COURT OF APPEALS
DECISION
DATED AND FILED

January 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2583-CR **Cir. Ct. No. 2011CF3467**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT VINCENT MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

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

¶1 FINE, J. Robert Vincent McCoy appeals the judgment entered after a jury convicted him of armed robbery with use of force as party to a crime. *See* WIS. STAT. §§ 943.32(2) & 939.05. McCoy argues that the trial court: (1) should

have excluded a videotape of the robbery; and (2) should have excluded his mother's testimony that McCoy "robbed people" in the neighborhood. We affirm.

I.

¶2 In May of 2011, McCoy and a friend robbed Milwaukee Fire Lieutenant Craig Schmitt by threatening him with a sawed-off shotgun outside of a bar in the River West neighborhood in the City of Milwaukee. The security camera of a nearby homeowner captured the robbery on tape. A police community liaison officer, Raymond Robakowski, asked the homeowner for a copy of that tape and the homeowner uploaded the video to YouTube and emailed it to the police.

¶3 McCoy was not identified, however, until a month later when his mother, Regina Richardson, who lived near the bar, flagged down a patrol officer, William Feely, to report a different crime. During the investigation of that crime, Richardson told Feely that "her son [McCoy] had been committing several armed robberies in the city of Milwaukee." In response, Feely asked Richardson to view the YouTube video of the robbery, during which she said the two suspects looked like her "son and the guy named Plies he was with." Richardson said she recognized her son's "green jacket," "his usual black pants that he wear" [*sic*] and her "name [tattooed] on his neck." She also recognized the voice on the video as that of her son, McCoy.

¶4 The State charged McCoy with armed robbery use of force as party to a crime. Before the trial started, the prosecutor told the trial court that she wanted to play the robbery video for the jury. The YouTube video had been burned onto a DVD for trial. When McCoy's lawyer asked "how this is going to be presented in court[?]" they had the following exchange:

> THE COURT: Well, I assume that [the prosecutor] is going to have the DVD marked as an exhibit and authenticated and then ask it be received and then published to the jury, right?
>
> [Prosecutor]: That is exactly what is going to happen, I am going to show it to the victim to identify that he's there, where that location is in the city and county of Milwaukee and he's going to tell us what happened …. and then show it a second time to the defendant's mother, Regina Richardson, and have her identify her son which is what she's previously done under oath.
>
> THE COURT: If she does that, I don't see how it is not going to be admitted.
>
> [McCoy's lawyer]: That is the whole question, your Honor … I don't have any documentation … how that video came to be or was obtained by the police.
>
> THE COURT: That is not the test.
>
> [McCoy's lawyer]: I understand, but I didn't know how they were going to authenticate the video.
>
> THE COURT: She just told you, she's going to have the victim identify that it is him [the victim] on the video.
>
> [McCoy's lawyer]: I am not sure that has been done before, if the video is being shown in court and the victim says I don't think--I can't make it out or whatever.
>
> THE COURT: Then it doesn't get shown to the jury.

The next day, the prosecutor explained how the police got the video: that Robakowski asked the homeowner for it, that the homeowner uploaded it to YouTube and emailed it to Robakowski. The trial court then discussed this with McCoy's lawyer:

> THE COURT: How do you want to handle it, [McCoy's lawyer]?
>
> ….

> [McCoy's lawyer]: … I have two concerns here, first of all the authentication of the video in the first place, which I have no problem with the explanations as far as Mr. Robakowski contacting the --
>
> THE COURT: How do you want that in, do you want Robakowski here to testify?
>
> [McCoy's lawyer]: I would think so, I don't know if the owner of the camera needs to be here.
>
> THE COURT: I don't think so. Robakowski can testify that he got it and we have got the victim who will identify himself, that is what you said yesterday, I think that authenticates the video.
>
> [McCoy's lawyer]: *That's fine, I have no problem with that*. The other issue we have, which has been a concern of mine throughout this case from the beginning and was just resolved moments ago is the connection between the video that [Officer] Feely was aware of and Regina Richardson. And the connection is that Regina Richardson, because of the domestic violence incident, related to Officer Feely that her son was a robber which goes into the area of a previous motion in limine that I filed. So my solution that I am proposing is that *we do the authentication as indicated, which I have no problem with*, but exclude the information with regard to why Regina Richardson was chosen to view the video and leave that blank.

