STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2015AP000648 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

ANTON R. DORSEY,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW AND APPENDIX

OF THE DEFENDANT-APPELLANT-PETITIONER

ANTON R. DORSEY

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

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 of Rule 809.62 Criteria Relied Upon For Review.

Mr. Dorsey believes that there are special and important reasons for this Court to exercise its discretion to review the decision of the Court of Appeals because "the court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions" § 809.62(1r)(d), Wis. Stats.

Specifically, Mr. Dorsey believes that the circuit court and the Court of Appeals have departed from long standing precedent that has held 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*, 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). Heretofore, Wisconsin law always made a distinction between *specific* motive and *generalized* motive. Other acts evidence which demonstrates a linkage between the other acts and the charged offense, has always been 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.

In this case, there was no specific linkage between the other acts and the charged offense, and the crimes alleged by C.B. Rather, the State argued, and the circuit court and Court of Appeals agreed, that in cases of domestic abuse it is unnecessary to show any *specific* relationship between the other acts and the charged offense, but rather that it is sufficient to merely demonstrate the existence of some *generalized* motive on the part of the defendant to control the women with whom he is in a domestic relationship. This, even though, it has never been an element to crimes of domestic violence that the State prove the defendant had the purpose to control the persons with whom they are in a domestic relationship.

Mr. Dorsey further believes that the Court of Appeals departed from existing precedent in determining that the other acts evidence was relevant to proving the intent elements of the crimes with which Mr. Dorsey was charged. Specifically, neither the State nor the Court of Appeals articulated some other fact or proposition that R.K.'s testimony was going to prove with regard to Mr.

Dorsey's intent to cause bodily harm to C.B., other than to make an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man.

V. Statement of Facts and Case.

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

A one-day jury trial was held on August 28, 2014. (R.34). At trial the State presented testimony from a witness, R.K., who had no direct knowledge of any facts in this case, but rather testified to other criminal acts committed by Mr. Dorsey in 2011. (R.34:187-95). That testimony is the subject of Mr. Dorsey's appeal.

R.K.'s testimony was admitted after a hearing on August 26, 2014, on a motion by the State to introduce other acts evidence. (R.9 and R.33). 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). 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. 29-30).

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

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

(R.33:3 and 6-7; Appx. 25 and 28-29).

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

The testimonies of the victim-witness, C.B., Mr. Dorsey, and R.K., were largely as related in the Court of Appeals decision. (Appx. pp. 2-4, ¶¶ 2-10). In closing arguments the State made the following comments to the jury regarding the testimony of R.K.:

> You also have [R.K]. [R.K.]. [R.K.'s] testimony about what he did to her in June and in November of 2011. There was a battery on each of those two occasions under somewhat similar circumstances. Here it started because he -- she texted a man. God forbid that that should happen. And in that one she had made a remark that, boy, I'm really glad I don't have that problem, but I am going to want you to take a test at some point so that five years down the

> road you don't deny this is your baby. From that he presumes she's sleeping around and goes on to batter her.
>
> This also contains a reference -- a text where she tells somebody by the way, he saw your text. It's not good. I kicked him out. Just wanted you to be aware I saw it. At any rate, the testimony of [R.K.] is relevant and probative in this case even though this battery and abuse is to [C.B.] because it happened under similar circumstances. The motivation was the same. It was abusive within the context of a domestic relationship in which he was displaying jealousy and controlling behaviors. There was spitting involved in both cases and throwing things. He threw a cell phone in this case; in those he threw a baby bottle and shoe besides the blows to the head.
>
> It's interesting also that [R.K.] didn't report it right away.

(R.34:276-77; Appx. 44-45).

The jury returned verdicts of not guilty for Count 1, Strangulation and Suffocation, and guilty for Counts 2, Misdemeanor Battery, 3, Disorderly Conduct, and 4, Aggravated Battery. (R.34:306 and R.15). Sentencing was held on October 24, 2014, (R.36), and Mr. Dorsey was sentenced to concurrent sentences of one-year county jail for Counts 2 and 3, and for Count 4 a prison sentence of five years with two years and nine months of initial confinement and two years and three months of extended supervision (R.20 and R.21; Appx. 19-22). Mr. Dorsey filed his notice of intent to pursue post-conviction relief on October 27, 2014, (R.22), and his notice of appeal on March 30, 2015. (R.25). After briefing, a decision was delivered by the Court of Appeals on August 30, 2016, from which Mr. Dorsey now petitions this Court to review. (Appx. pp. 1-18). In that decision the Court of Appeals rejected Mr. 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. 12-13, ¶¶ 27-28). The Court of Appeals also rejected Mr. Dorsey argument the State never articulated how R.K. testimony may be relevant to showing the Mr. Dorsey had the intent to do acts of domestic violence upon C.B. (Appx. pp. 15, ¶ 35).

