character inferences, precisely the sort of evidence barred by WIS. STAT. § 904.04(1).

B. Relevance

¶18 Having concluded that intent is an acceptable purpose here to offer other acts evidence, we turn to the second step in the *Sullivan* analysis: whether the other acts evidence is relevant to show that intent. *Sullivan*, 216 Wis. 2d at ¶7. The question is whether the evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01.

¶19 “The measure of probative value in assessing relevance is the similarity between the charged offense and the other act.” *State v. Hammer*, 2000 WI 92, ¶31, 236 Wis. 2d 686, 706, 613 N.W.2d 629 (quoting *State v. Gray*, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999)). “Similarity is demonstrated by showing the ‘nearness of time, place, and circumstance’ between the other act and the alleged crime.” *Hammer*, 2000 WI at ¶ 31 (quoting *State v. Scheidell*, 227 Wis. 2d 285, 595 N.W.2d 661 (1999)).

¶20 Sanchez did not dispute that a cocaine transaction occurred between Servias and the police informant on October 28 at Sanchez's apartment. He simply stated that he knew nothing about it and had no recollection of the informant ever being in his apartment.

¶21 The State argues that the other acts evidence found at Servias's home in December was relevant to Sanchez's criminal intent in October. At trial, the State presented testimony that Sanchez was living with Servias two months after the drug sale in what was characterized as a fortified drug house. According to the State, the fact that Sanchez lived there undermined his present but innocent defense. It argues the evidence tended to make it less probable that Sanchez did not know about the drug sale in his apartment and more probable that he assisted Servias with the drug sale.

¶22 However, the circumstances between the October 28 drug sale and the other acts evidence are completely different. The October 28 drug sale took place at Sanchez's apartment. There is no evidence that his apartment contained any of the major items discovered in the December 28 search. There is no evidence that Sanchez's apartment was a fortified drug apartment like Servias's home. Further, the State is not arguing that Sanchez took part in any illegal activity while he lived at Servias's home nor does it allege that any of the evidence recovered from Servias' home belonged to Sanchez.

¶23 The evidence found during the December 28 search was not probative of Sanchez's intent to distribute drugs during the October 28 sale. Rather, the evidence tended to prove that Sanchez acted in conformity with his character. Therefore, we conclude that the other acts evidence was not relevant to Sanchez's intent to distribute.

C. Unfair Prejudice and Probative Value

¶24 Even if the other acts evidence was relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to Sanchez, the third step in the *Sullivan* analysis. See *Sullivan*, 216 Wis. 2d at ¶61. Unfair prejudice results when the 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. *Id.* at ¶62. In this case the danger of unfair prejudice was that the jurors would be so influenced by the other acts evidence that they would be likely to convict Sanchez because the other acts evidence showed him to be a bad man.

¶25 The State argues that the other acts evidence is not unfairly prejudicial because it was less likely to provoke the jury's instinct to punish than would the evidence concerning the October drug sale. However, as stated earlier, the circumstances between the October drug sale and the December search are completely different. The sale at Sanchez's apartment was a relatively minor drug transaction. Sanchez is alleged to have simply handed cocaine to a police informant. The evidence found at Servias's home two months later was indicative of a large-scale drug operation.

¶26 The State's argument that the evidence was not unfairly prejudicial fails because the evidence may have provoked the jury's instinct to punish Sanchez, not for his alleged crime in October, but for his association with a sophisticated drug ring. The State referred to the other acts evidence in its closing statement and urged the jury to consider what the other acts evidence revealed about his character. Specifically, the State argued to the jury that Sanchez

participated in the drug ring by monitoring who was coming and going by the use of the surveillance cameras. It also argued that the burglar alarm was used to prevent people from breaking into the home and going through Sanchez's "stash."

¶27 The picture the State painted with the other acts evidence portrayed Sanchez as a knowledgeable, experienced, and dangerous drug dealer. We conclude the probative value, if any, of the other acts evidence is substantially outweighed by the danger of unfair prejudice.

II. HARMLESS ERROR

¶28 The State argues that even if the other acts evidence was inadmissible, the error was harmless. The State contends there was other ample evidence to identify Sanchez as the man who assisted Servias in the October 28 cocaine sale. We disagree.

¶29 The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Patricia A.M.*, 176 Wis. 2d 542, 556, 500 N.W.2d 289 (1993). The party who benefits from the error bears the burden of proving the effect of the error. A reasonable possibility is one that is sufficient to undermine confidence in the outcome of the proceeding. *Id.* The conviction must be reversed unless the reviewing court is certain the error did not influence the jury. *Sullivan*, 216 Wis. 2d at ¶72.

¶30 This case was a credibility contest between Sanchez and the informant. There were no other witnesses. As a result of the inadmissible other acts evidence, Sanchez's credibility was destroyed. The State used this evidence as character evidence to imply that, at the very least, Sanchez was connected to a

drug dealer. The State cannot meet its burden of showing that this evidence did not influence the jury.

By the Court.—Judgment reversed and cause remanded.

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

