COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP1111-CR **Cir. Ct. No. 2009CF792**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMY L. POWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, J. This case arises from a drug deal gone bad. The defendant, Jimmy Powell, met up with one of his customers to sell him some cocaine. The customer ended up with life-threatening injuries. The case went to trial with Powell facing three charges. Powell was acquitted of two charges and

convicted of the third. Powell challenges the sufficiency of the evidence and alleges several instances of circuit court error and ineffective assistance of counsel relating to the trial. He also argues that the circuit court improperly applied $20,000 of bond money posted on his behalf to restitution even though that $20,000 specifically related to the two charges on which he was acquitted. We reject all of Powell's arguments, and affirm.

Background

¶2 Powell was charged with three crimes: attempted first-degree intentional homicide, armed robbery, and first-degree reckless injury. A five-day jury trial was held. We briefly summarize the trial evidence.

¶3 On April 30, 2009, around 3:00 p.m., the victim in this case, Robert Rabe, and his friend, Ryan Ryckman, met at Rabe's automobile repair shop. They started drinking alcoholic beverages sometime around 7:00 p.m. Rabe had $900 in cash in his wallet. At some point in the late evening, one or both of the men decided they wanted some cocaine. Rabe attempted to contact his regular source of cocaine, defendant Jimmy Powell. Eventually, Rabe and Ryckman met up with Powell at a remote location with dim lighting. Ryckman had never met Powell before, and Powell testified that he had never seen Ryckman before.

¶4 When Rabe and Ryckman arrived at the location, Rabe parked his vehicle, got out, approached Powell's vehicle, and got in the passenger side to complete the drug transaction. Ryckman stayed in Rabe's vehicle. The evidence regarding what happened after that is voluminous and often conflicting. What is clear is that there was an altercation that eventually left Rabe outside, but very near, Powell's vehicle and Powell inside the vehicle, that Powell sped off with his

headlights off, and that Powell's vehicle ran over Rabe, causing serious injury to Rabe.

¶5 Ryckman testified that, while he was waiting in Rabe's vehicle, he thought the "deal" was taking too long, he exited Rabe's vehicle, and he started walking toward Powell's vehicle. Ryckman told the jury that, as he walked toward Powell's vehicle, he saw Rabe getting run over. Ryckman said he approached Rabe, who was seriously injured. Ryckman took out his cell phone and called 911. Ryckman did not know where they were, but he attempted to give 911 location information so that help could be sent.

¶6 While Ryckman was on the phone with 911, Powell returned to the scene, with his vehicle headlights still off. Powell approached Ryckman and Rabe, who was lying on the ground. Ryckman testified that Powell pushed Ryckman to the ground and struggled with him over the phone. The phone was sheared in half, ending the 911 call. Powell testified that he dropped the half of the phone that ended up in his hand, got back in his vehicle, and drove off. Ryckman had the other half of the phone in his hand when police arrived. Disputed expert testimony and a knife found at the scene supported the view that Powell cut Rabe's throat with the knife before or after Powell's struggle with Ryckman. At the same time, the defense expert and one of the State's experts opined that Rabe's sliced throat could have been caused by Powell's vehicle. Police were unable to locate Rabe's $900 in cash.

¶7 The prosecution theory was that Powell observed that Rabe had a large amount of cash and attempted to take that cash from Rabe, leading to an altercation, Powell running over Rabe as Powell sped away, Powell returning to the scene, Powell interfering with Ryckman's attempt to summon help, and Powell

attempting to kill Rabe, who was the only person likely to be able to identify Powell.

¶8 Powell's trial counsel admitted that Powell was at the scene and that Powell hit Rabe with Powell's vehicle, but argued that it was an accident. The defense pointed to conflicts and ambiguities in the evidence. In concluding, Powell's counsel argued that it made no sense that Powell would attempt to rob and kill a long-term source of money.

¶9 The jury found Powell not guilty of the attempted first-degree intentional homicide count and the armed robbery count, but found him guilty of the first-degree reckless injury count.

Discussion

A. Sufficiency Of The Evidence

¶10 Powell challenges the sufficiency of the evidence supporting his reckless injury conviction. "[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Additionally, appellate courts consider the reasonable inferences the jury could draw from the evidence presented. *See* ***State v. Toliver***, 104 Wis. 2d 289, 293, 311 N.W.2d 591 (1981).

