COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2319-CR **Cir. Ct. No. 2013CF4675**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE BROWNLEE, JR.,

DEFENDANT-APPELLANT.

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

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

¶1 BRASH, J. Willie Brownlee Jr. appeals from a judgment of conviction, entered upon a jury's verdict, for one count of possession of cocaine,

fifteen to forty grams, with intent to deliver, contrary to WIS. STAT. §961.41(1m)(cm)3 (2015-16). [1] He also appeals from the order of the trial court denying his motion for postconviction relief. Brownlee argues that the evidence obtained from his vehicle after a traffic stop should have been suppressed because the police officers did not have probable cause to search the vehicle based on the smell of burnt marijuana, nor did they have consent to perform a search of the vehicle.

¶2 Brownlee also contends that the trial court erred in admitting text messages from Brownlee's cell phone because they were not sufficiently authenticated. Furthermore, Brownlee asserts that the texts relating to drug transactions involving pills and marijuana, as opposed to cocaine transactions that would support the charge against him, were erroneously admitted because they were other acts evidence that was inadmissible. We affirm.

BACKGROUND

¶3 On October 14th, 2013, Milwaukee police officers stopped Brownlee's vehicle after he ran a red light at the intersection of South 11th Street and West Maple Street. The vehicle was a rental car with Michigan plates, and there were two people inside the car: Brownlee, who was driving, and a passenger, Harry Dixson.

¶4 Officer Matthew Tracy and Officer Martin Saavedra conducted the traffic stop. Officer Tracy approached the passenger side of the vehicle while

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Officer Saavedra approached the driver's door. As soon as the officers made contact with the individuals, they both immediately smelled the distinct odor of burnt marijuana coming from inside the car. The police officers also noticed that both Brownlee and Dixson were acting "nervous."

¶5 Based on the odor of marijuana coming from the vehicle, Officer Saavedra asked Brownlee if either he or his passenger had been smoking marijuana. Brownlee said that he had not smoked any marijuana but that earlier he had been around people who had been smoking. Brownlee further stated that there were no other contraband items, such as drugs or weapons, inside the vehicle. Brownlee also told Officer Saavedra that the vehicle was a rental car, which he had picked up earlier that day.

¶6 The officers instructed Brownlee and Dixson to exit the vehicle. After removing Brownlee from the car, Officer Saavedra asked him whether they were going to find anything in the car, to which Brownlee responded in the negative and said that they were "free to look." At trial, Officer Saavedra testified that he believed he had consent from Brownlee to search the car. Officer Tracy testified that he did not personally receive consent from Brownlee, but rather searched the car based on the odor of the burnt marijuana.

¶7 In the glove compartment of the vehicle, Officer Tracy found "a bar-soap shaped piece" of what he believed was crack cocaine. It later tested positive as cocaine, and weighed 27.32 grams. No paraphernalia related to marijuana was found in the car.

¶8 Brownlee was then arrested. An iPhone found in Brownlee's possession was confiscated. A search warrant was obtained for the iPhone, and Officer Tracy examined it before sending it out for analysis. He found that the

number of the iPhone was one digit off from the number that Brownlee provided to the police; Officer Tracy later testified at trial that individuals who get arrested sometimes change their numbers when providing the information to police. Brownlee never denied that the iPhone was his during the traffic stop.

¶9 An outgoing text from the phone included a "selfie" of Brownlee, and an incoming text referred to the receiver as "Willie," Brownlee's first name. Furthermore, the email address associated with the iPhone also contained Brownlee's last name followed by numbers corresponding to his date of birth. Videos of other people were also found on the iPhone, although the videos do not depict who is filming.

