COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2009AP1105-CR **Cir. Ct. No. 2006CF446**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS J. SEATON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Travis J. Seaton has appealed from a judgment convicting him of first-degree reckless homicide as a repeat offender in violation

of WIS. STAT. § 939.62(1)(c) and § 940.02(1) (2007-08),[1] and from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Seaton was convicted by a jury of killing Keith Rockweit at approximately 1:00 a.m. on November 15, 2006, on Main Street in the city of Fond du Lac. The State alleged, and Seaton admitted, that Seaton punched Rockweit once in the jaw. The punch knocked Rockweit down, causing him to hit his head on the sidewalk and killing him. At trial, Seaton claimed that he acted in self-defense.

¶3 Seaton's first argument on appeal is that the trial court erroneously exercised its discretion by allowing the State to present evidence of Seaton's prior involvement in two fights, one in 1999 involving Gary Henning, and the other in 1998 involving Chad Resop. We conclude that the trial court acted within the scope of its discretion in admitting the evidence.

¶4 Evidence of other crimes, wrongs, or acts generally is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. WIS. STAT. § 904.04(2)(a). However, other acts evidence may be admitted when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶5 The admission of other acts evidence must be evaluated under the three-step analysis discussed in ***State v. Sullivan***, 216 Wis. 2d 768, 771-72, 576

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

N.W.2d 30 (1998). The trial court must consider: (1) whether the evidence is offered for an acceptable purpose under WIS. STAT. § 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ***Sullivan***, 216 Wis. 2d at 772-73.

¶6 In assessing relevance, the court must consider whether the other acts evidence relates to a fact or proposition that is of consequence to the action and whether the evidence has probative value. ***Id.*** at 772. Courts decide what facts are of consequence by referring to the elements of the crime the State must prove. ***State v. Gribble***, 2001 WI App 227, ¶48, 248 Wis. 2d 409, 636 N.W.2d 488. The probative value of other acts evidence depends on the similarity between the charged offense and the other acts. ***State v. Gray***, 225 Wis. 2d 39, 58, 590 N.W.2d 918 (1999). Similarity is demonstrated by nearness in time, place and circumstance between the charged crime and the other acts. ***State v. Scheidell***, 227 Wis. 2d 285, 305, 595 N.W.2d 661 (1999).

¶7 ***Sullivan*** states:

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90. "The inquiry is not whether the other acts evidence is prejudicial but whether it is unfairly prejudicial." ***Gray***, 225 Wis. 2d at 64 (emphasis omitted).

¶8 The standard of review of a trial court's decision to admit other acts evidence is whether the trial court exercised appropriate discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will sustain a discretionary act if the trial court 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. ***Id.*** However, regardless of the extent of the trial court's reasoning, we will uphold the trial court's decision if there are facts in the record which would support the trial court's decision. ***Id.***, ¶52.

¶9 Based upon these standards, we conclude that the trial court properly admitted the other acts evidence regarding the fights with Henning and Resop. Henning testified that, in 1999, he observed Seaton yelling at a friend of Henning's outside of Arbuckle's Saloon on Main Street in Fond du Lac and approached Seaton to ask him what he was doing. Henning and his sister, who observed the incident, testified that Seaton then punched Henning in the face and that Henning never struck Seaton.[2] Henning testified that he hit the concrete after the punch and did not remember what happened next until he was taken to the hospital by helicopter. However, Henning's sister, Kathy Krueger, testified that she observed Seaton stomp on Henning's face after he went down to the ground. Testimony indicated that this incident occurred at about 1:00 a.m., and that Krueger's husband, who arrived after the fight, attempted to detain Seaton, but Seaton fled. Henning suffered a brain injury and spinal column damage, lost approximately twenty teeth, and suffered memory loss as a result of the attack. Seaton was convicted of substantial battery for the incident.

[2] Henning described confronting Seaton verbally, but denied pushing, striking, or touching Seaton.

