State of Wisconsin
Court of Appeals
District 3
Appeal No. 2010AP001294 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Joseph Evans,

Defendant-Appellant.

Appeal from a judgment of conviction entered in the Marinette County Circuit Court, The Honorable Tim A. Duket, presiding

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Defendant-Appellant's Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Ave., Twelfth Floor
Milwaukee, WI 53233
(414) 671-9484

Attorneys for Defendant-Appellant
By: Jeffrey W. Jensen
State Bar No. 01012529

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law and, therefore, the appellant does not recommend oral argument or publication.

Statement of the Issues

I. Whether the trial court abused its discretion in admitting evidence, pursuant to Sec. 904.04(2), Stats., that some twenty-five years earlier, Evans (who was eighteen years old at the time) had been involved in a relationship with Lorea Saunier (who was in twelve years old at the time) in which the following events occurred:

A. Saunier came to Evans' house after school and he wanted her to make dinner, but she refused because she had homework to do. Evans then told Saunier to leave. Saunier started walking, and then Evans approached her in his car and ordered her to get in. When Saunier would not get into Evans' vehicle, he pulled her hair and smashed her head on the door. Evans instructed Saunier to tell her mother that she has slipped on the ice (to explain her injuries).

B. Saunier told Evans that their relationship was over and, shortly thereafter, Evans pulled into the driveway of Saunier's home, and then attempted to kill himself by connecting a hose to the exhaust pipe of the car and running the other end of the hose into the interior of the vehicle.

C.

Saunier was walking with her new boyfriend, Jamey, and Evans pulled up in his car, got out, and said he was going to "jack Jamey's jaw", and called him a punk. Evans, "If I can't have you, nobody will."

Answered by the trial court: No.

II. Whether the trial court abused its discretion in admitting expert testimony on behalf of the state concerning domestic violence data and opinions concerning the propensities of abusers and victims?

Answered by the trial court: No.

Summary of the Argument

I. The trial court abused its discretion in admitting other acts evidence against Evans; and the error was not harmless. The State filed a motion for a preliminary ruling concerning the admissibility of a slate of other acts evidence against Evans. By way of summary, the other acts evidence involved Evans, who was eighteen at the time, mistreating his twelve year-old girlfriend by a variety of brutish behavior. The trial court failed to conduct a proper analysis under *State v. Sullivan.* When one examines the record, there is no rational basis to admit the evidence even when the *Sullivan* analysis is properly done. Finally, the error was not harmless because the other acts evidence that was admitted was of the most defamatory sort. It suggested that Evan committed crimes against a child, and it is plausible that this included sexual crimes. The sole issue at trial was Evans' intent at the time the

fatal shot was fired. The admission of this defamatory evidence makes it very likely that the jury convicted Evans out of pure spite.

II. The trial court abused its discretion in admitting expert testimony to the effect that Evans fit the personality profile of a domestic abuser, that domestic abusers are very likely to kill their partner if the partner tries to leave, and that domestic abuse is intentional. The State filed a motion for a preliminary ruling on the admissibility of "expert testimony" concerning domestic violence data. The trial court ruled that the evidence was relevant and admissible. The judge specifically mentioned that the expert testimony could explain to the jury why Dina Evans would go to Joseph Evans' home that day, despite the fact that she had a domestic abuse restraining order against him. At trial, Darald Hanusa was called as an expert witness by the State. Hanusa, though, told the jury that the risk for lethal violence increases seventy-five percent when an abused partner tries to leave the batterer. (R:111-29) According to Hanusa, domestic violence is not accidental, it is intentional, and it is used by the abuser because it works. (R:111-34) Typically, there is a progression from destruction of property to physical abuse. (R:111-40)

As will be set forth in more detail below, expert testimony is admissible where it will help the jury. However, expert testimony that amounts to a comment on another witness's credibility, or opinion testimony as to the defendant's propensity to commit the crime, is not helpful. Here, the expert's testimony was nothing but a claim by the expert that Evans fit the profile of a person who resorts to domestic violence. Therefore,

according to the expert, it was very likely that Evans acted in conformity with that character on the day that Dina Evans was shot. Thus, the jury was left to infer, Evans was lying about the shot being fired accidentally.

For these reasons, the trial court abused its discretion in admitting the expert testimony in that regard.

Statement of the Case

I. Procedural Background

The defendant-appellant, Joseph Evans ("Evans"), was charged with criminal damage to property and first degree intentional homicide arising out of incidents that occurred in Marinette County on July 5, 2008 and July 26, 2008, respectively. (R:1) The complaint alleged that Evans, who was estranged from his wife, Dina, went to her trailer home on July 5, 2008 while she was not there, and he damaged much of the property in the home by apparently slicing it with a knife and by pouring paint on the property. Finally, the complaint alleges, on July 26, 2008, Dina came to Evans' home and, while there, Evans shot and killed her.

