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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP000648

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ANTON R. DORSEY,

Defendant-Appellant

On appeal from the Circuit Court for Eau Claire County,

The Honorable Paul J. Lenz, presiding

BRIEF OF THE DEFENDANT-APPELLANT

ANTON R. DORSEY

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Whether evidence of other criminal acts committed against a person other than the victim are admissible in cases of alleged domestic abuse for the purpose of showing a generalized motive or purpose on the part of the defendant to control persons with whom he is in a domestic relationship.

Whether the testimony of R.K. was relevant to the purpose of proving intent on the part of Mr. Dorsey to cause bodily harm to C.B., and if so, was the probative value of R.K.'s testimony substantially outweighed by the danger of unfair prejudice.

IV. Statement on oral argument and publication.

This case involves a novel assertion on the part of the State and the trial court that other acts evidence can be admitted for the purpose of proving a generalized motive or purpose on the part of the defendant to control persons with whom he is in a domestic relationship. This assertion appears to have been influenced at least in part by recent changes by the Wisconsin Legislature to Wis. Stats. § (Rule) 904.04(2). It is foreseeable that future courts will be faced with similar issues as those encountered in Mr. Dorsey's case. This court's decision should be published, and this court would benefit from oral argument.

V. Statement of the case and facts.

On March 18, 2014, a four count criminal complaint was filed in the circuit court, Eau Claire County, charging Anton R. Dorsey, with: a first count of Strangulation and Suffocation, in violation § 940.235(1), Wis. Stats.; a second count of Misdemeanor Battery, in violation of § 940.19(1), Wis. Stats.; a third count of Disorderly Conduct, in violation of § 947.01(1), Wis. Stats.; and a fourth count of Aggravated Battery, in violation of § 940.19(6), Wis. Stats. (R.1:1-2). All four counts included repeater penalty enhancers pursuant to § 939.62(1)(b), Wis. Stats., and counts 3 and 4 were charged as acts of domestic abuse, pursuant to § 973.055(1), Wis. Stats. (R.1:1-2).

Mr. Dorsey waived his right to a preliminary hearing on April 15, 2014, and was arraigned on May 2, 2014. (R.28 and R.29). In addition to the usual status and scheduling hearings there was a motion hearing on August 26, 2014, on the State's motion to introduce other acts evidence. (R.33 and R.9). That motion hearing will be discuss in further detail below. A one day jury trial was held on August 28, 2014. (R.34).

A. Testimony of C.B.

The State's first witness was C.B., the alleged victim. (R.34:73-152). C.B. testified to three separate incidents of violence which she claimed to have suffered at the hands of Mr. Dorsey.

The first incident, which was the basis of Count 1 of the criminal complaint, allegedly occurred on the morning of October 12, 2013. (R.34:76-83;

Appx. 26-32). C.B. testified that on evening of October 11, 2013, she had gone with friends to a bar after her son's high school football game. (R.34:76-77; Appx. 26-27). There she was met by Mr. Dorsey. (R.34:76-77; Appx. 26-27). At some point an unnamed person entered the bar, a person whom Mr. Dorsey did no wish to be in the same room with. (R.34:77-78; Appx. 27-28). Mr. Dorsey stated he wanted to "wait in the car" until C.B. was ready to leave the bar, a desire which C.B. did not understand. *Id.* Eventually, they left the bar together with two of C.B.'s friends, Jenny and Vicki. *Id.* After driving Jenny and Vicki to their homes, they proceeded to a gas station. *Id.* On the way to the gas station they began quarreling over what happened in the bar. (R.34:78-79; Appx. 28-29). When they arrived at the gas station he asked her for money, and she responded by telling him that "all I'm good for is money." *Id.* According to her testimony, Mr. Dorsey took offense at this statement and the quarrel escalated until he pulled over and stopped the car a street before her home. (R.34:79-80; Appx. 29-30). They argued for a while in the car, then she exited the car and began walking home. *Id.* There on the street, she testified, Mr. Dorsey came up to her, placed both hands on either side of her neck with his thumbs in the middle, and applied pressure to her windpipe. (R.34:80-81; Appx. 30-31). She remembered experiencing tightness, then being pulled off the ground and Mr. Dorsey saying "You aren't F-ing doing this to me." *Id.* She testified that afterwards he kept apologizing to her about what just happened. (R.34:82; Appx. 31). On cross-examination she admitted that she

did not report the incident to the police until March 17, 2014, nor discussed the incident with friends or coworkers before that date. (R.34:122-24; Appx. 56-58).

The second incident, which was the basis of Count 2 of the criminal complaint, allegedly occurred some time in December of 2013. (R.34:84-87; Appx. 33-36). According to C.B., Mr. Dorsey was upset with her, though she could not remember his reasons for being upset. (R.34:85; Appx. 34). She did recall, however, that she did not want to talk to him but that he insisted that they should talk. *Id.* At some point in the quarrel she stated that "he took his finger and flipped it at my lip, and split my lip open." *Id.* After splitting her lip open, C.B. testified that Mr. Dorsey threw a box of Kleenex at her and said "There. Now take care of it." *Id.* Then, he grabbed her by the arm and her waist, pulled her forward so he could have eye contact, and spit in her face. (R.34:85-86; Appx. 34-35). She testified to having injuries of a bloody lip and bruises to her arm, hip and inner thigh. (R.34:86; Appx. 35). Later, C.B. texted Mr. Dorsey writing "I don't know what to think or feel right now. You spit in my face, gave me a bloody lip, bruises all over my arm and my waist and put your ashes in my eye. I can't send" and "I can't understand how the man I love could go this far even if it was my fault for making him angry." (R.34:84; Appx. 33). To that text, Mr. Dorsey replied "You lying to me for no reason at all, why do that?" (R.34:85; Appx. 34). C.B. also testified to Mr. Dorsey hitting her in the head in December of 2013, and specifically to hitting her above the hairline so as to leave no proof of his hitting her. (R.34:86-87; Appx. 35-36). Despite this incident, C.B. testified that in early

February of 2014, she allowed Mr. Dorsey moved into her home. (R.34:88; Appx. 37).