¶10 Evidence regarding the 1998 incident involving Resop indicated that it also took place outside Arbuckle's on Main Street in Fond du Lac at approximately 1:00 a.m. Resop testified that he was walking across the street, felt a blow on the back of his head, turned around and saw Seaton, and threw a punch at him in an attempt to defend himself. Resop testified that the next thing he remembered was waking up in a woman's arms on the street and being taken to the hospital for treatment for a swollen eye. Philip Anderson, a retired police detective who had investigated the fight, testified that Seaton told him that he struck Resop because he was upset about a fight they had about ten months earlier. Anderson testified that Seaton admitted causing Resop's injuries and leaving the scene.[3]

¶11 In both a pretrial ruling and during trial prior to the admission of the other acts evidence, the trial court concluded that the evidence was admissible to prove plan, motive, intent and identity. It concluded that the other acts evidence was relevant to the elements of the first-degree reckless homicide charge, including the requirement that the State prove that Seaton caused Rockweit's death under circumstances which showed an utter disregard for human life. In finding that the other acts evidence was relevant, it considered the similarities between the charged crime and the prior fights, including the geographic location in a bar area on Main Street, the involvement of alcohol, the one-on-one nature of the fights, and the fact that Seaton fled after each incident. It concluded that the probative value of the evidence substantially outweighed the risk of unfair

[3] Seaton was not convicted of a crime for this incident.

prejudice, and that a limiting instruction would prevent the jury from improperly utilizing the evidence.

¶12 The trial court's decision reflects a proper exercise of discretion. To convict Seaton of first-degree reckless homicide under WIS. STAT. § 940.02(1), the State had to prove that he caused Rockweit's death, that he did so by criminally reckless conduct, and that he did so under circumstances which showed an utter disregard for human life. WIS JI—CRIMINAL 1020 (2002). Conduct is criminally reckless if the defendant creates an unreasonable and substantial risk of death or great bodily harm, and the defendant was aware of that risk. ***State v. Blair***, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991); WIS. STAT. § 939.24(1). The standard for determining whether the defendant's conduct displayed an utter disregard for human life is measured objectively based on what a reasonable person in the defendant's position would have known. ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. Factors to consider are the type of act; its nature; why the perpetrator acted as he did; the extent of the victim's injuries and the degree of force required to cause those injuries; characteristics of the victim, including age and vulnerability; and whether the totality of the circumstances showed any regard for the victim's life. ***Id.***, ¶24.

¶13 As determined by the trial court, the other acts evidence was properly admissible to prove intent, motive, plan, and knowledge.[4] The other acts evidence showed that Seaton intended to physically harm Rockweit, was aware that punching Rockweit created a substantial risk of causing him great bodily injury, and struck him with an utter disregard for human life. The evidence demonstrated that the blow and injury to Rockweit was intentional and the result of Seaton's plan, not the result of accident or mistake.

¶14 The other acts evidence was also relevant to an issue of consequence to the case, making it more likely that Seaton knew his act of punching Rockweit created an unreasonable risk of great bodily harm. Seaton's decision to punch Rockweit, despite this knowledge, also made it more likely that he acted in utter disregard of human life. *Cf.* ***Gribble***, 248 Wis. 2d 409, ¶¶48-49 (evidence that defendant had previously caused injury to another child was admissible under WIS. STAT. § 904.04(2) to show that the defendant was aware that his actions could cause great bodily harm to a victim). Moreover, the similarities between the three incidents, including the time of night, the geographic location, the

[4] We note that in its pretrial ruling, the trial court concluded that the other acts evidence was admissible to prove plan, motive, intent and identity. However, in the cautionary instruction given to the jury, the trial court instructed the jurors that the other acts evidence was relevant only as to the issues of intent, knowledge, and absence of mistake or accident. We do not view the instruction as being materially different from the trial court's prior determination that the evidence was admissible to prove plan, motive, intent and identity. The exceptions enumerated under WIS. STAT. § 904.04(2) are not mutually exclusive and are impossible to state with categorical precision. ***State v. Hammer***, 2000 WI 92, ¶29 n.4, 236 Wis. 2d 686, 613 N.W.2d 629. The same evidence may fall into more than one exception. ***Id.***

involvement of alcohol, the nature of the fights, and Seaton's fleeing, confirmed its relevance.[5]

¶15 While the other acts evidence was undoubtedly detrimental to Seaton, the record provides no basis to conclude that it was unfairly prejudicial or that its probative value was substantially outweighed by the danger of unfair prejudice. Moreover, the trial court instructed the jury that the other acts evidence was relevant only as to the issues of intent, knowledge, and absence of mistake or accident, and that the jurors could not consider the evidence to conclude that Seaton had a certain character or character trait, and acted in conformity therewith. Because such instructions eliminate or greatly diminish the potential for prejudice, the trial court's decision admitting the other acts evidence must be upheld. *See* ***Hunt***, 263 Wis. 2d 1, ¶¶72-75.