(Emphasis added.)

¶5 The trial court then addressed whether Richardson would be allowed to testify "that the defendant was bragging about doing other armed robberies." McCoy's lawyer argued that those statements had to be excluded as "other acts" evidence. The trial court found that the statements made to Richardson were "admissions against interest" and under a "***Sullivan*** analysis, it comes in" because the statement "puts it into context as to why the mom and sister decided to contact the police and it's certainly not unfairly prejudicial." The trial court also ruled that, "It provides context to the jury as to how the police got involved, how this

video was ultimately identified by the mother and it becomes relevant for that," and that it would "give a limiting instruction."

¶6 At trial, the State first called Robakowski to testify as to how he got the video of the robbery. When the prosecutor started to play the video, McCoy's lawyer objected: "I am going to object at this time, your Honor, playing the video for the jury until it has been properly authenticated." The trial court allowed its admission "subject to it being properly authenticated."

¶7 At the trial, Schmitt described what happened:

- As he was walking to the bar, he "was approached by a couple of young black males. One of them asked me how my evening was, I started to reply to him and then one of them grabbed me from behind and the other one pulled out a sawed off shotgun … and asked me for my money."

- Schmitt gave the robber all the cash from his money clip and then the robber "asked me for my wallet. I told him there was nothing in there he could use" and the robber said "he was going to fucking kill me if I didn't give him the wallet." The robber also asked for Schmitt's cell phone and when Schmitt said he "didn't have one," the robber "raised the gun up and said something about I am going to kill your fucking white ass anyway or something like that."

- This scared Schmitt who then "start[ed] talking to him and told him I was a lieutenant on the fire department and I'd been serving the inner city for 21 years and why would he want to hurt me for a couple of things like that." After that, McCoy and his friend left.

- Schmitt testified that the robbers were about his height and that one "had on a hoodie and some dark pants, dark hoodie."

- Schmitt confirmed that the video depicted the robbery.

When the State played the video during Schmitt's testimony, McCoy's lawyer did not object.

¶8 Police officer Feely testified next at the trial. He told the jury that in June of 2011, while on patrol with his partner in the River West neighborhood, Richardson "flagged" him down to report that her son had committed a "battery." Richardson also told Feely "that her son had been committing several armed robberies in the city of Milwaukee." McCoy's lawyer objected on "hearsay" grounds to this testimony, but the trial court overruled the objection: "It is not offered for the truth of what she told, it is offered only for the purpose of what the officer did next; so the jury is instructed that the officer's answer right now doesn't mean that what Ms. Richardson told the officer was necessarily true but it is an explanation as to why the officer did what he did." Feely then told the jury that Richardson's statement prompted him to show Richardson the YouTube video, after which, as we have seen, she identified McCoy as one of the men who robbed Schmitt.

¶9 Richardson also testified at trial and was asked the following questions by the prosecutor:

> Q Do you remember speaking with the police about the domestic incident and about Robert [McCoy]?
>
> A Yes, I did.
>
> Q Do you remember talking to the police about Robert and the crimes he might have committed?

A Yes.

Q What did you tell him?

[McCoy's lawyer]: Well, Your Honor, I object at this time on the basis that we previously discussed.

THE COURT: Overruled.

[McCoy's lawyer]: Ask that it be a continuing objection.

THE COURT: You have it.

Q You can answer, Ms. Richardson.

THE COURT: Go ahead. You can answer the question. What did you tell them?

A That Robert [McCoy] and his friends was out here robbing people.

The trial court gave a limiting instruction:

> Evidence has been presented regarding other conduct of the defendant which -- for which the defendant is not on trial.
>
> Specifically, evidence has been presented that the defendant participated in another robberies [*sic*]. If you find that this conduct did occur, you should consider it only on the issue of context or background.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> The evidence was received on the issues of context or background, that is, to provide a more complete presentation of the evidence related to the offense charged.
>
> You may consider this evidence only for the purpose that I have described. Give it the weight you determine it deserves. It is not to be

> used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

¶10 As we have seen, the jury found McCoy guilty. On appeal, McCoy argues the trial court should have excluded both the videotape and any testimony that he committed armed robberies in the neighborhood.

II.