After a preliminary hearing, Evans was bound over for trial, and he entered a not guilty plea to both charges. (R:100-3)

A. The other acts evidence hearing

The State filed an extensive pretrial motion seeking a preliminary ruling on the admissibility of several items of other acts evidence under Sec. 904.04(2), Stats. (R:24). By way of summary, the State sought to introduce the following evidence:

The "Laurie Saunier" evidence, which included an incident twenty-five years earlier in which Evans, who was eighteen years old at the time, was in a "relationship" with twelve-year old, Saunier, and quarreled with her when she refused to make dinner because she had homework. After Saunier walked out of the house, Evans followed her in his car and, in the process of forcing her into the car, he struck her head on the door frame, causing injuries. According to the State, Evans instructed Saunier to tell her mother that she had slipped on the ice. On another occasion, Evans allegedly threw Saunier down a flight of stairs. Additionally, there was an occasion where Evans saw a young man he suspected of being interested in Saunier. Evans got out of his car and threatened to "jaw jack" the young man. There was an incident in which Evans allegedly shot off his little finger after he came to believe that Saunier would break up with him; and, finally, when Saunier did break up with Evans, he attempted to commit suicide by parking his car in Saunier's driveway, and using a garden hose to route the automobile exhaust to the interior of the car.

The trial court ruled at all of the Saunier evidence was admissible except the incident in which Evans allegedly through Saunier down the stairs. (R:101-149 to 160; Appendix B) Later, the court stated:

Two other points I think I forgot to make on the 904.04(2) ruling, and I'm talking about the incident with the missing finger, if the defendant came into Mikey Evans and family and explained that, you know there was an accident and problem with this pinky, I think that would be another arrow in the state's quiver concerning doctrine of chances, another catastrophic event that's explained by a mere accident, which would be relevant for weighing and evaluating subsequently the June 26th, 08 was an accident or not, and secondly, on the *Sullivan* analysis, I know there's three prongs. One is whether it fits under 904.04(2), second, is it relevant, and then, is it unduly prejudicial, and I hope that my extensive comments have made clear, *even though I didn't identify those three prongs,* that I'm ruling that it's-- it fits several of those categories under 904.04(2), which is not exclusive, by the way, because contacts I don't think is listed, and that these things are relevant and the ultimate determination, and I think it's not unfairly prejudicial, I think it's necessary, and *I think a lot of this evidence undermines the credibility of the defendant*, if believed by the jury, and that it goes ultimately to the heart of the evidence, whether maximum or not, so I think under the *Sullivan,* the three prong analysis, I'm ruling in favor of the state as to all three prongs as to the incidents previously discussed.

(R:101-158, 159)

B. The expert testimony

The State also filed a motion seeking a preliminary ruling on the admissibility of expert testimony concerning "domestic violence data." (R:28) Perhaps the most controversial testimony the State sought to introduce was the expert's opinion that a victim of domestic violence who attempts to leave her abuser is seventy-five percent more likely to be killed by the abuser than is the victim who stays in the relationship. The court ruled that the evidence was admissible. The court's reasoning is as follows:

> Well, I think for all the reasons stated by the state, this stuff is relevant. It explains to the jury a lot of things that common people would not understand. Most people-- unless you're in an abusive relationship, if, in fact, this is an abusive relationship, and that's for the jury to determine. The average juror, I don't think, would have any notion of a lot of these concepts. They would have misconceptions, I'm sure, about what would she even go over there for if, in fact, he was genuinely dangerous, and why would she go with him when she's got a domestic abuse injunction, or TRO. What would she be doing over there that morning bringing him groceries. They wouldn't understand this. They would-- they would-- without the help of an expert there's at least a half a dozen points, I think, that have been made by the state as to how this testimony can assist the jury in weighing and evaluation the-- the notions of domestic abuse and what's not commonly understood, and so I think it is relevant.

> I think if there's an expert in Wisconsin on domestic abuse relationships, this might be preeminent authority, looking over his resume, seems eminently qualified. I think it is relevant. I think it would assist the jury in understanding a lot of things that average people would not understand in this arena. Maybe as we get closer to trial we can have a more detailed look at those slides to figure out maybe between the state and the defense, they could agree to include things, not to include things, or elimination of some of those slides that if, ultimately, I have to decide, I will, but on the whole, I think this type of testimony is appropriate, and the jury should hear it.

(R:101-176, 177).

The case proceeded to trial from September 21, 2008 to September 24, 2008. The jury returned verdicts finding the defendant guilty of both counts. (R:65, 66). The Court sentenced Evans to nine months in jail on the criminal damage to property count; and to life in prison on the first degree intentional homicide count. (R:73, 74)

II. Factual Background

On July 5, 2007, Tressa Evans, who is the daughter of Joseph Evans and Dina Evans, went to Dina's trailer and found that someone had destroyed much of Dina's personal property, and that the person had poured paint over the belongings. (R:108-161) The police were called and they documented that many belongings were damaged, and that blue and green paint was spattered primarily on the couch. (R: 110-40) The police

interviewed Evans, who at the time denied causing the damage. (R:110-77) According to Tressa, the paint she saw on the belongings was the same paint she had seen at her father's house (Joseph Evans). *Id.* Tracy Brabant, who is Dina Evans' sister, testified that on July 5, 2007 she had a telephone conversation with Evans, and Evans told her that he had gone to Dina's trailer, destroyed her stuff, and claimed that he had a pistol and that he was going to "hunt Dina down." (R:108-152) At trial, Evans admitted that he was angry at Dina that day, and that he did do the damage to Dina's belongings. (R:112-82)

