COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2252-CR **Cir. Ct. No. 2013CF903**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS CALDERON-ENCARNACION, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 BRASH, J. Luis Calderon-Encarnacion, Jr. appeals a judgment convicting him of first-degree recklessly endangering safety as a repeater with a domestic abuse assessment, and possession of a firearm by a felon as a repeater. Calderon makes the following arguments on appeal: (1) the circuit court erred

when it admitted other acts evidence, namely that Calderon was seen with a black and silver gun within the month prior to when the alleged crime occurred; and (2) the circuit court erred when it admitted prejudicial evidence implying that Calderon was a member of a gang and had prior police contacts. We disagree and affirm.

BACKGROUND

¶2 On February 18, 2013, at approximately 5:00 p.m., S.G. and E.W. spoke with Officer Raymond Brock of the Milwaukee Police Department regarding threats Calderon made against S.G. earlier that day. E.W. is S.G.'s father and, at the time, the two lived together at 2430 South 16th Street. S.G. informed Officer Brock that Calderon was her ex-boyfriend and that the two had a nine-month-old child together.

¶3 During this conversation, S.G. reported that Calderon called her at approximately 4:30 p.m. that day and stated that he was going to drive by her house later that night to "air it out." S.G. believed this to mean that Calderon intended to shoot up her house. S.G. also reported to Officer Brock that she saw Calderon with a black and silver gun within the past month. Additionally, E.W. informed Officer Brock that after Calderon threatened S.G., E.W. observed a silver Chevy Blazer parked in front of the house. E.W. stated he recognized the vehicle as belonging to Calderon from past experience.

¶4 Later that same evening, Officer Brock and other officers responded to a shots fired call at S.G.'s residence. Upon arrival, S.G. informed officers that approximately five minutes before the shooting, she observed Calderon's vehicle drive by her residence. S.G. reported that she then heard multiple gunshots. S.G.

further reported that her mother, father, and nine-month-old son were also in the residence when the shots were fired.

¶5 Additionally, a third party witness informed police that she was in front of S.G.'s residence at the time of the shooting. This witness reported to officers at the scene that she observed a silver Chevy Blazer with shiny rims and that she had seen Calderon drive this vehicle several times in the past. This witness further reported that she saw a male with a hooded sweatshirt get out of the vehicle and discharge a firearm multiple times at S.G.'s residence. The male then returned to the vehicle and drove off.

¶6 Approximately twenty minutes after the shots were fired, and less than two miles from the scene of the shooting, officers stopped a silver Chevy Blazer. Calderon was driving and was the only person in the vehicle. At the time of the stop, Calderon was wearing a dark hooded sweatshirt.

¶7 Officers searched the vehicle, finding a silver revolver with a black handle hidden in the fuse panel, within Calderon's reach. This revolver had five spent casings in the chambers. Sometime after the shooting, E.W. pointed out to investigating officers five bullet holes in his house that were not there prior to the February 18, 2013 shooting. Ballistics matched the gun found in Calderon's vehicle to at least one bullet fired into S.G.'s residence.

¶8 On February 22, 2013,[1] the State filed a criminal complaint against Calderon alleging one count of first-degree recklessly endangering safety as a

[1] The appellant indicates that the complaint was filed on February 21, 2013. This date, however, is the date it was signed by the State. The file stamp indicates it was filed with the circuit court on February 22, 2013.

repeater contrary to WIS. STAT. §§ 941.30(1) and 939.62(1)(c) (2013-14) as count one.[2] Count one included a domestic abuse assessment contrary to WIS. STAT. § 968.075(1). The complaint also alleged one count of possession of a firearm by a felon as a repeater contrary to WIS. STAT. §§ 941.29(2)[3] and 939.62(1)(b) as count two.

¶9 On May 10, 2013, the State filed a motion seeking to introduce other acts evidence at trial. Specifically, the State sought to introduce evidence that S.G. saw Calderon with a firearm within the month prior to the shooting and that S.G. described the gun as silver with a black handle. On May 20, 2013, Calderon filed a motion *in limine* seeking to exclude the other acts evidence sought by the State, and to prohibit the State from introducing any evidence that Calderon had any past gang affiliations.

