COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1593-CR **Cir. Ct. No. 2010CF167**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL D. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES O. MILLER and W. ANDREW VOIGT, Judges. *Affirmed.*

Before Sherman, Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Michael Miller was convicted in the Columbia County Circuit Court of one count of delivering marijuana. On appeal, Miller seeks reversal of the judgment of conviction arguing that the circuit court erred by admitting other acts evidence, and that the post-conviction court erred by denying Miller's motion for a new trial based on newly discovered evidence.[1] We reject Miller's arguments and affirm.

BACKGROUND

¶2 The following facts are undisputed. In 2009, the State charged Christine Haukom with violating a restraining order. In exchange for consideration by the district attorney's office on that charge, Haukom agreed to cooperate with law enforcement. Specifically, Haukom provided to law enforcement the names of persons from whom she said that she bought illegal drugs. Michael Miller was one of the names given to law enforcement by Haukom. Haukom also agreed to attempt to buy illegal drugs from Miller as part of her cooperation with law enforcement.

¶3 In August 2009, Haukom, at the behest of the Columbia County Sheriff's Department, contacted Miller for the purpose of buying marijuana. Miller agreed to sell marijuana to Haukom. Miller obtained the marijuana from an "associate" by trading Vicodin tablets for the marijuana, which Miller knew was an illegal act. A few days later, Miller provided the marijuana to Haukom and, in exchange, Haukom gave Miller "buy money" supplied by sheriff's deputies.

[1] The Honorable James O. Miller presided at the trial and sentencing and will be referred to as the "circuit court." The Honorable W. Andrew Voigt decided the post-conviction motion and will be referred to as the "post-conviction court."

¶4 As a result of that sale, in 2010 Miller was charged with one count of delivering marijuana in an amount less than 200 grams. Several months prior to trial, and again immediately before the trial began, Miller informed the State and the circuit court that he intended to raise the defense of entrapment. Miller contended that Haukom, at the State's urging, entrapped him because Haukom: (1) used Miller's romantic interest in Haukom to get Miller to sell the marijuana to her; and (2) pressured Miller to sell marijuana to her.

¶5 To rebut Miller's entrapment defense, and over various objections from Miller, the State introduced "other acts" evidence testimony from Haukom that, in the years 2006 to 2008 (prior to Miller's charged 2009 sale of marijuana to Haukom), Haukom purchased cocaine from Miller in excess of twenty times. Miller testified at trial that he never sold cocaine to Haukom. But, Miller admitted to using both marijuana and cocaine with Haukom before 2009.

¶6 Miller was convicted of the charged offense and filed a post-conviction motion claiming that he was entitled to a new trial based on newly discovered evidence. The post-conviction court denied the motion. Miller appeals.

¶7 Other relevant facts will be mentioned in the discussion of various issues, below.

DISCUSSION

¶8 Miller argues as follows: (1) the other acts evidence was not admissible; (2) Miller's due process rights were violated because the State failed to disclose to him, prior to trial, certain details about the other acts evidence; and (3) a new trial should be granted because of the effect of newly discovered

evidence, specifically evidence that Miller contends would undermine Haukom's credibility on the entrapment issue. We reject each of Miller's arguments.

I. The State's Introduction of Other Acts Evidence.

¶9 We first analyze the admissibility of other acts evidence offered by the State to rebut Miller's defense of entrapment. We conclude that such evidence was properly admitted by the circuit court.

A. Standard of Review.

¶10 We review a circuit court's admission of other acts evidence under an erroneous exercise of discretion standard. ***State v. Marinez***, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. The proper exercise of discretion contemplates that the circuit court explain its reasoning. ***State v. Payano***, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832. Here, the parties agree that the circuit court did not explicitly analyze each required step regarding the admissibility of this other acts evidence. As a result, we are required to independently review the record "to determine whether [the record] provides an appropriate basis for the circuit court's decision." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771.

B. Entrapment.

¶11 Miller conceded at trial that the central controversy was not whether Miller committed the elements of the crime charged but, instead, whether he was entrapped. Our analysis of both the admissibility of the other acts evidence and the newly discovered evidence, below, necessarily involves the defense of entrapment, so we will now briefly summarize aspects of that defense.