¶16 Seaton's next argument is that the evidence was insufficient to convict him of first-degree reckless homicide. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must

[5] In his brief on appeal, Seaton focuses on differences between the other acts evidence and the current charge. However, a prior act need not be identical to the charged act to be probative. ***State v. Gribble***, 2001 WI App 227, ¶50 n.15, 248 Wis. 2d 409, 636 N.W.2d 488. While Resop may not have suffered injuries as severe as Rockweit and Henning, all of the other acts evidence was relevant to prove that Seaton acted aggressively and intended to hurt his three victims and was subjectively aware that he was capable of knocking an opponent to the pavement with one blow and causing severe injuries.

accept the one drawn by the jury. ***Id.*** at 504. The credibility of the witnesses and the weight of the evidence is for the jury, as is the role of resolving inconsistencies and contradictions in the testimony of the witnesses. ***Id.***; ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

¶17 Applying these standards here, no basis exists to disturb the jury's verdict. Seaton admitted that he punched Rockweit and that the blow hit Rockweit in the jaw, making a "terrible sound," described as a "snapping sound." Seaton stated that Rockweit then staggered backward and fell onto the concrete pavement. A passerby, Darwin Jacobs, testified that he did not see the punch, but heard it. Jacobs testified that, after hearing the sound, he turned around and saw Rockweit take a couple of steps back before hitting his head on the concrete. The doctor who performed the autopsy on Rockweit testified that his jaw was broken and that the fracture could have been caused by a single punch.

¶18 Jacobs testified that after seeing Rockweit fall and hearing him "like snoring and choking," he asked Seaton what he was doing, and Seaton replied something to the effect of "don't worry, it's my uncle." Jacobs testified that he began calling 911, and Seaton "walked away or ran away real fast."

¶19 The police officer who was the first to arrive on the scene testified that Rockweit was lying on the ground with pools and drops of blood around him and blood coming out of his ears. He testified that Rockweit was making a

gurgling or snoring noise and was unresponsive. Medical testimony indicated that Rockweit died of blunt force trauma to the head.

¶20 Based upon this evidence, the jury was entitled to find that Seaton caused Rockweit's death and was guilty of first-degree reckless homicide. The jurors could reasonably conclude that Seaton's decision to punch Rockweit in the jaw created a substantial and unreasonable risk of great bodily harm and that Seaton knew of this risk based, in part, on the fact that he had previously knocked a person down with one punch and had caused serious injuries resulting in hospitalization. Based on the evidence that Seaton fled the scene while Rockweit lay on the sidewalk bleeding, gurgling, and seriously injured, the jurors could also find that he acted with utter disregard of human life. In reaching this conclusion, the jurors could consider the evidence that he had previously fled the scene after causing severe injuries to another person he had struck and kicked, indicating a lack of regard for human life.

¶21 Seaton devotes a substantial part of his brief to arguing that Jacobs and Rockweit's girlfriend were intoxicated and inconsistent in their testimony and that the jury therefore should not have rejected his claim of self-defense. However, as already discussed, determining credibility and resolving inconsistencies in the testimony of the witnesses was for the jury. Standing alone, the existence of inconsistencies in the statements and testimony of a particular witness does not render the testimony of that witness incredible as a matter of law. ***State v. Smith***, 2002 WI App 118, ¶20, 254 Wis. 2d 654, 648 N.W.2d 15. The jury was entitled to accept the testimony of Jacobs and Rockweit's girlfriend, and disbelieve Seaton's claim of self-defense.

¶22 In affirming the jury's verdict, we also reject Seaton's claim that he cannot be guilty of first-degree reckless homicide because he punched Rockweit only once. As already discussed, the evidence regarding Seaton's conduct permitted a finding of guilt in this case. While a defendant's conduct must be consciously dangerous to life and not such as might casually produce death by misadventure, the jury could reasonably conclude that a single punch from Seaton was capable of causing great bodily harm and that he was aware of that fact. The jury could therefore find him guilty of first-degree reckless homicide, even though he may not have intended for his blow to cause Rockweit's death. *Cf.* ***Blair***, 164 Wis. 2d at 73-74.

¶23 Seaton's next argument is that the trial court erred by admitting three photographs of him into evidence. The photographs were taken of him by the police at the time of his arrest. Seaton contends that the photographs make him look like "a punk or agitated individual" and therefore were unduly prejudicial.