¶11 Powell was convicted of reckless injury for driving over Rabe with Powell's vehicle. This crime requires proof that the defendant's conduct showed

"utter disregard for human life." WIS JI—CRIMINAL 1250. Powell argues that there was insufficient evidence of utter disregard for human life because, so far as Powell could tell, Rabe was standing on the passenger side of Powell's vehicle when Powell drove straight ahead. Thus, according to Powell, the evidence did not show that Powell would have had reason to think that his action put Rabe at risk.

¶12 Although Powell discusses the definition of the reckless injury crime and, in particular, the meaning of "utter disregard for human life," we need not dwell on the precise meaning of that phrase because Powell's argument fails on a more fundamental level. In arguing that the evidence is insufficient, Powell relies on a view of the evidence that is not, as our standard of review requires, a view that is most favorable to the jury's verdict. *See* ***Poellinger***, 153 Wis. 2d at 507. When the evidence is viewed in a light most favorable to the jury's verdict, it easily supports Powell's conviction.

¶13 Powell does not and could not reasonably dispute that the jury heard evidence supporting the following findings: (1) that Powell had a violent altercation with Rabe outside Powell's vehicle in a dimly lit area; (2) that Powell knew Rabe was outside and very near Powell's vehicle, but did not know where Rabe was; (3) that Powell drove off, spinning at least one wheel, with his vehicle headlights off; (4) that Rabe was partially in front of or on the ground partially under Powell's vehicle when Powell sped off; and (5) that Powell drove over Rabe, causing severe injuries. Powell points to limited testimony that might be read as supporting a finding that Powell thought Rabe was standing next to Powell's vehicle and, thus, was out of harm's way when Powell drove off. But this is simply one view of the evidence, not a view the jury was required to believe, especially since it is undisputed that Powell did in fact run Rabe over.

¶14 Powell argues that the evidence shows he had "regard for Rabe's life" because it shows that Powell returned to the scene to see if he had indeed run Rabe over and to make sure help was summoned. But again, this is simply a view of the evidence that Powell hoped the jury would adopt. It is not a view of the evidence in a light most favorable to the jury's verdict. Rather, the evidence supports, for example, findings that Powell returned with his headlights still off not knowing what he might do, Powell panicked, Powell intentionally interfered with Ryckman's effort to summon help for Rabe, and Powell then promptly fled the scene again.

¶15 The remainder of Powell's sufficiency-of-the-evidence discussion is easily rejected. Powell points out that there was no great disparity in size or age between Powell and Rabe, that Rabe was not particularly vulnerable or fragile, that Powell's act of driving his vehicle was not violent but rather an attempt to flee, and that it took little force to cause Rabe's injuries "other than ... driv[ing] the vehicle forward." None of these assertions, even if believed by the jury, conflict with the proposition that Powell sped away with reckless disregard for whether he might hit or run over Rabe.

¶16 In sum, we reject Powell's sufficiency-of-the-evidence challenge.

B. Other Acts Evidence

¶17 Powell argues that the circuit court erroneously admitted evidence that, for ten years prior to the drug-deal-gone-bad in this case, Powell had regularly sold cocaine to Rabe. We disagree with Powell, and begin by quoting from a case that summarizes the applicable other acts analysis:

> When deciding whether to allow other-acts evidence, Wisconsin courts look to Wis. Stat.

> § 904.04(2)(a), and apply the three-step analytical framework set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Under ***Sullivan***, courts must consider: (1) whether the evidence is offered for a proper purpose under § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury."
>
> The proponent of the other-acts evidence "bears the burden of establishing that the first two prongs are met by a preponderance of the evidence." Once the first two prongs of the test are satisfied, the burden shifts to the opposing party "to show that the probative value of the [other-acts] evidence is substantially outweighed by the risk or danger of unfair prejudice."
>
> ....
>
> The admissibility of evidence rests within the trial court's discretion and the decision to admit other-acts evidence is reviewed for an erroneous exercise of discretion. "A [trial] court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrably rational process to reach a conclusion that a reasonable judge could reach." We generally look for reasons to sustain the trial court's discretionary decisions. "Although the proper exercise of discretion contemplates that the [trial] court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." We are required to independently review the record if the trial court does not provide a detailed ***Sullivan*** analysis. As such, [when a] trial court [does] not perform a ***Sullivan*** analysis ..., our review is *de novo*.