¶10 On May 28, 2013, the circuit court held a hearing on the State's other acts motion and Calderon's motion *in limine*. As to the State's motion, the circuit court ruled in the State's favor. Specifically, the circuit court ruled that it was proper for S.G. to testify regarding her observation of Calderon possessing a gun prior to the date of the shooting that looked like the one that was found in Calderon's vehicle. The circuit court further ruled, however, that no other witness would be permitted to testify that they previously saw Calderon with the gun. As to Calderon's motion, the circuit court ruled that there should be no mention of

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

[3] WISCONSIN STAT. § 941.29(2) was repealed by 2015 Wis. Act 109. Owens, however, was charged and convicted under § 941.29(2) prior to its repeal.

any kind of gang affiliation on behalf of Calderon and ordered the State to instruct its witnesses to that effect.

¶11 At trial, S.G. testified that she did not recall telling Officer Brock that she saw Calderon with a gun prior to the shooting. Officer Brock, however, testified that S.G. described the gun to him on the day of the shooting as being silver with a black handle. Officer Brock further testified that after the shooting, he showed S.G. pictures of different kinds of guns on the internet, and S.G. identified Calderon's gun as a revolver with a bulky cylinder on the side.

¶12 Additionally, the following exchange occurred between the State and Officer Matthew Tracy of the Milwaukee Police Department at trial:

> Q: Okay. Did she indicate that she had met [Calderon] before?
>
> A: Yes. She indicated to me that she had met [Calderon] once prior to this incident just briefly. She actually knew that his nickname--[Calderon's] nickname was Luigi and he was also a member of--

Before Officer Tracy could finish his statement, the State moved to strike the answer, and the circuit court complied with this request.

¶13 Furthermore, the following exchange occurred between the State and Officer Brock:

> Q: And how did you first learn of this alleged threat?
>
> A: We had actually, myself and my partner, actually heard the call come across the radio and while the dispatcher was giving out some of the info she had mentioned a nickname of a person that we are familiar and have dealt with in the past so we decided to go along with the original investigating squad and give them a hand.

¶14 Following Officer Brock's testimony, the circuit court held a sidebar outside the presence of the jury. At this sidebar, Calderon's counsel objected to Officer Tracy's testimony that Calderon was a "member of--." Calderon's counsel further objected to Officer Brock's testimony indicating that he was familiar with and dealt with Calderon in the past. The circuit court ruled that neither statement created prejudice; the first one was stricken, and the second one did not mention specifically what the past contacts were.

¶15 Closing statements were made on May 30, 2013, after which the jury retired for deliberations. Later that day, the jury returned verdicts finding Calderon guilty on all counts.

¶16 On August 7, 2013, Calderon filed a notice of intent to pursue postconviction relief. Calderon ultimately decided not to file a postconviction motion with the circuit court. This appeal follows.

DISCUSSION

¶17 On appeal, Calderon makes the following arguments: (1) the circuit court erred when it admitted other acts evidence, namely that Calderon was seen with a black and silver gun within the month prior to when the alleged crime occurred; and (2) the circuit court erred when it admitted prejudicial evidence implying that Calderon was a member of a gang and had prior police contacts. Additionally, Calderon argues that these errors were not harmless because they contributed to his convictions on both counts. We discuss each issue in turn.

I. Evidence Regarding Calderon's Prior Gun Possession

¶18 The decision whether to admit other acts evidence rests with the circuit court's discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780-81, 576 N.W.2d

30 (1998). We review the admission of other acts evidence under the erroneous exercise of discretion standard. *See* ***id.*** at 781. We will uphold a circuit court's discretionary decision to admit other acts evidence so long as 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.'" *See* ***State v. Hurley***, 2015 WI 35, ¶28, 361 Wis. 2d 529, 861 N.W.2d 174 (one set of quotation marks and citation omitted).

¶19 A party seeking to admit other acts evidence bears the burden of establishing, by a preponderance of the evidence, that the proffered evidence is being admitted for a proper purpose and that it is relevant. ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Once the proponent establishes the first two prongs, the burden shifts to the opponent to show that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice. ***Id.*** Calderon argues that the circuit court improperly admitted the other acts evidence that S.G. saw Calderon with a black and silver gun prior to the shooting. We disagree.

