**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 28, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP641-CR** **Cir. Ct. No. 2013CF244**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM B. PETTY,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Petty appeals a judgment of conviction for possession of a firearm by a felon as a repeater and injury by negligent handling of a dangerous weapon as a repeater in connection with a shooting at an apartment. Petty also appeals the denial of his postconviction motion for a new trial. Petty

argues that the judgment should be vacated and the case should be remanded for a new trial for three reasons: (1) Petty was deprived of his constitutional right to confrontation when the victim testified selectively at trial by invoking the Fifth Amendment privilege against self-incrimination; (2) the circuit court erred in admitting "other acts" evidence of Petty's gun purchase two days before the charged crimes occurred; and (3) the circuit court erred in admitting into evidence an out-of-court identification of Petty by the seller of the gun. We address and reject each of Petty's arguments below. Accordingly, we affirm.

## BACKGROUND

¶2 This case arises from an incident at an apartment rented by A.W. on 11th Street in La Crosse, Wisconsin on March 12, 2013. Petty and M.J. were present at A.W.'s apartment on that day, and while there M.J. sustained a gunshot wound to the neck. Petty was later arrested and charged with one count each of possession of a firearm by a felon in violation of WIS. STAT. § 941.29(2) (2013-14)[1] and causing injury by negligent handling of a dangerous weapon in violation of WIS. STAT. § 940.24(1).[2] The criminal complaint alleged that "on or about … March 12, 2013, … [Petty] did intentionally possess a firearm after having been convicted of a felony in Wisconsin." The complaint further alleged that "on or about … March 12, 2013, ... [Petty] did cause bodily harm to [M.J.], by the negligent use or handling of a dangerous weapon."

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

[2] Petty was also charged with, but not convicted of, intimidating a witness in violation of WIS. STAT. § 940.43(3).

¶3 The State filed a pretrial motion to admit "other acts" evidence that Petty purchased a gun from Stephen Brown two days before the shooting for the purpose of proving that Petty had the opportunity to commit the crime of injury by negligent handling of a dangerous weapon and the crime of felon in possession of a firearm. The State alleged that the "description of one of the firearms sold by Stephen Brown to William Petty is similar to one of the firearms [A.W.] observed Petty wielding just before [M.J.] was shot on March 12, 2013."

¶4 Petty also filed a pretrial motion to suppress an out-of-court identification of Petty by Brown on the basis that the photo array was impermissibly suggestive.

¶5 The circuit court held a hearing on both motions. The court granted the State's motion to admit Brown's testimony as to the prior gun purchase by Petty, and denied Petty's motion to suppress Brown's out-of-court identification.

¶6 During direct examination on the first day of trial, M.J. invoked his Fifth Amendment privilege against self-incrimination. Petty then cross-examined M.J. At the beginning of the second day of trial, Petty moved for a mistrial on the basis that he could not effectively cross-examine M.J. The circuit court denied the motion and allowed Petty to call M.J. as his witness during the second day of trial for additional questioning.

¶7 The jury found Petty guilty of possession of a firearm by a felon as a repeater and of injury by negligent handling of a dangerous weapon as a repeater, and judgment was entered accordingly. Petty filed a postconviction motion for a

new trial. The circuit court denied the motion.[3] Petty appeals that order denying the motion as well as the judgment.

## DISCUSSION

¶8 On appeal, Petty argues that the judgment should be vacated and the case should be remanded for a new trial for three reasons: (1) Petty was deprived of his constitutional right to confrontation when M.J. testified selectively by invoking the Fifth Amendment privilege; (2) the circuit court erred in admitting "other acts" evidence of Petty's gun purchase from Brown two days before the charged crimes occurred; and (3) the circuit court erred in admitting into evidence an out-of-court identification of Petty by Brown. We address and reject each of Petty's arguments below.

### *A. Calling Witness Who Invokes Privilege Against Self-Incrimination*

¶9 Petty argues that he should be granted a new trial because he was deprived of his constitutional right to confrontation with respect to M.J. More specifically, Petty argues that the circuit court erred in allowing M.J. "to testify selectively, while invoking [the Fifth Amendment] privilege to matters going to his credibility" and in "not granting a mistrial after the State improperly put [M.J.] on the stand knowing he would invoke his Fifth Amendment privilege selectively." As we proceed to explain, we conclude that the circuit court did not err with respect to M.J.'s testimony, because Petty had the opportunity to effectively cross-examine M.J.