State v. Lock, 2012 WI App 99, ¶¶40-43, 344 Wis. 2d 166, 823 N.W.2d 378, *review denied*, 2013 WI 6, 345 Wis. 2d 401, 827 N.W.2d 96 (citations omitted).

¶18 Turning to the facts here, prior to trial, the prosecution moved the court to admit testimony that Powell had sold cocaine to Rabe for several years. The prosecution requested permission to introduce evidence that, over a ten-year period preceding the charged incident, Rabe purchased drugs from Powell "an

estimated thirty to forty" times "without incident or violence." The circuit court granted the motion over Powell's objection.

¶19 Powell now argues that the circuit court erred. He asserts that his ten-year history of selling drugs to Rabe was "not probative of any issue at trial" and was "highly prejudicial." We discuss Powell's more specific arguments using the three-step test set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

1. Proper Purpose

¶20 Powell argues that the drug sales evidence was not offered for a proper purpose because he was not charged with a drug crime and because the evidence, as identification evidence, was unnecessary because Rabe had identified Powell in a photo lineup and at trial. Powell, however, does not address the correct first-prong question under ***Sullivan***. Rather, his argument, at best, addresses the second and third ***Sullivan*** prongs.

¶21 Powell's point that he was not charged with a drug crime seemingly suggests that the evidence lacks relevance. Powell's observation that there was other identification evidence suggests that admission of the other acts evidence was unnecessarily cumulative. Neither of these points addresses whether the evidence was offered for a proper purpose.

¶22 Here the first "proper purpose" prong is met. The prosecutor's motion offered the other acts evidence to show context and for its identification value. Both are proper purposes. *See* ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis.

2d 1, 666 N.W.2d 771 (context is a proper purpose); WIS. STAT. § 904.04(2)[1] (specifically listing "identity" as a proper purpose).

¶23 We pause to emphasize, as our supreme court has, the limited nature of the first ***Sullivan*** prong. The first prong is easily met because it merely requires a theoretically proper purpose. *See* ***State v. Marinez***, 2011 WI 12, ¶25, 331 Wis. 2d 568, 797 N.W.2d 399 ("As long as the State and circuit court have articulated at least *one* permissible purpose for which the other-acts evidence was offered and accepted, the first prong of the ***Sullivan*** analysis is met."). Thus, our supreme court observed, "[t]his first step in the ***Sullivan*** analysis is not demanding." ***Id.***

2. Relevance

¶24 Powell argues that the evidence was not relevant because "evidence of prior drug deals was not similar to Powell's charged offenses." On this topic, Powell fails to address obvious reasons why the evidence is relevant. As the circuit court explained, the history of drug dealing explains and gives context to Powell's and Rabe's late-night meeting in a dimly lit, remote location. We agree with the State that the evidence is also relevant to prove Powell's identity. The fact that the evidence is cumulative to other evidence does not mean it is not relevant. Powell does not seriously argue otherwise.

3. Weighing Probative Value Against Unfair Prejudice

¶25 Although the only seriously debatable ***Sullivan*** prong is the last, whether the probative value of the evidence outweighs the danger of unfair

[1] All references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted, such as in the "Bond Money" section of this opinion.

prejudice, Powell's argument on the topic is cursory. Powell simply asserts that the danger of unfair prejudice greatly exceeded any probative value and, in support, states: "Presenting evidence that for ten years Powell sold drugs to Rabe would unduly influence the jury to convict Powell for his uncharged crimes." We are not persuaded.

¶26 The circuit court sensibly concluded that the jury needed to know why Rabe was meeting up with Powell in order to understand the evidence. Indeed, before the circuit court, Powell's counsel did not argue that the jury should be in the dark about the purpose of the meeting. Counsel stated: "I understand some context might be appropriate," but counsel felt it was unnecessary to disclose to the jury the ten-year history.

¶27 Given that the jury needed to learn that Powell was there to sell drugs to Rabe, the question for the circuit court was whether Powell would be substantially worse off if the jury learned that Powell had been selling drugs to Rabe for a long time. On this issue, the circuit court reasoned that prejudice flowed in both directions because the jury would also learn that Rabe was a regular illegal drug user. We agree. Moreover, as we explain next, it is readily apparent that this evidence carried with it a substantial benefit to Powell.

