STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000648-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ANTON R. DORSEY,

Defendant-Appellant-Petitioner

**On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction entered in the
Circuit Court for Eau Claire County,
The Honorable Paul J. Lenz, presiding**

BRIEF OF THE DEFENDANT-APPELLANT-PETITIONER ANTON R. DORSEY

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Whether the other acts testimony presented in this case was relevant to the purpose of proving intent on the part of the defendant to cause bodily harm to the victim.

IV. Statement on oral argument and publication.

This case involves a novel assertion that other acts evidence can be admitted for the purpose of proving a generalized motive or purpose on the part of a defendant to control persons with whom he is in a domestic relationship. It is foreseeable that future courts will be faced with similar issues as those encountered in Dorsey's case. This Court's decision should be published, and this Court would benefit from oral argument.

V. Statement of the case.

Anton R. Dorsey was charged in a four count information with strangulation and suffocation, in violation Wis. Stat. § 940.235(1); misdemeanor battery, in violation of Wis. Stat. § 940.19(1); disorderly conduct, in violation of Wis. Stat. § 947.01(1); and aggravated battery, in violation of Wis. Stat. § 940.19(6). (R.4:1-2). All four counts included repeater penalty enhancers pursuant to Wis. Stat. § 939.62(1)(b), and the disorderly conduct and aggravated battery counts were charged as acts of domestic abuse, pursuant to Wis. Stat. § 973.055(1). (R.4:1-2).

After a one day jury trial Dorsey was found not guilty of the strangulation and suffocation charge, but was convicted on the counts for misdemeanor battery,

disorderly conduct, and aggravated battery. (R.34:306 and R.15). Dorsey was sentenced to concurrent sentences of one-year county jail on his convictions for misdemeanor battery and disorderly conduct, and to a prison sentence of five years, with two years and nine months of initial confinement and two years and three months of extended supervision, for the aggravated battery conviction. (R.20 and R.21; Appx. 38-41). Dorsey appealed his convictions and sentence to the Court of Appeals. (R.22 and R.25).

A decision was delivered by the Court of Appeals on August 30, 2016 (Appx. 20-37), which was subsequently withdrawn and replaced with a revised decision on December 6, 2016. (Appx. 1-19). In that revised decision, the Court of Appeals rejected Dorsey's arguments that other acts evidence of a generalized motive or purpose on the part of the defendant to control persons with whom he is in a domestic relationship is not a valid purpose for the admission of other acts evidence. (Appx. pp. 11-13, ¶¶ 26-28). The Court of Appeals also rejected Dorsey argument that the State never articulated how the witness R.K.'s testimony may be relevant in proving an intent on Dorsey's part to commit acts of domestic violence upon C.B. (Appx. pp. 14-17, ¶¶ 33-40).

Dorsey then petitioned this Court to review the decision of the Court of Appeals, which the State joined, and this Court subsequently granted.

VI. Statement of the facts.

A one day jury trial was held in this case on August 28, 2014. (R.34). At trial the State called as its first witness 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 Dorsey.

The first incident, which was the basis for the strangulation and suffocation charge, allegedly occurred on the morning of October 12, 2013. (R.34:76-83; Appx. 63-70). C.B. testified that on the previous evening she had gone with friends to a bar after her son's high school football game. (R.34:76-77; Appx. 63-

64). There she was met by Dorsey. *Id.* At some point an unnamed person entered the bar whom Dorsey apparently disliked. (R.34:77-78; Appx. 64-65). Mr. Dorsey expressed a desire to leave and they left the bar, taking some of their friends back their respective homes. *Id.* They then 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. 65-66). 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, 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. 66-67). They argued for a while in the car, then she exited the car and began walking home. *Id.* There on the street, she testified, 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. 67-68). She remembered experiencing tightness, then being pulled off the ground and Dorsey saying, "You aren't F-ing doing this to me." *Id.* She testified that afterwards he kept apologizing to her about what had just happened. (R.34:82; Appx. 69). 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. 94-96).