The third incident, which was the basis of Counts 3 and 4 of the criminal complaint, allegedly occurred in March of 2014. (R.34:88-106; Appx. 37-55). According to C.B., on the evening of March 11, 2014, she and Mr. Dorsey were in a bar when he discovered on her phone a text message which she had sent to male friend. (R.34:90; Appx. 39). This friend was a person whom Mr. Dorsey did not like and he accused her of sleeping with this gentleman, which she denied. *Id.* Later, in the parking lot of the bar, C.B. claimed Mr. Dorsey came up behind her, grabbed her and held her against the side of the building and asked "Why are you doing this?" (R.34:91; Appx. 40). C.B. then told him "Get your hands off me. I'm going to scream" at which point he let go of her and said "Go to the car." *Id.* That was the end of the argument for that evening. *Id.*

The next morning, however, C.B. testified that she awoke with Mr. Dorsey's face approximately 4 and a half inches from her own. (R.34:92; Appx. 41). She stated that he was saying "I can't believe you're doing this, that you keep doing this." *Id.* She testified that she ignored what he was saying because she knew he would not do anything while her sons were at home. *Id.* When the boys left for school, she told Mr. Dorsey that she needed to go to work, but he told her "No. We're going to talk about this." *Id.* According to C.B., Mr. Dorsey then sat down on the bed next to her and hit her on the side of the head, first with a closed fist, then with his open hand. (R.34:92-93; Appx. 41-42). From these blows C.B.

said she experienced ringing in her head, sickness in her stomach, and an instant throbbing headache. (R.34:93; Appx. 42). C.B. further testified that after these initial blows Mr. Dorsey was saying to her things like "why do [you] keep doing this? Why do [you] keep lying to [me]? Am I being played for a fool." *Id.* While he was saying these things, she kept telling him that she had to go to work, and Mr. Dorsey hit her a couple of more times in the head. *Id.* C.B. testified that she finally told Mr. Dorsey that "I have to go to work. I have a meeting. If I'm not there, they're going to wonder what's going on, and they will send someone to the house. I need to call work." (R.34:93-94; Appx. 42-43). At this point, she claims he threw her phone at her, bruising her chest. (R.34:94; Appx. 43). C.B. testified that she then took the phone, ran down the stairs, grabbed the car keys hanging by the door, and left the house. (R.34:95; Appx. 44).

After leaving the house, C.B. called her friend Lori Gustafson and told her that Mr. Dorsey had just beaten her. (R.34:95; Appx. 44). Ms. Gustafson urged C.B. to find a safe place and contact the police. *Id.* However, it would be some five days later before she would contact the police. (R.34:122; Appx. 56).

After C.B. left the house Mr. Dorsey sent repeated text messages to C.B. asking her to call him. (R.34:96-101; Appx. 45-50). C.B. repeatedly replied to those text messages informing Mr. Dorsey that she would not call him and that she was ending the relationship. *Id*. In one text, Mr. Dorsey's requested that she meet him, and C.B. responded "No. I need to be away from you. I apologize for disrespecting you. I know I was wrong. I never meant to hurt you, but I will not

be with someone who puts their hands on me for any reason." (R.34:100; Appx. 49). To this message Mr. Dorsey texted back "Will you pick up real fast?" *Id.* In another text message she wrote "I'm in pain and not feeling good. You really hurt me." (R.34:102; Appx. 51). Again, he responded by neither admitting nor denying the accusation, but rather sought contact with C.B. by replying "Where are you?" *Id.*

Eventually, C.B. sent Mr. Dorsey a text message telling him that he needed to leave the house because she was sending someone to the house to get her purse. (R.34:104; Appx. 53). That afternoon, instead of sending someone else to collect her purse, C.B. went back to the house alone. *Id.* According to C.B. when she pulled into the driveway he pulled in right behind her and told her to go into the house. (R.34:104; Appx. 53). Once in the house, she testified that Mr. Dorsey told her to "Sit down. We're going to talk about this," and at the same time grabbed an extension cord and began folding the cord and moving his hands along its length. (R.34:104-05; Appx. 53-54). C.B. said that Mr. Dorsey did not acknowledge hitting her and kept asking her why she thought negatively about him. (R.34:105; Appx. 54). She testified that she kept apologizing to him because she feared he would hit her with the extension cord. *Id.* She said Mr. Dorsey then put down the extension cord and asked her for some gas money. (R.34:106; Appx. 55). She gave him some money and he then left the house. *Id.* While there would be other contacts and communications between C.B. and Mr. Dorsey after

this, there were no further accusations of violence or threats of violence occurring after this time.

On cross-examination the defense counsel pursued various lines of questioning, including a line of questioning which suggested that C.B. had made false accusations against Mr. Dorsey because she believed he was having a relationship with another woman named Shannon (R.34:126-30; Appx. 60-64); a line of questioning which drew out that she continued to have a relationship with Mr. Dorsey after the first two incidents, and told no one of these incidents when they happened (R.34:136-40; Appx. 70-74); and line of questioning which established that there were no witnesses to any of these incidents of alleged violence other than herself. (R.34:141-42; Appx. 75-76).

B. Other witnesses with direct knowledge of the case.

The State also presented testimony from Officer Kenneth Rasmussen. (R.34:152-59). Officer Rasmussen testified to taking a statement from C.B. on the morning of March 17, 2014; to taking a photograph of a bruise on C.B. chest; and discussing safety planning with C.B. *Id.* Officer Chad Stedl was called by the State to testify about his downloading of text messages from C.B. phone. (R.34:161-64). A friend of C.B.'s, Lori Gustafson, was called by the State and she testified to statements made by C.B. after the March 12, 2014 incident, to taking C.B. to the hospital, and to urging her to contact the police and find a safe place. (R.34:164-74). On cross-examination Ms. Gustafson admitted that she did not witness any of the alleged incidents of violence and that Mr. Dorsey never

admitted to her of perpetrating any acts of violence against C.B. (R.34:175-81). Lisa K. Field, the nurse practitioner at Sacred Heart Hospital who examined C.B. on March 13, 2014, testified to her examination of C.B.; to statements made by C.B. at the examination; and to her diagnosis of C.B. as suffering a "minor head injury". (R.34:203-06). She also testified that the photograph taken by Officer Rasmussen of a bruise on C.B's chest was consistent with a bruise that is a number of days old. (R.34:207). On cross-examination Ms. Field acknowledged that she did not see any bruising on the head, swelling around the face, the nose or the eyes, that there were no cuts and no blood, and that she did not make a diagnosis of a concussion. (R.34:209-11).

C. Testimony of Anton R. Dorsey

Mr. Dorsey chose to testify on his own behalf. (R.34:216-56). His testimony consisted of a denial that any of these incidents of violence towards C.B. ever occurred. He denied having an argument with C.B. in October of 2013 concerning a man who entered a bar whom he did not like. (R.34:247; Appx. 108). He denied that he ever strangled or suffocated C.B. (R.34:226 and 235; Appx. 87 and 96). He denied that he ever struck C.B. in the head, in December of 2013, or any other time. (R.34:235 and 237; Appx. 96 and 98). He denied that C.B. ever told him that she was afraid of him, or that he ever prevented her from leaving the home. (R.34:230; Appx. 91). He denied ever throwing a phone or any other object at C.B. (R.34:231 and 236; Appx. 92 and 97). He denied ever spitting in her face. (R.34:243; Appx. 104). He also gave testimony to the effect

that C.B. was angry at him because she thought he had entered into a relationship with a woman named Shannon. (R.34:251-53; Appx. 112-14). Mr. Dorsey was also questioned extensively on cross examination concerning two incidents that occurred in 2011 involving an R.K. (R.34:237-40; Appx. 98-101). That testimony will be discussed further below.

