COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2255-CR **Cir. Ct. No. 2012CF3151**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY RIVERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. A jury found Danny Rivera guilty of disorderly conduct and substantial battery, both as a party to a crime. He appeals the judgment of conviction and the order denying postconviction relief. He claims the circuit court erred by admitting evidence that he was serving a term of extended

supervision when he committed the acts underlying the charges he faced. He seeks a new trial. We reject his contentions and affirm.

BACKGROUND

¶2 The State charged Rivera, his mother, Marta Munoz, and his sister, Vanessa Gonzalez, with disorderly conduct and with substantial battery by use of a dangerous weapon, all as a party to a crime.[1] According to the criminal complaint, the trio battered Hector L. Alejandro-Rodriguez during a fight that erupted on June 20, 2012, while Rivera and Gonzalez were helping Munoz move out of the home she shared with Alejandro-Rodriguez.

¶3 The State additionally charged both Munoz and Gonzalez with obstructing an officer. In support of these charges, the State alleged that Munoz falsely told police that Rivera was not present during the altercation with Alejandro-Rodriguez and that Gonzalez falsely told police that Rivera, while present during the altercation, did not participate in the battery.

¶4 Munoz and Gonzalez resolved the allegations against them with plea bargains that included a guilty plea by each woman to the charge of obstructing an officer. Rivera, however, demanded a trial. His theory of defense was that he struck Alejandro-Rodriguez to defend Munoz because Alejandro-Rodriguez had attacked her.

¶5 Following jury selection, Rivera made an oral motion to bar the State from presenting evidence that he was serving a term of extended supervision

[1] The State also alleged that Rivera committed the crimes as a habitual offender.

on June 20, 2012. Rivera asserted that the evidence "has no relevance to the outcome of this case." The State disagreed:

> his extended supervision status is the reason why the co-defendants in this case lied to the police and were convicted of lying to the police. It's incredibly relevant. It's consciousness of guilt because he fled because he faced more than just criminal conviction type consequences and his family members knew that. That's why they lied to the police to protect him and were convicted of that. So it's incredibly probative of his participation in this event.

The circuit court agreed with the State that the evidence was relevant and denied the motion. The circuit court, however, instructed the parties to refer to "supervision," not "extended supervision," to avoid revealing that Rivera had been convicted of a felony.[2]

¶6 Alejandro-Rodriguez testified at trial and said he was attacked and beaten by Munoz, Gonzalez, and Rivera while Munoz was moving out of his home. Alejandro-Rodriguez described Rivera as the primary aggressor and said that he used brass knuckles during the incident. Alejandro-Rodriguez identified pictures of himself and explained that they showed the lacerations he suffered from the beating, and he confirmed the accuracy of the hospital records reflecting his diagnosis of a concussion following the attack.

¶7 Gonzalez testified and said that she hit Alejandro-Rodriguez after he attacked Munoz during the move. Gonzalez went on to describe calling the police

[2] A person convicted of either a misdemeanor or a felony may be supervised in the community if the circuit court places the person on probation. *See* WIS. STAT. § 973.09(1)(a) (2011-12). When a court sentences a person to imprisonment in the Wisconsin state prisons for a felony, however, the court must impose a bifurcated sentence consisting of a term of confinement in prison followed by a term of extended supervision. *See* WIS. STAT. § 973.01(1)-(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and then going to the police station to report Alejandro-Rodriguez's attack on Munoz. Gonzalez also said that she was sure Rivera never hit Alejandro-Rodriguez, and she said that she gave a similar statement to the police. She acknowledged, however, that she "was convicted for lying to the police in this case." She also acknowledged that she was "aware that [Rivera] was on supervision" and "aware that if [Rivera] ... gets in trouble or has police contact, he could be revoked on his supervision." She agreed that she did "n[o]t want to see [Rivera] revoked on his supervision."

¶8 Munoz also testified. She said that Alejandro-Rodriguez attacked her while she was moving out of his house, and that Gonzalez therefore hit Alejandro-Rodriguez. Munoz said she recalled telling police that Rivera was not at the house while she was moving out, and she testified that she was presently not sure if Rivera was at the house during the move. She acknowledged that she was convicted of lying to the police.

¶9 Rivera testified on his own behalf. He said that he and Gonzalez were helping Munoz move out of her home when Alejandro-Rodriguez attacked Munoz. Rivera admitted that he responded by striking Alejandro-Rodriguez "three or four times" with a bare fist. Rivera told the jury that his actions were taken to aid Munoz, but he also told the jury that he struck Alejandro-Rodriguez again after Munoz and Gonzalez left the scene. Rivera said that he neither went to the police station nor otherwise contacted the police to report the fight because he was on supervision at the time of the incident and therefore "any contact with police could potentially send [him] to prison. Any contact."