The second incident, which was the basis of misdemeanor battery count allegedly occurred some time in December of 2013. (R.34:84-87; Appx. 71-74). According to C.B., Dorsey was upset with her, though she could not remember his reasons for being upset. (R.34:85; Appx. 72). 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 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 spat in her face. (R.34:85-86; Appx. 72-73). She testified to having

injuries of a bloody lip and bruises to her arm, hip and inner thigh. (R.34:86; Appx. 73). Later, C.B. texted 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. 71). To that text, Dorsey replied, "You lying to me for no reason at all, why do that?" (R.34:85; Appx. 72). C.B. also testified to 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. 73-74). Despite this incident, C.B. testified that in early February of 2014, she allowed Dorsey moved into her home. (R.34:88; Appx. 75).

The third incident, which was the basis of the disorderly conduct and aggravated battery charges, allegedly occurred in March of 2014. (R.34:88-106; Appx. 75-93). According to C.B., on the evening of March 11, 2014, she and Dorsey were in a bar when he discovered on her phone a text message she had sent to male friend. (R.34:90; Appx. 77). This friend was a person whom Dorsey disliked and he accused her of sleeping with this gentleman, which she denied. *Id.* Later, in the parking lot of the bar, C.B. claimed Dorsey came up behind her, grabbed her, held her against the side of the building, and asked "Why are you doing this?" (R.34:91; Appx. 78). She replied "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 Dorsey's face approximately four and a half inches from her own. (R.34:92; Appx. 79). 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 Dorsey that she needed to go to work, to which he responded, "No. We're going to talk about this." *Id.* According to C.B., 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. 79-80). From these blows C.B. said she experienced ringing in her head, sickness in her stomach, and a throbbing headache. (R.34:93; Appx. 80). C.B. further testified that after these initial blows Dorsey kept 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 this Dorsey allegedly hit her a couple more times in the head. *Id.* C.B. testified that she finally told 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. 80-81). At this point, she claimed he threw her phone at her, bruising her chest. (R.34:94; Appx. 81). 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. 82). After leaving the house, C.B. called her friend Lori and told her that Dorsey had just beaten her. *Id.* Lori 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. 94).

After C.B. left the house Dorsey sent repeated text messages to C.B. asking her to call him. (R.34:96-101; Appx. 83-88). C.B. repeatedly replied to those text messages informing Dorsey that she would not call him and that she was ending the relationship. *Id*. Eventually, C.B. sent 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. 91). 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. *Id.* Once in the house, she testified that 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. 91-92). C.B. said that Dorsey did not acknowledge hitting

her and kept asking her why she thought negatively about him. (R.34:105; Appx. 92). She testified that she kept apologizing to him because she feared he would hit her with the extension cord. *Id*. She said Dorsey then put down the extension cord and asked her for some gas money. (R.34:106; Appx. 93). She gave him some money and he then left the house. *Id.* While there would be other contacts and communications between C.B. and Dorsey, there are no accusations of violence or threats of violence occurring after this time.

On cross-examination, defense counsel pursued various lines of questioning, including a line of questioning which suggested that C.B. had made false accusations against Dorsey because she believed he was having a relationship with another woman named Shannon (R.34:126-30; Appx. 98-102); a line of questioning which drew out that she continued to have a relationship with Dorsey after the first two incidents, and told no one of these incidents when they happened (R.34:136-40; Appx. 108-12); 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. 113-14).

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.'s phone. (R.34:161-64). C.B.'s friend Lori, 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 Lori admitted that she did not witness any of the alleged incidents of violence and that Dorsey never admitted to her of perpetrating any acts of violence against C.B. (R.34:175-81). Lisa 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).