¶28 After the prosecution presented Rabe's testimony that he purchased drugs from Powell just 35 to 40 times over the prior seven to eight years, Powell testified that he sold to Rabe far more often. Powell testified that he sold to Rabe once a week for ten years. This testimony allowed Powell's counsel to argue to the jury that it made no sense that Powell would try to rob or kill Rabe. In part, Powell's counsel argued:

> Mr. Powell probably gets a couple hundred bucks a week from Mr. Rabe. Why is he going to kill his client? Over ten years a couple hundred bucks a week, that's a lot more than 900 bucks. And there's nothing going on to suggest that that relationship wouldn't continue. That's not good business sense. Everyone knows that, and Mr. Powell said he would rather have an ongoing customer than kill him.

This argument was not only theoretically powerful, we now know that the jury acquitted Powell of both robbery and attempted intentional homicide.

¶29 Powell seemingly argues that our analysis of prejudice should ignore the fact that Powell was acquitted of the homicide and robbery charges. When arguing that he was harmed by the lack of a limiting instruction, Powell states: "It matters not that Powell was acquitted of the other two counts." Powell, however, provides no authority for this proposition. Our non-exhaustive research located no cases directly on point, but we observe that, in at least two cases, we have considered acquittal on some counts when assessing the prejudice prong of the ineffective assistance test. *See* ***State v. Prineas***, 2009 WI App 28, ¶¶6, 36, 316 Wis. 2d 414, 766 N.W.2d 206; ***State v. Elm***, 201 Wis. 2d 452, 456-57, 463, 549 N.W.2d 471 (Ct. App. 1996).

¶30 When arguing lack of relevance, Powell complains that the prior drug deals were not similar to the charged offenses. We agree, but conclude that, when it comes to assessing prejudice, this fact weighs *in favor* of admission. Powell's long history of peaceably selling drugs to Rabe suggests that Powell is not the type of person who would rob or kill a customer. *Cf.* ***State v. Payano***, 2009 WI 86, ¶90, 320 Wis. 2d 348, 768 N.W.2d 832 ("The situation in which unfair prejudice is most likely to occur is when one party attempts to put into evidence other acts allegedly committed by the opposing party that are similar to the act at issue in the current case.").

¶31 In a distinct other acts argument, Powell seemingly contends that reversal is required because the circuit court found it unnecessary to hear full argument from the prosecutor and because the court gave a limited explanation as to why it believed the drug-selling history was admissible. If Powell means to make this argument, we reject it. Assuming, without deciding, that such action by a court might be a problem under some circumstances, here cutting off the prosecutor's oral argument plainly did not matter because the court had before it the prosecutor's written argument. Moreover, we know of no requirement that a circuit court hear argument supporting the circuit court's ruling. As to the court's brief explanation for admitting the evidence, even if we thought the explanation was insufficient, Powell himself notes in his brief-in-chief that, when a circuit court fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's ruling. *See* ***Sullivan***, 216 Wis. 2d at 781. The record here easily supports the circuit court's ruling.

¶32 Therefore, we reject Powell's argument that the circuit court erred in admitting evidence of Powell's history of selling drugs to Rabe.

C. Ineffective Assistance Of Counsel

¶33 Powell alleges ineffective assistance of counsel. We provide a summary of the applicable legal principles and then address Powell's specific arguments.

¶34 The test for ineffective assistance of counsel is well established. We have explained:

> A defendant claiming ineffective assistance of counsel must establish that a defense attorney's

> performance was deficient, and that the deficient performance prejudiced the defense. Assessing deficient performance means determining whether counsel's performance was objectively reasonable. In making this determination we may consider reasons trial counsel overlooked or disavowed. An attorney's performance is deficient when "the attorney made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Deficient performance has prejudiced the defense when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." A claim for ineffective assistance of counsel fails if we conclude either that counsel's performance was not deficient or that the deficient performance did not prejudice the defense, and we may begin with either inquiry.

State v. Williams, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719 (citations omitted).

1. Ineffective Assistance—Other Acts

¶35 Powell asserts that his trial counsel "failed to properly argue against the admission of other acts evidence." Powell, however, does not explain what argument his counsel should have made. We address the argument no further.

