COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP913-CR **Cir. Ct. No. 2010CF4596**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Brian J. Anderson appeals the judgment convicting him of first-degree intentional homicide with the use of a dangerous weapon,

contrary to WIS. STAT. §§ 940.01(1)(a) & 939.63(1)(b) (2011-12).[1] He also appeals from the order denying his postconviction motion.[2] On appeal, Anderson—who shot and killed one of his roommates, believed to be covering for another friend who was having an affair with Anderson's fiancée—argues that the trial court erroneously exercised its discretion by: (1) denying the admission of most of the evidence he moved to admit under ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973); and (2) admitting other acts evidence concerning an incident three weeks prior to the shooting where Anderson pistol-whipped a couple of men who made sexual comments about his fiancée.[3] We disagree and affirm.

BACKGROUND

Nature of the Case

¶2 In September 2010, Anderson was charged with first-degree intentional homicide with the use of a dangerous weapon for the death of one of his roommates, Joseph Hall. According to the criminal complaint and other materials in the record, Anderson believed that his fiancée was cheating on him with another roommate, Marshall Provost; Anderson also believed that Hall may have had knowledge of the affair. On the day in question, Anderson confronted Hall with a shotgun demanding to know what, if anything, was going on between

[1] The judgment of conviction was entered by the Hon. Jeffrey A. Conen. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The order denying Anderson's postconviction motion was entered by the Hon. Ellen R. Brostrom.

[3] The Hon. Dennis R. Cimpl ruled on Anderson's ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), motion and the State's motion to introduce other acts evidence.

Hall, Provost, and his (Anderson's) fiancée. Hall saw Anderson with the shotgun and asked him what he was doing with it, at which time Anderson told Hall not to advance on him. When Hall did not retreat, Anderson, allegedly fearing for his safety, held the shotgun up to Hall's chest and pulled the trigger. Anderson pled not guilty and a jury trial was scheduled.

*Anderson's Motion to Introduce **McMorris** Evidence*

¶3 Prior to trial, Anderson filed a motion to introduce evidence of Hall's prior violent acts pursuant to ***McMorris***, which held that "[w]hen the issue of self-defense is raised in a prosecution for … homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident." *See **id.***, 58 Wis. 2d at 152. Specifically, Anderson moved to admit twelve pieces of ***McMorris*** evidence, the descriptions of which we take directly from Anderson's motion:

> a) That shortly after July 2010 and his moving in with the Defendant, Mr. Hall told the Defendant that he (Mr. Hall) killed his former drug partner sometime around 1985….
>
> b) That the Defendant believed that Mr. Hall killed [his former drug partner]….
>
> c) That Mr. Hall's son, Matt Hall, told the Defendant that Mr. Hall took medication to control his temper and violent outbursts. Further, the Defendant observed medications prescribed to Mr. Hall that the Defendant believed to be used for the aforementioned purpose.
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> d) That the Defendant was told that Mr. Hall, in a fit of rage … lifted up [his] son's car while the son was in it and threatened to kill the son….

> e) That Mr. Hall told the Defendant that he (Mr. Hall) slashed another individual's throat during a robbery in 1985 or 1986.
>
> f) That Mr. Hall asked the Defendant if "God could forgive a few murders."
>
> g) That Mr. Hall told the Defendant that he (Mr. Hall) threatened some teenagers who were mocking his (Mr. Hall's) wife at a Dunkin' [Donuts]. Mr. Hall stated that he was brandishing a knife when he threatened the teens.
>
> h) That Mr. Hall told the Defendant that Mr. Hall threatened a man who mocked his (Mr. Hall's) wife, and that he used a shotgun to threaten the man.
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> i) That the Defendant is both personally aware and has been told by others of other incidents of rage-based violence on the part of Mr. Hall.
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> j) That Mr. Hall told the Defendant he would kill his (Mr. Hall's) property manager and the property manager's family if he (Mr. Hall) was evicted from his flat on 68th and Clark.
>
> k) That Mr. Hall told Matt Hall and the Defendant that he (Mr. Hall) would shoot his (Mr. Hall's) son … in the face if he (Mr. Hall) lost a lawsuit…. During the same conversation Mr. Hall also threatened to kill his (Mr. Hall's) brother in law….
>
> l) That Mr. Hall would frequently speak to the Defendant of killing his (Mr. Hall's) employer when he (Mr. Hall) would become frustrated with his job.