Later, on July 26th, Evans was served with a domestic violence restraining order that had been obtained by Dina. (R:110-31). According to Evans, he could not understand this because, at the very time he was served with the order, Dina was asleep in his trailer. (R:112-117) Later that day, though, Tressa went to her mother's trailer, and discovered that she was not there. Tressa tried to call Dina a number of times, and she was unable to reach her. (R:108-163). Next, Dina went to her father's trailer. (R:108-163) There she saw Evans on the telephone, and she heard her father state that he had accidentally shot Dina. (R:108-169) Dina, who was lying on the floor inside Evans' trailer, was pronounced dead at the scene from a gunshot wound to the chest. (R:109-71). According to the medical examiner, the shot was fired from less than two feet away. (R:109-74)

When the police arrived and asked Evans what had happened, Evans told them that he was cleaning his gun and it went off. (R:108-202)

Evans testified at the trial. He told the jury that on July 26th he returned home at about 4:00 p.m. with some fast food, he

ate, smoked a cigarette, and then went into the spare bedroom to get his pistol. (R:112-44) Evans was examining the gun to make sure it was empty, and then he tried to get familiar with it. (R:112-46) As he was attempting to load the weapon for the fifth time, the door opened and Dina walked in. (R:112-48) Evans got up, intending to set the pistol on the top of a speaker. At that point, Dina exclaimed, "What the fuck," and grabbed his arm. *Ibid.* The pistol fired, and Evans dropped the weapon. *Ibid.* Dina collapsed to the floor.

Evans said that he was in shock because he did not see any sign of a gunshot wound on Dina. (R:112-49) Evans then called 9-1-1. *Ibid.* At that point he realized that Tressa was outside, and he told her to leave immediately.

Lorea (Laurie) Saunier was called as a witness by the State. She testified that she was Evans' girlfriend when she is in eighth grade and Evans was eighteen years old at the time. (R:110-79) Saunier told the jury of an incident in which she went to Evans' house after school and he wanted her to make dinner. Saunier refused because she had homework to do. At that point, Evans became angry and told Saunier to leave. Saunier left the house and began walking down the sidewalk. Evans followed her in his car. He then stopped the car and, in the process of forcing Saunier into the vehicle, he smashed her head on the door frame. (R:110-80). Saunier was injured, and Evans told her to tell her mother that she had slipped on the ice. (R:110-81)

Additionally, Saunier explained to the jury that, in a separate incident, she had told Evans that their relationship was over and, later that day, Evans pulled into the driveway of her home and attempted to kill himself by running a hose from the

exhaust pipe of his van into the interior of the vehicle. (R:110-82)

On a third occasion, Saunier said she was walking with her new boyfriend, Jamey, when Evans pulled up in his car. Evans got out and said he was going to "jack Jamey's jaw" and called him a punk. (R:110-85) At that point, Evans said, "If I can't have you, nobody will." (R:110-86) Evans flatly denied that these incidents ever happened. (R:112-142 to 144)

Finally, a recording was played in which Michael Evans (appellant's brother) said that Joseph Evans was so upset about breaking up with Saunier that he (Joseph) shot himself in the hand. (R:110-101) According to Evans, he accidentally shot himself in the hand while he was out hunting coyotes. (R:112-146)

Darald Hanusa was called as an expert witness by the State. Hanusa was permitted to launch into an expansive lecture on nearly all aspects of domestic violence, and Hanusa's experience in treating those who engage in domestic violence. (R:111-22 to 102). Given the breadth of Hanusa's sermon, it is impossible to recount it here. Several of Hanusa's comments, though, are worthy of individual attention. Hanusa told the jury that the risk for lethal violence increases seventy-five percent when an abused partner tries to leave the batterer. (R:111-29)

According to Hanusa, domestic violence is not accidental, it is intentional, and it is used by the abuser because it works. (R:111-34) Typically, there is a progression from destruction of property to physical abuse. (R:111-40). Hanusa also told the jury:

> Suicide as a behavior is one of the questions that I screen for because oftentimes what me will do is they will use threats of suicide to control her, to put her in fear and to keep her there. And they will say things like if you leave, I will kill myself and what are our children going to think or that will be on your head and you will live with guilt forever.

(R:111-86-88)

Argument

I. The trial court abused its discretion in admitting the "Laurie Saunier" other acts evidence.

The State filed a motion for a preliminary ruling concerning the admissibility of a slate of other acts evidence against Evans. By way of summary, the other acts evidence involved Evans, who was eighteen at the time, mistreating his twelve year-old girlfriend by a variety of brutish behavior. The trial court failed to conduct a proper analysis under *State v. Sullivan.* When one examines the record, there is no rational basis to admit the evidence even when the *Sullivan* analysis is properly done. Finally, the error was not harmless because the other acts evidence that was admitted was of the most defamatory sort. It suggested that Evan committed crimes against a child, and it is plausible that this included sexual crimes. The sole issue at trial was Evans' intent at the time the fatal shot was fired. The admission of this defamatory evidence makes it very likely that the jury convicted Evans out of pure spite.