D. The other acts evidence.

The State present one further witness who had no direct knowledge of any facts in this case, but rather testified to other criminal acts committed by Mr. Dorsey in 2011. (R.34:187-95; Appx. 77-85). That witness was R.K. The first incident to which R.K. testified took place on Father's Day of 2011. (R.34:187; Appx. 77). According to R.K., she and Mr. Dorsey were having a child together and an argument erupted when R.K. requested Mr. Dorsey take a DNA test "Because I don't want our daughter to be like five or six years old and you get mad at me for something and decide to say that she's not yours. I just want you to know for sure right away." (R.34:188-89; Appx. 78-79). Mr. Dorsey took this to mean that R.K. was unsure as to the paternity of the child, though R.K. denied that this was what she meant. *Id*. According to R.K., Mr. Dorsey got upset and left. (R.34:187; Appx. 77). She testified:

> ... later that night when he came back he was yelling at me and swearing at me and calling me names, and he flicked a lit cigarette butt at me. He tried to leave in my car, and I had got in my car in the passenger side and told him that I didn't want him to take my car, and he pushed me out of the vehicle while he was backing out of the driveway. Then he came back and yelled at me some more, and then he ended up dragging me out of the house by my feet and pushed me out of the garage and like locked me out of my house, and so then after that I got in my car and drove to the

> hospital to make sure that the baby was okay 'cause my stomach had hit the stairs when he dragged me out.

(R.34:187-88; Appx. 77-78). The baby was alright. *Id.* R.K. also testified that Mr. Dorsey spat upon her during this incident. (R.34:189; Appx. 79).

The second incident related by R.K. occurred in November of 2011, she testified:

> That time it was at night, I think it was like eight or nine o'clock at night, he got upset with me, saying that I didn't respect him, and I -- and I could tell that he was getting extremely upset about it, and he asked me to leave, so I was going to leave because I didn't want the -- I didn't want things to escalate.
>
> He was sitting on the couch feeding our daughter, and as I walked out the door, he took her bottle out of her mouth and threw it at me and threw a shoe at me. And I went outside, and then he had asked me to come back in, and when I came back in, he pushed me in the door and then locked the door and wouldn't let me leave again. He started yelling at me and getting really upset with me again. He had pushed me down on the ground and started hitting me in the head with a shoe and kicking me in the back repeatedly. And then after a while he got up and went in the kitchen, and when he did that, like I grabbed my daughter and ran out to my car and drove to my mom's house and called the police.

(R.34:190; Appx. 80).

Mr. Dorsey was also asked about these incidents. (R.34:237-40; Appx. 98-101). Initially he was confused as to how he was supposed to respond to the questions, (R.34:237-39; Appx. 98-100), but then testified as follows:

> Q (By Ms. Clark) Okay. Mr. Dorsey, I'll ask you again, in November of 2011 did you throw a shoe at [R.K.]?
> A Yes.
> Q Did you hit her?
> A Yes.
> Q Did you throw a baby bottle at her?
> A Yes.
> Q Did you prevent her from leaving the apartment?
> A Yes.
> Q In June of 2011 did you spit on her?
> A Yes.
> Q In June of 2011 did you drag her out of the house causing her abdomen to hit the stairs on the way out?
> A Yes.

Q And that was when she was six months pregnant with your daughter?
A Yes.
Q That argument came about because of you being upset about not -- about the baby possibly not being yours?
A Yes.
Q And the November 2011 argument happened because you didn't feel she was respecting you?
A Yes.

(R.34:237-40; Appx. 98-101).

R.K.'s testimony was admitted after a hearing on a motion by the State to introduce other acts evidence. (R.9 and R.33; Appx. 21-25 and 5-20). The State offered this evidence to "establish the defendant's intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship." (R.9:2; Appx. 22). At the motion hearing on August 26, 2014, the State explained its theory for admittance thus:

> What I think it means is that the legislature recognizes that domestic violence happens in the context of a relationship and there's always a motive to control and harm the victim, at least a motive to control, and the statute recognizes that this is a dynamic perhaps similar to the dynamic that happens in child sex abuse cases, not the same but different, but it's a dynamic; and for that reason, prior acts of domestic violence are relevant to prove motive to control the victim in the present pending case. Motive is always relevant.
>
> And in this case, the November 2011 battery is very similar to what he's charged with doing in March of 2014. In November of 2011, he threw a bottle at [R.K.] of the bruise that caused on her chest...
>
> The other thing which brings the prior domestic, especially the November 2011 incident, in is that the defendant got off probation for these offenses in November of 2013. He was already in a relationship with [C.B.] in the summer of 2013, and part of the reason she didn't report the incidents besides -- I mean, there was one that happened in October where he strangled her, allegedly, in the street, she went unconscious, she didn't report those because he told her he was on paper and didn't want to get in trouble and he loved her and she thought it wouldn't happen again and all of the reasons why women don't often go forward or why they are less than -

(R.33:7-8; Appx. 11-12).

Trial counsel for Mr. Dorsey argued the following in opposition to the admittance of this evidence:

> Mr. Dorsey's case is that he committed none of these offenses. ... We're not saying that there was any type of accident, there was any type of striking or pushing that was accidental or any type of mistake. He said it didn't occur at all. There's not an identity issue. The State's witness is going to say that Mr. Dorsey is the -- the aggressor. Mr. Dorsey will say that, no, I was not the aggressor and it did not happen.
>
> ...
>
> But if the theory of the defense is that there was no physical contact, not accidental, not that he didn't intend to harm, that there was no physical contact, then this doesn't apply to our case. It's not as if the persons are in the home and there was a -- a grabbing and such that the person's wrist was sprained or broken or anything like that. We're saying none of that happened at all. So intent is not really a defense. It's not part of our defense. We're saying it didn't happen at all.

(R.33:3 and 6-7; Appx. 7 and 10-11).