¶10 The jury found Rivera guilty of battery causing substantial injury and guilty of disorderly conduct, both as a party to a crime. The jury acquitted him of using a dangerous weapon to commit the battery.

¶11 Rivera filed a postconviction motion seeking a new trial on the ground that the circuit court improperly admitted evidence of his supervision status. The circuit court rejected his claims in a written order, and Rivera appeals.

DISCUSSION

¶12 Rivera argues on appeal that WIS. STAT. § 904.04(2) controls the admission of evidence about his supervision status and that the circuit court failed to conduct the analysis required under that statute. 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). 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). We search the record for reasons to sustain a circuit court's evidentiary ruling. *See* ***State v. Jensen***, 2007 WI App 256, ¶34, 306 Wis. 2d 572, 743 N.W.2d 468.

¶13 WISCONSIN STAT. § 904.04(2)(a) provides that "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." 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.*** Admissibility of evidence pursuant to § 904.04(2) is governed by a three-step inquiry: (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.[3] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶14 The first step of the ***Sullivan*** analysis requires the party offering other acts evidence to 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. At trial here, the State articulated several purposes for evidence of Rivera's supervision status. On appeal, the State relies on one of those purposes, namely, that the evidence provided a reason for Gonzalez to lie about Rivera's involvement in the assault on Alejandro-Rodriguez. The State explains in its brief:

> Gonzalez testified at the trial that she did not think Rivera hit the victim while she was in the house with them, and that she did not know how the victim was injured. The prosecutor believed Gonzalez was lying. However, Gonzalez made prior consistent statements to the police, telling them that Rivera never hit the victim, and that she did not observe any injuries to the victim.
>
> Prior statements made by the witness that are consistent with her testimony at the trial can rebut any claim of recent fabrication, or improper influence or motive. So to show that Gonzalez was lying at the trial, the prosecutor had to show she was also lying when she made her prior consistent statement to the police. The fact that Gonzalez knew her brother was on supervision and could be revoked if he had contact with the police gave Gonzalez a motive to lie to the police.

[3] Rivera describes the analysis under WIS. STAT. § 904.04(2) as consisting of two steps and, in support, he cites ***State v. Kuntz***, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991). Since ***Kuntz***, the supreme court has explained that the test consists of three steps, although some cases describe the first step as having two parts. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 771-72 n.3, 576 N.W.2d 30 (1998). We use the formulation of the test set forth in ***Sullivan***.

¶15 A defendant's criminal history may be offered for any of the purposes permitted under WIS. STAT. § 904.04(2). *See* ***State v. Ingram***, 204 Wis. 2d 177, 189, 554 N.W.2d 833 (Ct. App. 1996). Evidence may be admitted under the statute to prove that a witness has a motive to lie. ***State v. Missouri***, 2006 WI App 74, ¶¶15-16, 291 Wis. 2d 466, 714 N.W.2d 595. Thus, the State satisfied the first prong of the ***Sullivan*** test here.

¶16 ***Sullivan*** requires that the proposed evidence be relevant. ***Id.***, 216 Wis. 2d at 772. "The credibility of a witness is always relevant when the facts are in dispute.... Evidence that a witness has a motive to lie is therefore admissible, subject to limitations imposed on its use and the discretion of the [circuit] court." ***State v. Vonesh***, 135 Wis. 2d 477, 492, 401 N.W.2d 170 (Ct. App. 1986). Rivera asserts that his family's desire to protect him "existed even if he wasn't on supervision, making the probative value of that evidence minimal." This argument, which concedes that the evidence of Rivera's supervision status had some probative value, fails to persuade us that the evidence had no probative value. Moreover, "unless a defendant can 'make a record' so the jury can assess *why* the witness might be testifying falsely, attacks on credibility will often be perceived by the jury as 'a speculative and baseless line of attack.'" *See* ***State v. White***, 2004 WI App 78, ¶25, 271 Wis. 2d 742, 680 N.W.2d 362 (citation omitted) (explaining that a witness's probationary status is relevant because that status and the fear of revocation may illuminate whether the witness has a motive to shape his or her testimony). Evidence of Gonzalez's motive to lie was relevant here.

¶17 The third prong of the ***Sullivan*** analysis requires consideration of whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* ***id.***, 216 Wis. 2d at 772-73. "[T]he 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.'" ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citation omitted).