[3] Petty also requested resentencing on the basis of inaccurate information at the sentencing hearing. The circuit court denied that request, and Petty does not appeal.

¶10 "Generally the decision to admit or exclude evidence is within the circuit court's discretion. However, this discretion may not be exercised until the court has accommodated the defendant's right of confrontation. Whether the limitation of cross-examination violates the defendant's right of confrontation is a question of law that we review de novo." ***State v. Barreau***, 2002 WI App 198, ¶48, 257 Wis. 2d 203, 651 N.W.2d 12 (citations omitted).

¶11 The Confrontation Clause of the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee the right of an accused "the opportunity of cross-examination." *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 678 (1986); ***Barreau***, 257 Wis. 2d 203, ¶47. However, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." ***State v. Heft***, 185 Wis. 2d 288, 303, 517 N.W.2d 494 (1994) (quoted source omitted). "Even where the defendant's right of confrontation may be implicated, a witness cannot be compelled to waive his or her privilege against self-incrimination." ***Barreau***, 257 Wis. 2d 203, ¶51. "No error is committed merely by calling a witness who will claim the [Fifth Amendment] privilege. What is forbidden is the conscious and flagrant attempt to build a case out of inferences arising from use of the testimonial privilege." ***West v. State***, 74 Wis. 2d 390, 401, 246 N.W.2d 675 (1976) (citation omitted).

¶12 "[W]hen cross-examination is restricted by a witness's invocation of the Fifth Amendment, 'courts must watch vigilantly to ensure that the invocation did not effectively emasculate the right of cross-examination itself.'" ***Barreau***, 257 Wis. 2d 203, ¶52 (quoted source omitted). "[W]hen the privilege prevents a defendant 'from directly assailing the truth of the witness' testimony,' it may be necessary in some cases to prohibit that witness from testifying or to strike

portions of the testimony if the witness has already testified." ***Id.*** (quoted source omitted). "But this does not mean a defendant's right of confrontation is denied in each instance that potentially relevant evidence is excluded." ***Id.***, ¶53. "When the record shows that the witness's credibility was adequately tested, the defendant's right of confrontation has not been violated." ***Id.***

¶13 Petty fails to convince us that M.J.'s invocation of his Fifth Amendment privilege denied Petty's right of cross-examination. Here, M.J. testified during direct examination on the first day of trial that he was shot in the back of the neck on March 12, 2013 at A.W.'s apartment on 11th Street in La Crosse. He testified that he spoke to the police after the shooting and, at that time, told the police something different—that he was shot somewhere on 5th Street. When the prosecutor pursued what appeared to be M.J.'s false statements to the police by asking M.J. how he had described that incident to the officers, M.J. invoked his Fifth Amendment privilege and refused to answer. M.J. refused to answer any additional questions about what he *told the police officers* about the shooting. Petty cross-examined M.J. that same day and was allowed to call M.J. as a defense witness the following day. At no time did M.J. again invoke his Fifth Amendment privilege.

¶14 Petty's argument is poorly developed, but he seems to contend that M.J.'s invocation of his Fifth Amendment privilege with respect to what M.J. told the police somehow prevented Petty from questioning M.J. about M.J.'s rejection of a plea agreement. According to Petty, "[M.J.] was offered a reduction in his felony bailjumping case on the condition that he cooperate with the State in its case against Petty, and ... [M.J.] had not taken advantage of this offer by not agreeing to name Petty as the shooter." Petty seems to suggest that his inability to explore this topic prevented him from presenting evidence suggesting that M.J.

refused the plea agreement offer because M.J. did not know the identity of the shooter. Regardless what benefit Petty thinks he could have derived from this line of questioning, the flaw in his argument is that M.J.'s invocation of his Fifth Amendment privilege did not prevent Petty from pursuing this topic.

¶15 As we have explained, M.J. did not invoke his Fifth Amendment privilege while being questioned by Petty. We acknowledge that, at one point, Petty asked M.J. about the plea agreement and the prosecutor objected, and that objection was sustained. But the circuit court later reversed course and informed Petty that he could ask M.J. about the plea offer.