Ultimately, the trial court ruled on the admission of R.K.'s testimony thus:

> I'm looking at this and I want the record to be clear, because this might be the case where the enlightened ones will enlighten all of us as to what this language means. I read this language providing greater latitude to be similar in -to the serious sex offense business and making it available more to be able to be used in the case in chief than I would provide. I find that using that greater latitude that the three-prong analysis of *Sullivan* is met. It does have probative value in that it does go to, because of the similarity, the motive to control. Although it is not very, very, very near in time, it's within two years and in a period of time in which the clock kind of stops ticking a little bit because the defendant is on probation for a period of that time. And while they're similar, they do not involve the same victim, there is some case law that it doesn't need to involve the same victim, but the clear statutory language indicates that it does not need to involve the same victim. And is the probative value substantially outweighed by the danger of unfair prejudice, confusion, misleading the jury, needless presentation of cumulative evidence, and then the court's consideration of delay and waste of time, I do not find that it is. That with a cautionary instruction, it can be provided that this information goes only to evaluate the defendant's motive and intent elements. There's going to be no claim of mistake or what have you. So for those reasons, I'll allow it in.

(R.33:11-12; Appx. 15-16). A cautionary instruction, Wis. JI – Criminal 275 (2003), was given instructing the jury to consider the testimony of R.K. only for the issues of motive and intent. (R.34:276-77; Appx. 118-19).

In closing arguments the State made the following comments to the jury regarding the testimony of R.K.:

> You also have [R.K]. [R.K.]. [R.K.'s] testimony about what he did to her in June and in November of 2011. There was a battery on each of those two occasions under somewhat similar circumstances. Here it started because he -- she texted a man. God forbid that that should happen. And in that one she had made a remark that, boy, I'm really glad I don't have that problem, but I am going to want you to take a test at some point so that five years down the road you don't deny this is your baby. From that he presumes she's sleeping around and goes on to batter her.
>
> This also contains a reference -- a text where she tells somebody by the way, he saw your text. It's not good. I kicked him out. Just wanted you to be aware I saw it. At any rate, the testimony of [R.K.] is relevant and probative in this case even though this battery and abuse is to [C.B.] because it happened under similar circumstances. The motivation was the same. It was abusive within the context of a domestic relationship in which he was displaying jealousy and controlling behaviors. There was spitting involved in both cases and throwing things. He threw a cell phone in this case; in those he threw a baby bottle and shoe besides the blows to the head.
>
> It's interesting also that Robyn King didn't report it right away.

(R.34:276-77; Appx. 116-17).

The jury returned verdicts of not guilty for Count 1, Strangulation and Suffocation, and guilty for Counts 2, Misdemeanor Battery, 3, Disorderly Conduct, and 4, Aggravated Battery. (R.34:306 and R.15). Sentencing was held on October 24, 2014, (R.36), and Mr. Dorsey was sentenced to concurrent sentences of one year county jail for Counts 2 and 3, and for Count 4 a prison sentence of five years with two years and nine months initial confinement and two years and three months extended supervision (R.20 and R.21; Appx. 1-4). Mr. Dorsey filed his notice of intent to pursue post-conviction relief on October 27, 2014, (R.22), and his notice of appeal on March 30, 2015. (R.25).

VI. Argument.

A. The Standard of Review for Admission of Other Acts Evidence.

The standard of review for cases concerning the admission of other act evidence has been explained as follows:

> The applicable standard for reviewing a circuit court's admission of other-acts evidence is whether the court exercised appropriate discretion. *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414–415, 320 N.W.2d 175 (1982) (citing *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971)). A circuit court's failure to delineate the factors that influenced its decision constitutes an erroneous exercise of discretion. See *McCleary*, 49 Wis.2d at 282, 182 N.W.2d 512. When a circuit court fails to set forth its reasoning, it has been held that an appellate court independently should review the record to determine whether it provides an appropriate basis for the circuit court's decision. See *Pharr*, 115 Wis.2d at 343, 340 N.W.2d 498

State v. Hunt, 2003 WI 81, ¶ 34, 263 Wis.2d 1, 666 N.W.2d 771; and *State v. Sullivan*, 216 Wis.2d 768, 780-81, 576 N.W.2d 30 (1998). It has been further held that:

> "When reviewing a circuit court's determination for erroneous exercise of discretion an appellate court may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court, and may affirm the circuit court's decision for reasons not stated by the circuit court." *Hunt*, 263 Wis.2d 1, ¶ 52, 666 N.W.2d 771. " 'Regardless of the extent of the trial court's reasoning, [a reviewing court] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." Id. (citing *186 *State v. Shillcutt*, 116 Wis.2d 227, 238, 341 N.W.2d 716 (Ct.App.1983), aff'd on other grounds, 119 Wis.2d 788, 350 N.W.2d 686 (1984)).

State v. Hurley, 2015 WI 35, ¶ 29, 861 N.W.2d 174.

B. The Admission of Other Acts Evidence Generally.

1. The general rule regarding the admission of other acts evidence is one of exclusion.

The admission of other acts evidence is addressed by Wis. Stats. § (Rule) 904.04(2), which provides:

> Other crimes, wrongs, or acts.
> (a) General admissibility. Except as provided in par. (b)2., 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.

"The general policy of § 904.04(2), STATS., is one of exclusion; the rule precludes proof of other crimes, acts or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question. ... However, other acts evidence is admissible if its relevance hinges on something other than the forbidden character inference proscribed by § 904.04(2) *and the proponent of the evidence uses it for that purpose*." *State v. D. J. Johnson*, 184 Wis.2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994) (emphasis added).

The reasoning behind the general rule was explained in *Whitty v. State*, 34 Wis.2d 278, 292, 149 N.W.2d 557 (1967), as follows:

> The character rule excluding prior crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes.

"[T]he 'character rule' is universally established that evidence of prior crimes is not admitted in evidence for the purpose of proving general character, criminal

propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, is not legally or logically relevant to the crime charged." *Id.* at 291-92. "Because other acts evidence is inherently relevant to prove character and therefore a propensity to behave accordingly, 'the real issue is whether the other act is relevant to anything else.' " *Hurley*, 2015 WI 35, ¶ 76, (citing *State v. Payano*, 2009 Wis. 86, ¶ 67, 320 Wis.2d 348, 768 N.W.2d 832, in turn citing Blinka, 7 Wis. Prac., Wis. Evidence § 404.6, at 181).

In admitting other acts evidence the Court in *Whitty* warned that "Evidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence. The use of such evidence under the adopted rule will normally be a calculated risk." *Whitty*, 34 Wis.2d at 297.

2. The admission of other acts evidence is analyzed under the three-step *Sullivan* framework.

The three-step framework for analyzing the admission of other acts evidence was explained in *State v. Sullivan*, 216 Wis.2d 768, 576 N.W.2d 30 (1998). That framework was set forth as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 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 Wis. Stat. § (Rule) 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 Wis. Stat. § (Rule) 904.03.

