STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2012AP186-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL K. ROGERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE TODD P. WOLF PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED FOR REVIEW

Did the trial court properly exercise its discretion in admitting evidence that four months after the charged sexual assault, Rogers choked the victim because she had not lied for him?

In finding the evidence admissible, the trial court implicitly said yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the single issue presented can be resolved by applying existing case law, the State does not request oral argument or publication of the court's opinion.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those set forth at pages 3-11 of Rogers' brief will be presented where necessary in the Argument section.

ARGUMENT

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE THAT FOUR MONTHS AFTER THE CHARGED CRIME, ROGERS CHOKED THE VICTIM BECAUSE HE WAS ANGRY SHE HAD NOT LIED FOR HIM IN THIS CASE.

A. General principles and standard of review.

With respect to preserved claims of error, evidentiary rulings "are generally reviewed with deference to determine whether the circuit court properly exercised its discretion in accordance with the facts and accepted legal standards." *State v. Tucker*, 2003 WI 12, ¶ 28, 259 Wis. 2d 484, 657 N.W.2d 374.

"[S]imply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. Rather, as this court explained in *State v. Dukes*, 2007 WI App 175, 303 Wis. 2d 208, 736 N.W.2d 515,

> Evidence is not "other acts" evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime.

Id. ¶ 28. *Accord State v. Jensen*, 2011 WI App 3, ¶ 85, 331 Wis. 2d 440, 794 N.W.2d 482 (evidence showing Jensen had left pornographic photos around the house to torture his wife was admissible as "'part of the panorama of evidence'" surrounding her murder because it "involved the relationship between the principal actors . . . and traveled directly to the State's theory as to why Jensen murdered [his wife]").

To be admissible as "other acts" evidence, proffered evidence must pass a three-part test:

(1) The evidence must be offered for an admissible purpose under Wis. Stat. § 904.04(2) that does not depend on a prohibited "propensity" inference of the defendant's character to commit the charged crimes. *See State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Because "[t]he purposes for which other-acts evidence may be admitted are 'almost infinite[,]'" satisfying this first step "is not demanding." *State v. Marinez*, 2011 WI 12, ¶ 25, 331 Wis. 2d 568, 797 N.W.2d 399.

(2) The evidence also must be relevant, meaning it must be "of consequence to the determination of the action" and must have "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis. 2d at 772.

(3) Finally, the probative value of the other-acts evidence must not be "substantially outweighed" by the considerations set forth in Wis. Stat. § 904.03, which includes "the danger of unfair prejudice." *Sullivan*, 216 Wis. 2d at 772-73.

Admission of other-acts evidence is deferentially reviewed for an erroneous exercise of discretion.

Sullivan, 216 Wis. 2d at 780-81. If the trial court fails to adequately set forth its reasoning, the appellate court "independently review[s] the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Id.* at 781.

"The question on review is not whether [the appellate] court would have allowed admission of the evidence in question." *State v. Kimberly B.*, 2005 WI App 115, ¶ 38, 283 Wis. 2d 731, 699 N.W.2d 641 (citation omitted). Rather, "[t]he circuit court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted).

Regardless of whether the evidence being challenged on appeal was part of the panorama of evidence needed to fully understand the crime, or whether it is treated as other-acts evidence, the State will show below why the trial court properly exercised its discretion in admitting the evidence.

B. Evidence that four months after the charged sexual assault, Rogers choked the victim into unconsciousness because she had not lied for him in this case is part of the panorama of evidence.

Although the prosecutor, defense counsel and the trial court treated evidence of the June 15, 2010 incident involving Rogers and the victim as other-acts evidence (*see* 13:2; 14:2; 33:3-6), the State submits this event is part of the panorama of the evidence relevant to show Rogers' guilt of the charged crime. Support for this view comes from *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995).

Neuser, who was accused of stabbing his girlfriend in the arm, telephoned a threat to her shortly before trial. *Id.* at 144. This court rejected Neuser's contention that the threat was evidence of other acts pursuant to Wis. Stat. § 904.04. Instead, this court found the threat constituted "admissible evidence of Neuser's consciousness of guilt." *Id*. In doing so, the court acknowledged that the evidence posed "substantial prejudice to Neuser." *Id.* at 145 (footnote omitted).

Long before *Neuser*, our supreme court in *Price v. State*, 37 Wis. 2d 117, 154 N.W.2d 222 (1967), upheld the admission of evidence that Price had said to a witness shortly before trial, "'If it takes me thirty years, I will kill you.'" *Id.* at 130. After citing several evidence treatises for the proposition that "[t]he attempt to hinder or threaten a witness to a crime is an occurrence that has relatively high probative value" (*id.* at 132), the court explained why evidence of Price's threat was admissible at his burglary trial:

> The threat was made only shortly before the testimony of Rogers, and it would appear to be directly related to the fact that Rogers was about to testify against him. It was not evidence of general bad character; it was evidence directly related to the crime charged. It was an occurrence that tended to show Price's attempt to suppress evidence of his guilt and was therefore of probative value.

Price, 37 Wis. 2d at 133.