A. Purpose

¶20 The first step under ***Sullivan*** is that the evidence must be offered for an admissible purpose. ***Id.***, 216 Wis. 2d at 772. Other acts evidence is admissible when it is "offered for … purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2)(a). Such evidence, however, is not admissible to prove a person's character in order to show the person acted in conformity with that character in committing the offense. ***Hurley***, 361 Wis. 2d 529, ¶56; *see also* § 904.04(2)(a). So long as the proponent identifies one or more proper purposes

for the evidence that are not related to the prohibited character inference, the purpose step under ***Sullivan*** is satisfied. *See* ***State v. Payano***, 2009 WI 86, ¶63, 320 Wis. 2d 348, 768 N.W.2d 832.

¶21 Here, the State proffered the following purposes for the other acts evidence: identity, knowledge, and absence of mistake.[4] These purposes are proper under WIS. STAT. § 904.04(2)(a). *See* ***Sullivan***, 216 Wis. 2d at 772 (proper purposes include identity, knowledge, and absence of mistake). Although the circuit court found that knowledge and absence of mistake were perhaps more acceptable purposes than identity in this case, the circuit court found that the State's purposes were proper. Accordingly, we conclude the circuit court had a reasonable basis for ruling that the State's proffered purposes were proper.

B. Relevance

¶22 The second step under ***Sullivan*** is that the evidence must be relevant to the purpose for which it is being offered. ***Id.*** This is a two-pronged determination: first, the evidence must be of consequence to the determination of the action; and second, it must have "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.***; *see also* ***Payano***, 320 Wis. 2d 348, ¶68. "[T]here is a strong presumption that proffered evidence is relevant." ***State v. Richardson***, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997).

[4] The State's other acts motion argued that identity was the sole purpose for admitting S.G.'s statement that she saw Calderon with a black and silver gun prior to the shooting. At the May 28, 2013 motion hearing, however, the State further argued that knowledge or absence of mistake might also be purposes for admitting S.G.'s statement, and that this would depend on the opening statements by the defense.

¶23 In addressing the first prong, we assess the pleadings and the contested issues in the case. *See* ***Payano***, 320 Wis. 2d 348, ¶69. Calderon's defense to the reckless endangerment charge was that he was not the shooter and that he was not driving the vehicle at the time of the shooting. Furthermore, Calderon asserted that he did not know the firearm was inside the vehicle. The central issues in this case, therefore, were whether Calderon shot the gun and whether he was found in the vehicle with the gun shortly thereafter. Accordingly, we conclude that the circuit court had a reasonable basis for concluding that the State's proffered purposes for the other acts evidence were of consequence.

¶24 Next, we must determine whether the other acts evidence makes these consequential facts more or less probable. *See* ***Sullivan***, 216 Wis. 2d at 772. The evidence only needs some probative value in showing that Calderon was the shooter and knew the gun was in the vehicle. *See* ***Payano***, 320 Wis. 2d 348, ¶¶67-68. Again, Calderon's defense was that he was not the shooter and that he did not know the gun was inside the vehicle. Evidence that S.G. saw Calderon with a black and silver gun within the month prior to when the shooting occurred directly rebuts Calderon's defense, making the evidence relevant.

¶25 Calderon argues that it was conjecture that the gun found in his car was the same gun that S.G. described. In support of his argument, Calderon asserts that S.G.'s description of the gun was vague and did not contain sufficient detail. This argument is misguided. The State did not need to prove that the gun S.G. described was the same gun the police found in the car. The State only needed to show that the evidence had a tendency to make the consequential facts—that Calderon was the shooter and knew the gun was in his vehicle—more probable than those facts would be without the evidence. *See* ***id.***

¶26 Nevertheless, while S.G. recanted her statement to Officer Brock about seeing Calderon with the gun, Officer Brock testified that S.G. described the gun to him on the day of the shooting as being silver with a black handle. Moreover, Officer Brock testified that after being shown pictures of different kinds of guns, S.G. identified Calderon's gun as a revolver with a bulky cylinder on the side. Officer Brock's testimony was clear that the gun found in Calderon's car matched the description of the gun that S.G. described to him on the day of the shooting. Consequently, Calderon's previous possession of a similar gun had a tendency to make his identity as the shooter more probable than not. *See* ***id.***

¶27 Calderon also argues that Officer Brock's testimony regarding Calderon's prior possession of the gun did not reveal how, or in what manner, he previously possessed the gun, or whether the prior incident involved an automobile. Calderon concludes that the other acts evidence was not probative of his possession of the gun inside the vehicle. Once again, this argument is misguided. The State was not required to show how Calderon previously possessed the gun in order for the other acts evidence to be relevant as to his possession of the gun within the car. *See* ***id.*** Accordingly, we conclude that the circuit court had a reasonable basis for ruling that the other acts evidence was relevant.