Id. at 772. "The proponent of the evidence ... bears the burden of persuading the circuit court that the three-step inquiry is satisfied." *Id.* at 774. "The proponent and the opponent of the other acts evidence must clearly articulate their reasoning for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework." *Id.* "If the other acts evidence was erroneously admitted ... the second issue presented is whether the error is harmless or prejudicial." *Id.* at 772.

Regarding the first step of the *Sullivan* framework "[t]he proponent of other acts evidence must demonstrate a proper purpose by a preponderance of the evidence. Blinka, supra, § 404.1 at 149, § 404.6 at 180. As long as the proponent identifies one acceptable purpose for admission of the evidence that is not related to the forbidden character inference, the first step is satisfied." *State v. Payano,* 2009 WI 86, ¶ 63, 320 Wis.2d 348, 768 N.W.2d 832.

"The second step in the Sullivan analysis is to assess whether the evidence is relevant as defined by Wis. Stat. § 904.01 ... . Because other acts evidence is inherently relevant to prove character and therefore a propensity to behave

accordingly, "*the real issue is whether the other act is relevant to anything else.*" Blinka, *supra,* § 404.6 at 181." *Payano,* 2009 WI 86, ¶ 67 (emphasis added).

In discussing the first question contained in step two of the *Sullivan* framework, the Wisconsin Supreme Court in *Payano* wrote that:

> Answering the first question of whether the evidence is offered in relation to any fact or proposition that is of consequence to the determination of the action, the court must focus its attention on the pleadings and contested issues in the case. Blinka, supra, § 404.6 at 181. "The pleadings set forth the elements of the claims, charges, or defenses. *Unless parties stipulate or fail to contest them, all such elements as well as any propositions tending to establish them are fairly in dispute*." Id.; see also *Sullivan*, 216 Wis.2d at 785–86, 576 N.W.2d 30 ("The substantive law determines the elements of the crime charged and the ultimate facts and links in the chain of inferences that are of consequence to the case."). "*The relevancy requirement is not met if the issue on which the evidence is offered ... is not in dispute in the case*...." Wis JI—Criminal 275.1 at 2 (1990) (citing *Alsteen*, 108 Wis.2d at 730, 324 N.W.2d 426)."

Payano, 2009 WI 86, ¶ 69 (emphasis added)

Regarding the second question in step two the Wisconsin Supreme Court wrote in *Payano* that:

> The second question relating to probative value—whether the consequential fact or proposition for which the evidence was offered becomes more or less probable than it would be without the evidence—"is a common sense determination based less on legal precedent than life experiences." Blinka, supra, § 404.6 at 181 ... Although some other acts cases focus "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, 576 N.W.2d 30 (citing *Whitty*, 34 Wis.2d at 294, 149 N.W.2d 557), Blinka, supra, § 404.6 at 181, "'[s]imilarity' and 'nearness' are not talismans. Sometimes dissimilar events will be relevant to one another." Blinka, supra, § 404.6 at 181–82; see also *Pharr*, 115 Wis.2d at 346, 340 N.W.2d 498 ("Relevancy is not determined by resemblance to, but by the connection with, other facts.") (internal quotations and citations omitted).

Payano, 2009 WI 86, ¶ 70.

As to step three of the *Sullivan* framework, if the proponent of the other acts evidence can satisfy the first two steps of *Sullivan,* the evidence will be admissible "unless the opponent demonstrates that `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.'" *Payano,* 2009 WI 86, ¶ 80. Concerning probative value the Court has written that:

> "The evidence's probative value "largely turns on the relevancy analysis" from step two under Sullivan. Blinka, supra, § 404.6 at 183. Essentially, probative value reflects the evidence's degree of relevance. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value. See id. ("The more attenuated its relevancy, the lower its probative value...."). The main consideration in assessing probative value of other acts evidence "is the extent to which the proffered proposition is in substantial dispute"; in other words, "how badly needed is the other act evidence?" Id.; see also *Pharr*, 115 Wis.2d at 348–49, 340 N.W.2d 498; *Johnson*, 184 Wis.2d at 338–40, 516 N.W.2d 463."

Payano, 2009 WI 86, ¶ 81. With regard to "unfair prejudice" the *Sullivan* Court wrote that '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. And again in *Payano* the Court wrote:

> As for unfair prejudice, in *Whitty*, this court stated that, to ensure a defendant's right to a fair trial, the circuit court must "carefully consider whether the prejudice of other-crimes [or other acts] evidence is so great as compared with its relevancy and the necessity for its admission in the particular case as to require its exclusion." *Whitty*, 34 Wis.2d at 295, 149 N.W.2d 557. The determination of unfair prejudice must be made with great care because "[n]early all evidence operates to the prejudice of the party against whom it is offered.... The test is whether the resulting prejudice of relevant evidence is fair or unfair." *Johnson*, 184 Wis.2d at 340, 516 N.W.2d 463 (citing *Christensen v. Econ. Fire & Cas. Co.*, 77 Wis.2d 50, 61–62, 252 N.W.2d 81 (1977)).

Payano, 2009 WI 86, ¶ 88. "In this context, 'unfair prejudice' refers to the danger that the jury will draw the forbidden propensity [or character] inference regardless of a[ ] limiting instruction." *Id.* at ¶ 89.

Finally, if the reviewing court concludes that there was error in admitting the other acts evidence, then the reviewing court is to engage in a harmless error analysis:

> The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. See *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985); *Fishnick*, 127 Wis.2d at 265, 378 N.W.2d 272. The conviction must be reversed unless the court is certain the error did not influence the jury. See *Dyess*, 124 Wis.2d at 541–42, 370 N.W.2d 222. The burden of proving no prejudice is on the beneficiary of the error, here the State. The State must establish that there is no reasonable possibility that the error contributed to the conviction. See *Dyess*, 124 Wis.2d at 543, 370 N.W.2d 222.

Sullivan, 216 Wis.2d at 792-93.

3. In certain case the trial court is to exercise "greater latitude" in the admission of other acts evidence.

Since *Proper v. State*, 85 Wis. 615, 55 N.W. 1035 (1893), Wisconsin law has recognized "[a] greater latitude of proof as to other like occurrences is allowed in cases of sexual crimes." "Although the greater latitude rule permits more liberal admission of other crimes evidence, such evidence is not automatically admissible." *State v. Davidson*, 2000 WI 91, ¶ 52, 236 Wis.2d 537, 613 N.W.2d 606. "[T]he greater latitude standard does not relieve a court of the duty to ensure that the other acts evidence is offered for a proper purpose under sec. 904.04(2).... Nor does it relieve a court of the duty to ensure the other acts evidence is admissible under sec. 904.03 and the other rules of evidence. *Plymesser*, 172

Wis.2d at 598, 493 N.W.2d 367. In other words, courts still must apply the three-step analysis set forth in *Sullivan*." *Davidson*, 2000 WI 91, ¶ 35, See also *State v. Veach*, 2002 WI 110, ¶ 53, 255 Wis.2d 390, 648 N.W.2d 447.