A. Standard of Appellate Review

In, *State v. Payano*, 2009 WI 86, P40-P41 (Wis. 2009), the Supreme Court very recently reiterated the standard of appellate review for issues concerning the admission of other acts evidence. The Supreme Court wrote:

> This case requires us to determine whether the circuit court erroneously exercised its discretion when it allowed the admission of other acts evidence against Payano. (internal citations omitted)
>
> In these circumstances, we are to determine whether the circuit court "reviewed the relevant facts; applied a proper standard of law; and using a rational process, reached a reasonable conclusion." (internal citations omitted). If, for whatever reasons, the circuit court failed to delineate the factors that influenced its decision, then it erroneously exercised its discretion. (internal citations omitted). However, "[r]egardless of the extent of the trial court's reasoning, we 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."

B. The other acts analysis generally

Sec. 904.04(2)(a), Stats., provides:

> (a) Except as provided in par. (b), 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.

In, *State v. Sullivan,* 216 Wis. 2d 768, 773-774 (Wis. 1998), the Wisconsin Supreme Court set forth the "three step analysis" to be used in determining whether other acts evidence is admissible under Sec. 904.04, Stats. The Supreme Court explained that, when faced with this issue, the courts must address the following:

> (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.

Concerning relevance, the Supreme Court has explained:

> In the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial. . . . Relevancy in logic is the tendency of evidence to establish a proposition which it is offered to prove. Relevancy, as employed by judges and lawyers, is the tendency of the evidence to establish a material proposition."

State v. Becker, 51 Wis. 2d 659, 667 (Wis. 1971).

Just as important to the analysis, though, is the third prong: Whether the unfair prejudice of admitting the evidence outweighs any probative value that the evidence might have. The Wisconsin Supreme Court has long emphasized that an accused has "'the fundamental right to be tried only upon

evidence which bears upon the specific offense charged,'" calling it "'an ancient right firmly imbedded in our jurisprudence.'" *Mulkovich v. State*, 73 Wis. 2d 464, 471-472, 243 N.W.2d 198, 202 (1976). The court, in *Mulkovich,* explained:

> From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him."

Id., 73 Wis. 2d at 472, 243 N.W.2d at 202-203 (quoted source omitted). Thus, in *State v. Albright*, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), the Court of Appeals reversed a drunk-driving conviction because a testifying police officer volunteered that, after he had arrested the defendant, the officer removed from the defendant's car a chain and a knife. *Id.*, 98 Wis. 2d at 666, 675-676, 298 N.W.2d at 198-199, 203. The Court of Appeals explained:

> The reference to confiscated weapons was improper. The testimony created unfair prejudice which substantially outweighed any probative value. Testimony by a state trooper that he confiscated a chain and knife from Albright's car clearly

> inferred impropriety or illegality on the part of Albright. While a chain or knife does not necessarily constitute a weapon, removal by an officer infers that they were in this case. The resulting prejudice to Albright is that the jury might unjustifiably conclude on the basis of this confiscation that Albright was engaged in violent and unlawful activity and therefore it would convict him on the basis of these uncharged "crimes." We view this evidence as intending the inference we draw from it because we have been provided with no other plausible explanation for offering such obviously irrelevant evidence. We note that this information was not solicited by the prosecutor, but was volunteered by the highway patrolman.

Finally, in *Sullivan,* 216 Wis. at 773-774, apparently in recognition of the difficulty in analyzing other acts issues on appeal, the Wisconsin Supreme Court admonished the lower courts and the lawyers as follows:

> We first comment on the circuit court's and the court of appeals' mode of addressing other acts evidence. In this case, the circuit court admitted the other acts evidence. Although the prosecutor, the proponent of the evidence, and the circuit court referred to the three-step framework described above, they failed to relate the specific facts of this case to the analytical framework. The prosecutor and the circuit court did not carefully probe the permissible purposes for the admission of the other acts evidence; they did not carefully articulate whether the other acts evidence relates to a consequential fact or proposition in the criminal prosecution; they did not carefully

> explore the probative value of the other acts evidence; and they did not carefully articulate the balance of probative value and unfair prejudice.
>
> 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. The circuit court must similarly articulate its reasoning for admitting or excluding the evidence, applying the facts of the case to the analytical framework. This careful analysis is missing in the record in this case and has been missing in other cases reaching this court. Without careful statements by the proponent and the opponent of the evidence and by the circuit court regarding the rationale for admitting or excluding other acts evidence, the likelihood of error at trial is substantially increased and appellate review becomes more difficult. The proponent of the evidence, in this case the State, bears the burden of persuading the circuit court that the three-step inquiry is satisfied.

Here, the manner in which the trial court conducted the hearing on the motion for a preliminary ruling on the other acts evidence made it exceedingly difficult for appellate counsel to present the issues for review in an organized and understandable manner. The motion hearing did not proceed in the customary fashion where each attorney argues, and then the court rules. Rather, the hearing consisted of the lawyers and the judge engaging in what is best described as a "conversation" about the other acts evidence-- the sort of

conversation that is frequently done off-the-record to narrow the issues. This conversation went from R:101-42 to R:101-159.

