

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2516-CR

Cir. Ct. No. 2004CF230

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN C. MCALEESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Shawano County: PATRICK J. MADDEN and GREGORY E. GRAU, Judges.
Affirmed.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Shawn McAleese appeals a judgment of conviction for two counts of forgery—uttering, as party to a crime. He also appeals orders denying his motions to admit other acts evidence against a State’s witness,

prohibiting him from calling a rebuttal witness, and granting the State's motion to use other acts evidence against him. McAleese asserts he was entitled to use other acts evidence to impeach the State's witness, his rebuttal witness was necessary for a complete defense, and the State's evidence was unfairly prejudicial. We conclude the trial court properly exercised its discretion and we affirm the judgment and orders.

Background

¶2 Around July 8, 2004, McAleese dropped off his girlfriend Harley Messer and friend Heather Boyd at the home of Dale Schwab and Joan Poirier. While there, Boyd and Messer stole Schwab's and Poirier's personal checks. When Boyd and Messer returned to Antigo, they began forging checks. McAleese returned shortly after the women and all three went out. Boyd and Messer began cashing the forged checks. When the women returned to McAleese's car after trying to cash one of the checks, a purse belonging to Sarah Klingbile was in the vehicle.

¶3 A few days after stealing the checkbooks, McAleese and the women drove to Florida with Boyd's two children and another individual. During the trip, more checks were cashed and Klingbile's credit and debit cards were used.

¶4 McAleese was charged with three counts of theft as party to a crime and two counts of forgery—uttering as party to a crime. He pled not guilty and his case was tried to a jury.

¶5 Messer confessed and testified McAleese did not know she and Boyd had stolen the checks and he was not involved in stealing or forging them.

She claimed Boyd had obtained Klingbile's purse, but conceded that all of them had used Klingbile's credit card to pay for gas on the trip to Florida.

¶6 Boyd testified it was McAleese's idea to steal and cash checks. She claims that a few nights prior to July 8, he had brought up the idea of going to Florida because he was unhappy in Wisconsin. Although Boyd asserted she "would not have known how to forge checks or how to get money with forged checks" without McAleese, she also admitted that she knew how to forge and cash checks on her own.

¶7 Prior to trial, McAleese had moved to admit other acts evidence against Boyd and the State moved to admit other acts evidence against McAleese. The court denied McAleese's motion in part, allowing evidence of Boyd's eighteen prior convictions to be admitted, but excluding as premature evidence of specific acts or crimes because McAleese was assuming what Boyd's testimony would be. The court stated the issue could be revisited at trial after Boyd testified. The court additionally granted the State's motion to admit other acts evidence of check cashing and credit card usage subsequent to the thefts to show a plan.¹

¶8 At trial, McAleese renewed his motion to admit other acts evidence against Boyd, seeking to admit evidence of past forgery in an attempt to discredit her statement that she needed McAleese to learn how to commit forgery. The court denied the motion, concluding the evidence of her eighteen prior convictions accomplished the same credibility impeachment McAleese intended with the other

¹ The Honorable Gregory Grau presided over this pretrial motion. The case was subsequently assigned to the Honorable Patrick Madden, who presided over the trial and McAleese's renewed other acts motion.

acts evidence. Moreover, the court noted Boyd had admitted knowing how to steal and forge checks without McAleese's assistance.

¶9 Boyd had also testified that she had not been offered anything by the State in exchange for her testimony. McAleese made an offer of proof that Alana Zdanovec would testify Boyd told her she was getting time off of her sentence in exchange for testifying. Boyd testified she did not know anyone named Alana. The court denied McAleese's attempt to call Zdanovec.

¶10 The jury acquitted McAleese on the theft charges but convicted him of the two counts of forgery as party to a crime. On the first count, he was sentenced to three years' initial confinement and three years' extended supervision. On the second count, he was sentenced to one year initial confinement and one year extended supervision, consecutive to the first sentence.

Discussion

¶11 McAleese asserts the court erred by denying his motion to admit other acts evidence against Boyd, by refusing to allow him to call Zdanovec, and by allowing the State to use other acts evidence against him. The decision to admit or exclude other acts evidence and to permit or prohibit the calling of a rebuttal witness are discretionary decisions. *See State v. Cofield*, 2000 WI App 196, ¶7, 238 Wis. 2d 467, 618 N.W.2d 214 (other acts evidence) and *State v. Konkol*, 2002 WI App 174, ¶18, 256 Wis. 2d 725, 649 N.W.2d 300 (rebuttal witnesses).

¶12 We uphold discretionary determinations unless the court erroneously exercised its discretion. *See State v. Weed*, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. In its exercise of discretion, the trial court must examine the relevant

facts, apply a proper legal standard, and reach a reasonable conclusion by using a rational process. *Id.*

McAleese's Other Acts Motion

¶13 The admission of other acts evidence is governed generally by WIS. STAT. § 904.04(2)(a),² which states:

Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶14 Because of other rules of evidence, the courts have created a three-step analytical process for determining whether to admit other acts evidence. We ask: (1) is the other acts evidence offered for an acceptable purpose under WIS. STAT. § 904.04(2); (2) is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01; and (3) in accordance with WIS. STAT. § 904.03, 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 State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶15 Here, Boyd testified that stealing checks was McAleese's idea and that she would not have known how to steal or forge checks without him.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

McAleese wanted to admit evidence of Boyd's prior forgery convictions, arguing this showed her motive for testifying falsely against him.

