COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP165-CR **Cir. Ct. No. 2015CM204**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES A. PAGE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Charles A. Page appeals judgments of conviction for shining of deer, contrary to WIS. STAT. § 29.314(3)(a), and resisting a conservation warden, contrary to WIS. STAT. § 29.951. Page contends that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

circuit court erroneously exercised its discretion when it excluded at trial certain testimony by Page on the basis that the testimony was inadmissible other acts evidence and when the court excluded proposed testimony by a defense witness on the basis that counsel did not timely file a motion to admit that testimony. Page also contends that the judge at trial went beyond the role of a neutral magistrate when the judge directly questioned Page and thereby advocated for Page's conviction. I affirm for the reasons discussed below.

BACKGROUND

¶2 In September 2015, Conservation Warden Adam Hanna observed Page point a crossbow, which was equipped with a white light, infrared lights and a night vision scope, from the window of Page's vehicle toward three deer and, illuminate the deer with a light. Hanna testified at trial that when he questioned Page, Page initially denied shining a light on the deer, but later admitted that he had done so. Hanna also testified that Page gave him multiple explanations for what he was doing. Initially, Page told Hanna that he was "going to his grandpa's." Page then changed his story and said that he was out looking for poachers after having received a call from his grandpa, who Page at first said was "Arthur Rupnow" but later said was "Melvin Rupnow,"[2] and that there were poachers in the area. Hanna testified that Page also told him that Page had seen poachers earlier and that he was trying to find them.

¶3 Page was ultimately charged with shining deer while in possession of a crossbow and obstruction of a conservation warden. In pretrial proceedings,

[2] Melvin Rupnow testified at trial that Page is not his grandson.

the circuit court ruled that all motions must be filed "by July 1 [2016] or they are barred." Page's trial was held on August 31, 2016. Before the trial began, the court ruled upon several preliminary matters. At that time, Page's trial counsel advised the court that she wanted to question Fairchild Police Chief John Anderson about whether Page had "reported poaching activity to him in the month of September." Counsel stated that this testimony "might be construed as … other act[s]" evidence, necessitating the court's permission for admission at trial, and counsel acknowledged that he had not moved the court to introduce any such other acts evidence before the deadline set by the court.

¶4 After considerable argument, the court ruled that the testimony of Chief Anderson was other acts evidence and that the evidence would not be allowed because notice of the evidence had not been given within the deadline imposed by the court before trial.[3]

¶5 During the course of the trial, the circuit court and Page's counsel discussed other acts evidence at several times with respect to Page's testimony about the events of the evening. None of those discussions resulted in a direct evidence ruling by the court.

¶6 At the conclusion of the re-cross-examination of Page, the following exchange took place between the trial judge and Page:

> BY THE COURT:
>
> Q I want to clarify something about operation of your—you said it is a night vision scope that you were using, correct?
>
> A Yes.

[3] At the final pretrial on May 5, 2016, the court said: "All right. If there [are] any remaining motions that anybody comes up with, file them by July 1 or they are barred."

> Q And you said it needs light to be able to operate, at least some, correct?
>
> A Correct.
>
> Q Not too much, correct?
>
> A Correct.
>
> Q And so you used, in essence, what's a flashlight mounted on the brim of your cap to shine out on the field to illuminate things enough for your night vision scope?
>
> A Yes.
>
> Q Let me finish. To see what was out there. Is that correct?
>
> A To see the specific area I wanted to look at, yes.
>
> Q So to see what's out there, whatever is in that area, the light from your hat is going to provide enough light on whatever is out there for your night vision scope to then see what's there. Is that how you are saying it works?
>
> A That's how it works, yes.
>
> Q Whatever is there, deer, people, rocks?
>
> A Yes.
>
> Q Trees?
>
> A Yes.
>
> Q Boulders?
>
> A Yes.
>
> Q Okay. So the night vision scope needs some light. You said there wasn't enough light from the moon; and therefore, you had to use a light from your hat to make it work. And that light from the hat has to shine on something out there, whatever it is?
>
> A In that direction.
>
> Q In that direction to reflect back, and the night vision scope amplifies it?
>
> A Correct.

The jury found Page guilty on both charged counts, and a judgment of conviction was entered by the court. Page appeals.

DISCUSSION

¶7 Page raises three issues on appeal. Page claims that the court erred when it classified two testimonial statements as "other acts" evidence. Page further claims that the court erred when it excluded evidence because Page had not introduced a motion for admission of one of the "other acts" testimony prior to the time limit for bringing such motions. Finally, Page claims that the court exceeded its role as a neutral magistrate by questioning Page at the conclusion of his testimony. For the reasons set forth below, I affirm.