¶4 The trial court subsequently held a hearing on Anderson's ***McMorris*** motion, at which Anderson testified about the incidents detailed therein. Anderson testified that when he pulled the trigger at Hall, "[w]hat was in my mind is … that [Hall] made it expressively clear to me for the last 13 years that when he got mad nobody could stop him … that [Hall] is a multiple-confessed murderer who … backed me into a corner."

¶5 The trial court granted Anderson's motion in part and denied it in part. The trial court granted the motion and allowed testimony regarding the incidents described in parts c), j), and k) above. The court reasoned that those particular incidents occurred relatively recently—generally within months of Hall's death—and were relevant to establish Anderson's state of mind regarding Hall on the day he shot him. With regard to the incidents described in parts a) and b), the trial court initially ruled that they were too remote in time, but later decided that this evidence would be admissible if the State introduced Anderson's statement to police—a statement in which Anderson answered, in response to police asking, "What was going through your head? Why did you do this?" that Hall had killed somebody in the past. For the incidents described in parts d) through i) and l), as well as evidence of an incident not mentioned in Anderson's motion, but which Anderson testified at the hearing in which Hall threatened a friend approximately fourteen years earlier, the trial court denied the motion and prohibited the testimony. The trial court reasoned that this evidence either occurred too remotely in time to be relevant, and/or that the descriptions of the evidence were too vague and did not pertain to specific events that Anderson could recall.

The State's Motion to Introduce "Other Acts" Evidence

¶6 After Anderson filed his motion to introduce ***McMorris*** evidence, the State filed a motion to introduce "other acts" evidence pursuant to WIS. STAT. § 904.04(2). The evidence involved an incident that occurred about three weeks before Hall's death. During this incident, Anderson, believing that his fiancée was having an affair, climbed on the rooftop of her garage to listen to a conversation that her landlord and two other men were having. Anderson overheard the men talking about how they would like to have sex with his fiancée. He then went

back home, grabbed a shotgun—the same shotgun he used to kill Hall—but was met by Hall, who persuaded him not to take the shotgun from the house. Anderson took a handgun with him instead, and returned to his fiancée's house, where he pistol-whipped the men who made the sexual comments about his fiancée. The State offered the evidence on the grounds that it "shows the extreme jealousy and possessiveness of the defendant" and "also shows that the defendant could handle himself as he beat two men severely." The State also argues that the evidence showed "motive for killing Joseph Hall, that being the jealousy over his girlfriend."

¶7 The trial court granted the State's motion over Anderson's objection. The trial court reasoned that the evidence was offered for an acceptable purpose, which was to provide context for Anderson's actions, show motive, and show that he was jealous. The trial court further reasoned that the evidence was relevant because the incident occurred about three weeks before Anderson killed Hall and because it involved the same shotgun. Finally, the trial court found that the evidence was not unfairly prejudicial.