For their part, the lawyers did not make appellate review of the issues any easier. The prosecutor, rather than "clearly articulating his *reasons*" for seeking admission of the specific other acts evidence, presented the trial court with a survey of cases in which an appellate court found no abuse of discretion in admitting ostensibly similar types of other acts evidence. All of the cases cited by the prosecutor were pre-*Sullivan;* and the holdings, of course, were limited to the unique facts of each case. For example, the prosecutor told the court, "One of the other domestic violence cases cited by the state in its brief in which an appellate court allowed a prior relationship to be admitted as it related to incidents of domestic violence that occurred in a prior relationship was the *State v. Clark* case." (R:101-74). This survey of other acts evidence cases-- for the purpose of finding superficial similarities between the other acts evidence-- falls woefully short of the clear articulation of reasons required by *Sullivan.*

Even the court's ruling was incomplete. The court entertained this lengthy conversation about the evidence, and then abruptly made a ruling admitting the other acts evidence (with the exception of the incident in which Saunier was thrown down the stairs). In the ruling, the judge only individually addressed two of the incidents. The court did not specifically speak about the suicide attempts. A few moments later, though, the judge went back on the record, and noted that he had not done the required *Sullivan* analysis. Then, in a talismanic manner, the judge recited that, "[S]o I think under *Sullivan*, the three prong analysis, I'm ruling in favor of

the state as to all three prongs as to the incidents previously discussed." (R:101-159).

This procedure, alone, constitutes a failure by the prosecutor to clearly articulate his reasons for seeking admission of the other acts evidence. Likewise, the trial court's ruling admitting the evidence was an abuse of discretion because the trial court did not apply a proper standard of law and, using a rational process, reach a reasonable conclusion.

Nonetheless, the Supreme Court has instructed that, "[W]here the trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." *State v. Pharr*, 115 Wis. 2d 334, 343 (Wis. 1983). Thus, the appellant will address each of the other acts evidence.

C. Saunier's refusal to make dinner

Laurie Saunier testified at trial about an incident, twenty-five years earlier, in which she went to Evans' house after school, and Evans asked her to make dinner. Saunier, who was in eighth grade at the time, refused because she had homework. Evans ordered her out of the house, but then he followed her in his car as she walked down the street. Eventually, he parked the car and forced Saunier into it. In the process, Saunier's head was injured. Evans instructed Saunier to tell her mother that she had slipped on the ice. In admitting this evidence, the trial court reasoned:

> I think I already mentioned that even though it's 25 years old, the attack against Saunier by banging her head into the door frame and then telling her to have an accidental explanation is relevant, and there are sufficient similarities. It's potentially a lethal attack. You say, well, he's attacking her head, in this case he's firing a bullet into her chest and saying it was an accident. I mean, those things are-- I think are necessary for the jury to hear and evaluate to figure out what really happened.

(R:101-149). Contrary to the trial court's expressed "hope" that its extensive comments would make clear (R:101-176), this reasoning does not approach the proper *Sullivan* factors.

The question is whether, if the proper analysis had been done, there was a legal basis in the record for admitting the evidence.

Immediately after Dina was shot, Evans told the police that he was cleaning his gun and "it went off". In other words, Evans claimed that Dina was accidentally shot. He so testified at trial.

A proper purpose for other acts evidence under Sec. 904.04(2), Stats., is to show, "absence of mistake or accident." Thus, there is a rational basis in the record to conclude that the other acts evidence was offered for a proper purpose under the statute. The first prong of the *Sullivan* analysis is satisfied.

The analysis begins to quickly disintegrate, though, when one reaches the second prong-- whether the other acts evidence is *relevant.* As mentioned above, relevant evidence is evidence that makes a material proposition of fact more or less likely.

Here, the State's material proposition of fact must be that Joseph Evans did not *accidentally* shoot Dina Evans; rather, he intentionally shot her, and he then lied to the police about his actual intent, claiming it was an accident. In other words, the material proposition of fact goes strictly to Evans' *state of mind* (absence of accident).

Does the fact that, twenty-five years earlier, Evans injured Laurie Saunier, and then he told her to claim that she accidentally caused the injuries herself, make our material proposition of fact-- that Evans *intended* to kill Dina-- more or less likely?

The only logical inference from the Saunier evidence is that Evans wanted to totally conceal the fact that he was responsible for Saunier's injuries. Evans' behavior, then, in telling Saunier to claim that she slipped on the ice, tells us nothing about Evans' state of mind during that incident, it goes only to his unwillingness to accept responsibility for hurting her.

At trial, Saunier testified that, in her opinion, Evans *intentionally* slammed her face into the door frame. (R:110-81).

It is not Saunier's interpretation of Evans' intent, though, that is important. The other acts evidence at issue is Evans' conduct in telling Saunier to lie about who caused her injuries. This, of course, has utterly no bearing on Evans' intent on the day he injured Saunier; much less does it shed any light on Evans' intent on July 26, 2008 when Dina Evans was shot.