¶36 Powell argues that his trial counsel failed to "ensure[] that the [circuit] court used the ***Sullivan*** analysis," an apparent reference to the fact that the circuit court did not expressly address the three ***Sullivan*** prongs individually. However, Powell does not present any reason to think that the circuit court's ruling would have been any different if only his counsel had objected and asked the court to expressly address each prong. Moreover, a reasonable reading of the circuit court's comments shows that the court did consider all three prongs.

¶37 Powell contends that his trial counsel failed to ensure "that the State properly put forth its argument for the admission of the evidence." In this regard, Powell seemingly focuses on pretrial *oral* argument in which the circuit court declined to hear argument from the prosecutor. Powell states, in a clear reference to the oral argument, that "[t]he circuit court did not even allow the state to make its argument for the admission of the evidence." As indicated above, however, Powell ignores the prosecutor's written argument. The written submission supplies an adequate argument for admission of the other acts evidence.

¶38 Powell's final other acts related ineffective assistance argument concerns the lack of an other acts limiting instruction. We understand Powell to be arguing that his trial counsel failed to sufficiently request such an instruction. Although Powell's trial counsel gave testimony on this topic at a post-trial evidentiary hearing, Powell does not discuss the justification counsel gave in that testimony. Rather, Powell simply argues that, without a limiting instruction, there was a danger that the jury "would have been influenced to punish Powell for his numerous uncharged crimes spanning ten years." We reject the argument.

¶39 Assuming, without deciding, that Powell's counsel performed deficiently, we are not persuaded that the lack of a limiting instruction affected the verdicts. The primary danger of other acts evidence is the potential that jurors will think the other acts evidence shows that the defendant had a propensity to commit the *type* of crime charged. *See* WIS. STAT. § 904.04(2) (other acts evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith"). Powell does not persuade us that this danger is significant here.

¶40 Moreover, as we explain in ¶28 above, Powell's counsel ably used the other acts evidence to show just the opposite. That is, that Powell's long history of peaceably selling drugs to Rabe suggested that Powell is not the type of person who would attempt to rob and kill Rabe. At a minimum, the acquittals on the robbery and attempted intentional homicide charges strongly suggest that the jury did not hold Powell's long history of drug dealing against him.

¶41 Accordingly, we conclude that Powell was not prejudiced by the lack of an other acts limiting instruction.

2. Ineffective Assistance—Jury Question

¶42 Powell contends that his trial counsel provided ineffective assistance when counsel failed to object to an instruction given to the jury after the jury had started deliberations. Powell contends that the instruction misstated the law and that there can be no reasonable strategic reason to agree to a legally flawed instruction. For the reasons that follow, we conclude that the instruction accurately responded to the question posed by the jury and, therefore, reject this ineffective assistance argument.[2]

¶43 During deliberations, the jury sent out the following question: "Is there a time element associated with this utter disregard? (Before, during, after)." An "off-the-record" discussion among the court and the parties produced the following answer:

[2] In Powell's brief-in-chief, prior to arguing the jury question topic in the context of ineffective assistance of counsel, Powell argues as if his objection to the answer to the jury's question was preserved for appeal. However, we agree with the State that the argument on this topic made on appeal was not presented to the circuit court and, therefore, that we should address the issue only in the context of ineffective assistance of counsel.

> In this case, the crime of first degree reckless injury involves the period of time while Mr. Powell is engaged in conduct related to operating his motor vehicle. It does not include conduct by Mr. Powell after Mr. Rabe had been run over.

On the record, the parties agreed that this answer was proper. The court then gave the answer to the jury in written form.

¶44 Powell argues that the answer conflicts with the jury's obligation to consider the totality of the circumstances when deciding whether Powell acted with utter disregard for human life. Powell correctly states that the circumstances here include what happened at the scene before and after Powell was engaged in the conduct of driving his vehicle and injuring Rabe. For example, according to Powell, the jury was entitled to adopt a view of the evidence suggesting that Powell returned to the scene and got out of his car to see if he had injured Rabe and to ensure help was summoned. Powell argues that the instruction improperly told the jury it could not consider anything Powell did before or after injuring Rabe with Powell's vehicle when deciding whether Powell did so with utter disregard for human life.