¶18 Rivera asserts that the circuit court "completely failed to weigh the probative value of the evidence and the prejudicial impact." His argument, however, does not demonstrate that he ever asked the circuit court during trial to conduct such a balancing test. Our examination of the trial transcripts reveals that he objected to the evidence on relevance grounds without an accompanying allegation of unfair prejudice. "We review the circuit court's determination in light of the actual objections defense counsel raised." ***State v. Gary M.B.***, 2004 WI 33, ¶24, 270 Wis. 2d 62, 676 N.W.2d 475. In this case, we are satisfied that the circuit court cannot be faulted for erroneously balancing relevance against unfair prejudice because Rivera never asked the circuit court to strike such a balance.[4]

¶19 Moreover, when the circuit court does not conduct a complete analysis under WIS. STAT. § 904.04(2), we conduct an independent review of the record and uphold the circuit court's decision if the record provides a basis for

[4] Pursuant to WIS. STAT. § 901.03(1)(a), a party must state the basis for an objection to proposed evidence, and "an objection preserves for appeal only the specific grounds stated in the objection." ***State v. Hartman***, 145 Wis. 2d 1, 9, 426 N.W.2d 320 (1988). Because Rivera objected at trial to the evidence of his supervision status on relevance grounds without an accompanying allegation of unfair prejudice or a reference to WIS. STAT. § 904.04(2), he appears to have forfeited his claim that an analysis under § 904.04(2) requires exclusion of that evidence. Although Rivera later filed a postconviction motion claiming that § 904.04(2) affords him relief, an evidentiary challenge must be raised during trial, not after conviction, to preserve the claim for appeal. *See* ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996). We may, however, exercise our discretion to address claims that are not preserved for review. *See* ***id.*** at 519. Both parties have briefed the merits of Rivera's claim, and we have chosen to address it.

doing so. *See* ***Payano***, 320 Wis. 2d 348, ¶41. Here, our review of the record shows that evidence of Rivera's supervision status had no unfair impact at all.

¶20 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. Evidence of Rivera's status as a person on supervision is wholly dissimilar from the accusation that Rivera committed a battery and engaged in disorderly conduct. Thus, the evidence of his status was not inherently likely to persuade the jury to convict him for improper reasons.[5] *See* ***id.***, ¶¶89-90.

¶21 Because the evidence of Rivera's supervision status was relevant to show Gonzalez's motive to lie and the evidence posed no inherent risk of leading the jury to convict Rivera of the charges he faced because he previously

[5] In light of the dissimilarity between the charges Rivera faced and the disputed evidence about his supervision status, he misplaces reliance on ***State v. Kourtidias***, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996). In ***Kourtidias***, the State presented a parole officer's testimony that the defendant, a sex offender on trial for child enticement, had a "high risk" classification and that a condition of parole was that the defendant have no contact with minors. ***Id.*** at 580, 584. We determined that the evidence was wrongly admitted, deeming it more prejudicial than probative. *See* ***id.*** at 585-86. In the instant case, by contrast, the State offered no testimony about why Rivera was on supervision or about the specific conditions of that supervision, demonstrating only that Rivera could not "get in trouble" or "have police contact" without risking a change in his status.

committed similar acts, the evidence was admissible under ***Sullivan***. The circuit court therefore did not err by admitting the evidence.[6]

¶22 Although we are satisfied that Rivera shows no error in admitting evidence of his supervision status, we also, for the sake of completeness, address the parties' dispute over whether any error was harmless. *Cf.* ***State v. Kourtidias***, 206 Wis. 2d 574, 585-87, 557 N.W.2d 858 (Ct. App. 1996) (harmless error to admit parole officer's testimony about defendant's parole status and conditions of parole). Generally an evidentiary error is harmless when no reasonable possibility exists that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). An error does not contribute to a conviction "if it is 'clear beyond a reasonable doubt that a rational jury would have convicted absent the error.'" *See* ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485(citation omitted). The error was harmless here for several reasons.

¶23 First, the jury heard ample evidence supporting the charges of substantial battery and disorderly conduct. Alejandro-Rodriguez testified and accused Rivera of battery. Rivera took the stand and admitted that he hit and injured Alejandro-Rodriguez. Although Rivera argued that he acted to protect his mother from Alejandro-Rodriguez's aggression, Rivera also admitted that he struck Alejandro-Rodriguez after Munoz left the residence.