The *Sullivan* analysis completely fails, though, when one reaches the third prong-- whether the probative value of the other acts evidence exceeds the unfair prejudice. Even if the court were to conclude that the Saunier evidence has some

bearing upon Evans' state-of-mind at the time Dina was shot, the probative value of this evidence is paltry at best.

On the other hand, the unfair prejudice of the Saunier evidence is monumental. Firstly, the jury was informed that Evans, when he was eighteen years old, had a *twelve year-old girlfriend.* On top of that, Evans apparently expected this eighth grader to make dinner for him. When she refused because she had homework, Evans reacted cruelly. There is no way to sugar-coat the inferences that the jury must have drawn from this evidence. It portrays Evans as an unmitigated creep, and it runs afoul of the "[F]undamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him." *Mulkovich*, *supra.* Perhaps most disturbing, though, is that these facts have nothing to do with the 904.04(2), Stats purpose for which the other acts evidence is offered (i.e. to show absence of accident). The nature of the quarrel between Evans and Saunier, nor Saunier's age, has anything to do with Evans' behavior in telling Saunier to claim that her injuries were accidental.

The unfair prejudice of admitting this evidence grossly exceeded any probative value.

Thus, when the appellate court examines the record, it is clear that there is no basis to sustain the trial court's order admitting the evidence. Rather, when one examines the record, and then laboriously applies the *Sullivan* standard, the fact that the trial court admitted the Saunier evidence is fairly unsettling.

D. Evans' suicide attempt in Saunier's driveway

Saunier was permitted to testify at trial that after she broke up with Evans, he pulled his van into her driveway, using garden hose, he routed the exhaust into the interior of the vehicle, and thus attempted to kill himself. In admitting this evidence, the trial court reasoned:

> [D]efendant and Ms. Saunier discuss the end of their relationship, whereafter the defendant drives the van to Mr. Saunier's mother's driveway and engaged in an apparent suicide attempt. I think that's relevant when you understand the state's attempt to prove motive here, to be able to control. I agree with attorney Morrow that she can't come in and just say people at the hospital called me and said get in here because we can't control him unless you're here to hold his hand; however if they had people that were there at the hospital in a suicide attempt, I don't know if it was the finger or gassing in the driveway, but certainly if those witnesses are available, that at the hospital in the emergency room that he was insistiong that Dina show up, then, again, I think that's relevant to motive, to control, and manipulate somebody that's trying to break away from him.

(R:101-149, 150).

In applying the proper *Sullivan* analysis to this evidence, one must struggle mightily to imagine a permissible purpose for the evidence under Sec. 904.04(2), Stats. The trial judge mentioned "motive" which, of course, is a permissible purpose under Sec. 904.04(2), Stats.

So, supposing that the evidence is offered for the permissible purpose of proving motive, what is the material proposition of fact? "Motive refers to a person's reason for doing something." Wis. JI-Criminal 175. How could that fact that twenty-five years earlier, Evans tried to kill himself in Saunier's driveway give him a reason to intentionally shoot Dina Evans? The facts of this case defy a formulation of any material proposition of fact that would support motive.

A closer look at the trial court's words, though, is instructive. The judge said, "I think that's relevant to motive, to control, and manipulate somebody that's trying to break away from him." What the judge is saying is that whenever a woman attempts to break-up with Evans, he becomes unreasonable, controlling, and manipulative. In 2008, Dina Evans was attempting to break up with Joseph Evans; and, therefore, Evans *controlled her* by shooting her to death. This is nothing but unvarnished character evidence. It is within Evans' character to react unreasonably and unpredictably when a woman tries to break up with him. In shooting Dina, Evans was acting in conformity with his character.

The second prong of the *Sullivan* analysis entirely fails. Once cannot even imagine how Evans' suicide attempt twenty-five years earlier could provide a reason for him to shoot Dina Evans.

Once again, though, the third prong is perhaps most persuasive. If the jury were not thoroughly disgusted after learning that Evans had a twelve-year old girlfriend that he treated cruelly, the evidence of the suicide attempt in Saunier's driveway surely must have done the trick. This evidence has no probative value. It would not take much unfair prejudice,

then, to outweigh the probative value. Nonetheless, the evidence heaped a good measure of unfair prejudice on Joseph Evans.

E. The "jaw-jacking" incident

At trial, Saunier testified that she was walking with her new boyfriend, "Jamey", when Evans pulled up in his car. Evans got out and said he was going to "jack Jamey's jaw" and called him a punk. (R:110-85) At that point, Evans said, "If I can't have you, nobody will." (R:110-86).