C. Unfair Prejudice

¶28 Finally, once the State has satisfied the first two prongs of ***Sullivan***, the burden shifts to Calderon to show that its probative value is substantially outweighed by the considerations set forth in WIS. STAT. § 904.03. *See* ***Sullivan***., 216 Wis. 2d at 772-73. These considerations include "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." *See* § 904.03. "The inquiry is not whether the other acts evidence is prejudicial but whether it is *unfairly* prejudicial." ***State v. Gray***, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999). Moreover, the term substantially outweighed "'indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted.'" *See* ***Payano***, 320 Wis. 2d 348, ¶80 (italics and citation omitted).

¶29 Here, the other acts evidence was not unfairly prejudicial to Calderon because it did not have a tendency to influence the outcome by improper means, or provoke the jury's instinct to punish Calderon or "base its decision on something other than the established propositions in the case." *See* ***Sullivan***, 216 Wis. 2d at 789-90. Based on a stipulation, the jury already knew that Calderon was a convicted felon and, based on the charges, knew he was being charged with gun possession and reckless endangerment. Additionally, evidence adduced at trial showed that S.G., E.W., and others considered Calderon to be dangerous and believed him to be armed. The other acts evidence, therefore, did not influence the jury by improper means.

¶30 In that vein, Calderon argues that the other acts evidence was not necessary because the State already had sufficient evidence for a jury to convict. This argument overlooks the key issue that the State still needed the other acts evidence to rebut Calderon's contention that he did not know the gun was in the vehicle and to prove Calderon's identity as the shooter. Moreover, while the other acts evidence may have been somewhat prejudicial, this prejudice did not substantially outweigh its probative value. *See* ***id.*** at 772-73; *see also* ***Payano***, 320 Wis. 2d 348, ¶80 (if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence is admissible). Accordingly, we conclude

that the circuit court properly exercised its discretion when it admitted the other acts evidence of S.G. seeing Calderon in possession of a gun prior to the shooting.

II. Testimony Suggesting Calderon's Prior Gang Affiliation And Police Contacts

¶31 Calderon argues that his due process rights were violated because Officer Tracy and Officer Brock insinuated that he was a member of a gang and that he had prior contacts with the police. We disagree.

¶32 "The admissibility of evidence is within the sound discretion of the [circuit] court." ***State v. Long***, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884. We will not reverse a circuit court's decision "if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards." *See* ***id.*** While evidence of a defendant's gang affiliation may be admissible in certain situations, this evidence is inadmissible if it "so permeate[s] the trial as to create a risk of unfair prejudice or confusion of the issues." *See* ***id.***, ¶23.

¶33 The circuit court ruled that no mention of any kind of gang affiliation regarding Calderon would be permitted at trial. As to this ruling, Calderon takes issues with the following exchange between the State and Officer Tracy:

> Q: Okay. Did she indicate that she had met [Calderon] before?
>
> A: Yes. She indicated to me that she had met [Calderon] once prior to this incident just briefly. She actually knew that his nickname--[Calderon's] nickname was Luigi and he was also a member of--

¶34 The State cut off Officer Tracy's testimony before he could continue. Furthermore, the circuit court immediately struck Officer Tracy's

answer and later instructed the jury not to consider the stricken testimony. *See* ***Payano***, 320 Wis. 2d 348, ¶99 (cautionary jury instructions go a long way in limiting or mitigating prejudice). We conclude that the record is clear that there was no mention of Calderon's gang affiliation and, therefore, this exchange was in compliance with the circuit court's ruling on Calderon's motion *in limine*.

¶35 As to testimony suggesting Calderon's prior contacts with the police, the following exchange occurred at trial between the State and Officer Brock:

> Q: And how did you first learn of this alleged threat?
>
> A: We had actually, myself and my partner, actually heard the call come across the radio and while the dispatcher was giving out some of the info she had mentioned a nickname of a person that we are familiar and have dealt with in the past so we decided to go along with the original investigating squad and give them a hand.