¶16 Petty might mean to suggest that he could not effectively question M.J. about M.J.'s rejection of the plea agreement without also asking about the topic M.J. did not want to talk about, that is, the facts underlying the charges M.J. was facing, which apparently involved statements M.J. made to the police. However, there was no need to question M.J. about the factual basis for the charges he was facing. Rather, to the extent the plea agreement rejection had possible value to Petty, it was simply the inference that M.J. rejected the benefit of the agreement because M.J. was unwilling to name Petty as the shooter.

¶17 Thus, Petty fails to demonstrate that M.J.'s invocation of his Fifth Amendment privilege against self-incrimination had any effect on Petty's ability to effectively cross-examine M.J.

¶18 Petty also seems to suggest that M.J.'s invocation of his Fifth Amendment privilege in the presence of the jury was error in and of itself and warrants a mistrial. Petty asserts that "[b]ecause of [M.J.'s] invocation of privilege [before the jury], the State was able to present a victim but prevent any questioning on what that victim saw or remembered about the night in question."

As we noted above, "[n]o error is committed merely by calling a witness who will claim the [Fifth Amendment] privilege. What is forbidden is the conscious and flagrant attempt to build a case out of inferences arising from use of the testimonial privilege." ***West***, 74 Wis. 2d at 401 (citation omitted). Thus, the fact that M.J. invoked his Fifth Amendment privilege in the presence of the jury is not error in and of itself, and is error only if the State consciously and flagrantly attempted to build a case out of inferences arising from use of the Fifth Amendment privilege.

¶19 Petty fails to persuade us that that happened here. Our review of the record shows that M.J. invoked his Fifth Amendment privilege only as to incriminating questions about what he had *told the police officers* the night of the shooting. Contrary to Petty's assertion, Petty had the opportunity to cross-examine M.J. about what he *saw or remembered* from the night of the shooting, and Petty chose not to do so. As the circuit court noted in its decision on the postconviction motion, "[a]ny limitation on [Petty's] ability to cross-examine [M.J.] was essentially self-imposed." We agree with the circuit court. Indeed, after the circuit court denied the mistrial motion, Petty then recalled M.J. as a defense witness, and M.J. did not invoke his Fifth Amendment privilege again. We see no conscious and flagrant attempt by the State to build a case out of inferences arising from use of the Fifth Amendment privilege that would require declaring a mistrial.

¶20 In sum, we conclude that Petty's right to confrontation was not violated with respect to M.J., and therefore, the circuit court did not err in denying Petty's motion for a mistrial and Petty is not entitled to a new trial on that basis.

*B. Other Acts Evidence of Prior Gun Purchase From Brown*

¶21 Petty argues that the circuit court erred in admitting Brown's testimony regarding Petty's gun purchase two days prior to the shooting because, according to Petty, that evidence constituted inadmissible other acts evidence. "The applicable standard for reviewing a circuit court's admission of other-acts evidence is whether the court exercised appropriate discretion." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. "An appellate court will sustain an evidentiary ruling if it finds that 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." ***Id.*** As we proceed to explain, we conclude that the circuit court did not erroneously exercise its discretion in admitting Brown's testimony.[4]

¶22 Under WIS. STAT. § 904.04(2)(a):

> [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. This subsection 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.

(Emphasis added.)

[4] The State argues in its brief, as it did in the circuit court, that the evidence was admissible as direct evidence. Because we conclude that this evidence was admissible under the admissibility test for other acts evidence, we do not address the issue of whether this evidence could also have been admissible as direct evidence. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶23 In ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), our supreme court established a three-prong test for determining the admissibility of other acts evidence:

> (1) Is the other acts evidence offered for an *acceptable purpose* under [WIS. STAT. § 904.04(2)], such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence *relevant*, considering the two facets of relevance set forth in [WIS. STAT. § 904.01]? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the *probative value* of the other acts evidence 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?

(Emphasis added and footnote omitted.)

¶24 "The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." ***State v. Hurley***, 2015 WI 35, ¶58, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted).

