COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1480-CR **Cir. Ct. No. 2010CF5110**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY MALDONADO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD A. SANKOVITZ, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Johnny Maldonado appeals a judgment of conviction entered after a jury found him guilty of one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide, both by use of a dangerous weapon and as a party to a crime. He contends that the

circuit court erred by admitting evidence of other acts under WIS. STAT. § 904.04(2) (2011-12).[1] Because we conclude that the evidence was relevant to prove motive, and because the evidence was not unfairly prejudicial, we affirm.

BACKGROUND

¶2 According to the criminal complaint, police found the body of Spencer Buckle on April 11, 2009, in an alley near the 1100 block of West Grant Street in Milwaukee, Wisconsin. The county medical examiner determined that Buckle died of a gunshot wound to the head and deemed Buckle's death a homicide. The complaint further states that police spoke to Sergio Vargas. He described hearing gunshots as he walked in the alley with Buckle, Maldonado, and Raymond L. Nieves. Vargas then saw Buckle fall to the ground. Vargas said that he also fell to the ground and that he "played dead" because he realized that his companions, Maldonado and Nieves, were the shooters. Vargas went on to report that while he was on the ground, he was shot in the hand. He said that he could see Maldonado's feet, and he could hear additional gunshots as bullets went past his head. Vargas said that he remained on the ground until he was certain that Maldonado and Nieves had left the scene.

¶3 The State filed an information charging Maldonado and Nieves with first-degree intentional homicide and attempted first-degree intentional homicide by use of a dangerous weapon and as a party to the crime. Each man demanded a jury trial.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 During pretrial proceedings, the State moved to admit other acts evidence pursuant to WIS. STAT. § 904.04(2). Specifically, the State sought to show that Maldonado, Nieves, Buckle, and Vargas were members of a street gang called the Maniac Latin Disciples. Further, the State sought to show that in March 2009, a member of a rival street gang, the Latin Kings, fired shots at Vargas, and that he, Maldonado, Nieves, and Buckle, together with a fifth member of the Maniac Latin Disciples, retaliated by killing a member of the Latin Kings in Waukegan, Illinois. Maldonado, Nieves, Buckle, and Vargas fled to Wisconsin, but Maldonado and Nieves subsequently became concerned that one or more of the other people who had participated in the Illinois homicide were providing information about that crime to the police. The State argued that evidence about the events and circumstances of the Illinois homicide, together with the concerns of Maldonado and Nieves that some of those who participated in the Illinois homicide might be cooperating with law enforcement, all established a motive for Maldonado and Nieves to kill Buckle and attempt to kill Vargas.

¶5 Maldonado objected to the State's motion. He contended that the proposed evidence had minimal relevance and was unduly prejudicial to his defense. The circuit court rejected these arguments and admitted the evidence. The circuit court instructed the jury, however, that the "evidence was received only with respect to possible motive to commit the crimes charged in the information and you may consider it only for that purpose." The circuit court further instructed the jury that "you may not find the defendant guilty merely because he was associated with a gang" and that "you may not find the defendant guilty merely because he may have been involved in a crime that is not charged in the information in this case." The jury found Maldonado guilty as charged, and he appeals.

DISCUSSION

¶6 A circuit court has "'broad discretion to admit or exclude evidence.'" ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619 (citation omitted). We will not disturb a circuit court's evidentiary ruling if the circuit 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.'" ***State v. Abbott Labs.***, 2013 WI App 31, ¶31, 346 Wis. 2d 565, 829 N.W.2d 753 (citation omitted). Our standard of review is "'highly deferential.'" *See* ***State v. Shomberg***, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted).

¶7 Maldonado complains that the circuit court improperly admitted evidence of his participation in a homicide in Illinois and of the events and circumstances surrounding that crime. "[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." WIS. STAT. § 904.04(2)(a).[2] The statute, however, "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." ***Id.*** "[S]ec[tion] 904.04(2), Stats, favors admissibility in the sense that it mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes." ***State v. Speer***, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). The admission of evidence under the statute is governed by a three-step

[2] The legislature recently amended WIS. STAT. § 904.04(2). *See* 2013 Wis. Act 362, §§ 20-22, 38. The amendments do not affect our analysis.

analysis: (1) whether the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the concerns enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).[3]

¶8 The first step of the ***Sullivan*** analysis requires only that the party offering the other acts evidence propound an acceptable purpose for presenting the evidence. *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832. "[T]his 'first step is hardly demanding.'" ***Id.*** (citation and emphasis omitted). Here, the State identified motive as the purpose for admitting the evidence. Motive is "the reason [that] leads the mind to desire the result of an act." *See* ***State v. Fishnik***, 127 Wis. 2d 247, 260, 378 N.W.2d 372 (1985). Because WIS. STAT. § 904.04(2)(a) includes "motive" as an acceptable purpose for admitting other acts evidence, the State plainly satisfied the first step of the ***Sullivan*** analysis. Maldonado does not suggest otherwise.