¶16 The court denied this motion twice, the first time evidently because it was premature and the second time because the court concluded that the evidence was cumulative. McAleese does demonstrate how this was an erroneous exercise of discretion by the court.

¶17 McAleese makes no argument that the court erred in determining the motion was initially premature and, in fact, had he claimed error we would conclude any error was harmless when the court allowed him to bring his motion a second time after Boyd testified. Nor does McAleese explain how a prior forgery conviction is ultimately relevant to motive—whether motive to steal the checks or testify falsely against him—particularly when Boyd admitted she knew how to steal and forge checks. Here, McAleese fails to overcome the second *Sullivan* prong.

¶18 Similarly, McAleese cannot overcome the third *Sullivan* prong. The court allowed the jury to hear that Boyd had eighteen prior convictions and concluded that information by itself accomplished the same credibility impeachment objective for which McAleese sought to introduce the forgery convictions. That is, the court concluded evidence of the specifics of Boyd's convictions would be cumulative. McAleese does not demonstrate how this reasoning is an erroneous exercise of discretion.

McAleese's Rebuttal Witness

¶19 Boyd testified that she had not been offered anything by the State in exchange for her testimony. McAleese contends she was offered sentencing

leniency and he wanted to present Alana Zdanovec, to whom Boyd allegedly indicated she would get time off her sentence for testifying against McAleese. On the stand, however, Boyd denied knowing anyone named Alana. The court denied McAleese's attempt to call Zdanovec. McAleese argues the court's holding denied him the right to present a defense.

¶20 We note that McAleese offers no legal analysis of his argument. We need not consider unsupported arguments. *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988); *see also* WIS. STAT. RULE 809.19(1)(e).

¶21 The State points out that under WIS. STAT. § 906.08(2), “[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility ... may not be proved by extrinsic evidence.” The State contends that McAleese was attempting to prove a specific instance of conduct—here, Boyd’s alleged statement—through the extrinsic evidence of Zdanovec’s testimony. Moreover, the State explains, Zdanovec’s testimony was “contrary to evidence,” as McAleese phrased the court’s holding, because McAleese was constrained by Boyd’s testimony she did not know the woman. *See McClelland v. State*, 84 Wis. 2d 145, 160-61, 267 N.W.2d 843 (1978). Because McAleese responds to none of these arguments, they are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 793 (Ct. App. 1979).

The State’s Other Acts Motion

¶22 The State sought to admit evidence of stolen checks cashed outside Shawano County and the use of Klingbile’s credit card between Wisconsin and Florida. This information would, according to the State, demonstrate an overall plan—namely, financing a trip to Florida. The court agreed and admitted the

evidence. McAleese complains that there was no evidence that any checks were cashed outside Wisconsin and that using the Klingbile card “did nothing to establish a plan to steal and cash the Schwab and Poirier checks.” He argues that under *Sullivan*, the probative value of the evidence was outweighed by prejudice and confusion. We disagree with McAleese.

¶23 The trial court specifically addressed the three prongs of the *Sullivan* test when ruling on the State’s motion. As to purpose, the court noted that “what the State seeks to do is offer the financial transactions in question to show a plan” based on evidence that McAleese, Boyd, and Messer discussed going to Florida and funding it if they could “rip somebody off, steal their checks, and perhaps other financial documents or materials, and use those to fund the trip. And that is exactly what happened, that ultimately the checkbook and the credit card got stolen.” The court further noted that the checks were used to procure items and cash for the trip and the credit card was used on the way.

¶24 To the extent McAleese complains there were no checks cashed outside of Wisconsin, he does not address the checks cashed outside of Shawano County, such as checks used in Wausau at Wal-Mart and ShopKo. Further, although he complains that the stolen card is not probative of a plan to steal checks, the State notes the trial court specifically held the card was stolen prior to the trip. McAleese cannot refute that the card theft appears to be evidence of an overall plan to finance a trip to Florida. This satisfies the first prong of *Sullivan*, admission for acceptable purpose.

¶25 Under the second *Sullivan* prong, the court concluded the evidence was relevant because the transactions occurred closely in time and were drawn from the same checking accounts that are referenced in the charges against

McAleese. It also concluded that the evidence was probative of the overall plan. McAleese does not directly address this prong, and we discern no error in the court's conclusion.

¶26 Finally, under the third *Sullivan* factor, McAleese contends the probative value of the evidence was outweighed by the danger of prejudice. He contends “[t]he only purpose the proffered evidence could possibly have had was to influence the outcome of the trial by using improper means and provoke the jury to base its decision on something other than the facts of the case.”

¶27 The court acknowledged the possibility of some prejudice but concluded it did not outweigh the probative value of the evidence. The court concluded that the State was not offering the other acts evidence to prove those other acts actually happened, but only to demonstrate its theory of an overall larger plan. This conclusion is not erroneous.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