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 disliked. (R.34:247; Appx. 146). He denied that he ever strangled or suffocated C.B. (R.34:226 and 235; Appx. 125 and 134). 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. 134 and 136). 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. 129). He denied ever throwing a phone, or any other object, at C.B. (R.34:231 and 236; Appx. 130 and 135). He denied ever spitting in her face. (R.34:243; Appx. 142). 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. 150-52). Dorsey was also questioned extensively on cross examination concerning two incidents that occurred in 2011 involving an R.K. (R.34:237-40; Appx. 136-39). That testimony will be discussed further below.

The other acts evidence.

The State presented one further witness who had no direct knowledge of any facts in this case, but rather testified to other criminal acts committed by Dorsey in 2011. (R.34:187-95; Appx. 115-23). 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. 115). According to R.K., she and Dorsey were having a child together and an argument erupted when she requested that 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. 116-17). 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 had meant. *Id*. According to R.K., Dorsey got upset and left. (R.34:187; Appx. 115). 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. 115-16). R.K. testified that Dorsey also spat upon her during this incident. (R.34:189; Appx. 117).

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. 118).

Mr. Dorsey was also asked about these incidents. (R.34:237-40; Appx. 136-39). Initially he was confused as to how he was supposed to respond to the questions, (R.34:237-39; Appx. 136-38), 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. 136-39).

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. 58 and 42-57). 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. 59). At the motion hearing, 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. 48-49) (emphasis added).

Trial counsel for 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. 44 and 47-48).

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. 52-53). A cautionary instruction, Wis. JI – Criminal 275 (2003), was given to the jury instructing the jury to consider the testimony of R.K. only for the issues of motive and intent. (R.34:276-77).

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.

(R.34:284-85; Appx. 154-55) (emphasis added).

The jury returned verdicts of not guilty for the charge of strangulation and suffocation, and guilty on the charges of misdemeanor battery, disorderly conduct and aggravated battery. (R.34:306 and R.15). After sentencing Dorsey brought this appeal, and a decision was delivered by the Court of Appeals on December 6, 2016. (Appx. pp. 1-19). As stated above, the Court of Appeals withdrew its initial

decision rendered on August 30, 2016. (Appx. pp. 20-37). The revised decision varied from the initial decision in its treatment of changes by the Wisconsin Legislature to Wis. Stat. § (Rule) 904.04(2).[1] (Appx. pp. 7-11, ¶¶ 16-23). Ultimately, the Court of Appeals concluded that:

> The text of § 904.04(2)(b)1. does not indicate any clear legislative intent to make the greater latitude rule, as developed through our state's case law, now applicable to domestic abuse cases. Under the statute, the only greater latitude provided in admission of evidence in domestic abuse cases is the ability to admit other acts evidence "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." Therefore, we decline to otherwise interpret the statute to provide for greater latitude in the admissibility of other acts evidence in domestic abuse cases merely because of the subsection title.

(Appx. p. 10, ¶ 22). The Court of Appeals then analyzed whether the State met its burden on the first two prongs of the *Sullivan*[2] framework. (Appx. p. 11, ¶ 23).

VII. 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.

[1] 2013 Wis. Act 362 § 38.
[2] State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998).

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. Stat. § (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). See

also, *State v. Scheidell*, 227 Wis.2d 285, 294, 595 N.W.2d 661, 667 (1999) ("The general rule is one of exclusion").

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 this 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 *Sullivan*, and 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.

In 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). This involves answering two questions (1) "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action," and (2) "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." *Sullivan*, 216 Wis.2d at 772.

In discussing the first question contained in step two of the *Sullivan* framework, this Court has written:

> 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)[3]."

Payano, 2009 WI 86, ¶ 69 (emphasis added). Regarding the second question this Court has written 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

[3] *State v. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982).

> 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 this Court has written:

> "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. "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.

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. 59). Moreover, it was the "motive to control" that was identified by the trial court in its ruling as the purpose for which the other acts evidence could be admitted. (R.33:11-12; Appx. 52-53).

