COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0007-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEMARRUS D. WILLIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and JEFFREY A. KREMERS, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

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[1] The Hon. Patricia D. McMahon presided over the trial and entered the judgment of conviction; the Hon. Jeffrey A. Kremers entered the order denying Willis's motion for postconviction relief.

PER CURIAM. Demarrus D. Willis appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide while armed, party to a crime, and attempted first-degree intentional homicide while armed, party to a crime, contrary to §§ 939.05, 939.63 and 940.01(1), STATS., and §§ 939.05, 939.32, 939.63 and 940.01(1), STATS. Willis also appeals from an order denying his postconviction motion for a new trial. Willis claims that the trial court erred by finding that his trial counsel was not ineffective for failing to object to, or for not seeking a cautionary instruction regarding the State's introduction of gang-related character evidence against him. Willis also claims that the trial court erroneously exercised its discretion when it: (1) excluded impeachment testimony relating to the credibility of the State's witness, Bobby Keys; and (2) admitted other-acts evidence that Willis kicked his pregnant girlfriend in the stomach. Finally, Willis asks this court to order a new trial on the ground that the real issue or controversy was not tried. We disagree with Willis's claims and affirm the judgment and order.

I. BACKGROUND.

This case arises from a shooting which occurred on February 11, 1995, at a Milwaukee tavern, in which Corey Pittman was shot and killed by Willis for stepping on a gang member's shoe. Willis and other acquaintances, including Bobby Keys and Benard Treadwell, were at the tavern together when Pittman stepped on a gang member's shoe. As Pittman left the tavern, he was pushed down by Keys. Willis then shot Pittman numerous times, killing him. Damion Powell, who was with Pittman at the tavern, managed to drive away from the scene and escape unharmed, although his car was repeatedly shot at by Treadwell.

Willis was arrested and charged with first-degree intentional homicide while armed, party to a crime, and attempted first-degree intentional homicide while armed, party to a crime. Following a jury trial, Willis was convicted of both counts, and was sentenced to life imprisonment on the intentional homicide charge, and thirty years in prison consecutive to the first sentence, on the attempted homicide charge. Willis then filed a motion for postconviction relief which was denied. Willis now appeals.

II. ANALYSIS.

A. Denial of ineffective assistance of counsel claim.

Willis claims that the trial court erred by finding that his counsel was not ineffective for failing to object to "repeated references made by the State to [Willis's] alleged gang membership." We conclude that Willis was not prejudiced by any alleged deficiency, and thus, that his counsel was not ineffective.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove both deficient performance by counsel and resulting prejudice. ***Strickland v. Washington,*** 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's claim of ineffectiveness will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.***

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. See ***id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But whether the defendant established proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.*** at 634, 369 N.W.2d at 715.

Willis first argues that, because the judge who decided his postconviction motion was not the same judge who presided over his trial, our review of the trial court's factual findings should be *de novo*. *See* ***State v. Herfel***, 49 Wis.2d 513, 521, 182 N.W.2d 232, 236-37 (1971) (in a review of a denial of a motion for a new trial on the grounds of newly discovered evidence, when the judge who decided the motion did not hear the evidence at trial, appellate court "starts from scratch and examines the record *de novo*"). We need not address this issue for two reasons: (1) Willis has failed to direct our attention to any specific finding of fact which he feels we should review *de novo*; and (2) the only issue relevant to our decision, whether Willis was prejudiced, is a question of law, which this court always reviews *de novo*.

Willis claims that his counsel was ineffective for failing to object to numerous references to his alleged gang membership. In order to succeed, Willis must show a reasonable probability that, had his counsel objected to the gang

references, the outcome of his trial would have been different. The trial court concluded that any objection would have been overruled, and therefore, that Willis was not prejudiced by his counsel's failure to object and was not entitled to a ***Machner*** hearing.[2] We agree.