¶12 "Entrapment is an affirmative defense which, for public policy considerations, comes into play to exonerate an accused only in circumstances where the accused would otherwise be found guilty because all elements of the crime have been proved beyond a reasonable doubt." ***State v. Saternus***, 127 Wis. 2d 460, 468, 381 N.W.2d 290 (1986). Entrapment is a defense to a charged crime when the "evil intent" and the "criminal design" of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of the government. ***Id.*** at 469 (quoting ***State v. Hochman***, 2 Wis. 410, 418, 86 N.W.2d 46 (1957)). Wisconsin has adopted the subjective "origin of intent" doctrine rather than an objective test. ***Id.*** This subjective test focuses on the reason for the defendant's state of mind which led to the intent to commit the crime; in other words, whether the government conduct affected or changed a particular defendant's state of mind. ***Id.*** at 470.

¶13 When a defendant raises the defense of entrapment, he or she is first required to prove by a preponderance of the evidence that he or she was induced by law enforcement to commit the crime. If the defendant cannot do so, the entrapment defense fails. ***State v. Pence***, 150 Wis. 2d 759, 765, 442 N.W.2d 540 (Ct. App. 1989) (citing ***Saternus***, 127 Wis. 2d at 480-81).

¶14 But, not every inducement by law enforcement leads to a finding of entrapment. "[T]he law permits law enforcement officers to engage in some inducement, encouragement, or solicitation in order to detect criminals." ***State v. Hilleshiem***, 172 Wis. 2d 1, 9, 492 N.W.2d 381 (Ct. App. 1992). As a result, entrapment is only established "if the law enforcement officer used *excessive* incitement, urging, persuasion, or temptation." ***Id.***

¶15 Of significance in the context of drug transactions is that "[m]erely seeking or offering to buy drugs is not the kind of inducement which establishes entrapment." ***State v. Bjerkaas***, 163 Wis. 2d 949, 955, 472 N.W.2d 615 (Ct. App. 1991) (citing ***Hawthorne v. State***, 43 Wis. 2d 82, 90, 168 N.W.2d 85, 89 (1969); WIS JI—CRIMINAL 780, comment at 4 (1986)).

¶16 If the defendant proves by a preponderance of the evidence that the defendant was induced by law enforcement to commit the crime, the State is then required to prove beyond a reasonable doubt that the defendant had a prior disposition to commit the crime. If the State cannot do so, the defendant must be found not guilty. ***Hilleshiem***, 172 Wis. 2d at 8-9.

C. Other Acts Evidence.

¶17 WISCONSIN STAT. § 904.04(2)(a)[2] prohibits admission of evidence of a defendant's other "bad acts" to show that the defendant has a propensity to commit crimes. ***Marinez***, 331 Wis. 2d 568, ¶18. However, other acts evidence that is offered for a purpose other than the propensity of the defendant to commit crimes is admissible if it is relevant to a permissible purpose and it is not unfairly prejudicial. ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998). As a guide for determining whether other acts evidence is admissible under

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. The parties do not contend that the applicable statutes have changed in any pertinent way between the time of the 2010 trial and now.

§ 904.04(2)(a), Wisconsin courts have developed a three-prong analysis. ***Id.*** at 772-73.[3] We now apply each step to the facts.

1. First Prong of ***Sullivan*** *Analysis.*

¶18 The first prong of the ***Sullivan*** analysis concerns whether the other acts evidence was offered for a permissible purpose pursuant to WIS. STAT. § 904.04(2)(a). Here, the parties agree that the first prong has been met because the evidence is offered for a permissible purpose; that is, it tends to undermine Miller's innocent explanation (entrapment) for the charged criminal conduct. *See* ***Payano***, 320 Wis. 2d 348, ¶63 n.12.

2. Second Prong of ***Sullivan*** *Analysis.*

¶19 The second prong in the ***Sullivan*** analysis assesses whether the evidence is relevant as defined by WIS. STAT. § 904.01. ***Payano***, 320 Wis. 2d 348, ¶67. As the proponent of this evidence, the State bears the burden of proving its relevance by a preponderance of the evidence. ***Id.***, ¶68 n.14. We conclude, through our independent analysis of the record, that the State has met its burden to show that the evidence was relevant.