The admissibility of this incident was not specifically ruled upon by the trial court. Thus, we are left to wonder what permissible purpose under Sec. 904.04, Stats. the evidence could possibly serve. During the conversation about the evidence, though, the trial judge gave us some insight into his reasoning. The judge asked defense counsel:

> What about, you know, I emphasize this jack in the jaw, it's kind of an unusual expression. I haven't heard it before until I saw it in this case. It's the same language then, it's the same language now. This Laurie Saunier's got a cousin and some friend, and he's going to make a big scene allegedly stopping in the car and I'm going to jack you in the jaw, that kind of stuff, and then in this case, when he's making all these phone calls on the 24th, if this is correct and this is him saying, he's going to jack her in the jaw [referring to Dina Evans]

(R:101-114). Is the judge suggesting that the use of the phrase "jack in the jaw" is a sort of signature phrase that Evans uses when he is angry about a break-up with a woman? If so,

this would mean that the permissible purpose under Sec. 904.04(2), Stats would have to be *identity.*

But the identity of the shooter was not an issue. Everyone agreed that Joseph Evans was holding the gun that shot Dina Evans. The issue at the trial was Evans' state of mind. That is, did he intend to kill Dina?

In Sullivan, the other acts evidence involved the defendant removing his glasses as a prelude to a fist-fight. That is, whenever the defendant removed his glasses, it was an indication that he intended to fight. Here, perhaps the State may argue that Evans' "jack-in-the-jaw" phrase is a prelude to violence, just like in *Sullivan*. Unfortunately for the State, though, this does not carry the day. Apparently, Evans never did jack Jamey in the in the jaw. Thus, it appears to have been a hollow threat-- mere saber rattling by Evans. This being the case, the "jack in the jaw" comment did not suggest that Evans intended to engage in violence.

For these reasons, the trial court abused it discretion in admitting this evidence.

F. The shot to the hand incident

The trial court permitted the State to introduce evidence that Evans was so upset about breaking up with Saunier that he shot himself in the hand. (R:110-101). The analysis on this point is identical to the analysis applied to the suicide evidence; and, therefore, it need not be repeated here. Suffice it to say that Evans' pathetic appeal to Saunier's sympathy hardly establishes that Evans had a motive to kill Dina Evans twenty-five years later.

G. The error was prejudicial

Where there has been an erroneous admission of evidence,

> The harmless error test as set forth in *Dyess* contemplates that the "reviewing court must set aside the verdict unless it is sure that the error did not influence the jury or had such slight effect as to be de minimus." (citation omitted). The reviewing court must determine "whether there is a reasonable possibility that the error contributed to the conviction." *Id*. at 543. In assessing this, the focus should be on whether the error undermines the court's confidence in the outcome of the case. *Id*. at 545.

State v. Grant, 139 Wis. 2d 45, 52-53 (Wis. 1987).

Here, the errors were not harmless because: (1) the evidence was extremely defamatory; (2) the error was repeated several times; and, (3) the issue of Evans' intent was the sole contested issue in the case and the improperly admitted evidence invited the jury to convict Evans out of pure spite.

As mentioned above in the "unfair prejudice" analysis, the improperly admitted evidence was of the most defamatory sort. The evidence suggested that if Evans were not an outright pedophile, he at least had an uncommonly warped sense of what is appropriate in a boyfriend-girlfriend relationship. In the public's fabled hierarchy of loathsome criminality, a person who commits crimes against children-- and especially one who commits *sexual* crimes against children-- resides at a level

where he is resigned to gaze up from below at murderers, sexual predators, and even drunken drivers.

And it might have been one thing if the jury had learned only of a single episode of Evans' brutish behavior toward Saunier; but, no, the jury was treated to the complete trilogy. This included, of course, not only the appalling scene in which Evans resorts to violence after demanding that his twelve year-old girlfriend neglect her homework in favor of making him dinner; but also the ill-fated gassing incident in the driveway of Saunier's home; as well as the self-mutilation of Evans' hand by gunshot. As an encore, the jury learned that Evans had threatened to jack Saunier's new boyfriend in the jaw.

Perhaps more meaningful, though, is the fact that the sole factual issue at trial was Evans' intent at the time the shot was fired. Concerning intent, the judge instructed the jury that, "You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's *acts, words, and statements, if any, and from all other facts and circumstances in the case bearing upon intent."* (R:113-124) In deciding whether Evans meant to kill Dina, then, how could the jury have resisted this enticing invitation? Evans is precisely the sort of jerk who mistreats a twelve year-old girl; so, of course he intended to kill his wife.

For these reasons, the trial court erred in admitting the other acts evidence, and the error was surely not harmless.

II. The trial court abused its discretion in admitting the expert testimony concerning domestic violence data.

The State filed a motion for a preliminary ruling on the admissibility of "expert testimony" concerning domestic violence data. The trial court ruled that the evidence was relevant and admissible. The judge specifically mentioned that the expert testimony could explain to the jury why Dina Evans would go to Joseph Evans' home that day, despite the fact that she had a domestic abuse restraining order against him. At trial, Darald Hanusa was called as an expert witness by the State. Hanusa, though, set forth a personality profile of persons who commit domestic violence, he told the jury that the risk for lethal violence increases seventy-five percent when an abused partner tries to leave the batterer. (R:111-29) According to Hanusa, domestic violence is not accidental, it is intentional, and it is used by the abuser because it works. (R:111-34) Typically, there is a progression from destruction of property to physical abuse. (R:111-40)

As will be set forth in more detail below, expert testimony is admissible where it will help the jury. However, expert testimony that amounts to a comment on another witness's credibility, or opinion testimony as to the defendant's propensity to commit the crime, is not helpful. Here, the expert's testimony was nothing but a claim by the expert that Evans fit the profile of a person who resorts to domestic violence. Therefore, according to the expert, it was very likely that Evans acted in conformity with that character on the day that Dina Evans was shot. Thus, the jury was left to infer, Evans was lying about the shot being fired accidentally.