Conviction and Further Proceedings

¶8 Anderson subsequently stood trial. He chose not to testify. Anderson's attorney explained that Anderson's decision not to testify was based in part on the trial court's prior rulings. A jury found Anderson guilty as charged. After he was sentenced, Anderson filed a postconviction motion, which was denied. Anderson now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶9 On appeal, Anderson argues that the trial court erroneously exercised its discretion by: (1) denying the admission of most of his ***McMorris*** evidence, and (2) admitting other acts evidence concerning the incident where he pistol-whipped the men who made sexual comments about his fiancée.[4] "[W]hether to admit or deny evidence rests in the sound discretion of the [trial] court, which we will not overturn absent an erroneous exercise of discretion." *See* ***State v. Novy***, 2013 WI 23, ¶21, 346 Wis. 2d 289, 827 N.W.2d 610; *see also* ***McMorris***, 58 Wis. 2d at 152. The question on review is not whether we would have allowed admission of the evidence in question. *See* ***State v. Veach***, 2002 WI 110, ¶55, 255 Wis. 2d 390, 648 N.W.2d 447. Instead, if the trial court "'examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach,'" we will affirm its decisions. *See* ***id.*** (citation omitted).

1. The trial court properly exercised its discretion in admitting/denying Anderson's ***McMorris*** *evidence.*

¶10 Anderson argues that the trial court's decision to prohibit much of his ***McMorris*** evidence was arbitrary and not supported by clear reasoning. Anderson also claims that the trial court's decision to limit the evidence based on its remoteness in time was improper. Anderson additionally argues that the trial court "seemed to engage in a credibility determination which was not

[4] In addition, Anderson argues that if we determine that he waived his right to appeal the trial court's rulings on his ***McMorris*** evidence because he did not testify at trial, then "trial counsel was ineffective and the trial court made an erroneous decision." Because we do not conclude that Anderson forfeited his right to appeal the trial court's rulings on his ***McMorris*** evidence, we do not address this argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("cases should be decided on the narrowest possible ground").

appropriate." We disagree with Anderson and conclude that the trial court properly exercised its discretion in admitting and denying the ***McMorris*** evidence.

¶11 We have reviewed the trial court's reasoning in ruling on Anderson's proffered ***McMorris*** evidence and conclude that it is neither arbitrary nor unclear. In fact, the trial court very clearly explained that for the evidence it would allow—specifically, the testimony regarding the incidents described in parts c), j), and k) above—the testimony was relevant to establish Anderson's state of mind regarding Hall on the day he shot him and was not too remote in time, having occurred quite recently. *See* ***Veach***, 255 Wis. 2d 390, ¶55. For example, with regard to the evidence in part c), Hall's use of medication to control his temper, the trial court noted that this had occurred approximately thirty to forty-five days before the shooting. Likewise, the trial court noted that the incident described in part k), Hall's threatening to kill his son and his brother-in-law, also occurred recently, and the incident described in part j), where Hall told Anderson that he threatened to kill his property manager, was the event that precipitated Hall's living with Anderson. Similarly, for the remaining pieces of evidence, those that were either not admitted or those for which the trial court withheld its ruling until trial, the trial court's rulings again reflect a reasoning process based on the relevance of the evidence, its remoteness in time, and the specificity of Anderson's hearing testimony. *See* ***id.*** The trial court reasoned that this evidence was either too remote in time to be relevant, and/or that the descriptions of the evidence were too vague and did not pertain to specific points in time that Anderson could recall. The trial court gave a clear explanation regarding its reasoning regarding each individual piece of evidence. *See* ***id.***

¶12 Moreover, contrary to what Anderson argues, the trial court appropriately considered the remoteness of the evidence. "It is within a [trial]

court's discretion to determine whether other-acts evidence is too remote." *See* ***State v. Hunt***, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771.

¶13 Finally, we are not persuaded by Anderson's argument that the trial court "seemed to engage in a credibility determination which was not appropriate." This argument is unsupported by any record citations or legal authority, and we will not consider it. ***State v. McMorris***, 2007 WI App 231, ¶30, 306 Wis. 2d 79, 742 N.W.2d 322 ("we may choose not to consider arguments unsupported by references to legal authority, arguments that do not reflect any legal reasoning, and arguments that lack proper citations to the record").