¶25 With these principles in mind, we turn now to whether the circuit court erroneously exercised its discretion in admitting Brown's testimony that Petty purchased guns from Brown two days before the shooting.

*1. Acceptable Purpose*

¶26 As stated above, the first prong of the admissibility test is whether the State offered the other acts evidence—Petty's gun purchase two days before the alleged shooting—for an acceptable purpose. We conclude that it did for at least the charge of possession of a firearm by a felon.

¶27 "Identifying a proper purpose for other-acts evidence is not difficult and is largely meant to develop the framework for the relevancy examination." ***Hurley***, 361 Wis. 2d 529, ¶62. "The proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct." ***Id.*** (quoted source omitted). "As long as one permissible purpose for the other-acts evidence exists, the first prong of the ***Sullivan*** analysis is met." ***Id.***

¶28 The crime of possession of a firearm by a felon has two elements: (1) a prior felony conviction and (2) the possession of a firearm. *See* WIS. STAT. § 941.29; ***State v. Black***, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363. The parties do not dispute that Petty had a prior felony conviction. Thus, the only issue tried was whether Petty possessed a firearm on March 12, 2013. "Possession under Wisconsin law requires that the defendant 'knowingly had actual physical control of a firearm.'" ***State v. Henning***, 2013 WI App 15, ¶11, 346 Wis. 2d 246, 828 N.W.2d 235 (quoted sources omitted). "'Knowingly' means conscious possession." ***Id.***

¶29 The State argues, as it did in the circuit court, that Petty's prior gun purchase was offered for the acceptable purpose of showing Petty's opportunity to commit the charged crime because Petty obtained access to a firearm.[5] Petty counters that "it [was] more likely that the evidence would be used as propensity evidence by suggesting that because Petty is the type of person to illegally purchase and/or possess a firearm on one day, he is more likely to have been the one to possess the firearm that went off during the party [at A.W.'s apartment] on March 12, 2013."

¶30 However, the likelihood of prejudice to Petty does not alter our analysis of the first prong of the admissibility test. The first prong merely requires that the State identify an acceptable purpose for the evidence of a prior gun purchase. We conclude that the State satisfied the first prong of the admissibility test because under the ***Sullivan*** standard, whether Petty had the opportunity to commit the crime of possession of a firearm by a felon was an acceptable purpose. We now move on to the related second prong—whether the other-acts evidence was relevant.

*2. Relevance*

¶31 As we noted above, "[t]he first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in

[5] The circuit court appears to have admitted this evidence for the purpose of showing intent rather than opportunity. "[A] reviewing court may consider acceptable purposes for the admission of other-acts evidence other than that contemplated by the circuit court." ***State v. Hurley***, 2015 WI 35, ¶70, 361 Wis. 2d 529, 861 N.W.2d 174. In this opinion, we consider the State's offered purpose of opportunity, as that purpose was argued by the State in the circuit court and on appeal.

assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Sullivan***, 216 Wis. 2d at 772.

¶32 The State argues that the prior gun purchase was relevant because the "prior purchase of firearms days before the charged offense makes the proposition that [Petty] possessed a firearm on March 12 more probable." Petty argues that it was not relevant, because "[w]hether Petty possessed a firearm on any previous date is of no consequence to whether he had actual physical control of a firearm on the evening of March 12, 2013." We disagree.

¶33 Contrary to Petty's contention, the gun purchase two days prior to the shooting was relevant because it related to a proposition that was of consequence to the determination of the action, namely, whether Petty was in possession of a firearm on March 12, 2013. Petty ignores the State's argued inference that his prior gun purchase provided an opportunity for Petty to possess a firearm on the evening of March 12, 2013. Because evidence of the prior gun purchase made the proposition that Petty was in possession of a firearm on March 12, 2013 more probable, that evidence was relevant and satisfied the second prong of the admissibility test. We now move on to the third and final prong—whether the probative value was substantially outweighed by unfair prejudice to Petty.