¶45 The State, in keeping with answers given by Powell's trial counsel at the postconviction hearing, views the meaning of the answer differently. The State contends the answer properly clarified that the *injury-causing conduct* at issue was Powell driving off in his vehicle. Thus, for example, the instruction clarified that the jury should not convict Powell of reckless injury based on other conduct, such as Powell's role in the altercation outside of Powell's vehicle before Powell drove off or Powell's actions when Powell returned to the scene.

¶46 Although the parties largely talk past each other on this topic, we conclude that the State has the better argument. It is readily apparent that, during

the off-the-record discussion, the parties and the circuit court understood the jury to be asking for guidance on exactly what *injury-causing conduct* was at issue with respect to the first-degree reckless injury count.

¶47 The reckless injury instruction the jury received prior to deliberations told the jurors that they had to decide whether Powell engaged in "conduct" that was "criminally reckless." The instruction explained, in part: "Second, that the defendant caused great bodily harm by criminally reckless conduct." Given the series of events before, during, and after Rabe was run over, the jury obviously questioned exactly what alleged conduct it should focus on when deciding whether such conduct was criminally reckless. There was no reason to suppose that the jury questioned whether it could consider all of the circumstances when deciding whether particular conduct was criminally reckless. The instruction in that regard was clear:

> The third element of first degree reckless injury is that *the circumstances of the defendant's conduct* showed utter disregard for human life.
>
> In determining whether the conduct showed utter disregard for human life, *you should consider these factors:* What the defendant was doing; *why the defendant was engaged in that conduct;* how dangerous the conduct was; how obvious the danger was; *whether the conduct showed any regard for life; and all other facts and circumstances relating to the conduct.*

(Emphasis added.)

¶48 In sum, Powell's argument is based on an interpretation of the question and answer that is at odds with the view of the circuit court and the parties during the trial. We reject Powell's interpretation and, therefore, reject his

contention that his counsel rendered ineffective assistance when counsel failed to object to the answer to the jury's question.[3]

D. Mistake Instruction

¶49 Powell argues that the circuit court erroneously declined to give the standard mistake jury instruction. Without citation to the record, Powell asserts that his mistaken belief of fact was "that Rabe was not in the way of Powell's vehicle and that [Rabe] was still at the side of the vehicle where [Powell] saw [Rabe] last [when Powell sped away]." We conclude that the circuit court properly declined to give the mistake instruction.

¶50 During the instruction conference, Powell's trial counsel requested both the accident and the mistake instructions, but offered little supporting argument. Counsel said simply: "There [are] reasonable views of the evidence where either [accident or mistake] could apply, and I think accident or mistake are related so that's — I just cannot separate the two and say one applies and one doesn't. I think [there are] arguments that either one could apply." Powell's counsel did not point to any evidence supporting a finding that Powell mistakenly believed that Rabe was out of harm's way when Powell drove off. That failure continues on appeal.

[3] Powell contends that the answer to the jury's question improperly "gave the jury the impression that [the circuit court] had concluded the crime of First Degree Reckless Injury had occurred during the operation of Powell's vehicle" and, therefore, impermissibly relieved the State of the burden of proving the crime. This argument is patently meritless and we discuss it no further. Powell also contends that the erroneous answer warrants reversal in the interest of justice. However, his two-sentence supporting argument adds nothing to arguments that we have already addressed and rejected.

¶51 The circuit court explained why this omission matters. The court explained that, unlike the accident instruction, the mistake instruction is appropriate when a person acts based on a belief that a certain fact is true. The court made clear that it did not believe that there was evidence that Powell had a particular belief with respect to Rabe's position when Powell sped off. Powell does not persuade us that this assessment of the evidence was incorrect. Accordingly, we affirm the circuit court on this issue.[4]

E. Bond Money

¶52 Powell was charged with three crimes: attempted first-degree intentional homicide, armed robbery, and first-degree reckless injury. In what the parties suggest is an atypical practice, bond was set on a *per-count* basis. That is, bond was set at $10,000 for each count, rather than setting a total $30,000 bond amount. Separate bond receipt documents were signed by two persons who posted bond money so that Powell could be released pending trial. The bond receipts are also count-specific. One group of bond receipts totaling $10,000 specifies the attempted homicide count. A second group of receipts totaling $10,000 specifies the attempted robbery count. Finally, a third group of receipts totaling $10,000 specifies the reckless injury count.