¶36 This testimony contained no details of any previous interaction between Calderon and the police. The mere fact that an officer had seen Calderon before in the community does not automatically mean that Calderon was a nefarious individual. Jurors could have reasonably inferred that Officer Brock's familiarity and dealings with Calderon were a result of S.G.'s statements to Officer Brock shortly before the shooting. Additionally, the jury could also have reasonably inferred that Officer Brock's prior dealings with Calderon were the result of his prior criminal conviction, which was stipulated to prior to trial and made known to the jury. Finally, Calderon's motion *in limine* did not request to exclude any reference to Calderon's past contacts with the police, nor did the circuit court's ruling prohibit such references.

¶37 Accordingly, we conclude that the testimony suggesting Calderon's prior gang affiliation and police contacts did not "so permeate[] the trial as to

create a risk of unfair prejudice or confusion of the issues." *See* ***Long***, 255 Wis. 2d 729, ¶23.

III. Harmless Error

¶38 Calderon argues that these alleged errors are not harmless and he is therefore entitled to a new trial. As a preliminary matter, because we find that the circuit court did not err in admitting the evidence discussed above, we need not address Calderon's harmless error argument. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) (we decide cases on the narrowest grounds possible). Nevertheless, even if the circuit court did err in admitting the other acts evidence, the testimony insinuating that Calderon was a member of a gang, and that he had prior police contacts, we would find these errors harmless.

¶39 An error is harmless unless "the error complained of has affected the substantial rights of the party." WIS. STAT. § 805.18(2). "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698 (citation omitted). "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** (citation omitted). The harmless error inquiry is a question of law that we review *de novo*. ***State v. Magett***, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42.

¶40 Here, it is clear that a rational jury would still have found Calderon guilty absent the alleged errors. We need only look to the totality and strength of the credible evidence in supporting the verdicts to reach that conclusion.

¶41 E.W. testified that Calderon threatened S.G. on the day of the shooting. E.W. further testified that he saw a silver Chevy Blazer drive by his

house twice on the day of the shooting. E.W. testified that seeing this vehicle made him fear that Calderon was going to carry out the threats he made earlier.

¶42 A third party witness testified that she was going to pick up S.G. to stay at the witness's house because S.G. feared for her life. This witness also testified that on the day of the shooting, she observed a man with a hooded sweatshirt discharge a firearm at S.G.'s residence. Furthermore, immediately following the shooting, this witness reported to Officer Tracy that she saw a silver Chevy Blazer with large shiny rims drive by and that she knew this vehicle belonged to Calderon. This witness also informed Officer Tracy that a few moments later she observed an unknown male fire shots at S.G.'s residence.[5]

¶43 Officer Brock testified that he spoke with S.G. shortly before the shooting. Officer Brock testified that during the course of this conversation, S.G. stated that she saw Calderon with a black and silver gun within a month prior to the shooting. Officer Brock further testified that, after the shooting, he showed S.G. pictures of different kinds of guns and that S.G. identified Calderon's gun as a revolver with a bulky cylinder.

¶44 Finally, Officer Todd Weber of the Milwaukee Police Department testified that officers stopped a silver Chevy Blazer shortly after shots were fired at S.G.'s residence. Officer Weber testified that Calderon was the only occupant in the vehicle and that he was wearing a dark hooded sweatshirt. Officer Weber further testified that officers searched the vehicle and found a silver revolver inside the vehicle's fuse panel.

[5] This witness did not testify at trial regarding her observation of the silver Chevy Blazer or her observation of the unknown male firing shots at S.G.'s residence. However, Officer Tracy, who spoke with this witness shortly after the shooting, included this information in his testimony.

¶45 Based on the totality and strength of the credible evidence, we find that even if the circuit court erred in admitting the other acts evidence, the evidence that insinuated Calderon was a member of a gang, and the testimony that he had prior police contacts, these errors would not have "'undermine[d] confidence in the outcome'" of the trial. *See* ***Martindale***, 246 Wis. 2d 67, ¶32 (citation omitted). Accordingly, we conclude that these alleged errors constitute harmless error.

¶46 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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