COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP262-CR **Cir. Ct. No. 2011CF87**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD W. MAGOLSKI,

DEFENDANT-APPELLANT.

APPEAL from judgment and an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed and cause remanded*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Chad Magolski appeals a judgment of conviction, following a jury trial, for first-degree intentional homicide and an order denying his motion for postconviction relief. For the reasons discussed below, we reverse the judgment of conviction and remand for further proceedings.

¶2 In May 2011, Magolski, was charged with first-degree intentional homicide for the death of James Park. Park, who lived in the same apartment building as Magolski in New London, Wisconsin, was found dead in his apartment in December 2007. Park had been stabbed multiple times and was the victim of an apparent robbery—the pockets of Park's pants appeared to have been searched, and the clip that Park used to hold his cash was missing. No evidence of forced entry was found and the murder weapon, which had been cleaned, was discovered in Park's sink.

¶3 Magolski was convicted following a jury trial and was sentenced to life imprisonment. On appeal, Magolski contends that he is entitled to a new trial for the following three reasons: (1) he was prejudiced by the erroneous admission of other acts evidence at trial; (2) he received ineffective assistance of counsel at trial; and (3) in the interest of justice. For the reasons discussed below, we conclude that the other acts evidence was improperly admitted and that the admission of that evidence was not harmless error. We reverse the judgment of conviction on that basis and remand for a new trial.

Other Acts Evidence

¶4 Prior to trial, the State moved the circuit court to admit other acts evidence relating to Magolski's conviction in 2000 for the burglary of an automotive dealership where Magolski used to work. The State sought the admission of the evidence for the purpose of showing motive, intent, context, and identity. The circuit court granted the State's motion, and testimony regarding the burglary was provided by a law enforcement officer who investigated the crime.

¶5 The officer testified that during his investigation of the burglary, no evidence of forced entry on the outside of the dealership's building was

discovered, but interior office doors had been pried open. The officer testified that the tool that was believed to have been used to pry open interior doors was found inside the building. The officer testified that employees of the business stated that Magolski's employment had recently been terminated, that Magolski had been observed visiting the business the night before the burglary, but that no one had seen Magolski leave. The officer testified that, when investigating the burglary, the officer attempted to make contact with Magolski at his residence on more than one occasion, but that Magolski did not answer his door. The officer testified that contact was eventually made with Magolski after Magolski was observed outside his apartment. The officer also testified that Magolski admitted that he had hidden inside the dealership until all the employees left for the night, at which point he retrieved a pry bar which he used to gain access into two rooms, and that he left after obtaining a bag containing cash, checks and credit card receipts. The officer testified that Magolski disposed of checks and receipts taken from the dealership, but kept the cash, which he had hidden. Testimony was also given by the owner of the dealership, who testified that Magolski's employment had been terminated approximately two weeks prior to the burglary.

¶6 We review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶14, 294 Wis. 2d 700, 720 N.W.2d 704. A court properly exercises its discretion if it applies the proper law to the established facts, and there is a reasonable basis for the court's ruling. ***Id.***

¶7 WISCONSIN STAT. § 904.04(2)(a) (2013-14)[1] prohibits the admission of "evidence of other crimes, wrongs, or acts … to prove the character of a person in order to show that the person acted in conformity therewith." Other acts evidence is admissible, however, if the evidence offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident. ***Id.***

¶8 In deciding whether to admit other acts evidence, Wisconsin courts look to WIS. STAT. § 904.04(2)(a), and apply the three-step analytical framework set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). *See* ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Under ***Sullivan***, courts must consider: (1) whether the evidence was offered for a proper purpose under § 904.02; (2) whether the evidence is relevant, that is whether the evidence "relates to a fact or proposition that is of consequence to the determination of the action" and whether it "has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence"; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. ***Sullivan***, 216 Wis. 2d at 772-73; *see* WIS. STAT. § 904.01 (evidence relevancy). The proponent of other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. *See* ***Marinez***, 331 Wis. 2d 568, ¶19. If the proponent satisfies his or her burden, the burden then shifts to the opposing party, who must show that the evidence's

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

probative value is "substantially outweighed by the risk or [the] danger of unfair prejudice." ***Id.***

¶9 Magolski does not dispute that the State offered the other acts evidence for a proper purpose. Magolski argues, however, that the evidence was not relevant to any permissible purpose and that the prejudice resulting from the evidence outweighs any probative value.

¶10 The State argues that the other acts evidence was relevant in light of the "points of similarity" between the crimes. So far as we can tell, the State's argument on appeal is that the evidence of Magolski's 2000 burglary conviction is relevant to proving Magolski's *identity* as the perpetrator in Park's murder.[2]

¶11 To be admissible for the purpose of proving identity, "other-acts evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" ***State v. Kuntz***, 160 Wis. 2d 722, 746, 467 N.W.2d 531 (1991) (quoted source omitted).