Prior to the Court of Appeals' decision in the case *sub judice*, Wisconsin law was 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). 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"). Obviously, the incident between Dorsey and R.K. did not provide a specific motive for 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 the State did not, and cannot, articulate any reason why the 2011 incidents would have provided a specific motive for Dorsey to commit an act of violence against C.B.

That leaves a "generalized motive" as the State's sole recourse. The State asserted that the other acts evidence could be admitted for the purpose of showing a generalized motive to "control [C.B.] within the context of a domestic relationship." (R.9:2 and R.33:7-8; Appx. 59, 48-49). 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 or purpose of sexual gratification. What the State overlooked, 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).

Fishnick is not an isolated case. Three years after *Fishnick* this Court in *State v. Friedrich*, 135 Wis.2d 1, 22, 398 N.W.2d 763, 772 (1987), reaffirmed its holding in *Fishnick*, writing:

> As in *Fishnick*, the motivation for defendant's touching the complainant was sexual gratification. There was obviously a similar motive present in the prior incidents with M.A. and J.H. One of the elements of the charged crime was that the Defendant had the purpose of sexual arousal or gratification. Other acts evidence is admissible when probative of the elements of a crime, subject to the general rule excluding character evidence. *Hough v. State*, 70 Wis.2d 807, 813, 235 N.W.2d 534 (1975)

> Because the purpose of the sexual contact is an element of the crime, and because the Defendant's motive is related to his purpose for committing the crime with which he is charged, other-acts evidence which tends to show Defendant's motive is properly admissible. *Fishnick,* 127 Wis.2d at 260–61, 378 N.W.2d 272. Thus the other-acts evidence consisting of the testimony of M.A. and J.H. is relevant since it illuminates Defendant's motive, which in turn is related to his purpose for committing the crime—sexual gratification—which is an element of the charged offense.

In 1992, in *State v. Plymesser*, 172 Wis.2d 583, 593, 493 N.W.2d 367, 372 (1992), this Court again wrote that:

> In *Friedrich,* we concluded that a circuit court properly exercised its discretion by admitting evidence of uncharged sexual assaults. *Id.* at 25, 398 N.W.2d 763. We determined that evidence of the prior assaults was relevant to motive "[b]ecause the purpose of the sexual contact is an element of the crime, and because the Defendant's motive is related to his purpose for committing the crime with which he is charged...."

(Citations omitted). Twice in the year 2000, this Court held that the admission of other acts evidence was permissible to show a generalized motive or purpose of sexual gratification when sexual gratification was an element of the crime. First in *State v. Davidson*, 2000 WI 91, ¶ 57, 236 Wis.2d 537, 613 N.W.2d 606, wherein this Court wrote that "[o]ur cases establish that when the defendant's motive for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing motive." (Citations omitted). And again in *State v. Hammer*, 2000 WI 92, ¶ 27, 236 Wis.2d 686, 613 N.W.2d 629 wherein this Court held that "testimony was properly admitted to prove motive because purpose is an element of sexual contact, and motive is relevant to purpose." Further in 2003, this Court in *State v. Hunt*, 2003 WI 81, ¶ 60, 263 Wis.2d 1, 666 N.W.2d 771, held that "other-acts evidence was properly admitted to prove motive because purpose is an element of sexual assault, and motive and opportunity are relevant to purpose." And as recently as 2015, this Court in *State v. Hurley*, 2015 WI 35, ¶ 72, 861 N.W.2d 174 held that:

> "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 ... *motive.*" *Hunt,* 263 Wis.2d 1, ¶ 60, 666 N.W.2d 771

> (emphasis added); *see also Davidson*, 236 Wis.2d 537, ¶ 57, 613 N.W.2d 606 ("Our cases establish that when the defendant's *motive* for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing *motive.*").

(Emphasis in the original).