¶53 As we have seen, Powell was acquitted of the homicide and robbery counts and was convicted of the reckless injury count. After trial, Powell argued

[4] We note that if Powell had, on appeal for the first time, pointed to evidence supporting a mistake instruction, such argument would have been forfeited and the question of ineffective assistance would arise. In the context of ineffective assistance, we doubt that Powell could meet his burden of showing prejudice. While we do not decide the issue, we question why, under the facts in this case, a jury that rejected an accident defense would agree with a mistake defense.

that, under the felony bond statute, WIS. STAT. § 969.03,[5] the persons who posted bond for Powell were entitled to the return of $20,000 in bond money relating to the two counts for which Powell was acquitted. The circuit court disagreed and applied the entire $30,000 to restitution.

¶54 On appeal, Powell renews his argument that $20,000 of the bond money should have been returned. Powell's supporting argument appears to have two parts. First, Powell seems to argue that, when, as here, bond is set on charges individually, WIS. STAT. § 969.03 is properly read as requiring the return of bond money on a specific count if that count was dismissed or if the defendant was acquitted after a trial on the count. Powell's second argument is a contract argument. Powell contends that, because all of the receipts for the bonds were count-specific, these documents amounted to individual contracts that were, likewise, count-specific and, therefore, required the return of bond money on each specific count if that count was dismissed or if the defendant was acquitted of the charge. We reject both arguments.

1. Reliance On WIS. STAT. § 969.03

¶55 In the context of construing the misdemeanor bond statute, we have summarized the applicable statutory construction principles:

> We review a statute to ascertain its meaning, so that the statute may be given its full, proper and intended effect. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." When

[5] In this section of our opinion, the references to WIS. STAT. § 969.03 are to the statutes that were in effect at the time of charging in this case, which were the 2007-08 version. The quoted and cited portions of § 969.03 are the same in both the 2007-08 version and the 2011-12 version of the statutes.

> interpreting a statute, we "begin[] with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." If the statutory intent is set forth clearly and unambiguously in the statutory language, we apply that intent to the case at hand and do not search for meaning outside the text of the statute. We may resort to extra-textual sources only when the statutory language is ambiguous, i.e., it "reasonably gives rise to different meanings."

State v. Baker, 2005 WI App 45, ¶5, 280 Wis. 2d 181, 694 N.W.2d 415 (citations omitted) (interpreting WIS. STAT. § 969.02, the misdemeanor bond statute).

¶56 The felony bond statute reads, in pertinent part:

> **(1)** A defendant charged with a felony may be released by the judge without bail or upon the execution of an unsecured appearance bond or the judge may in addition to requiring the execution of an appearance bond or in lieu thereof impose one or more of the following conditions which will assure appearance for trial:
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> ....
>
> **(3)** Once bail has been given and a charge is pending or is thereafter filed or transferred to another court, the latter court shall continue the original bail in that court subject to s. 969.08. A single bond form shall be utilized for all stages of the proceedings through conviction and sentencing or the granting of probation.
>
> **(4)** If a judgment of conviction is entered in a prosecution in which a deposit had been made in accordance with sub. (1)(d), the balance of the deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered under s. 973.20 and then, if ordered restitution is satisfied in full, to the payment of the judgment.
>
> **(5)** If the complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned. A deposit under sub. (1)(d) shall be returned to the person who made the deposit, his or her heirs or assigns, subject to sub. (4).

WIS. STAT. § 969.03.

¶57 Powell's statutory construction argument rests on the premise that this statutory scheme directs that bond money relating to a specific count—that is dismissed or on which the defendant is acquitted—can never be applied to satisfy a judgment relating to different charges. We conclude that this interpretation of the statute is unreasonable.

¶58 An example serves to show why Powell's interpretation would produce absurd results. Under Powell's interpretation, if a defendant was charged with aggravated battery, if he or she posted bond for that count, and if the count was later dismissed as part of a plea agreement in which the defendant was convicted of disorderly conduct, the bond money could not be applied to restitution. The legislature could not have intended this result. In this example, the case as a whole was not dismissed and the defendant was not acquitted—to the contrary, the defendant was convicted based on the same underlying behavior. Plainly under those circumstances the legislature intended that the bond money be available to satisfy restitution or otherwise satisfy the judgment. While our example does not track the facts here, it serves to explain why Powell's contention—that, if a particular charge does not result in conviction of that specific charge, bond money associated with that charge must be returned—is not reasonable.