A. Other Acts Evidence

¶8 Page argues that the court erred by determining that evidence which he sought to introduce at trial was "other acts" evidence and not admissible. Under WIS. STAT. § 904.04(2), "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." However, evidence of other acts may be admitted if: (1) there is an acceptable purpose under § 904.04(2) for doing so, "such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," (2) the evidence is relevant; and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1996).

¶9 The admission of evidence is addressed to the court's discretion. We review the evidentiary rulings of a circuit court to determine whether the court exercised its discretion in accordance with accepted legal standards and the facts of record. ***State v. Doerr***, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). Because the admission or exclusion of evidence is a discretionary decision, we will not overturn the circuit court's ruling absent an erroneous exercise of

discretion. ***Id.*** The question of whether evidence constitutes "other acts" evidence is a question of law, which this court reviews de novo. *See* ***State v. Bauer,*** 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N. W. 2d 902.

1. Chief of Police Anderson

¶10 Prior to trial, Page sought to call Chief of Police Anderson to testify that just days before the incident for which he was charged, Page had called Anderson to report poachers in the same area. The circuit court excluded the evidence as not being the subject of a timely motion, in effect treating the evidence as "other acts" evidence, since otherwise no motion would have been required. Page contends that the testimony of Chief Anderson was not other acts evidence because the evidence was not offered for the purpose of showing that Page "acted in conformity therewith." Page argues that the evidence instead adds credibility to his claim that his purpose on the night of the incident for which he was charged was not poaching but to investigate suspected poaching so that he could report any suspected poaching to the police, as he had done previously. Page's argument fails for two reasons.

¶11 First, Page argues that the point of the evidence was to show Page's motive, which is an exception to the prohibition on using other acts evidence. *See* WIS. STAT. § 904.04(2). Arguing that the evidence falls within an exception to the prohibition on using other acts evidence is to concede that the evidence is subject to the general prohibition, or there is no point to the argument.

¶12 Second, there can be no real doubt that the proposed evidence is offered to show that Page acted in conformity with his prior actions. That is the whole point. Page wanted to offer Chief of Police Anderson's testimony as evidence that he was doing exactly what he had previously done, which was to

turn in a poacher. Page's counsel conceded as much when she argued to the court: "[Page] has a history of investigating or turning in or making reports of poachers. Jury could infer that he was doing—he was out there doing the same kind of thing that night." That is other acts evidence. *See* ***id.***

¶13 Therefore, irrespective of whether or not the evidence would be admissible under the statute, it is other acts evidence.

¶14 Page also argues that even if the evidence was other acts evidence, the circuit court erroneously exercised its discretion when it denied her motion to admit the evidence because the motion was not made within the timeframe set by the court. Upon ruling that Chief Anderson's purported testimony is other acts evidence, the circuit court excluded the testimony because timely notice had not been given. The pretrial order setting time limits does not refer to admission of other acts evidence, however, Page does not dispute that it did, nor, as a practical matter, could he. While there is no general rule requiring a court to impose a pretrial notice limit for introduction of other acts evidence, the parties themselves had no doubt that the court's pretrial order included required notice of other acts evidence. For one thing, Page himself moved the court to exclude the State's other acts evidence for lack of notice. Furthermore, Page's trial counsel conceded to the circuit court that the notice requirement was not met.

¶15 Under WIS. STAT. § 971.23(2m)(a) and (am), a defendant is required to provide the district attorney with a list of witnesses that the defendant intends to call at trial, along with any statements of that witness, within a reasonable time before trial. Page's list of witnesses is not part of the record before this court. However, Page's trial counsel conceded that Page's witness list was untimely, and it is a reasonable inference from the statement of counsel above that although the

list included the name of Chief of Police Anderson, the list did not indicate that Chief Anderson would offer other acts evidence.[4] Under § 971.23(7m)(a), the court shall exclude any witness not timely listed.

¶16 Page argues that even though timely notice of Chief Anderson's testimony was not provided, the circuit court needed to undertake a ***Sullivan***[5] analysis before excluding the evidence. The State argues in response that the court did so. Because it is not essential to the resolution of this issue, I will assume without deciding that the court did not undertake a ***Sullivan*** analysis.

¶17 This court may reverse a circuit court's decision on the admissibility of other acts evidence only where the court has erroneously exercised its discretion. *See* ***State v. Jones***, 151 Wis. 2d 488, 492-493, 444 N.W.2d 760 (Ct. App. 1989). The circuit court explained its reasons for excluding the evidence as follows:

> It is not timely. It is denied. And while that may create an issue for appeal and ineffective assistance of counsel, sometimes one has to draw those lines in the sand to make sure people remain effective and do the things they need to do.
>
> In any event, in looking at it, the reason the court has this difficulty is that it starts asking questions, how and why is this the same? It doesn't have any paperwork to evaluate, any outline of what's transpired to compare events, to compare circumstances, to compare the details of

[4] "I had submitted a list of potential witnesses to Attorney Stumbris. I don't know when I submitted it, but it was after the deadline for filing the motions."