Here the victim testified that in June – i.e., just four months after the charged sexual assault – Rogers asked her to lie about the earlier incident (34:77) and choked her when he found out she hadn't lied for him (*id.*:171). This evidence, like the threat evidence in *Neuser* and *Price*, was admissible to show Rogers' consciousness of guilt. As such, the choking incident was part of the panorama of evidence and was not truly "other acts" evidence, the parties' treatment of it notwithstanding. Evidence of the June incident was also panorama evidence because it

showed the relationship of the principal actors, just lithe evidence of the pornographic photos in *Jensen*, 331 Wis. 2d 440, ¶ 85, helped illuminate the relationship between Jensen and his deceased wife.

Because evidence of the choking incident was not "other acts," its admissibility is analyzed only under Wis. Stat. §§ 904.01 and 904.03. Under *Neuser* and *Price*, evidence that Rogers choked the victim four months after the assault because he wanted her to lie about it is undeniably relevant. And while the evidence was surely prejudicial, it was not unfairly so. *See Neuser*, 191 Wis. 2d at 144-45 & n.2. In this regard, it is noteworthy that the trial court offered to give a cautionary instruction telling the jury to consider the evidence only for consciousness of guilt (34:142-43), but Rogers declined the court's invitation on two occasions (*id.*:143, 183). Such an instruction would have lessened the prejudicial effect of the evidence, but Rogers decided as a strategic matter to forego such an instruction.

For all these reasons, this court should find that under §§ 904.01 and 904.03, the trial court properly admitted evidence of the June 2010 choking incident.

C. Alternatively, the evidence was admissible "other acts" evidence under § 904.04(2).

Assuming this court finds that the evidence of the choking incident must be analyzed as "other acts" evidence, it easily passes muster under the three-part *Sullivan* test set forth in section A. above.

As the supreme court acknowledged in *Marinez*, 331 Wis. 2d 568, ¶ 25, the first step in the *Sullivan* analysis – showing that the evidence is admissible for a permissible purpose – is not demanding. That is certainly the situation here.

While Rogers apparently believes that this court in its analysis is limited to the purpose for which the prosecutor wished to introduce the evidence, and for which the circuit court received it, that belief is misguided. It is well settled that when reviewing a circuit court's decision admitting other-acts evidence, the appellate court can consider acceptable purposes for the evidence that the circuit court did not contemplate and may affirm the lower court's decision for reasons not stated by the circuit court. *State v. Hunt*, 2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771.

Here, evidence of the choking incident was relevant to show Rogers' consciousness of guilt in the charged offense. Proof that he choked the victim because she had not lied for him was relevant to show he wanted her to lie for him in his upcoming trial, which in turn was circumstantial evidence of his guilt on the underlying charge. That this is a proper reason for admitting the evidence is clear from *State v. Bettinger*, 100 Wis. 2d 691, 697-98, 303 N.W.2d 585 (1981), and from *Price* and *Neuser*, both of which are discussed in section B. above.

This is not to say the evidence was not admissible for the purpose the trial court identified, i.e., to show that Rogers used suffocation/choking to get the victim to submit to his demands (*see* 33:4). With respect to the charged crime, the victim told nurse Linda Stankey (34:115) that Rogers "[w]as trying to suffocate [her] with his hands" (*id.*:121). At trial, the victim testified that Rogers "had me down by the leg up around my neck" (*id.*:68) and "kept smothering" her into the pillows and blankets (*id.*:69). In the June 2010 incident, Rogers choked her until she lost consciousness (*id.*:77). Rogers therefore used a similar method to cause the victim to submit to his demand that she lie for him as he had used to cause her to submit to his desire for anal intercourse four months earlier. The choking incident was therefore admissible to show Rogers' method for obtaining compliance with his demands as well as to show consciousness of guilt.

Finally, the choking incident was admissible for the proper purpose of showing the relationship between Rogers and his girlfriend. *See State v. Shillcutt*, 116 Wis. 2d 227, 237-38, 341 N.W.2d 716 (Ct. App. 1983), *aff'd on other grounds,* 119 Wis. 2d 788, 350 N.W.2d 686 (1984).

The evidence easily passes the first step of the *Sullivan* analysis.

Because the choking evidence was relevant to show Rogers' consciousness of guilt on the charge of sexual assault, it necessarily clears the second *Sullivan* hurdle, i.e., that the evidence was "of consequence to the determination of the action" and had "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis. 2d at 772.

As for *Sullivan*'s third step, Rogers bears the burden of proving that the probative value of the other-acts evidence is substantially outweighed by the risk of unfair prejudice. *See Hunt*, 263 Wis. 2d 1, ¶ 53. This court should find he has failed to satisfy this burden. Here, the trial court was willing to give a limiting instruction regarding the evidence, but Rogers twice declined that offer (34:143, 183). And while the evidence was certainly prejudicial, it was not unfairly so. *See Neuser*, 191 Wis. 2d at 144-45 & n.2. Because Rogers knew in advance of trial that the evidence was forthcoming, he was prepared to and did testify that the victim denied the June incident at a preliminary hearing (134:159).

Under these circumstances, this court should find that the trial court properly found the evidence satisfied the third step of *Sullivan*.

CONCLUSION

For all of the above reasons, this court should affirm the judgment of the circuit court.

Dated this 27th day of June, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2011 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of June, 2012.

_____
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