For these reasons, the trial court abused its discretion in admitting the expert testimony in that regard.

A. Standard of Appellate Review

"Whether an expert's opinion should be admitted into evidence is largely a matter of the circuit court's discretion. *State v. Jensen,* 147 Wis. 2d 240, 246 (Wis. 1988). Therefore, the standard of appellate review is whether the trial court abused its discretion. *Payano, supra.*

B. The trial court abused its discretion in admitting the expert testimony.

Sec. 907.02, Stats., provides that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Significantly, though:

> Expert testimony does not assist the fact-finder if it conveys to the jury the expert's own beliefs as to the veracity of another witness. (citation omitted) This is because "the credibility of a witness is . . . something a lay juror can knowledgeably determine without the help of an expert opinion." (citation omitted) An expert's conclusion as to witness credibility does not assist the jury to evaluate credibility; it usurps their role as '"lie detector in the courtroom,'" (citation omitted) To determine

> whether expert testimony violates this standard, this court will examine the testimony's purpose and effect. Jensen, 147 Wis. 2d at 254-55.

State v. Pittman, 174 Wis. 2d 255 (Wis. 1993).

The courts have held numerous times that expert testimony may be helpful to explain behavior on the part of the victim that might appear to be inconsistent with the person having been the victim of a crime. *See, e.g., Jensen, supra; State v. Bednarz,* 179 Wis. 2d 460, 463 (Wis. Ct. App. 1993; expert testimony about "battered women's syndrome" to explain the victim's behavior in recanting and returning to the relationship). The expert may be asked to describe the behavior of the alleged victim. Then the expert may be asked if the victim's behavior is consistent with the behavior of other victims. However, in *Jensen*, the Supreme Court cautioned that there is a risk that the jury could interpret such comparison testimony as an opinion concerning the credibility of another witness, and stated that, "the expert witness must not be allowed to convey to the jury his or her own beliefs as to the veracity of the complainant with respect to the assault." *Jensen*, 147 Wis. at 256-57.

Here, Hanusa's opinions were hardly limited to the consistency between profile persons of domestic abuse, and the behavior of Dina Evans in this case. Rather, Hanusa was permitted to create a personality profile of persons who are likely to commit crimes of domestic violence, he talked about the excuses used by abusers, he talked about the strategies they use to control their partners, testified that domestic abuse is *intentional*-- and he even presented statistics of *how likely* it

is that a domestic abuser will kill his partner if she tries to leave. This testimony did not merely explain counter-intuitive behavior by Dina Evans in returning to Evans' trailer that day-- this was propensity evidence about Joseph Evans; and it was propensity evidence of the worst sort. Likewise, the "comparison" testimony by Hanusa was a thinly-veiled opinion that Evans intentionally killed Dina.

Hanusa's testimony, particularly in conjunction with the Saunier other acts evidence, was nothing, if it was not an attempt by the State to inform the jury that it is part of Evans' character to be one who is violent toward women, manipulative, and a domestic abuser; and that Joseph Evans was acting in conformity with his character on the day that Dina Evans was shot. In fact, according to Hanusa, the chances that Joseph Evans would kill Dina Evans increased by seventy-five percent when Dina Evans decided to leave. This is so clearly propensity evidence, prohibited by Sec. 904.04(2) and also by Sec. 907.02, Stats., that it is difficult imagine what argument could be made to the contrary.

Additionally, Hanusa's testimony was nothing if it was not an expression of Hanusa's opinion that Joseph Evans was lying about accidentally shooting Dina Evans. According to Hanusa, domestic violence "is intentional" (R:111-34). Moreover, as Hanusa pointed out, Evans possesses a number of the personality characteristics of abusers who resort to lethal violence. Though he was not specifically asked the question, this evidence certainly invited the jury to infer that Hanusa disbelieves Evans' testimony that the shot was fired accidentally.

For these reasons, the trial court abused its discretion in admitting the expert testimony of Hanusa insofar as the testimony related to Evans' propensity to commit domestic violence, and to the credibility of Evans' claim that the shot was fired accidentally.

Conclusion

For these reasons, it is respectfully requested that the Court of Appeals reverse Evans' conviction; and remand the matter for a new trial with instructions that the other acts evidence is not admissible; and with further instructions that the testimony of Hanusa concerning the personality characteristics of abusers, is not admissible.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2010.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53223

(414) 671-9484

Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 8548 words.

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Dated this _____ day of
_____, 2010:

_____
Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 3
Appeal No. 2010AP001294 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Joseph Evans,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of bench decision on other acts evidence

C. Excerpt of bench decision on expert testimony

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or

written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated at Milwaukee, Wisconsin, this _____ day of _____, 2010

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Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue, 12th Floor
Milwaukee, WI 53233

414.671.9484