

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2012AP186-CR

Cir. Ct. No. 2010CF106

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL K. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
TODD P. WOLF, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, J. Daniel K. Rogers was charged with second-degree sexual assault by use of force, domestic abuse, as a repeater. During the jury trial, the victim testified that several months after the incident for which Rogers was charged, Rogers choked the victim because she decided not to lie

about the sexual assault after Rogers asked her to do so. Rogers was found guilty and appeals the judgment of conviction. The issue on appeal is whether the court properly admitted the choking evidence. We affirm.

BACKGROUND

¶2 Rogers was charged with second-degree sexual assault by use of force, domestic abuse, as a repeater for violently sexually assaulting his live-in girlfriend in February 2010. According to trial testimony, Rogers was released on bond and awaiting trial when he asked the victim to lie for him about the sexual assault and the victim agreed to do so. The victim testified that after learning that the victim would not lie for him, Rogers choked the victim to the point of unconsciousness. Rogers was eventually charged as a result of the choking incident.

¶3 Prior to the trial, the State brought a motion to join the instant case with two other cases, one of which involved the choking incident, that were pending against Rogers in Wood County. In the alternative, the State sought the court's permission to admit evidence of the choking incident under WIS. STAT. § 904.04 (2011-12),¹ as other acts evidence. The court denied the motion for joinder, but granted the State's motion to admit evidence of the choking incident as other acts evidence. A jury trial was held on the sexual assault charge and the jury found Rogers guilty. Rogers appeals.

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

DISCUSSION

¶4 On appeal, Rogers argues that the circuit court erroneously exercised its discretion in granting the State’s motion to admit the choking evidence as other acts evidence. He argues that the choking evidence was inadmissible other acts evidence under WIS. STAT. § 904.04(2), because it did not satisfy the three-part *Sullivan* test for admitting other acts evidence. See *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We agree, however, with the circuit court and the State that the evidence was properly admitted as other-acts evidence.

¶5 We begin by quoting from a case that summarizes the applicable other acts analysis:

When deciding whether to allow other-acts evidence, Wisconsin courts look to Wis. Stat. § 904.04(2)(a), and apply the three-step analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Under *Sullivan*, courts must consider: (1) whether the evidence is offered for a proper purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.”

The proponent of the other-acts evidence “bears the burden of establishing that the first two prongs are met by a preponderance of the evidence.” Once the first two prongs of the test are satisfied, the burden shifts to the opposing party “to show that the probative value of the [other-acts] evidence is substantially outweighed by the risk or danger of unfair prejudice.”

....

The admissibility of evidence rests within the trial court’s discretion and the decision to admit other-acts evidence is reviewed for an erroneous exercise of discretion. “A [trial] court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process

to reach a conclusion that a reasonable judge could reach.” We generally look for reasons to sustain the trial court’s discretionary decisions. “Although the proper exercise of discretion contemplates that the [trial] court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.” We are required to independently review the record if the trial court does not provide a detailed *Sullivan* analysis. As such, [when a] trial court [does] not perform a *Sullivan* analysis ..., our review is *de novo*.

State v. Lock, 2012 WI App 99, ¶¶40-43, 344 Wis. 2d 166, 823 N.W.2d 378, review denied, 2013 WI 6, 345 Wis. 2d 401, 827 N.W.2d 96 (citations and quoted sources omitted).

¶6 Regarding the first *Sullivan* prong, although the parties discuss other proper purposes, we limit our discussion to one clearly proper purpose, admission of the choking evidence to show consciousness of guilt. “[E]vidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.” *State v. Neuser*, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) (quoted source omitted).

¶7 As to the second *Sullivan* prong, Rogers argues that the evidence here was not probative of consciousness of guilt. In his reply brief, Rogers concedes that “arguably testimony that Rogers asked [the victim] to lie would have been admissible as evidence of consciousness of guilt.” However, Rogers then goes on to argue that the victim’s testimony does not support admitting the choking evidence to prove his consciousness of guilt. Rogers contends that, on direct examination, the victim testified that Rogers choked her after she agreed to lie for him, and presumably before Rogers discovered that the victim had decided to testify truthfully. Rogers contends that, based on the victim’s testimony on

direct examination, it cannot be true that Rogers choked the victim to “get her to lie.” In other words, in Rogers’ view, the victim’s version of the alleged choking incident cannot establish that he choked the victim in an effort to prompt her to lie for him, but rather her version indicates that Rogers choked her after she told him that she *would* lie for him. We acknowledge that some of the victim’s testimony was unclear. We conclude, however, that her testimony is reasonably understood as an assertion that Rogers choked her in an effort to get her to lie for him.

¶8 On direct examination, the victim testified that in June 2010, after the preliminary hearing at which she testified against Rogers, but before trial, Rogers approached the victim and asked her to lie for him about the alleged sexual assault, and the victim said that she would lie for Rogers. The victim subsequently testified that Rogers choked her until she lost consciousness. However, contrary to Rogers’ assertion, the victim did not testify that she agreed to lie and that then Rogers choked her. Rather, the victim was asked why she told Rogers that she would lie for him, and she responded that she did so because he “would become very violent.” Obviously, it makes little sense to interpret her answers as an assertion that she agreed with Rogers’ request and, in response, he became violent. That is not a reasonable understanding of the victim’s testimony.

¶9 Similarly, the victim’s answers on re-direct examination lack clarity, but are most reasonably read as repeating the assertion that, in June, Rogers choked the victim in an effort to prompt her to lie for him at trial. During this part of her testimony, the victim again stated that Rogers asked her to lie for him. The victim testified that “he choked me ... after he found out that I didn’t lie for him.” The context again shows that the victim is conveying the idea that Rogers wanted her to lie and would punish her, as he did by choking her, if she would not lie for him at trial.

¶10 This evidence indicates Rogers’ intent to “obstruct justice [and] avoid punishment,” and is thus probative of Rogers’ consciousness of guilt. *See id.*

¶11 With respect to the third prong of *Sullivan*, Rogers argues that the probative value of the evidence is outweighed by unfair prejudice. We disagree. It is true that the choking evidence carries with it substantial potential for unfair prejudice. But at the same time, it is highly probative because it shows the substantial length to which Rogers was willing to go to either prompt the victim to change her testimony or to prevent her from testifying altogether. A reasonable judge could certainly conclude that the probative value of the evidence offset the danger of unfair prejudice.

¶12 For the reasons above, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.