*3. Unfair Prejudice to Petty*

¶34 In evaluating the third prong to the admissibility test, the burden shifts to Petty to show that the probative value of the prior gun purchase evidence was substantially outweighed by unfair prejudice to Petty. *See* ***Hurley***, 361

Wis. 2d 529, ¶58. Petty argues that the prior gun purchase evidence was "only presented to shock the sensibilities of the jury so as to prejudice the jury against [the] defendant." Petty further argues that allowing the evidence "opened the door for the jury to improperly base its decision on a prior alleged bad act of Petty for which he was never charged, potentially encouraging the jury to find him guilty in the present case to punish him for a previous act that had gone unpunished." As we proceed to explain, Petty fails to persuade us that the probative value was substantially outweighed by unfair prejudice to Petty where, here, testimony that showed Petty's opportunity to possess a gun was highly relevant and the circuit court took steps to limit any prejudice to Petty.

¶35 "Prejudice is not based on simple harm to the opposing party's case, but rather, 'whether the evidence tends to influence the outcome of the case by improper means.'" ***Hurley***, 361 Wis. 2d 529, ¶87 (quoted source omitted). "To limit the possibility that the jury will convict based on 'improper means' circuit courts may provide limiting instructions, give cautionary instructions, edit the evidence, or restrict a party's arguments." ***Id.***, ¶89. "Limiting instructions substantially mitigate any unfair prejudicial effect." ***Id.*** "A reviewing court 'presume[s] that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence.'" ***Id.***, ¶90 (quoted source omitted).

¶36 Here, the circuit court concluded that allowing Brown's testimony as to the prior gun purchase would not cause undue prejudice to Petty and the court took additional steps to minimize any prejudice. For example, the court excluded certain prejudicial testimony, such as that the gun purchased by Petty was a stolen weapon. The court also limited the nature of the testimony as to the meeting

between Petty and Brown. The court held that what was relevant as to this charge was "the fact that the gun went from Mr. Brown to Mr. Petty" and limited Brown's testimony to that fact.

¶37 The circuit court also provided limiting instructions to the jury as follows:

> Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.
>
> Specifically, evidence has been presented that the defendant came into possession of a gun or guns prior to the charged conduct. If you find that this conduct did occur, you should consider it only on the issue of opportunity to possess a gun on or about March 12, of 2013.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.
>
> The evidence was received on the issue of opportunity, that is, whether the defendant had the opportunity to commit the offense charged.
>
> You may consider this evidence only for the purpose I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

The above limiting instructions substantially mitigated any unfair prejudicial effect to Petty in admitting Brown's testimony as to Petty's prior gun purchase.

¶38 In sum, evidence of Petty's prior gun purchase was admissible for a proper purpose and was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice. Therefore, the circuit court did not

erroneously exercise its discretion in admitting Brown's testimony as to Petty's prior gun purchase.

### *C. Out-of-Court Identification of Petty*

¶39 Petty argues that the circuit court erred in admitting an out-of-court identification of Petty by Brown because that identification was impermissibly suggestive. More specifically, Petty contends that the photo array used in the identification was impermissibly suggestive because Brown knew two of the individuals in the photo array besides Petty.[6] However, Petty does not explain how the fact that Brown knew the first two individuals impermissibly suggested to Brown that he should identify the man in the third photograph as Petty. The parties did not dispute that Brown was presented an array of six photographs in sequence, that Brown knew the individuals in the first and second photographs, and that Brown did not know how many photographs were in the array when he identified Petty in the third photograph. Given these facts, we cannot conclude that the out-of-court identification was impermissibly suggestive, and Petty's argument to the contrary is undeveloped. Therefore, we reject Petty's argument that the circuit court erred in denying Petty's motion to suppress the out-of-court identification.

## CONCLUSION

¶40 For the reasons set forth above, we conclude that: (1) Petty was not deprived of his constitutional right to confrontation when the victim testified

[6] In his brief, Petty seems to suggest that Brown "knew" more than two of the individuals in the photographs. However, our review of the record that was before the circuit court at the time of the motion hearing indicates that Brown knew only two of the individuals.

selectively at trial by invoking the Fifth Amendment privilege against self-incrimination; (2) the circuit court did not err in admitting "other acts" evidence of Petty's gun purchase two days before the charged crimes occurred; and (3) the circuit court did not err in admitting into evidence an out-of-court identification of Petty by the seller of the gun. Therefore, we affirm the judgment and order denying postconviction relief.

*By the Court.*—Judgment and order affirmed.

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