VI. Argument.

A. The Court of Appeals' holding that a generalized "motive to control" a person with whom they are in a domestic relationship is an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), is a marked departure from this Court's prior cases concerning the admission of other acts evidence for purposes proving a generalized motive or purpose.

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). This has been the law in the State of Wisconsin, regardless of whether a "greater latitude" standard has applied or not. In his appeal Mr. Dorsey argued that a generalized motive or purpose to control persons with whom one is

in a domestic relationship was not a proper purpose for the admission of other acts evidence, because a motive or purpose to control persons with whom one is in a domestic relationship was not an element of any of the crimes for which Mr. Dorsey was charged.

To this argument the Court of Appeals wrote that:

> ... As Dorsey points out in his brief:
>
> > Other 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. ***State v. Cofield***, 2000 WI App 196, ¶12, 238 Wis. 2d 467, 618 N.W.2d 214 (citations omitted).
>
> Dorsey submits that neither condition can be satisfied in this case. However, the cited case law stands for an "either/or" test—that is, other-acts evidence may be admitted to establish motive for the charged offense *either* if there is a relationship between the other acts and the charged offense, *or* if there is a purpose element to the charged crime. "[T]here is no requirement that the purpose for which evidence of another act is proffered be an element of the crime ...." ***State v. Normington***, 2008 WI App 8, ¶30, 306 Wis. 2d 727, 744 N.W.2d 867 (citing ***Sullivan***, 216 Wis. 2d at 772). Thus, even though motive is not an element of any of the charges against Dorsey, motive is a proper purpose under the statute.
>
> ¶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. pp. 12-13, ¶¶ 27-28). This, however, is a clear departure from how this Court has always explained the rationale for the admission of other acts evidence to prove a generalized motive or purpose, even in cases where the greater latitude standard applied.

This Court has made it abundantly clear that other acts evidence showing a generalized motive or purpose is admissible only if the motive or purpose is an element of the crime. A review of those cases will show this to have always been the case. In 1984, this Court in *State v. Fishnick*, 127 Wis.2d 247, 260-61, 378 N.W.2d 272, 279 (1985), affirmed the admission of other acts evidence consisting of a prior attempt by Fishnick to entice a minor, even though, that prior act had no specific relationship to the crime with which he was charged. This Court wrote that:

> Here, the motivation for Fishnick's interaction with C.S. was sexual gratification. His attempted interaction with D.F. was also, arguably, sexual gratification. Whether the defendant acted with the purpose of becoming sexually aroused or gratified by the sexual contact is an element of the crime with which Fishnick was charged. Section 940.225(1)(d) and (5)(a), Stats. 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 impacts upon his purpose for committing the crime with which he is charged, other-acts evidence which tends to show Fishnick's motive is properly admissible.

In 1987, 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.

Again in 1992, in *State v. Plymesser*, 172 Wis.2d 583, 593, 493 N.W.2d 367, 372 (1992), this Court 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 most recently in 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).

In all of these cases the 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 the "greater latitude" standard would allow the evidence to come in regardless of whether motive was an element of the crime?

Against this lengthy line of cases, and the Court of Appeals own decision in *Cofield,* the State and the Court of Appeal presented as contrary authority *State v. Normington,* 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867. In fact, *Normington* does not contradict *Cofield,* but rather provides more support for Mr. Dorsey's position. 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. In addition, the evidence that Normington viewed pornography showing the insertion of objects

> into persons' anuses is connected to the charged offense because it provides a reason why he would insert the toilet plunger into Bob's anus.

Normington, 2008 WI App 8, ¶ 30. The admission of the other acts evidence in *Normington* was related to an element of the offense with which Normington was charged. In addition there was a specific relationship between the other acts evidence and the charged offense in *Normington* which went well beyond asserting a generalized motive to commit a particular kind of crime. Normington had a particular and unusual sexual fetish. He obtained sexual gratification from viewing the anal insertion of foreign objects into other persons. The crime with which Normington was charged involved the insertion of a toilet plunger into the victim's anus. This is an unusual crime, and an unusual fetish. The other acts evidence clearly went beyond an assertion of a "generalized motive to commit a particular kind of crime" and provided a very specific relationship between the rather unusual other acts in which Normington engaged and the particularly heinous crime with which he was charged. Additionally, the other acts evidence in *Normington* could have as easily been argued to show plan or identity, as well as motive.