¶12 The State acknowledges that the present case and the burglary are not "facially similar"—in one the crime is murder and in the other it is a burglary. The State argues, however, that there are "numerous similarities" in Magolski's conduct in each crime which "made the [] burglary relevant [in the present case], in spite of [the crimes'] superficial dissimilarity." According to the State, those

[2] The State's appellate brief discusses similarities between the other acts evidence and the charged crime without expressly tying the alleged similarities to a particular purpose. We focus on identity because of our conclusion that the other acts evidence the State discusses is not even arguably relevant for other purposes listed by the State.

similarities are: (1) Magolski had knowledge that Park "carried wads of cash" and had lots of money, and Magolski knew that the automotive dealership kept cash on the premises; (2) Magolski "intensely disliked Park, whom he viewed as a smelly, drunken old fossil," and Magolski's employment had been terminated shortly before 2000 burglary; (3) there was no forced entry in either Park's murder or the 2000 burglary; (4) both crimes involved targets familiar to Magolski; (5) in both crimes, Magolski left the "instrument of his crime" at the scene; (6) in both crimes, Magolski "separated himself from incriminating evidence"—he tossed the checks and credit card receipts in the burglary and he gave his landlord some of the money stolen from Park for his rent; (7) after each crime Magolski initially hid from the police in his apartment and declined to answer the door; and (8) each crime "involved a degree of advance planning." We disagree that this represents a series of similarities so strong that "the other acts and the present act constitute the imprint of the defendant." *See* ***id.***

¶13 The State asserts that the crimes are similar because Magolski "intensely disliked Park" and Magolski's employment was terminated by the business he burglarized. However, even assuming that it can be inferred that in both instances Magolski was motivated to some degree by ill will, such a motivation is by no means a unique criminal motive. The State asserts that the crimes are similar because Park's apartment and the dealership did not show signs of forced entry. However, in the burglary Magolski hid inside the premises until the employees had left for the evening, but there is no suggestion that Magolski hid inside Park's residence until Park left. The State asserts that there is a similarity between Magolski's disposal of stolen checks and receipts in the burglary and using money stolen from Park to pay his rent in the present case. However, we fail to see any similarity in those actions. The State argues that both

crimes involved "a degree of advance planning." However, the State has not explained in what manner Park's murder involved advance planning. In the burglary, we know that Magolski hid inside the building until the building was empty before robbing the business. There is no indication in the record before us that a similar level of planning was involved in Park's murder. As to the remaining similarities identified by the State—knowledge that the dealership and Park had cash; Magolski's familiarity with both; leaving the tool used to pry open the office doors of the dealership and leaving the knife used to kill Park; and not answering his door to the police—when we take into consideration the substantial differences between the two crimes, we conclude that there is no reasonable basis upon which a court could conclude that the burglary evidence is relevant to proving Magolski's identity as the perpetrator in Park's murder. Accordingly, we conclude that the circuit court erroneously exercised its discretion in determining that the evidence was relevant.[3]

¶14 The State argues that even if the other acts evidence was not relevant, and thus inadmissible, any error in admitting the evidence at trial was harmless. An error is considered harmless if there is no reasonable possibility that the error contributed to the outcome of the action. *See* ***Schwigel v. Kohlmann***, 2005 WI App 44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467. The State bears the burden of proving the harmlessness of the error. *See* ***State v. Harris***, 2010 WI 79, ¶32, 326 Wis. 2d 685, 786 N.W.2d 409.

[3] Because we conclude that the evidence was not relevant, we do not reach the third inquiry, whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶15 The State has not developed an argument that there is no possibility that the admission of the other acts evidence did not contribute to the outcome of Magolski's trial. The State asserts: "If Magolski is correct that the [2000] burglary was so dissimilar that it had very low probative value, then its admission was for that very reason harmless." The State essentially argues in favor of a rule that any time other acts evidence lacks probative value for a proper purpose, the evidence's admission is harmless for that very reason. The State does not cite to any legal authority supporting such a rule and does not otherwise provide reasoned support for the approach. *See* ***State v. Lindell***, 2001 WI 108, ¶23 n.8, 238 Wis. 2d 422, 617 N.W.2d 500 (unsupported legal assertions need not be considered). Obviously, the problem with irrelevant other acts evidence of serious criminal behavior is that the jury will use it for the improper purpose of inferring that the defendant is the type of person who would commit the charged crime. Moreover, the State has not developed an argument showing that the properly admitted evidence was so strong that we can be confident beyond a reasonable doubt that the jury would have found Magolski guilty regardless of the other acts evidence. Thus, we do not further address the State's harmless error argument. *See* ***id.***

¶16 Accordingly, we conclude that because the circuit court's admission of other acts evidence in this case was erroneous and because the State has not met its burden of showing that the admission of that evidence was harmless,

Magolski's judgment of conviction should be reversed and the cause remanded for a new trial.[4]

CONCLUSION

¶17 For the reasons discussed above, we reverse the judgment of conviction and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

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

[4] Because we conclude that Magolski is entitled to a new trial, we do not reach Magolski's arguments that he is entitled to a new trial because his trial counsel was ineffective and in the interest of justice. We observe that Magolski argued in part that his trial counsel was ineffective for failing to challenge the admissibility of DNA evidence. Addressing that issue now would be premature because the record will necessarily change on retrial.