¶59 Furthermore, we agree with the State that the statute uses language that is not count-specific. WISCONSIN STAT. § 969.03(1)(d) refers to "the execution of *an appearance bond*" (emphasis added). Similarly, the subsections specifically dealing with what happens to the appearance bond if there is dismissal, acquittal, or conviction are not phrased in terms of individual counts. Section 969.03(4) refers to whether "a judgment of conviction is entered" and states that, if such judgment is entered, "the balance of the [bond] deposit ... shall

be applied first to the payment of any restitution ... and then ... to the payment of the judgment." And, § 969.03(5) directs that, "[i]f the complaint against the defendant has been dismissed or if the defendant has been acquitted, the *entire sum deposited* shall be returned" (emphasis added).

¶60 Looking at this language, we agree with the State that when the legislature speaks in terms of the "complaint" being dismissed, rather than a charge being dismissed, the wording is a plain reference to all charges being dropped, not the dismissal of individual charges. Similarly, when the legislature speaks of acquittal and returning the "entire sum deposited," the phrasing shows that the legislature had in mind the entire prosecution, not individual charges. Indeed, Powell seemingly acknowledges that the legislature did not intend that bond be either set or returned based on individual charges. Powell states in his reply brief: "It may not make sense that the court commissioner set the bail at $10,000 per count, but that is what occurred."

¶61 Accordingly, we reject Powell's statutory interpretation argument.

2. Contract Argument

¶62 Powell's contract argument is short. Citing a Seventh Circuit opinion, ***United States v. Santiago***, 826 F.2d 499 (7th Cir. 1987), Powell asserts that "[a] bail bond agreement is a contract between two parties: the government and the surety on behalf of the criminal defendant." Powell then states: "A reasonable interpretation of the surety certification [in this case] is that the surety is bound to the particular bond being signed and not for any other bonds the defendant may have." To this short argument, Powell adds in his reply brief: "[Because] [t]he bail sheets [were] credited specific to each count ... the posters

had an expectation that the money deposited would relate to each count and not to the case as a whole."

¶63 We conclude that this argument lacks sufficient legal and factual development, and reject it on that basis. As to Powell's legal argument, his reliance on a Seventh Circuit opinion is not persuasive. The import of the non-binding ***Santiago*** decision is unclear. In that case, the Seventh Circuit's "[e]ssentially ... a contract" comment comes in the context of a discussion about whether a surety's appeal from a bail bond forfeiture is civil or criminal in nature. *See* ***id.*** at 502. As to factual development of his argument, Powell does not point to particular language and explain why the language, by its terms, might be read as binding the government to return the bond money.[6]

¶64 Even if we were to address the merits of Powell's contract argument, it appears that it runs contrary to reasoning employed by our supreme court in ***State v. Iglesias***, 185 Wis. 2d 117, 517 N.W.2d 175 (1994). In that case, appellants who had posted bond for the defendant argued that the bond money could not be used to satisfy fines and costs imposed against the defendant, but rather could be used only to assure a defendant's appearance. ***Id.*** at 124-25, 133-34. In part, the appellants complained that they received inadequate notice that the bond money they posted could be used to satisfy a judgment imposed against the defendant. *See* ***id.*** at 142-44. The ***Iglesias*** court explained, however, that statutory authorization for such use of the money was, by itself, sufficient because

[6] Each of the bail receipts in the record includes a "Surety Certification." This certification indicates that the surety has received a copy of the bond and a copy of the "Surety Notification," and that the surety understands all conditions of the bond. Our review of the record does not reveal the contents of the bond conditions or the "Surety Notification."

citizens are charged with knowledge of statutory provisions affecting the disposition of property. *See* ***id.*** at 143; *see also* ***id.*** at 144 (explaining that, even if the appellants were not actually notified, "[i]n this case, we believe that procedural due process was clearly satisfied by publication of the statute"). We stress that we do not decide the issue, but this reasoning in ***Iglesias*** seemingly undercuts any argument that the "posters" here may rely on the language in the bail documents to show that they are contractually entitled to the bond money.

Conclusion

¶65 For the reasons above, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.