While this is not a case involving a sexual crime, but rather a case involving domestic abuse, the "greater latitude" rule may come into play because the Wisconsin Legislature in 2013 Wis. Act 362 § 38[1] amended Wis. Stats. § (Rule) 904.04(2) as follows:

> 904.04 (2) (b) 1. In ~~a prosecution under this section, it is competent for the state to prove~~ other criminal proceeding alleging a violation of s. 940.302 (2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused ~~for the purpose of showing the accused's intent and disposition~~ is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

Historically, the rationale for the "greater latitude" rule has been that "[t]o a person of normal, social and moral sensibility, the idea of the sexual exploitation of the young is so repulsive that it's almost impossible to believe that none but the most depraved and degenerate would commit such an act. The average juror could well find it incomprehensible that one who stands before the court on trial could commit such an act." *State v. Friedrich*, 135 Wis.2d 1, 27-28, 398 N.W.2d 763, 775 (1987). That particular rationale would not appear to apply in cases of domestic abuse involving battery or disorderly conduct.

[1] The effective date of this amendment was April 24, 2014.

What exactly was intended by the Wisconsin Legislature is not clear. Mr. Dorsey, however, would argue that given the considerable differences between cases of sexual crimes, particularly sexual crimes against children, and cases of domestic abuse, that surely the Wisconsin Legislature intended some sort of intermediate test, where greater latitude is given to the admission of other acts evidence in domestic cases, but not as great a latitude as is given in cases of sexual crimes, especially sexual crimes against children. To argue otherwise is to diminish the gravity of crimes such as *Friedrich* Court was addressing.

Ultimately, though, Mr. Dorsey does not believe this court will have to address the "greater latitude" question, because even with the greatest of latitude, the State cannot pass the *Sullivan* test.

C. The Admission Of Other Acts Evidence To Prove The Defendant's "Motive To Control" A Person With Whom They Are In A Domestic Relationship Is Not An Acceptable Purpose Under Wis. Stat. § (Rule) 904.04(2).

The State offered two purposes for the admission of R.K.'s testimony, namely to "establish the defendant's intent and motive to cause bodily harm to his victim and to control her within the context of a domestic relationship." (R.9:2; Appx. 22). As the motive to control was the purpose identified by the trial court in its ruling admitting the other acts evidence, Mr. Dorsey will address that purpose first. (R.33:11-12; Appx. 15-16).

Wisconsin law is clear, "[o]ther crimes evidence may be admitted to establish motive for the charged offense *if there is a relationship between the*

other acts and the charged offense, see e.g., *Holmes v. State*, 76 Wis.2d 259, 268–69, 251 N.W.2d 56 (1977), *or if there is a purpose element to the charged crime*, see *State v. Friedrich*, 135 Wis.2d 1, 22, 398 N.W.2d 763 (1987)." *State v. Cofield*, 2000 WI App 196, ¶ 12, 238 Wis.2d 467, 618 N.W.2d 214 (emphasis added). Here, neither can be satisfied.

1. There was no linkage between the crimes charged involving C.B. and the 2011 incidents involving R.K. which would provide a specific motive on the part of Mr. Dorsey to commit acts of violence upon C.B.

Obviously, the incident between Mr. Dorsey and R.K. did not provide a specific motive for Mr. Dorsey to commit an act of domestic abuse upon C.B. Indeed, R.K. was unaware of C.B.'s existence prior to March of 2014, (R.34:195; Appx. 85), and State did not, and cannot, articulate any reason why the 2011 incidents would have provided a specific motive for Mr. Dorsey to commit an act of violence against C.B.

Unless motive is an element of the crime charged, other acts evidence which merely demonstrates a "generalized motive as oppose to a specific motive to commit a particular crime" is inadmissible. *State v. T. M. Johnson*, 121 Wis.2d 237, 255, 358 N.W.2d 824 (Ct. App. 1984), see also *State v. Cartagena*, 99 Wis.2d 657, 299 N.W.2d 872 (1981). Examples of "specific motive" would be cases where the other act and the charged offense were all part of a single transaction, e.g. *Holmes*, 76 Wis.2d at 267 (1977) ("There can be no question that evidence relating to the armed robbery was relevant to the issue of the attempted murder charge, in that it provided the motive for the shooting at the police officer. The

armed robbery, the flight with the officers in pursuit, and the attempted murder to evade apprehension, all arose out of a single transaction. The reason that the defendant shot at the police officer was to attempt to thwart his apprehension for the armed robbery."); or in a case where the commission of a prior crime provided the motive for a later crime, e.g. *State v. Bettinger*, 100 Wis.2d 691, 697-8, 303 N.W.2d 585, 588-9 (1981) ("In this case evidence of the sexual assault would be admissible to show the context of, and the motivation for, the act of bribery"). The 2011 incidents with R.K. did not provide a specific motive for Mr. Dorsey to commit acts of violence against C.B. None were asserted, none existed.

2. The 2011 crimes committed against R.K. could not be admitted to prove a generalized motive on the part of Mr. Dorsey to "control [C.B.] within the context of a domestic relationship" because "motive to control" is not an element of any of the offenses with which Mr. Dorsey was charged.

Realizing that the incidents with R.K. did not provide any specific motive for Mr. Dorsey to commit acts of violence against C.B., the State asserted that the other acts evidence could be admitted to show a generalized motive and purpose to "control [C.B.] within the context of a domestic relationship." No doubt, what the State had in mind were cases holding that past acts of sexual misconduct may be admissible in cases involving sexual crimes when offered to show the defendant had a motive for the purpose of sexual gratification. What the State overlooks, however, is that these cases have uniformly held that the reason such other act evidence was admissible was "[b]ecause the purpose of the sexual contact is an element of the crime, and because the defendant's motive impacts upon his

purpose for committing the crime with which he is charged...." *State v. Fishnick*, 127 Wis.2d 247, 259, 378 N.W.2d 272, 279 (1985); See also, *Hunt*, 2003 WI 81, ¶ 60 ("When a defendant's motive for an alleged sexual assault is an element of the charged crime, we have held that other crimes evidence may be offered for the purpose of establishing opportunity and motive."); and see also recently, *Hurley*, 2015 WI 35, ¶ 72.