[6] Rivera complains that the circuit court did not give a cautionary instruction to the jury limiting its use of the evidence of his supervision status. Rivera does not show, however, that he requested such an instruction at trial. "This court will not find error in the failure of a [circuit] court to give a particular instruction in the absence of a timely and specific request before the jury convenes." ***Bergeron v. State***, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978).

¶24 Second, the State presented only limited testimony about the meaning of "supervision." Thus, the jury learned from a police officer that "supervision" means that "you have been convicted of a crime and are serving a sentence in the community, and if you violate the rules of your supervision, you have the potential to be reincarcerated." Rivera, however, testified on his own behalf, and, pursuant to WIS. STAT. § 906.09, he admitted that he had four prior criminal convictions.[7] The evidence that he was serving a term of supervision thus added nothing adverse to the information that Rivera himself presented about his criminal record.

¶25 Third, the evidence of Rivera's supervision status blunted the impact of the State's argument that Rivera avoided the police after the incident because he "didn't want to be caught for something he did that was wrong." Rivera explained that, because he was on supervision he could not have "any contact" with the police without risking incarceration, and he testified that his supervision status was "of course" the reason that he did not report to the police that Alejandro-Rodriguez attacked Munoz. The evidence about Rivera's supervision thus offered the jury an alternative reason that Rivera avoided the police: not that he believed he was guilty of any wrongdoing, but that he knew he was on supervision and could not have contact with law enforcement.

¶26 Last, the jury acquitted Rivera of using a dangerous weapon, reflecting that the jurors believed his testimony that he struck Alejandro-Rodriguez

[7] WISCONSIN STAT. § 906.09 "indicates the intention that all criminal convictions be generally admissible for impeachment purposes." ***Kuntz***, 160 Wis. 2d at 751-52.

testified. Therefore, the evidence of Rivera's supervision status neither prevented the jurors from crediting Rivera's testimony nor led them to conclude that Rivera was guilty of the charges he faced because he had committed prior bad acts. *See* ***Payano***, 320 Wis. 2d 348, ¶89.

¶27 Accordingly, any error in revealing Rivera's supervision status was harmless in this case. The evidence did not adversely affect Rivera's substantial rights.

¶28 Rivera next contends that WIS. STAT. § 906.09 bars evidence of his supervision status. He is wrong. That statute does not control the evidentiary issue he presents. "The purpose of [§ 906.09] is to establish a procedure to follow when a party seeks to admit prior conviction evidence for impeachment purposes. "The statute reflects the long-standing view that 'one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted.'" ***State v. Seefeldt***, 2002 WI App 149, ¶24, 256 Wis. 2d 410, 647 N.W.2d 894, *aff'd*, 2003 WI 47, 261 Wis. 2d 383, 661 N.W.2d 822 (citation omitted). When the State uses criminal history evidence to attack a defendant's credibility, the defendant has the power to limit the extent of that evidence by admitting his or her criminal history on direct examination. ***Ingram***, 204 Wis. 2d at 189. When, however, a party seeks to admit criminal history evidence for other reasons, such as a witness's motive to testify for or against a defendant, § 906.09 is not implicated. *See* ***Seefeldt***, 256 Wis. 2d 41, ¶26; *see also* ***Ingram***, 204 Wis. 2d at 189-90 (when evidence of criminal history is offered to prove motive and intent, § 906.09 does not play a role in the analysis). Accordingly, § 906.09 affords Rivera no grounds for relief.

¶29 Finally, Rivera complains that "if the evidence of Rivera's supervision had not come in during the state's case-in-chief, Rivera would have had the option to not testify in the case and keep his prior convictions or bad acts from the jury." To the extent that Rivera suggests a defendant's criminal history is admissible only if the defendant testifies at trial, he is mistaken. *See* ***Ingram***, 204 Wis. 2d at 187, 189. Rivera could not control admission of such evidence merely by electing not to testify.

¶30 Perhaps Rivera intends to argue that he was somehow compelled to testify because the circuit court erroneously admitted evidence of his supervision status. As we have explained, however, the circuit court did not err. Moreover, a defendant is not compelled to testify in the face of an evidentiary error. *See* ***United States v. Paladino***, 401 F.3d 471, 477 (7th Cir. 2005). Rather "the defendant has the option of refusing to testify and instead, if he is convicted, of obtaining appellate correction of the erroneous evidentiary ruling and with it a new trial." *See* ***id.*** Rivera chose a different strategy. He cannot seek a new trial based on his own strategic choice. For all of these reasons, we affirm.

By the Court.—Judgment and order affirmed.

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