¶10 Additionally, text messages were recovered from the iPhone and analyzed by an officer who focuses on narcotics investigations. That officer testified that the contents of some of the text messages related to drug transactions through the use of slang words. For example, one text message sent from the phone asked if the recipient of the text could "drop me a 28 the same way," which a police officer testified is slang for another ounce of a controlled substance in the same manner as it had been obtained previously. There was also a drug-related text exchange with an individual named Ron. The text exchange discussed the availability of sufficient amounts of marijuana and pills and the need for more cocaine. Specifically, the text messages refer to having "zips of loud" and pills but the need for "yam." A "zip" is an ounce of a contraband substance, and "loud" refers to a "potent type of marijuana." "Yam" refers to either cocaine or crack cocaine. Another text from the iPhone to Ron explains that there was only "1.7 or 2 grams" of yam left. In short, the text messages recovered from the iPhone contain information regarding drug transactions for several controlled substances, including cocaine, marijuana, and pills.

¶11 Before trial, Brownlee filed a motion to suppress all evidence seized at the traffic stop, including the cocaine and the iPhone. Brownlee argued that the search and seizure was unlawful because the police officers did not have probable cause to stop the car or to search it. The trial court rejected this argument, stating that the officers had probable cause to stop the car because Brownlee unlawfully drove through a red light. The trial court further stated that the officers had probable cause to search the vehicle based on the smell of marijuana as well as the consent that Officer Saavedra received from Brownlee, which in turn provided collective knowledge for Officer Tracy.

¶12 Brownlee also filed a motion *in limine* seeking to exclude from evidence all of the text messages obtained from the iPhone on the grounds that the messages were not properly authenticated. Specifically, Brownlee argued that there were not sufficient contextual clues to directly identify the iPhone as Brownlee's because the photos and videos found on the phone did not include Brownlee, and further, that the State could not establish who sent or received the text messages. Moreover, Brownlee argued that the text messages were inadmissible because they constituted other acts evidence.

¶13 The trial court rejected both of these arguments. With regard to the authentication of the iPhone, the court determined that there were sufficient contextual clues to ascertain that Brownlee had sent and received the text messages. Additionally, the trial court found that the text messages were not other acts evidence but rather "panoramic evidence"[2] of the two-week period before the

[2] This term was used by the State in making its argument in response to Brownlee's motions. To be clear, we are not adopting this term as a separate category of evidence, but rather understood it to describe the evidence that places the crime in the context of its occurrence.

traffic stop and were being used to demonstrate the element of intent. In fact, the trial court declared that it did not "know how [the State] could tell the story to the jury without" including the text messages and that it would be "error" to exclude that evidence.

¶14 Brownlee was convicted of possession of cocaine with intent to deliver and was sentenced to five years of initial confinement with four years of extended supervision. Brownlee then filed a postconviction motion seeking to vacate the judgment of conviction on grounds that the search was unlawful, the text messages were not properly authenticated, and the trial court relied on inaccurate information. Alternatively, Brownlee sought a new trial on grounds of ineffective assistance of counsel, in the interest of justice, and based on plain error. The trial court denied his motion without a hearing. This appeal follows.

DISCUSSION

1. Challenge to Motion to Suppress

¶15 Brownlee filed a motion to suppress the evidence that was retrieved during the search of his vehicle, which was denied by the trial court. Brownlee is not challenging the basis for the stop of his vehicle, which was the result of Brownlee running a red light. Rather, he challenges the trial court's ruling that upheld the warrantless search of his vehicle made subsequent to the stop, based on the existence of probable cause due to the smell of burnt marijuana coming from the vehicle, and on the voluntary consent by Brownlee to Officer Saavedra. Brownlee argues that there was neither probable cause for the search of the vehicle, nor did he give his consent to the officers to perform the search, and therefore the search was in violation of the Fourth Amendment.