No such relationship existed between the other acts and the crimes charged in Mr. Dorsey's case. The acts of domestic violence which Mr. Dorsey admittedly perpetrated upon R.K., and those which were alleged by C.B., are sadly all too common. R.K.'s testimony demonstrated no specific relationship between her experiences with Mr. Dorsey, and the crimes allegedly perpetrated upon C.B. The

other acts evidence presented in Dorsey's case demonstrated nothing other than the possible existence of some generalized motive on the part of Dorsey to control those women with whom he is in a domestic relationship. That is exactly the sort of evidence that the other evidence rule in Wis. Stat. § (Rule) 904.04(2), and those Wisconsin cases extending back to *Fosdahl v. State*, 89 Wis. 482, 62 N.W. 185 (1895), were intended to exclude.

B. 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 Mr. Dorsey to cause bodily harm to C.B., nor any probative value toward showing such intent, beyond making an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man.

"[O]ther acts evidence is admissible if its relevance hinges on something other than the forbidden character inference proscribed by § 904.04(2) and the proponent of the evidence uses it for that purpose." 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." *State v. Sullivan*, 216 Wis.2d 768, 772, 576 N.W.2d 30 (1998). Certainly, there is case law for the proposition that other acts evidence is admissible to "undermine the defendant's innocent explanation for his act." *State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990), see also *State v. Evers*, 139 Wis.2d 424, 407 N.W.2d 256 (1987). These cases rest on the reasoning that:

> "... similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish

> (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent."

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

But Mr. Dorsey never asserted an innocent explanation that would negate a criminal intent for his acts, Mr. Dorsey denied the very acts themselves. Consequently, R.K.'s testimony could not, and was not, offered to negate an innocent explanation for Mr. Dorsey's acts, for the simple reason that Mr. Dorsey never asserted an innocent explanation. Or to put it in other words, an innocent explanation for Mr. Dorsey's actions was not an issue of consequence in this action. Mr. Dorsey had made it clear that he was not going to assert an innocent explanation for his acts, he was going to deny the acts. (R.33:3 and 6-7; Appx. 25 and 28-29).

The State therefore had to articulate some other fact or proposition that R.K.'s testimony was going to prove with regard to Mr. Dorsey's intent to cause bodily harm to C.B. And that fact or proposition would have to be something other than the "forbidden character inference." What might that fact or proposition be? The State never suggested how R.K.'s testimony might prove an intent to commit acts of domestic violence upon C.B., and neither did the Court of Appeals in its decision. Rather, 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. pp. 15, ¶ 35). But Mr. Dorsey did not argue that the State did not have to prove intent at trial, in fact, Mr. Dorsey cited the same cases the Court of Appeals cites for the exactly the same proposition. What Mr. Dorsey argued was 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.

Talismanically invoking the word "intent" does not make a piece of evidence relevant to intent. Again, in *D.J. Johnson* this court made it clear that 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. The State did not do that. The State in its closing remarks to the jury made no reference to intent, the State argued motive:

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

(R.34:276-77; Appx. 44-45). That is, the State's argument was that Mr. Dorsey is a jealous and controlling man, with a propensity to be violent with women with

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

Similarly, R.K.'s testimony had no probative value in proving an intent on the part of Mr. Dorsey to cause bodily harm to C.B., beyond making an impermissible inference that Mr. Dorsey is a jealous, controlling and violent man. "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. Given that Mr. Dorsey was not contesting intent, that he was not offering an innocent explanation for his actions, but rather, was denying that the violent incidents with C.B. ever happened, it is apparent that R.K.'s testimony was not needed for proving intent. This is not a case like *Sullivan*, where the victim testified at the preliminary hearing and at trial that her injuries were the result of an accident, and intent was clearly an issue of consequence. *Sullivan*, 216 Wis.2d 784-85. Here C.B. testified that Mr. Dorsey struck her, Mr. Dorsey denied the act, not the intent. R.K. testimony was not needed to negate an innocent explanation because none was asserted. It had no tendency to show an intent to harm with regard to C.B., because the incidents were completely unrelated.

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

VII. Conclusion.

Wherefore, Mr. Dorsey therefore respectfully requests that this Court grant review and reverse the decision of the Court of Appeals.

Respectfully submitted September 27, 2016.

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Appellant-Petitioner

VIII. Certifications.

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 5550 words.

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

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated September 27, 2016.

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