¶11 A trial court's decision to admit or exclude evidence is a discretionary determination that we will not upset on appeal as long as it considered the pertinent facts, applied the correct law, and had a reasonable basis for its decision. ***State v. Myrick***, 2013 WI App 123, ¶4, 351 Wis. 2d 32, ___, 839 N.W.2d 129, 132. WISCONSIN STAT. RULE 904.04(2) controls when "other acts" evidence may be admitted:

> [E]vidence 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.

We apply a three-part test to determine if "other-acts" evidence should be admitted: (1) whether the evidence is offered for a permissible purpose under RULE 904.04(2); (2) whether the evidence is relevant under WIS. STAT. RULE 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay, *see* WIS. STAT. RULE 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998).

A. *Videotape*.

¶12 On appeal, McCoy argues that the videotape's admission violated WIS. STAT. § 910.02 (not the original recording) and chain of custody rules. As we have seen, McCoy's *only* objection at trial was whether the videotape could be authenticated. When the trial court said that Robakowski and the victim would need to authenticate the video for admission, McCoy's lawyer said: "That's fine, I have no problem with that." McCoy did not object to the video after the victim confirmed its authenticity. Accordingly, he has forfeited any appellate review to the admission of the robbery video on authentication or on any new grounds. *See* ***State v. Ndina***, 2009 WI 21, ¶¶28–30, 315 Wis. 2d 653, 667–670, 761 N.W.2d 612, 619–620 ("[S]ome rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review."); *see also* ***State v. Nelis***, 2007 WI 58, ¶31, 300 Wis. 2d 415, 428, 733 N.W.2d 619, 625 ("A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal.").

¶13 Moreover, evidence may be authenticated by its very nature. Thus, WIS. STAT. RULE 909.01 merely requires that the evidence be "sufficient to support a finding that the matter in question is what its proponent claims." This is not a high hurdle: "Testimony of a witness with knowledge that a matter is what it is claimed to be" will suffice. *See* WIS. STAT. RULE 909.015(1). As we have seen, McCoy's trial lawyer did not object to Robakowski's testimony as to how he got the video. Further, "[a]ppearance, contents, substance … or other distinctive characteristics, taken in conjunction with circumstances," RULE 909.015(4), was sufficient for the jury to determine that the tape was what it purported to be: surveillance video of an ongoing robbery. (Authentication under RULE 909.015 is

one of conditional relevance under WIS. STAT. RULE 901.04(2)—see the Federal Advisory Committee Note to the federal rule counterpart reprinted at 59 Wis. 2d R331–332.)

B. *"Other-acts" evidence*.

¶14 McCoy also argues that Richardson's testimony and Feely's recounting of that testimony that McCoy was "out there robbing people in the neighborhood" should have been excluded as improper other-acts evidence under WIS. STAT. RULE 904.04.

¶15 As we have seen, the trial court admitted this testimony for the purpose of "context" so that the jury would understand why the police decided to ask Richardson to review the robbery video. ("It provides context to the jury as to how the police got involved, how this video was ultimately identified by the mother and it becomes relevant for that.") On appeal, McCoy does not dispute this "proper purpose" for admission; instead, he argues Richardson's "my son is out there robbing people" statement is irrelevant and unfairly prejudicial. We thus need not decide whether the trial court was correct. *See* ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not argued on appeal are deemed abandoned).

¶16 The trial court found that the testimony, although prejudicial, was not *unfairly* prejudicial. The trial court also told the jury to not consider the evidence as bearing on the issue of whether McCoy was guilty of the robbery charged in this case. We presume juries follow these instructions. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759, 768 (1994). Moreover, it was "relevant" if we assume, as McCoy has assumed, that it was received for a proper purpose. In any event, McCoy's appellate brief does not develop any argument as

to *why* the evidence was not "relevant" *if*, as he concedes, the evidence was received for a proper purpose. Given all that, the trial court did not erroneously exercise its discretion in allowing the challenged testimony.[1]

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

[1] McCoy also asks us to reverse in the "interest of justice" because, he argues, admitting the video and his mother's statements prevented the real controversy from being tried. We disagree; this is merely a rehash of his other arguments. *See* ***State v. Arredondo***, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 405, 674 N.W.2d 647, 663–664 (Ct. App. 2003).