And see *State v. Rushing*, 197 Wis.2d 631, 646, 541 N.W.2d 155 (Ct. App. 1995), wherein the Court of Appeals held that:

> Unlike the facts in *Plymesser*, the charged crime in this case is not sexual contact, which includes the element that the defendant had intentional sexual contact with the victim for the purpose of becoming sexually aroused or gratified, or for the purpose of sexually degrading or humiliating the victim. *Id*. at 593, 493 N.W.2d at 372; § 948.01(5), STATS. Instead, the charged crime in this case is sexual intercourse, which requires only that the defendant had sexual intercourse with a person who had not yet attained the age of sixteen. See §§ 948.02(2), 948.01(6), STATS., and WIS J I—CRIMINAL 2104. Because the State does not have to prove intent, the evidence of Rushing's prior act is not admissible to show proof of motive or intent.

And finally, see footnote 14 in *Sullivan* wherein this Court wrote "If intent is not an issue in the case, the exception for intent under Wis. Stat. § (Rule) 904.04(2) does not apply. See *State v. Danforth*, 129 Wis.2d 187, 201, 385 N.W.2d 125 (1986) (in prosecution for cruel maltreatment of children, evidence that the defendant had struck the child on two prior occasions was irrelevant since intent to injure was not an element of the offense)."

Both § 940.225(5)(b), Wis. Stats. and § 948.01(5), Wis. Stats. in defining "sexual contact" have an element that requires an act be done "for the purpose of 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 Dorsey was charged, nor within the definition of "domestic abuse." See, Wis. Stats. §§ 940.235(1), 940.19(1), 947.01(1), 940.19(6), and 973.055(1). In short, the State wanted to present evidence to prove something that it was under no obligation to prove. Given the State is under no obligation to show that Dorsey had a purpose

to control persons with whom he is in a domestic relationship, then "how badly needed is the other act evidence?" *Payano*, 2009 WI 86, ¶ 81.

Both the State and Court of Appeals cite the case of *State v. Normington*, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867, for the proposition that "there is no requirement that the purpose for which evidence of another act is proffered be an element of the crime ...." (Appx. p. 12, ¶ 27). But *Normington* is entirely in accord with the above cases. In *Normington* the Court of Appeals wrote:

> In *Cofield* we stated that "[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, or if there is a purpose element to the charged crime[.]" *Id.*, ¶ 12 (citations omitted). We concluded there was not a purpose element to the sexual assault charged and there was no connection between the evidence of the prior sexual assaults and the charged sexual assault, no evidence that the prior assaults provided a reason for committing the charged assault, and no other link between them. *Id.* In this case, in contrast, the motive of sexual arousal or gratification is an element for the second-degree sexual assault.

Normington, 2008 WI App 8, ¶ 30.

Moreover, Dorsey never argued that unless motive is an element of the crime charged, other acts evidence is inadmissible. What Dorsey argues is that Wisconsin law makes a distinction between *specific* motive and *generalized* motive. Other acts evidence which demonstrates a linkage between the other acts and the charged offense, is certainly admissible to show a *specific* motive to commit the charged crime, regardless of whether motive or purpose are an element of the crime. However, other acts evidence for a *generalized* motive to commit a particular kind of crime has always required that motive or purpose be an actual element of the crime.

The Court of Appeals wrote that:

> ¶28 Dorsey argues the incidents between him and R.K. did not provide a specific motive for him to commit an act of domestic abuse upon C.B. Indeed, R.K. was unaware of C.B.'s existence prior to March 2014. While Dorsey is correct on that point, he misses the relevant aspect of the rule. The greater latitude rule, codified in WIS. STAT. § 904.04(2)(b)1., expressly allows the admission of evidence of similar acts committed by Dorsey against a different victim. Accepting Dorsey's reasoning would directly conflict with the express language of § 904.04(2)(b).

(App. p. 12-13, ¶ 28).