¶14 In sum, the trial court, in admitting and denying the previously discussed ***McMorris*** evidence examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. *See* ***Veach***, 255 Wis. 2d 390, ¶55. We therefore conclude that it properly exercised its discretion. *See* ***McMorris***, 58 Wis. 2d at 152.

2. The trial court properly exercised its discretion in admitting the State's "other acts" evidence.

¶15 Anderson next argues that the trial court erroneously exercised its discretion in admitting other acts evidence concerning the incident where he pistol-whipped the men who made sexual comments about his fiancée. Specifically, he argues that the evidence is not relevant because it involves a different incident and different actors from the shooting, and is unfairly prejudicial. We disagree.

¶16 In ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), the supreme court outlined the analytical framework used to determine the admissibility of other acts evidence under WIS. STAT. §§ 904.04(2) and 904.03:

> (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.
>
> If the other acts evidence was erroneously admitted in this case, the second issue presented is whether the error is harmless or prejudicial.

See ***Sullivan***, 216 Wis. 2d at 771-73.

¶17 The trial court in this case determined that the State's other acts evidence was offered for the acceptable purpose of providing context and showing Anderson's jealousy and motive, and we agree. "This first step in the ***Sullivan*** analysis is not demanding." ***Marinez***, 331 Wis. 2d 568, ¶25. "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." ***Id.*** (citation omitted). Thus, "[a]s long as the State and [trial] 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." *See* ***Marinez***, 331 Wis. 2d 568, ¶25. Indeed, in his brief, Anderson agrees that providing context for his actions, and showing his jealousy and motive "are acceptable reasons" under the ***Sullivan*** framework. *See* ***id.***, 216 Wis. 2d at 772.

¶18 The trial court also determined that the other acts evidence was relevant to show context, jealousy, and motive because the incident occurred just three weeks before Anderson shot and killed Hall, and again we agree. WISCONSIN STAT. § 904.01 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." In his opening statement, Anderson's attorney asserted that Anderson had killed Hall in self-defense. As the State points out, however, there was testimony at trial that Anderson believed Hall had betrayed him by lying to him about Provost's alleged affair with his (Anderson's) fiancée. Anderson's father testified that Anderson had called him the night of the shooting and explained that Provost had had an affair with his fiancée. When his father asked what Hall had to do with it, Anderson responded, "Joe [Hall] knew about it and he lied to me." Given this testimony, the evidence of Anderson's jealous and violent behavior during the pistol-whipping incident not only provided context for Anderson's anger and jealousy on the day of the shooting, but showed that he had a motive for shooting Hall that was not self-defense. And, as the trial court pointed out, the pistol-whipping incident occurred just three weeks before the shooting. For all of the foregoing reasons, we disagree with Anderson's arguments to the contrary and conclude that the evidence was in fact relevant.

¶19 Finally, we agree with the trial court that the probative value of the evidence substantially outweighs any danger of unfair prejudice. "Because the statute provides for exclusion only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice, '[t]he bias, then, is squarely on the side of admissibility. Close cases should be resolved in favor of admission.'" ***Marinez***, 331 Wis. 2d 568, ¶41 (citation omitted). Anderson argues that the prejudice of the other acts evidence was "overwhelming" and unfairly prejudicial, but, as the State points out, Anderson's argument is premised on a belief that the evidence of the pistol-whipping was not probative because it did not concern Hall, and "Hall was not and had never been the target of Anderson's rage or jealousy." As we have seen from our review of the trial testimony, however, this is simply not true. The testimony at trial established that Anderson was convinced that Hall had lied to him. Therefore, any concern about unfair prejudice did not outweigh probative value of the other acts evidence. Consequently, the trial court did not erroneously exercise its discretion in admitting the other acts evidence.

¶20 In sum, because the trial court properly exercised its discretion in allowing the other acts evidence, *see* ***Veach***, 255 Wis. 2d 390, ¶55, we must reject Anderson's argument to the contrary and affirm.

By the Court.—Judgment and order affirmed.

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