¶16 In our review of a motion to suppress, we apply a two-step standard of review: (1) we first review the trial court's findings of fact, and will uphold them unless they are clearly erroneous; and (2) we then "review the application of constitutional principles to those facts *de novo.*" *See* ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

¶17 "Searches conducted without a warrant are *per se* unreasonable under the Fourth Amendment to the United States Constitution."[3] ***State v. Matejka***, 2001 WI 5, ¶17, 241 Wis. 2d 52, 621 N.W.2d 891 (italics added). However, this presumption of unreasonableness may be overcome in cases where probable cause is established, *see* ***State v. Hughes***, 2000 WI 24, ¶19, 233 Wis. 2d 280, 607 N.W.2d 621, or where voluntary consent is obtained, *see* ***Matejka***, 241 Wis. 2d 52, ¶17.

a. Probable Cause for Search

¶18 In establishing whether there is probable cause for a search, "the proper inquiry is whether evidence of a crime will be found." ***Hughes***, 233 Wis. 2d 280, ¶21. "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Id.*** (citation omitted).

[3] The state constitutional provision regarding search and seizure, WIS. CONST. art. I, § 11, has traditionally been interpreted by Wisconsin courts "in concert" with the United States Supreme Court's interpretation of the Fourth Amendment; thus, Wisconsin's search and seizure law "parallels" that of federal law. ***State v. Secrist***, 224 Wis. 2d 201, 208-09, 589 N.W.2d 387 (1999).

¶19 Our supreme court has previously held that "[t]he unmistakable odor of marijuana coming from an automobile provides probable cause for an officer to believe that the automobile contains evidence of a crime." ***State v. Secrist***, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999). Brownlee attempts to distinguish ***Secrist*** by focusing on the court's statement that the smell of burnt marijuana "may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered." ***Id.*** at 217-18. Brownlee argues that probable cause was not established because the officers could not link the marijuana odor specifically to Brownlee or Dixson, and that Brownlee had told the officers that he had not been smoking but that earlier in the day he had been with people who were smoking.

¶20 However, Brownlee's argument fails to acknowledge the difference in the inquiries for establishing probable cause to search from that of probable cause to arrest. In ***Secrist***, the lawfulness of both a search and an arrest were at issue, but the "primary focus" of the court's analysis was the "lawfulness of the arrest." ***Id.*** at 209. In determining whether there was probable cause to arrest, the proper inquiry "is whether the person to be arrested has committed a crime." ***Id.*** In contrast, the proper inquiry for establishing probable cause for a search, as stated above, is whether there is "a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Hughes***, 233 Wis. 2d 280, ¶21 (citation omitted).

¶21 Here, the smell of marijuana coming from the vehicle was sufficient for the police officers to believe that there was a "fair probability" that there was contraband in the vehicle, which provided the requisite probable cause to search the vehicle. *See* ***id.*** Furthermore, the officers' belief was substantiated in that they

did in fact find contraband in the vehicle, in the form of cocaine located in the glove compartment. Accordingly, the trial court properly denied Brownlee's motion to suppress on the grounds of lack of probable cause.

b. Voluntary Consent for Search

¶22 Brownlee also argues that the evidence surrounding his purported consent to search the vehicle was unclear. Specifically, he points out that only Officer Saavedra heard the alleged consent, and it was uncertain whether his statement was made before or after Officer Tracy began his search.

¶23 Based on Officer Saavedra's testimony, which the trial court found to be credible, it determined that Brownlee had given consent to Officer Saavedra for the search. "'It is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact.'" ***State v. Young***, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736 (citation and bracketing omitted). Moreover, as the "driver of the vehicle," Brownlee "had obvious possessory authority over the vehicle and therefore the capacity to consent to its search." *See* ***Matejka***, 241 Wis. 2d 52, ¶35. We therefore disagree with Brownlee's assessment that this finding was clearly erroneous on the part of the trial court. *See* ***Eason***, 245 Wis. 2d 206, ¶9.

¶24 Accordingly, based on the officers' having established probable cause for the search, as well as Brownlee's consent for the search given to Officer Saavedra, we affirm the trial court's denial of the motion to suppress.