Both § 940.225(5)(b), Wis. Stats. and § 948.01(5), Wis. Stats. in defining "sexual contact" have an element that require an acts be done "for the purpose sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." But there is no "purpose element" of any kind, let alone a "purpose to control" element, in any of the crimes for which Mr. Dorsey was charged, nor within the definition of "domestic abuse." See, Wis. Stats. §§ 940.235(1)[2], 940.19(1)[3], 947.01(1)[4], 940.19(6)[5], and 973.055(1)[6]. R.K.'s testimony was inadmissible to show a generalized motive or purpose to control persons with whom Mr. Dorsey was in a domestic relationship, because it was not

[2] (1) Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.
[3] (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
[4] (1) Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.
[5] (6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. ...
[6] (a) "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225(1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3.

an element of any crime with which he was charged that he should have such a purpose. The "motive to control" justification does not get pass step one of the *Sullivan* analysis.

D. R.K.'S Testimony Was Not Relevant To Show Intent On The Part Of Mr. Dorsey To Cause Bodily Harm To C.B., Or Intent To Strangle Or Suffocate Her, And Even If Relevant, The Probative Value Of Her Testimony Was Substantially Outweighed By The Danger Of Unfair Prejudice To Mr. Dorsey.

1. Intent to cause bodily harm to C.B. was an acceptable purpose for admitting other acts evidence, even though, Mr. Dorsey did not contest the intent element.

With regard to intent to cause bodily, Mr. Dorsey's trial counsel argued that R.K.'s testimony should not come in because Mr. Dorsey was not going to contest intent. Mr. Dorsey's defense was going to be that none of these incidents occurred, and lack of intent was not going to be a defense asserted by Mr. Dorsey. (R.33:3 and 6-7; Appx. 7 and 10-11). Appellate counsel will not attempt to argue that the State could not introduce other acts evidence to prove intent, *if that evidence was relevant for that purpose*, simply because Mr. Dorsey did not contest intent. There is ample authority for the proposition that "[i]f the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element." *State v. Hammer*, 2000 WI 92, ¶ 25, 236 Wis.2d 686, 613 N.W.2d 629, see also *Fishnick*, 127 Wis.2d at 259; *State v. Clark*, 179 Wis.2d 484, 493, 507 N.W.2d 172, 175 (Ct. App. 1993); *State v. Plymesser*, 172 Wis.2d 583, 594-95, 493 N.W.2d 367 (1992) ; *Friedrich*, 135 Wis.2d at 23; *Veach*, 2002 WI 110, ¶ 62.

However, Mr. Dorsey would argue that this holding only applies to step one of the *Sullivan* framework. Simply invoking the purpose of proving intent as the reason for offering the other act evidence does not relieve the proponent of the evidence from demonstrating its relevance under step two, nor does it forecloses the opponent of the evidence from arguing that the evidence's probative value is substantially outweighed by the danger of unfair prejudice. That is to say, *Sullivan* still applies, and the fact that a defendant does not contest an element of crime is a significant factor when analyzing the other acts evidence's relevancy in step two of the *Sullivan* framework, see, *Payano*, 2009 WI 86, ¶ 69 ("The relevancy requirement is not met if the issue on which the evidence is offered ... is not in dispute in the case."); and in determining whether the probative value of the evidence is outweighed by the danger of unfair prejudice, see, *Id.* at ¶ 81 ("The main consideration in assessing probative value of other acts evidence `is the extent to which the proffered proposition is in substantial dispute'; in other words, `how badly needed is the other act evidence?'"). In this case, the fact that Mr. Dorsey was not going to contest the intent element, but rather was going to argue the acts never occurred, was a significant factor for consideration in steps two and three of the *Sullivan* analysis. In fact, it should have been a decisive factor.

2. R.K.'s testimony was not relevant because it had no relation to showing intent on the part of Mr. Dorsey to cause bodily harm to C.B., beyond making an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man.

"[O]ther acts evidence is admissible if its relevance hinges on something other than the forbidden character inference proscribed by § 904.04(2) and the proponent of the evidence uses it for that purpose." *D. J. Johnson*, 184 Wis.2d at 336. To gain admission of other acts evidence "the proponent of the evidence ... must articulate the fact or proposition that the evidence is offered to prove." *Sullivan*, 216 Wis.2d at 772. Certainly, there is case law for the proposition that other acts evidence is admissible to "undermine the defendant's innocent explanation for his act." *State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990), see also *State v. Evers*, 139 Wis.2d 424, 407 N.W.2d 256 (1987). These cases rest on the reasoning that:

> "... similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent."

State v. Evers, 139 Wis.2d 424, 438-39, 407 N.W.2d 256 (1987), quoting from Wigmore, Evidence, sec. 302, p. 241 (Chadbourn rev. 1979).

But Mr. Dorsey never asserted an innocent explanation that would negate a criminal intent for his acts, Mr. Dorsey denied the very acts themselves.

Consequently, R.K.'s testimony could not, and was not, offered to negate an innocent explanation for Mr. Dorsey's acts, for the simple reason that Mr. Dorsey never asserted an innocent explanation. Or to put it in other words, an innocent explanation for Mr. Dorsey's actions was not an issue of consequence in this action. Mr. Dorsey had made it clear that he was not going to assert an innocent explanation for his acts, he was going to deny the acts. (R.33:3 and 6-7; Appx. 7 and 10-11).

The State therefore had to articulate some other fact or proposition that R.K.'s testimony was going to prove with regard to Mr. Dorsey's intent to cause bodily harm to C.B. And that fact or proposition would have to be something other than the "forbidden character inference." What might that fact or proposition be?

In *D.J. Johnson* this court made it clear that other acts evidence will come in if the proponent of the other acts evidence offers it for some purpose other than showing propensity "and the proponent of the evidence uses it for that purpose." *D. J. Johnson*, 184 Wis.2d at 336. That the State did not do. The State in its closing remarks to the jury made no reference to intent, the State argued motive:

> the testimony of [R.K.] is relevant and probative in this case even though this battery and abuse is to [C.B.] because it happened under similar circumstances. The motivation was the same. It was abusive within the context of a domestic relationship in which he was displaying jealousy and controlling behaviors.

(R.34:276-77; Appx. ____). That is, the State's argument was that Mr. Dorsey is a jealous and controlling man, with a propensity to be violent with women with

whom he is in a relationship, as shown by his criminal acts against R.K. That is a propensity argument pure and simple.

3. R.K.'s testimony had no probative value, that is, it had no tendency of showing intent on the part of Mr. Dorsey to cause bodily harm to C.B., beyond making an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man.