The State made numerous references to the Vice Lords street gang during Willis's trial. Willis characterizes all the references to the Vice Lords, some of which apparently did not involve direct allegations that Willis was himself a Vice Lord, as other-acts evidence that he was a member of the Vice Lords gang. Willis claims that had his counsel objected, this other-acts evidence should have, and would have, been excluded. Willis is mistaken.

In deciding whether to admit other-acts evidence, the trial court must apply a two-part test. ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must determine whether the evidence is offered for a purpose permissible under § 904.04(2), STATS. ***Id.*** If the trial court finds that it is, the trial court must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. ***Id.***; § 904.03, STATS.[3] Permissible uses of other-acts evidence include "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2). This list, however, "is not exclusionary, but rather, illustrative." ***State v. Shillcutt***, 116 Wis.2d 227, 236, 341 N.W.2d 716,

[2] *See* ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50 (1996); ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[3] Section 904.03, STATS., provides: "[A]lthough relevant, evidence may be excluded if its probative value 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."

720 (Ct. App. 1983). For example, other-acts evidence may be admissible if it impacts on a witness's credibility or assists in the impeachment of a witness's recantation of an accusation made against the defendant. *See* ***State v. Schaller***, 199 Wis.2d 23, 43, 544 N.W.2d 247, 255 (Ct. App. 1995); ***State v. McMahon***, 186 Wis.2d 68, 96, 519 N.W.2d 621, 633 (Ct. App. 1994). Other-acts evidence may also be admissible to show the context of the crime or if it is necessary to a full presentation of the case. ***State v. Chambers***, 173 Wis.2d 237, 255-56, 496 N.W.2d 191, 198 (Ct. App. 1992).

In the instant case, the other-acts evidence was admissible to prove Willis's motive, to impeach a witness's credibility, and to show the context of the crime, which was necessary to a full presentation of the case. At first glance, without considering the evidence of gang involvement, it might have been difficult for a jury to make sense of Willis's brutal slaying of Pittman, seemingly because Pittman had merely stepped on someone else's shoe. The other-acts evidence, however, that Willis and others involved in the shooting were Vice Lords gang members, and that Willis believed Pittman to be a rival gang member, provided the jury with a motive for what otherwise might be viewed as a random act of violence. The State's use of the evidence to prove a motive is expressly permitted by statute, and therefore, the evidence was admissible on this ground alone. Section 904.04(2), STATS.

Additionally, one of the State's witnesses, Camille Pendelton, recanted at trial statements she made to the police before trial which incriminated Willis. Before trial, Pendelton, who was Willis's girlfriend at the time of the shooting, told the police that Willis had admitted shooting Pittman to her, and that he had told her that he needed to get rid of his gun. Pendelton also showed the police a mattress where two guns were hidden, one of which was linked to the

shooting by the State's forensic expert. At trial, however, Pendelton denied telling the police that Willis had committed the murder, and substantially denied all the incriminating information she had given to the police. Detective Gary Temp testified that when he first spoke with Pendelton, she was frightened that Vice Lords members would harm her or her child if she talked to the police. Detective Temp also testified that the Vice Lords gang was known for intimidating witnesses by beating them up or shooting them in order to keep them from testifying. Thus, this evidence, and other statements regarding Willis's status as a Vice Lord gang member, were admissible to impeach Pendelton's trial testimony on the grounds that she had changed her story in order to avoid further reprisals from the Vice Lords.[4]

Finally, the other-acts evidence was admissible to show the context of the crime, and was necessary to a full presentation of the case. The evidence at trial strongly suggested that the shooting was gang-related, and in order to fully present its case, the State needed to be able to show the jury all the facts related to Willis's status as a Vice Lords's gang member. Excluding the evidence would have left the jury with an incomplete picture of an event that clearly was connected to gang members and gang rivalries. Therefore, the other-acts evidence was admissible under at least three exceptions to the character evidence rule—motive, impeachment of a recanting witness, and evidence necessary to fully present the State's case.