[5] ***State v. Sullivan,*** 216 Wis. 2d 768, 576 N. W. 2d 30 (1998). Under ***Sullivan,*** in determining whether other acts evidence is admissible, the court considers: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2), then (2) whether the evidence is relevant, and finally (3) whether the probative value of the evidence is outweighed by the danger of unfair prejudice. ***Id.*** at 772. Page twice referred to the ***Sullivan*** analysis in his brief-in-chief, but provides no citation contrary to WIS. STAT. RULE 809.15(1)(e).

> what happened on one particular occasion to another. *So its hands are tied in trying to evaluate that and apply the appropriate analysis.* And while it is unfortunate that it may raise issues, I think that's the situation we are in. And I don't like being put between a rock and a hard place when issues are raised at the last minute when they should be known and anticipated. And the rock is ineffective assistance of counsel. And the hard place is the timelines and people not following them. (Emphasis added.)

As the record shows, the court based its exercise of discretion not on the untimeliness alone, but on the particular problems which that untimeliness imposed upon the court in being able to exercise its discretion. The court was unable to apply the ***Sullivan*** analysis because the untimeliness deprived the court of the information that the court needed to apply that analysis. I conclude that the court's reasons for excluding Chief Anderson's other acts testimony was an appropriate exercise of discretion.

2. Page's Testimony

¶18 Page testified in his own defense. During direct examination, Page testified as follows:

> Q Okay. So you said that you grabbed this bow after you got the call-in. And then what did you do?
>
> [Page] I drove out there to identify what was going on.
>
> Q What happened when you got there?
>
> [Page] When I got there, there was this truck that was parked very suspiciously. And in that specific area, we have actually witnessed where somebody down the road is gutting out a deer. And after it gets gutted out, he uses a walkie-talkie to call the truck who is with their partner, come, throw the animal in the truck, and they drive off. And that's exactly what I thought that I had just run into.
>
> THE COURT: Can we take a break for a moment? Take the jurors out, please. (Jury excused at 1:18 p.m.)

¶19 While the jury was out of the courtroom, the circuit court heard argument from Page that he was not testifying as to "other acts" evidence. The

court reiterated its belief that this was other acts evidence, but left it to the State to object. The State did not object and the evidence was not excluded nor the jury instructed. However, before calling the jury back in, the court stated: "Tread carefully. I guess I don't want to turn this into a trial within a trial on what happened on ten different days."

¶20 First, the court did not rule on the admissibility of the testimony in question, and as a result, there is no ruling from which to be aggrieved. Whether or not the circuit court was correct in its opinion that the testimony was "other acts" evidence, it made no evidentiary ruling on that basis. *See, e.g.*, ***Stephenson v. Wilson***, 50 Wis. 95, 101, 6 N.W. 240 (1880). ("The question is an interesting one, but there does not seem to have been any ruling upon it in the court below, therefore we do not feel called upon to decide it.")

¶21 Page infers that the court's final comment "[t]read carefully" was chilling and limited Page's ability to offer similar or related evidence thereafter. However, Page made no offer of proof nor made any other attempt to testify as to past actions regarding poachers and, as Page himself admits, this is pure speculation. Accordingly, I reject this argument.

B. The Circuit Court's Questioning of Page

¶22 Page contends he was prejudiced by the circuit court's questioning of him at the conclusion of his testimony.

¶23 As set forth above in ¶6, the circuit court asked Page a brief series of questions. Page argues the questions were too great an intrusion into the trial and prejudiced Page. I disagree.

¶24 The judge in a trial is specifically authorized, in broad terms, to question witnesses by WIS. STAT. § 906.14(2), which provides in its entirety that "The judge may interrogate witnesses, whether called by the judge or by a party." However, when a judge does so, the judge "must be careful not to function as a partisan or advocate." ***Schultz v. State,*** 82 Wis. 2d 737, 741, 264 N.W.2d 245 (1978). As explained in ***Schultz***:

> There is a fine line which divides a judge's proper interrogation of witnesses and interrogation which may appear to a jury as partisanship. A trial judge must be sensitive to this fine line. However, the trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state. A judge does have some obligation to see to it that justice is done but must do so carefully and in an impartial manner."

Id.

¶25 Here, the judge asked a limited number of questions designed to clarify a single aspect of the evidence, which was how the low light scope on Page's crossbow worked. This was not, in any manner, addressed to the determinative questions of whether Page shined deer or resisted Warden Hanna, nor to Page's defense that Page was looking for poachers when he was stopped by Hanna. It is exactly the type of explanatory questioning that the statute and ***Schultz*** contemplates. Page has not pointed this court to any reason to believe that the court's questioning resulted in unfair prejudice to Page. Accordingly, I reject this argument.

CONCLUSION

¶26 For the reasons discussed above, I affirm.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.