Similarly, R.K.'s testimony had no probative value in proving an intent on the part of Mr. Dorsey to cause bodily harm to C.B., beyond making an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man. Again, "[t]he main consideration in assessing probative value of other acts evidence `is the extent to which the proffered proposition is in substantial dispute'; in other words, `how badly needed is the other act evidence?'" *Payano*, 2009 WI 86, ¶ 81. Given that Mr. Dorsey was not contesting intent, that he was not offering an innocent explanation for his actions, but rather, was denying that the violent incidents with C.B. ever happened, it is apparent that R.K.'s testimony was not needed for proving intent. This is not a case like *Sullivan*, where the victim testified at the preliminary hearing and at trial that her injuries were the result of an accident, and intent was clearly an issue of consequence. *Sullivan*, 216 Wis.2d 784-85. Here C.B. testified that Mr. Dorsey struck her, Mr. Dorsey denied the act, not the intent. R.K. testimony was not needed to negate an innocent explanation because none was asserted. It had no tendency to show an intent to harm with regard to C.B., because the incidents were completely unrelated. "Relevancy is

not determined by resemblance to, but by the connection with, other facts" *State v. Pharr*, 115 Wis.2d 334, 346-47, 340 N.W.2d 498 (1983).

It is true that there are similarities between R.K.'s testimony and C.B.'s testimony. Both R.K. and C.B. related incidents that occurred in the home, both were involved in relationships with Mr. Dorsey, both testified to suspicions of infidelity on the part of Mr. Dorsey, both testified to the throwing of objects and to spitting. But what in this case do the similarities prove? The similarities here, in and of themselves, prove nothing more than propensity. This evidence was not offered to negate an innocent explanation. The only tendency R.K.'s testimony had toward showing intent to harm on the part of Mr. Dorsey towards C.B. was in the inference that Mr. Dorsey was a jealous and controlling man who beats women he is in a relationship with, which is "precisely what the exclusion of other crimes evidence seeks to exclude." *Cartagena*, 99 Wis.2d at 670-1.

4. Even if R.K.'s testimony had sufficient probative value to get past step two of the *Sullivan* framework, the probative value of R.K.'s testimony was substantially outweighed by the danger of unfair prejudice to Mr. Dorsey.

The State asserted that R.K.'s testimony should come in because it was similar to the testimony of C.B. (R.9:3; Appx. 7). However, "[t]he situation in which unfair prejudice is most likely to occur is when one party attempts to put into evidence other acts allegedly committed by the opposing party that are similar to the act at issue in the current case." *Payano*, 2009 WI 86, ¶ 90. It is the very quality of "similarity" which gives the other act evidence its probative value in negating an innocent explanation for an act. However it is that very quality which

also creates the unfair prejudice which must be weighed against the evidence's probative value. That is why Mr. Dorsey announcement that he was not contesting intent was so significant. To what extent was his intent to cause bodily harm to C.B. in "substantial dispute"? That is, how important was R.K.'s testimony in proving that Mr. Dorsey struck C.B. with the intent to cause bodily harm? Not very, given that he was not offering an innocent explanation for his actions. Mr. Dorsey was contesting the very fact of the violent acts. That was the issue which was in substantial dispute. Hence, the probative value of R.K.'s testimony was very small, next to nothing, for any proposition that was in substantial dispute. That is, for any issue other than propensity.

On the other hand, the danger of "unfair prejudice" was great. R.K. described incidents in which Mr. Dorsey beat R.K. using a shoe as a weapon, kicked her in the back, and dragged her out of her house by her feet causing her abdomen to hit the stairs while she was pregnant. (R.34:187-195; Appx. 77-85). It would be crass to try and weigh the relative gravity of victims' experiences, and the undersigned will not do so here. However, it would be remiss not to observe that many, including those who were on the jury, might regard the beating, kicking, and dragging a pregnant woman down stairs as especially reprehensible conduct. And these are not similar facts, but dissimilar facts, to those in C.B.'s case. C.B. was not clubbed with a shoe. She was not kicked. Nor was she dragged down stairs. And most important, C.B. was not pregnant. This is exactly the kind of testimony which "appeals to the jury's sympathies, arouses its sense of

horror, [and] provokes its instinct to punish.'" *Sullivan*, 216 Wis.2d at 789–90. The danger of unfair prejudice was great. The probative value of R.K.'s testimony was slight. The probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The State did not need R.K.'s testimony, it was simply a final "kick at the cat." *Whitty*, 34 Wis.2d at, 297.

E. Admission of R.K.'s Testimony was not Harmless Error.

The admission of R.K.'s testimony was not harmless error. With R.K.'s testimony the jury was presented with not one, but two women, who testified to domestic abuse at the hands of Mr. Dorsey. There were no witnesses to the alleged acts of violence against C.B., other than the alleged victim herself. The acts violence against R.K., on the other hand, were admitted to by Mr. Dorsey himself. (R.34:237-40; Appx. 98-100). It was an open invitation to the jury to draw the inference that Mr. Dorsey was a jealous and controlling man, who abused women with whom he was in a domestic relationship. In fact, the State asked the jury to draw that inference. (R.34:276-77; Appx. 116-17). The State cloaked that invitation behind the word "motive" but it was clearly an argument based on propensity. *Dyess* requires that the State show that there "was no reasonable possibility that the error contributed to the conviction. *Dyess*, 124 Wis.2d at 543. In this case, there was more than a reasonable possibility that R.K.'s testimony contributed to Mr. Dorsey's conviction.

VII. Conclusion.

Admission of R.K.'s other acts testimony was reversible error. The purpose for which the evidence was accepted by the trial court, as evidence to show "a motive to control" was not an acceptable purpose. The incidents involving R.K. provided no specific motive for Mr. Dorsey to commit crimes against C.B., nor could R.K.'s testimony be used to show a generalized "motive to control" because there was no purpose element in any of the crimes charged against Mr. Dorsey.

Neither were the incidents related by R.K. relevant to show an intent by Mr. Dorsey to cause bodily harm to C.B. Mr. Dorsey did not assert an innocent explanation for the acts C.B. claim Mr. Dorsey committed against her. Mr. Dorsey claimed that these acts never occurred. Intent was not in substantial dispute; this case was about whether the acts had occurred at all. R.K.'s testimony had little or no probative value with regard to the issue of consequence in this case, and admission of her testimony created a considerable danger of unfair prejudice by inviting the jury to conclude that Mr. Dorsey was a jealous and controlling man, who abuses women with whom he was in a domestic relationship.

Wherefore, Mr. Dorsey humbly requests that this Court vacate his judgment of conviction and remand his case to the trial court for a new trial.

Respectfully submitted June 15, 2015.

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10913 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 June 15, 2015.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in:

- ☐ the United States mail for delivery to the Clerk of the Court of Appeals by express mail on _____.
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