[4] Willis also argues that the other-acts evidence could not have been used to impeach Pendelton because no foundation was laid to support Detective Temp's statements that the Vice Lords routinely intimidate witnesses in order to prevent them from testifying. This argument has been raised for the first time on appeal, and therefore, it will not be addressed. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (appellate court generally does not consider arguments raised for the first time on appeal).

Once other-acts evidence is shown to be admissible under 904.04(2), STATS., it will only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Section 904.03, STATS. The trial court's decision to admit or exclude evidence under § 904.03 is discretionary, and will be upheld if a reasonable basis exists to support the decision. *See* ***State v. Kuntz,*** 160 Wis.2d at 745-46, 467 N.W.2d at 540. We conclude that the probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice to Willis, and therefore, that the trial court properly exercised its discretion in admitting the evidence.

As stated previously, the other-acts evidence helped to establish Willis's motive assisted in the impeachment of Pendelton and her recantation, and allowed the State to fully present its case. Evidence of gang membership obviously was prejudicial to Willis. Simple prejudice, however, is not enough, since all evidence showing an element of the offense is "prejudicial" to a defendant. ***State v. Grande***, 169 Wis.2d 422, 434, 485 N.W.2d 282, 286 (Ct. App. 1992). A defendant must show that "unfair prejudice, not prejudice" substantially outweighs a piece of evidence's probative value in order to justify exclusion under § 904.03, STATS. ***Id.***

> Evidence is unfairly prejudicial if it 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."

Lease America Corp. v. Insurance Co. of N. America, 88 Wis.2d 395, 401, 276 N.W.2d 767, 770 (1979) (citation omitted).

In this case, there was some risk that evidence that Willis was a member of the Vice Lords gang would influence the jury to reach an outcome by improper means. Even so, Willis has failed to make the required showing that this danger of "unfair prejudice" substantially outweighed the probative value of the gang related other-acts evidence. The trial court's discretionary decision clearly had a reasonable basis, and therefore, it must be upheld.

B. Exclusion of evidence to be used to impeach a State's witness.

Willis next argues that the trial court erred by not allowing him to cross-examine Bobby Keys, a prosecution witness, regarding an unrelated murder prosecution which Keys faced in Illinois. We disagree.

Evidentiary determinations are a matter of trial court discretion. ***State v. Pharr***, 155 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). We will only reverse a trial court's decision to limit or prohibit a certain area of cross-examination offered to show bias upon a showing of a prejudicial erroneous exercise of discretion. *See* ***State v. Lindh***, 161 Wis.2d 324, 348-49, 468 N.W.2d 168, 176 (1991).

Counsel should be allowed to cross-examine a witness sufficiently to make a record of bias when a witness is "vulnerable" to prosecution by the jurisdiction which has called him as a witness, or when charges have been dismissed because of the witness's cooperation with the prosecution. *See* ***Davis v. Alaska***, 415 U.S. 308, 316-18 (1974); ***Delaware v. Van Arsdall***, 475 U.S. 673, 679-80 (1986). Nevertheless, "where a witness is himself subject to prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony." ***Lindh***, 161 Wis.2d at 352,

468 N.W.2d at 178. In such a circumstance, there is no "logical connection" between criminal action against a witness and the prosecution which has called the witness to testify at trial, and a trial court has the discretion to limit or deny cross-examination. *See* ***id***. at 351, 468 N.W.2d at 177.

In the instant case, Willis makes two arguments supporting his view that there was a rational connection between the charges Keys faced in Illinois and his being called to testify as a witness in Willis's trial. First, Willis argues that Keys needed to avoid a conviction for Pittman's murder, because such a conviction could constitute an aggravating factor and could subject him to the death penalty in the unrelated Illinois murder case. Although Willis in his brief in chief did mention, in one sentence, that Keys was being prosecuted "in Illinois, a death penalty state," Willis did not develop this argument until his reply brief. By waiting until his reply brief to present this court with the Illinois statutes dealing with the death penalty and with aggravating factors, Willis deprived the State of an opportunity to effectively respond to his argument. Therefore, we decline to address this argument. *See* ***Swartwout v. Bilsie,*** 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (appellate court will generally not consider issues raised for the first time in reply brief).

