

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2012AP1979-CR

Cir. Ct. No. 2008CF462

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. HAYDON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Michael Haydon appeals a criminal judgment convicting him of first-degree intentional homicide. Haydon contends that he is entitled to a new trial based on the circuit court's admission of other acts evidence.

For the reasons discussed below, we conclude that the challenged evidence was properly admitted, and affirm the judgment of conviction.

BACKGROUND

¶2 The State charged Haydon with fatally shooting Pat Zemke in the cab of Zemke's truck on the morning of November 18, 2003. The State's theory of the case was that Haydon killed Zemke out of jealousy and obsession, after mistaking Zemke for another truck driver who Haydon suspected was having an affair with Haydon's former girlfriend.

¶3 Prior to trial, the State filed a motion to admit other acts evidence relating to Haydon's interactions with his former girlfriend in the hours before Zemke was killed, which resulted in a separate criminal conviction. The circuit court granted the motion, allowing the State to introduce testimony that Haydon had kidnapped the woman's dogs on November 17, 2003, and left a message telling her she should pack her bags and a bible and come to his house if she wanted to get her dogs back. When the woman went to Haydon's house to retrieve her dogs, Haydon sexually assaulted her at gunpoint. During the hours that the woman was held captive, throughout the night of November 17 and into the morning of November 18, she observed Haydon drinking alcohol, snorting powdered Ritalin, and taking other pills. On this appeal, Haydon limits his challenge to the other acts evidence to the admission of the woman's sexual assault testimony.

STANDARD OF REVIEW

¶4 We review the circuit court's admission of other acts evidence under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768,

780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *See id.* at 780-81.

DISCUSSION

¶5 Under WIS. STAT. § 904.04(2) (2011-12),¹ evidence of other crimes or acts may be admissible when offered for proper purposes, including establishing plan, motive, and context. However, the evidence still must be relevant under WIS. STAT. §§ 904.01 and 904.02 in that it relates to a fact or proposition that is of consequence to the determination of the action, and its probative value must not be substantially outweighed by the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. *See Sullivan*, 216 Wis. 2d at 785-89.

¶6 Although the circuit court did not explicitly cite *Sullivan*, the court's comments plainly show that it was conducting a *Sullivan* analysis. First, the court determined that the evidence was being offered for the permissible purposes of providing context for the crime and showing Haydon's state of mind. Next, the court noted that the evidence was both probative of the State's case, and also prejudicial to the defendant. The court concluded that showing the defendant's state of mind in particular was necessary for a full presentation of the State's case, and that the potential prejudice to the defendant could be limited by providing the jury with a cautionary instruction regarding the use of the evidence.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 The circuit court's comments demonstrate a proper exercise of discretion. The sexual assault showed not only that Haydon was possessive and controlling of his former girlfriend, but that he had reached a point where he was willing to employ violence when his perceived relationship with her was threatened. Moreover, the assault happened mere hours before the murder. In short, the evidence was highly probative of Haydon's jealous and angry state of mind on the night of the murder that the circuit court properly determined that its probative value substantially outweighed any prejudicial effect.

¶8 We note that the State argues that we should declare the disputed evidence non-other acts evidence. The State supports its argument in this regard with citations to our decisions in *State v. Dukes*, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515, and *State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902. We need not, however, decide the issue. As we have demonstrated, even if the evidence is treated as other acts evidence, the State prevails on appeal.

By the Court.—Judgment affirmed.

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