Dorsey agrees with the Court of Appeals conclusion that "the text of § 904.04(2)(b)1 does not indicate any clear legislative intent to make the greater latitude rule, as developed through our state's case law, now applicable to domestic abuse cases." (Appx. p. 10, ¶ 22). Dorsey also agrees that "Under the statute, the only greater latitude provided in admission of evidence in domestic abuse cases is the ability to admit other acts evidence `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.'" *Id.* However, this cannot be the end of the analysis. When fully considered, the legislature's change to the statute cannot be considered as anything more than a truism.[4] After all, it has never been the case that other acts evidence was limited to acts that have been committed against the same victim. In fact, the other acts evidence admitted in *Fishnick, Friedrich, Plymesser, Davidson, Hammer* and *Hurley* all involved criminal acts which were perpetrated upon persons other than the victim. All these cases, incidentally, predate the inclusion of the language in § 904.04(2)(b)1, Wis. Stats., that "evidence of any similar acts by the accused ... 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." Further, in each of these cases a greater latitude rule applied. And yet, in none of these cases did this Court hold that other acts evidence could be submitted to prove a generalized motive to commit a certain kind of crime where purpose or motive was not an element of the crime.

Why would this Court on at least seven different occasions make a point that other acts evidence was admissible to show a generalized motive of sexual gratification when a purpose of sexual gratification was an element of the crime, if a "greater latitude" standard would allow the evidence to come in regardless of whether motive was an element of the crime? If Dorsey's reasoning conflicts with the express language of § 904.04(2)(b), then so too does this Court's reasoning in *Fishnick, Friedrich, Plymesser, Davidson, Hammer, Hunt* and *Hurley*.

[4] Unless one wishes to interpret the language as limiting the use of other acts evidence for different victims to those identified in § 904.04(2)(b)1, Wis. Stats.

D. The other acts testimony presented in this case was not relevant to the issue of intent because it had no relation to showing intent on the part of Dorsey to cause bodily harm to C.B., nor any probative value toward showing such intent, beyond making an impermissible inference that 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." *State v. D. J. Johnson*, 184 Wis.2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). 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.

Dorsey's trial counsel argued that R.K.'s testimony should not come in because Dorsey was not going to contest intent. 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 Dorsey. (R.33:3 and 6-7; Appx. 7 and 10-11). 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." *Hammer*, 2000 WI 92 at ¶ 25, see also *Fishnick* 127 Wis.2d at 259; *State v. Clark*, 179 Wis.2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993); *Plymesser*, 172 Wis.2d at 594-95; *Friedrich*, 135 Wis.2d at 23; *State v. Veach*, 2002 WI 110, ¶ 62, 53, 255 Wis.2d 390, 648 N.W.2d 447.

However, this holding only applies to first step 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, 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 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."). The fact that Dorsey was not going to contest the intent element, but rather was going to argue the acts never occurred, is a significant factor for consideration in the *Sullivan* analysis.

Talismanically invoking the word "intent" does not make a piece of evidence relevant to intent. Again, other acts evidence will come in only 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. And that is the nub of Dorsey's argument regarding intent. The State did not do that in this case. The State in its closing remarks to the jury made no reference to intent, the State only 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.34:284-85; Appx. 154-55). That is, the State's argument was that 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. The State did not use the testimony to negate an innocent explanation. The State never suggested that an innocent explanation might exist. What was lacking is any explanation from the State as to how crimes committed against R.K.'s might show that the alleged acts of violence against C.B. were intentional acts to cause bodily harm, beyond suggesting that Dorsey had a propensity toward committing such acts of domestic violence.

The Court of Appeals wrote that:

> ¶35 Dorsey argues he never offered an innocent explanation of the incidents with C.B. that would negate a criminal intent for his acts, but simply denied the acts ever occurred. The record shows that he did not offer an innocent explanation until he testified at trial. Consequently, Dorsey argues, R.K.'s testimony could not be offered to prove intent. Dorsey is wrong. "[T]he State is required to prove all elements of the crime beyond a reasonable doubt even if an element is not disputed." ***State v. Veach***, 2002 WI 110, ¶77, 255 Wis. 2d 390, 648 N.W.2d 447 (citing ***Davidson***, 236 Wis. 2d 537, ¶65); *see also* ***State v. Hammer***, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629). "Evidence relevant to any element is admissible even if the element is undisputed." ***Veach***,

> 255 Wis. 2d 390, ¶77. Quite simply, the State was obligated to prove intent before Dorsey testified to the alleged innocent explanation through accident.