In order to establish a connection between Keys's Illinois prosecution and his status as a State's witness in Willis's trial, Willis also points to Keys's statement that his attorney had told him it was in his "best interest" to cooperate as a witness in Willis's case. Willis's counsel asked Keys, during a conference held outside the jury's presence: "[D]id your defense attorney in Illinois indicate to you that it would be in your best interest to cooperate as a witness in this case," to which Keys responded, "right." Willis claims that this establishes a logical connection between Keys's Illinois' prosecution and his

testimony given in Willis's case. We disagree. The Wisconsin supreme court has stated: "[W]here a witness is himself subject to prosecution by those who are separate and distinct from those who have called him as a witness, there is no reasonable basis to believe the witness has a motive to curry favor or hope for leniency by virtue of his testimony." ***Lindh***, 161 Wis.2d at 352, 468 N.W.2d at 178. Thus, we conclude that, in spite of any statements made to Keys by his attorney, there was no reasonable basis to impeach Keys on grounds of bias, because he was subject to a prosecution by "those who are separate and distinct from those who have called him as a witness." ***Id***.[5]

C. Admission of other-acts evidence against Willis.

Willis also claims that the trial court erred by admitting other-acts evidence that he kicked his girlfriend, Pendelton, in the stomach when she was pregnant. Willis claims that the evidence was: (1) unnecessary because there was other evidence that Willis beat Pendelton and broke her nose; and (2) horrific and therefore unfairly prejudicial. The State agrees with Willis that the evidence was not necessary to show the objectively violent nature of the relationship. However, the State claims that it was needed to show Pendelton's subjective state of mind, in that she was afraid not only for herself, but also for her unborn child.

Willis does not argue that the other-acts evidence fails to fit any of the exceptions listed in § 904.04(2), STATS. Rather, Willis argues that the probative value of the evidence was substantially outweighed by the danger of

[5] Willis also argues that the trial court erroneously exercised its discretion by failing to make explicit reference to the facts of law upon which it was relying. We need not address this issue, however, in light of our conclusion that the trial court's decision had a reasonable basis. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

unfair prejudice, and should have been excluded under § 904.03, STATS. "Evidence is unfairly prejudicial if it 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.'" ***Lease America Corp.***, 88 Wis.2d at 401, 276 N.W.2d at 770 (citation omitted). Evidence that Willis kicked his girlfriend in the stomach when she was pregnant may indeed have a tendency to arouse a jury's sense of horror and provoke its instinct to punish. Willis, however, has failed to show that this potential danger substantially outweighed the probative value of the evidence. Pendelton, as stated earlier, substantially recanted at trial her previous statements to the police which incriminated Willis. The State needed to show why she may have had a reason to do so, and evidence that she feared for the life of her unborn child was relevant and probative for that purpose. Therefore, the trial court's decision had a reasonable basis, and we conclude that the trial court did not erroneously exercise its discretion when it decided to admit the evidence.

D. Trial of the "real issue in controversy."

Finally, Willis asks this court to use our discretionary power of reversal to grant him a new trial on the basis that the real controversy was never tried. *See* § 752.35, STATS. Willis's claims standing alone lack merit and do not become persuasive merely upon being aggregated. Therefore, we decline to exercise our discretionary power of reversal.

III. CONCLUSION.

In sum, Willis's counsel was not ineffective for failing to object to references to the Vice Lords gang; the trial court did not err by restricting Willis's

cross-examination of Keys; and the trial court properly exercised its discretion in admitting evidence that Willis kicked his pregnant girlfriend in the stomach.

By the Court.—Judgment and order affirmed.

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