2. Challenges to Admission of Text Messages

¶25 Brownlee next argues that the text messages from his confiscated iPhone were erroneously admitted by the trial court because they were not sufficiently authenticated, and because they constituted inadmissible other acts evidence. To the contrary, the State contends that the texts were properly authenticated through circumstantial evidence, and that they were not other acts evidence but rather "panoramic evidence" of the two-week period prior to Brownlee's arrest.

¶26 "The trial court has 'broad discretion to admit or exclude evidence,' and this court may overturn its decision only if the trial court erroneously exercised its discretion." ***State v. Giacomantonio***, 2016 WI App 62, ¶17, 371 Wis. 2d 452, 885 N.W.2d 394 (citation omitted). Accordingly, we will uphold a trial court's decision to admit evidence if it "correctly applied accepted legal standards to the facts of record and, using a rational process, reached a conclusion that a reasonable judge could reach." ***State v. Jensen***, 2011 WI App 3, ¶75, 331 Wis. 2d 440, 794 N.W.2d 482.

a. Authentication of Text Messages

¶27 Both parties cite this court's decision in ***Giacomantonio*** as the leading case in Wisconsin on the authentication of text messages. In ***Giacomantonio***, this court confirmed that Wisconsin law allows the authentication of electronic correspondence by circumstantial evidence. ***Id.***, 371 Wis. 2d 452, ¶19. Our holding was based primarily on the statutory framework for authentication found in WIS. STAT. §§ 909.01 and 909.015. Section 909.01 states that evidence is properly authenticated, and thus admissible, if there is sufficient evidence "to support a finding that the matter in question is what its proponent

claims." This includes circumstantial evidence, as provided in WIS. STAT. § 909.015(4), which states that evidence involving "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may assist with establishing authentication.

¶28 In this case, there is sufficient circumstantial evidence to authenticate the text messages found on the iPhone confiscated from Brownlee to support the finding that he had sent and received those texts. First, the iPhone was discovered in Brownlee's pocket at the time of his arrest. Furthermore, in providing his personal information upon arrest, Brownlee gave a phone number that differed by only one digit from the phone number of the confiscated iPhone; Officer Tracy testified that individuals placed under arrest often provide inaccurate information. Additionally, the email address associated with the phone contained Brownlee's last name followed by numbers that correlated with Brownlee's birthdate.

¶29 Moreover, the incoming and outgoing text messages also provide further circumstantial evidence to support the inference that the iPhone belongs to Brownlee. *See* ***State v. Baldwin***, 2010 WI App 162, ¶55, 330 Wis. 2d 500, 794 N.W.2d 769 (holding that "telephone calls can be authenticated by circumstantial evidence"). One of the incoming text messages refer to the receiver as "Willie," which is Brownlee's first name. A "selfie" photograph of Brownlee was also sent from the iPhone, which suggests that Brownlee possessed and used the phone to send the picture.

¶30 As a result, the trial court found that the information and content found on the iPhone, "taken in conjunction" with the circumstances in which the iPhone was confiscated from Brownlee—at the time of his arrest for possession of

cocaine—were sufficient to authenticate the iPhone as belonging to or used by Brownlee to send and receive the text messages at issue. *See* WIS. STAT. § 909.015(4). This determination of the trial court was made after it '"examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.'" *See* ***Giacomantonio***, 371 Wis. 2d 452, ¶17 (citation omitted). Therefore, it was not an erroneous exercise of discretion for the trial court to admit the text messages.

3. Admissibility of Text Messages

¶31 Brownlee also argues that the text messages were erroneously admitted because they constitute other acts evidence and, as such, were inadmissible. Brownlee specifically challenges the texts referring to drug transactions involving marijuana and pills, as the charge against him involves the possession and intent to deliver cocaine. The trial court, however, found that those texts did not contain inadmissible other acts evidence, and instead were offered as contextual evidence relating to the two weeks preceding Brownlee's arrest.