(Appx. 15). But Dorsey is not arguing that the State does not have to prove intent at trial. In fact, Dorsey cited the same cases the Court of Appeals cites for the exactly the same proposition. What Dorsey argues is that the State never showed how R.K.'s testimony might actually be relevant to the issue of intent, other than in making a forbidden character inference. The fact that the State has an obligation to prove an element, does not relieve the State of its burden to demonstrate how the evidence it wishes to submit might actually be relevant to that element.

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). When used for such a purpose other act evidence may certainly be relevant toward proving an intent to cause bodily harm.

But the State did not use R.K.'s testimony for such a purpose. And the reason for that was that Dorsey did not assert an innocent explanation that would negate a criminal intent for his acts. He did not assert an innocent explanation regarding the intent behind his acts towards C.B., and he did not assert an innocent

explanation regarding the intent behind his acts toward R.K. R.K.'s testimony did not negate an innocent explanation concerning the intent behind any of Dorsey's acts. An innocent explanation regarding Dorsey's intentions was not an issue of consequence in this action. 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. 25 and 28-29). The State therefore had to articulate some other fact or proposition that R.K.'s testimony was going to prove regarding 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?

R.K.'s testimony had no probative value in proving an intent on the part of Dorsey to cause bodily harm to C.B., beyond making an impermissible inference that Dorsey is a jealous and controlling man who uses violence to control the women with whom he is in a domestic relationship. "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?'" *State v. Payano*, 2009 Wis. 86, ¶ 81, 320 Wis.2d 348, 768 N.W.2d 832. In Dorsey's case, there was no need for R.K.'s testimony. Intent was amply demonstrated by C.B.'s testimony, the acts to which she testified, if believed by the jury, could not be interpreted as being anything other than intentional acts. What could R.K.'s testimony add to C.B.'s testimony on the issue of intent, beyond suggesting that Dorsey had a propensity toward committing such acts of domestic violence? R.K.'s testimony was not needed for proving intent, and had no tendency of showing an intent to cause bodily harm towards C.B., because the incidents were completely unrelated.

The Court of Appeal relies upon the "similarities" between the facts alleged by C.B. and the facts testified to by R.K. (Appx. pp. 15-16, ¶ 37). However, "[r]elevancy 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 Dorsey, both testified to suspicions of infidelity on the part of 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. Again, this evidence was not offered to negate an innocent explanation of the intent behind Dorsey's acts toward C.B.; R.K.'s testimony was offered to show that Dorsey must have committed these acts because it is in his nature to do so. The only tendency R.K.'s testimony had toward showing intent to harm C.B. on the part of Dorsey was in drawing the inference that Dorsey was a jealous and controlling man who beats the women with whom he is in a domestic relationship, which is "precisely what the exclusion of other crimes evidence seeks to exclude." *Cartagena*, 99 Wis.2d at 670-1.

VIII. Conclusion.

The 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 Dorsey to commit crimes against C.B. Nor could R.K.'s testimony be used to show a generalized "motive to control" women with whom he is in a domestic relationship because there was no such purpose element in any of the crimes charged against Dorsey. The State wanted to present evidence to prove something it was not obligated to prove.

Neither were the incidents related by R.K. relevant to show an intent by Dorsey to cause bodily harm to C.B. Dorsey did not assert an innocent explanation regarding the intent behind the acts C.B. claim Dorsey committed against her. 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 no probative value to an issue of consequence in this case, other than in inviting the jury to make an impermissible inference that Mr. Dorsey is a jealous and controlling man with a propensity toward using violence against women with whom he is 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 May 8, 2017.

/S/

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IX. 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 10977 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 May 8, 2017.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in:

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