¶24 The decision to admit photographs into evidence lies within the trial court's discretion. ***State v. Pfaff***, 2004 WI App 31, ¶34, 269 Wis. 2d 786, 676 N.W.2d 562. An appellate court will not disturb the trial court's decision unless it was wholly unreasonable or the only purpose of the photographs was to inflame and prejudice the jury. ***Id.*** Photographs should be admitted when they will help the jury gain a better understanding of material facts. ***Id.*** However, they should be excluded if they are not substantially necessary to show material facts and will tend to create sympathy or indignation or will direct the jury's attention to improper considerations. ***Id.***

¶25 The photographs were marked as exhibits 8, 10, and 11. The State first introduced exhibit 8 and published it to the jury without objection to show

that Seaton had concealed his shirt in the pocket of his pants. When the State subsequently asked to publish exhibits 10 and 11 to the jury, Seaton objected that the photographs were prejudicial. In determining that the photographs were admissible, the trial court agreed with the State that the photographs were relevant to show Seaton's demeanor when he was arrested and being questioned shortly after assaulting Rockweit. *See* ***State v. Silva***, 2003 WI App 191, ¶29, 266 Wis. 2d 906, 670 N.W.2d 385 (evidence of a defendant's demeanor after a crime may be admissible as evidence demonstrating guilt). The trial court concluded that there was nothing depicted in the photographs that was so damaging or detrimental as to inflame the jury or compromise fairness to Seaton. Based upon this court's review of the photographs, no basis exists to conclude that the trial court erroneously exercised its discretion in reaching these conclusions and admitting the photographs.

¶26 Seaton's next argument is that the trial court erroneously exercised its discretion by sentencing him to fifteen years of initial confinement and fifteen years of extended supervision. Seaton admits that the trial court adequately explained its sentence, but appears to argue that the sentence is excessive or unduly harsh.[6] A sentence is excessive or unduly harsh when it is "so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Seaton caused Rockweit's death after choosing to violently confront him, even though his prior experience

[6] In his one paragraph sentencing argument, Seaton states, "[W]e suggest that under all the facts and circumstances that the sentence is beyond what the Court should have imposed."

demonstrated that he was capable of causing great bodily harm by such conduct. As a repeat offender, he faced a potential sentence of sixty-six years in prison. *See* WIS. STAT. §§ 939.50(3)(b), 939.62(1)(c) and 940.02(1). Under these circumstances, Seaton's sentence cannot be deemed unduly harsh or excessive or disproportionate to the offense.

¶27 Seaton's final argument is that the trial court erred in denying his motion for a new trial based upon juror misconduct. Seaton based his motion upon an affidavit signed by Linda West, a former aunt of Seaton's by marriage. In her affidavit, West attested that she was approached by a man named Joseph Murray at a Speedway gas station in Fond du Lac shortly before the commencement of Seaton's jury trial. West attested that Murray asked if Seaton was her son, and West replied that he was her nephew. West attested that Murray stated that he was going to be serving on jury duty in Fond du Lac in the near future and that Seaton was going to prison and was guilty of the crime with which he was charged. The trial court subsequently held postconviction hearings on Seaton's motion. Both West and Murray testified.

¶28 Seaton contends that he is entitled to a new trial under the two-part test set forth in ***State v. Wyss***, 124 Wis. 2d 681, 726, 370 N.W.2d 745 (1985), *overruled on other grounds*, ***State v. Poellinger***, 153 Wis. 2d 493, 504-05, 451 N.W.2d 752 (1990), which provides that a new trial should be granted when a defendant demonstrates (1) that a juror incorrectly or incompletely responded to a material question on voir dire and, if so, (2) that it is more probable than not that, under the facts and circumstances surrounding the particular case, the juror was biased against the defendant. Seaton relies on the fact that Murray did not respond during voir dire when the potential jurors were asked if they had heard or read anything about the case or knew the defendant or anyone in his family. Seaton

contends that the evidence presented by him through West's testimony establishes both prongs of the ***Wyss*** test.

¶29 The decision to grant or deny a motion for a new trial based on a juror's incorrect or incomplete responses during voir dire lies within the trial court's discretion. ***State v. Delgado***, 223 Wis. 2d 270, 280, 588 N.W.2d 1 (1999). This court reviews the trial court's decision under an erroneous exercise of discretion standard and will sustain the trial court's decision if it reflects the court's reasoned application of the appropriate legal standard to the relevant facts of the case. ***Id.*** at 280-81.