¶32 Under WIS. STAT. § 904.04, evidence of other acts to prove character or to prove that an individual acted in conformity with that character is generally inadmissible. However, other acts evidence that is used "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is allowed. WIS. STAT. § 904.04(2)(a). This list of conditions under other acts evidence "is not exclusionary but, rather, illustrative." ***Jensen***, 331 Wis. 2d 440, ¶77. In fact, "[a]ccepted bases for the admissibility of evidence of other acts not listed in the statute arise when such evidence provides background or furnishes part of the context of the crime or case or is necessary to a full presentation of the case." ***Id.***

¶33 Furthermore, this court has previously recognized that "'simply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law.'" ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515 (citation omitted). To that end, evidence is not considered to be other acts evidence "if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." ***Id.***

¶34 Here, the trial court determined that the text messages involving information relating to drug transactions for marijuana and pills were part of the "panorama of evidence" against Brownlee, that is, the context in which the crime occurred, and not other acts evidence. *See* ***id.*** In fact, the trial court noted that it did not see how the State could tell the complete story of the case to the jury without this evidence. We agree with this categorization. The text messages regarding the sale of marijuana and pills, along with the messages relating to the sale of cocaine, were all relevant to one of the elements of the crime with which Brownlee was charged—intent to deliver. *See* WIS. STAT. §961.41(1m)(cm)3. *See also* ***Dukes***, 303 Wis. 2d 208, ¶30.

¶35 Moreover, even if the text messages are construed as other acts evidence, they would be admissible. Our supreme court has established a three-prong test for determining whether other acts evidence is admissible. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). Under this test, the trial court is to consider: "(1) whether the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the

danger of unfair prejudice, confusion of the jury or needless delay." ***Jensen***, 331 Wis. 2d 440, ¶76. The disputed texts here satisfy the ***Sullivan*** test.

¶36 In this case, the permissible purpose of all the texts is, again, proof of Brownlee's intent to sell illegal and controlled substances; thus, the first prong of the ***Sullivan*** test is satisfied. *See* ***id.*** The second prong of the test is satisfied as well, because evidence of Brownlee's intent to sell drugs is relevant to the charge against Brownlee of intent to deliver. *See* ***id.***

¶37 Once the first two prongs of the ***Sullivan*** test are established, "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. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Brownlee does not succeed in overcoming this burden. In the first place, the text messages certainly have a probative value to the extent that they demonstrate Brownlee's propensity to sell illegal and controlled substances.

¶38 As far as being unfairly prejudicial, most evidence presented by the State in a criminal trial is generally prejudicial toward the defendant to some extent, since the State's goal is to secure a conviction. *See* ***Bailey v. State***, 65 Wis. 2d 331, 351-52, 222 N.W.2d 871 (1974). Furthermore, this court has previously acknowledged that:

> [i]n most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect. Thus, the 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).

¶39 Brownlee fails to demonstrate that admitting the text messages influenced the outcome of the case by improper means and was so unfairly prejudicial that the strong probative value of the text messages was outweighed by prejudice. *See* ***id.*** *See also* ***Marinez***, 331 Wis. 2d 568, ¶19. Instead, Brownlee only makes conclusory statements regarding the prejudicial effects of the text messages, overlooking the application of the ***Sullivan*** test. *See* ***Sullivan***, 216 Wis. 2d at 772. Moreover, Brownlee presents no evidence that the admission of the text messages caused confusion on the part of the jury, or a needless delay of the trial. *See* ***Jensen***, 331 Wis. 2d 440, ¶76. Therefore, the text messages were admissible as other acts evidence.

¶40 In sum, whether the basis for the admission of the text messages was as other acts evidence or as part of the "panorama of evidence" demonstrating the context in which the crime was committed, *see* ***Dukes***, 303 Wis. 2d 208, ¶28, it was not an erroneous exercise of discretion on the part of the trial court.

¶41 Lastly, Brownlee argues that he is entitled to a new trial because the error of admitting the text messages into evidence was a miscarriage of justice that resulted in the real controversy not being tried. Because we find that it was not error for the trial court to admit that evidence, we do not address this argument.

By the Court.—Judgment and order affirmed.

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