¶9 ***Sullivan*** also requires that the proposed evidence be relevant. ***Id.***, 216 Wis. 2d at 772. Thus, the proponent must show that the evidence is offered to support a proposition of consequence to the determination of the action and that the evidence has probative value when offered for the purpose advanced. *See* ***Payano***, 320 Wis. 2d 348, ¶68. Here the State contended that evidence of motive

[3] The State suggests that the circuit court's decision to admit the evidence challenged in this case may be upheld using an analysis other than that described in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Because we uphold admission of the evidence using a ***Sullivan*** analysis, we need not consider whether another analysis might also lead to the same result. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on narrowest possible grounds).

was relevant to support the State's theory that Maldonado and Nieves wanted Buckle and Vargas dead to prevent Buckle and Vargas from telling police about a gang-related murder that the four men committed in Illinois. On appeal, Maldonado contends that the State "misle[]d the [circuit] court judge into believing that the State needed to establish motive." We reject Maldonado's suggestion that the facts of this case rendered motive irrelevant.

¶10 "Motive is not an element of any crime." ***State v. Berby***, 81 Wis. 2d 677, 686, 260 N.W.2d 798 (1978). Wisconsin law, however, 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." WIS. STAT. § 904.01. Therefore, such "evidence need not, as the defendant asserts, bear directly upon one of the elements of the crime. It may, as here, bear on motive ... or it may bear upon any one of countless other factors which are of consequence to the determination of the action." ***Holmes v. State***, 76 Wis. 2d 259, 268, 251 N.W.2d 56 (1977).

¶11 ***Holmes*** is instructive here. In that case, the supreme court considered whether evidence that a defendant committed an armed robbery was relevant in the defendant's trial for attempted murder of a police officer. *See* ***id.*** at 267. The ***Holmes*** court concluded that evidence of the armed robbery was relevant to prove motive because, as the supreme court explained, "[t]he reason that the defendant shot at the police officer was to attempt to thwart his apprehension for the armed robbery." ***Id.*** Similarly, here, evidence of the Illinois murder, the gang affiliations underlying it, and Maldonado's and Nieves's fear of detection explained why Maldonado committed homicide and attempted homicide in Wisconsin. Therefore, the evidence was relevant.

¶12 Turning to the last step in the ***Sullivan*** analysis, Maldonado claims the circuit court erred when it found that the probative value of the disputed evidence here is substantially outweighed by the danger of unfair prejudice. *See* ***id.***, 216 Wis. 2d at 772-73. We disagree.

¶13 Wisconsin courts have long recognized that "the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" *See* ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994), citing ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis. 2d 50, 61, 252 N.W.2d 81 (1977). In the context of a ***Sullivan*** analysis, "[t]he specific danger of unfair prejudice ... 'is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged.'" ***Payano***, 320 Wis. 2d 348, ¶89 (citations omitted). Therefore, "[t]he 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." *See* ***id.***, ¶90.

¶14 A number of factors reduce the risk of undue prejudice here. First, as Maldonado candidly and explicitly acknowledges, the other acts evidence at issue was "vastly dissimilar" from the crime for which he was on trial. Thus, the evidence, while undoubtedly helpful to the State and adverse to Maldonado, was not the kind of evidence inherently most likely to persuade a jury that, merely "because an actor committed one bad act, he necessarily committed the crime with which he is now charged." *See* ***id.***, ¶89.

¶15 Second, the danger of unfair prejudice is not as great when the other acts evidence is offered to prove a state of mind as when the evidence is offered to

prove identity. *See* ***id.***, ¶94. Where, as here, the evidence is offered to prove motive, any risk of unfair prejudice is diminished. *See* ***id.***

¶16 Third, the circuit court in this case carefully and thoroughly instructed the jury that it was permitted to consider the evidence of Maldonado's gang affiliation and of the homicide in Illinois solely in regard to the possible motive for committing the crimes in this case and not for any other purpose. When evidence poses a danger of undue prejudice, cautionary jury instructions serve to limit such danger. *See* ***id.***, ¶99. Indeed, "'[i]f an admonitory instruction is properly given by the [circuit] court, prejudice to a defendant is presumed erased from the jury's mind.'" ***Id.***, ¶99 n.20 (citation omitted).

¶17 In sum, we cannot conclude that the circuit court erroneously exercised its discretion by admitting the disputed evidence in this case. The State offered the evidence for a permissible purpose, the evidence had substantial probative value for that purpose, and the evidence posed little danger of leading jurors to draw improper inferences given the nature of the evidence and the reasons for presenting it. To the extent that the evidence posed any risk of unfair prejudice, the circuit court took the steps necessary to avoid such a risk. No error is shown. We affirm.

By the Court.—Judgment affirmed.

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