¶30 When a trial court acts as a finder of fact, it is the ultimate arbiter of the credibility of the witnesses and, where more than one reasonable inference may be drawn from the credible evidence, a reviewing court must accept the inference drawn by the trial court. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. WIS. STAT. § 805.17(2). This includes its findings as to actual or inferred bias. ***Delgado***, 223 Wis. 2d at 281.

¶31 The trial court found that Murray did not answer the voir dire questions inaccurately or incompletely and that no bias was shown. Based upon the record, no basis exists to disturb these findings.

¶32 West's testimony at the evidentiary hearing was somewhat different from her statements in her affidavit. She testified that she worked at the Speedway gas station and that Murray would stop by a couple of times a week. She testified that before Seaton's trial, Murray approached her and asked whether that was her son in the paper. West testified that she replied that it was her nephew and that Murray then commented that he was going to be doing jury duty.

West stated that although Murray did not indicate that he would be doing jury duty in Seaton's case, "he did make the comment, he's like thank God it's not your son, because Travis is going to prison." Upon questioning by the trial court, West conceded that Murray never said that he thought Seaton was guilty. She also conceded that she could not remember exactly what Murray said about prison, but it could have been "looking at prison, could be going to prison."

¶33 West indicated that she could not clearly remember when the alleged conversation with Murray took place and that it could have been "within a day or two after Travis was on the front page of the paper" or two months before trial. West also testified that she saw Murray during a lunch break at trial and said "hi" to him, but did not remember her conversation with him until after the jury returned its verdict, even though she attended several days of trial.[7]

¶34 Murray's testimony contradicted that of West. He testified that he did not know Seaton or any members of Seaton's family before the trial began. While he acknowledged being a customer at the gas station where West worked, he testified that he knew West only as "Linda," and did not know her last name or that she was related to Seaton until after the case was over. He testified that while he heard something on the radio about a disturbance on Main Street and that this was probably around the time the event occurred, he did not recall reading or hearing anything else about the case, except possibly seeing in his mother's newspaper that a case involving Seaton was coming up. He denied being aware of the charge against Seaton before serving on the jury and denied having a

[7] At another point, West testified that she did not recall the conversation until after Seaton's sentencing.

conversation with anyone before trial about Seaton's guilt or innocence. He testified that he did not have any conversation with West at the gas station about Seaton or the possibility of prison. He testified that he did not harbor any bias or prejudice against Seaton before or during the trial and that he answered all voir dire questions honestly.

¶35 In denying Seaton's motion, the trial court noted that West's testimony varied from her affidavit. It considered West's personal interest in the case because of her relationship with Seaton and contrasted it with Murray's lack of a personal interest in seeing Seaton convicted. It found that Murray's testimony about carrying out his responsibilities as a juror was extremely candid, forthright, and honest and that Murray had provided honest, complete, and correct information during voir dire. Relying upon Murray's unwavering testimony that he did not have a conversation with West about the case and the remainder of the evidence presented, it found no basis to conclude that Murray harbored any kind of bias against Seaton. Based upon its findings, the trial court concluded that neither prong of the ***Wyss*** test was satisfied.

¶36 The trial court's findings are supported by Murray's testimony and are not clearly erroneous. Based upon the trial court's findings and Murray's testimony that he did not know West was related to Seaton or talk to her about Seaton's case, no basis exists to conclude that Seaton met his burden of proving that Murray responded incorrectly or incompletely to a material question on voir dire. Based upon the trial court's finding that the evidence did not demonstrate that Murray was biased against Seaton, no basis exists to conclude that Seaton met

his burden under the second prong of the ***Wyss*** test. The trial court therefore properly denied Seaton's motion for a new trial.[8]

By the Court.—Judgment and order affirmed.

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

[8] In his brief on appeal, Seaton also refers to Murray's testimony that before the evidentiary hearing, he received two telephone calls from an unknown caller or callers. In one of the calls, Murray was asked if he was going to be a witness that day, and was told to "be honest with his answers." Seaton contends that an adjournment should have been granted so that this matter could have been investigated more thoroughly. However, he makes no argument or showing that this incident had any impact on his motion or the evidentiary hearings on his motion. Because Seaton has not shown that this incident affected his substantial rights, no basis exists for granting relief on appeal. *See* WIS. STAT. § 805.18.