[3] Evidence regarding a defendant's disposition to commit a crime, used to rebut a claim of entrapment, may also be admissible as character evidence under WIS. STAT. § 904.04(1)(a). ***State v. Pence***, 150 Wis. 2d 759, 767, 442 N.W.2d 540 (Ct. App. 1989). However, because the parties analyze this question under the other acts evidence methodology, we do the same. Also, the State makes a very brief argument that, because Miller presented an entrapment argument at trial, the evidence at issue was admissible without regard to the admissibility of other acts evidence. However, the State does not develop the argument based on Wisconsin authority, and we do not consider that contention further. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

¶20 "[F]or evidence to be relevant, the following questions must be answered affirmatively: (1) is the proposition for which the evidence is offered of 'consequence to the determination of the action;' and (2) does the evidence have probative value when offered for that purpose?" ***Id.*** (citing Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence*, §404.6 at 181 (3d. ed. 2008)). The second step here, regarding probative value, is a "common sense determination" based less on legal precedent than life experiences. ***Id.***, ¶70 (quoting Blinka, supra,§ 404.6 at 181). Nearness in time, place and circumstances to the alleged crime may be important to the relevance analysis. ***Id.*** (quoting ***Sullivan***, 216 Wis. 2d at 786). Important to our discussion is that other acts evidence may be used to rebut an allegation of entrapment because the prior acts purport to show that the "criminal design" of the charged offense originated in the mind of the defendant and not in the mind of the government agent. ***Pence***, 150 Wis. 2d at 767.

¶21 The State contends that the other acts evidence is relevant because it rebuts the contention that the "origin of intent" of Miller's acts was conduct by Haukom at the urging of law enforcement rather than his propensity to sell illegal drugs. In response, Miller argues that his sale of cocaine in the years 2006 to 2008 does not shed light on his predisposition to sell marijuana in 2009.

¶22 We conclude that evidence of Miller's earlier sales of cocaine to Haukom was of consequence to a contested issue in the case, entrapment, and that it was probative of, and rebutted, Miller's claim of entrapment. The testimony of Haukom that, in the years immediately before the charged offense, Miller sold cocaine to her over twenty times undermines Miller's allegation that the origin of his intent to sell marijuana to Haukom came from Haukom and not himself. It takes no leap of logic or common experience for a fact finder to conclude that, if

Miller sold one type of illegal drug to Haukom many times in 2006 to 2008, Miller needed no improper or excessive inducement to sell a different illegal drug to her in 2009.

¶23 Miller also argues that the other acts evidence offered by the State was not relevant because the illegal drug sold to Haukom by Miller during the other acts was cocaine, but the illegal drug sold to Haukom by Miller during the charged crime was marijuana. Miller relies on ***State v. Goldsmith***, 122 Wis. 2d 754, 756, 364 N.W.2d 178 (Ct. App. 1985), which held that other acts evidence about a potential sale of cocaine that occurred a month after the charged crime (a sale of marijuana) was inadmissible. We do not find ***Goldsmith*** controlling in this fact situation. ***Goldsmith*** did not create a per se rule that other act drug sales are relevant only if the other act sale and the charged crime concerned the same illegal substance. The holding of ***Goldsmith*** did not turn on the type of illegal drugs sold but, rather, focused on the timing of the other acts as compared to the charged crime. ***Goldsmith***, 122 Wis. 2d at 757. We conclude that the pattern of Miller's conduct, regardless of the illegal drug sold, serves to rebut Miller's claim of entrapment. *See* ***State v. Monsoor***, 56 Wis. 2d 689, 703, 208 N.W.2d 20 (1972).

¶24 Accordingly, the State has satisfied the second prong of the ***Sullivan*** analysis.

3. Third Prong of ***Sullivan*** *Analysis.*

¶25 Under the third prong of the ***Sullivan*** analysis, the burden shifts to Miller to establish that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. ***Marinez***, 331 Wis. 2d 568, ¶41; WIS. STAT. § 904.03. Prejudice, in this context, is not defined by harm to the opposing party's case but, rather, whether the evidence tends to influence the

outcome of the case by "improper means." ***Marinez***, 331 Wis. 2d 568, ¶41 (quoting ***Payano***, 320 Wis. 2d 348, ¶87). "Because the statute provides for exclusion only if the evidence's probative value is *substantially outweighed* by danger of unfair prejudice, '[t]he bias, then, is squarely on the side of admissibility. Close cases should be resolved in favor of admission.'" ***Id.*** (quoting Blinka, supra, §403.1 at 139).

¶26 Although given the opportunity in the circuit court and on appeal, Miller has made no cognizable argument that the evidence about other acts the State elicited from Haukom at trial was unfairly prejudicial. Therefore, we conclude that Miller has failed to meet his burden as to the third prong of the ***Sullivan*** analysis.

¶27 From our independent analysis of the record, we conclude that the circuit court properly admitted the other acts evidence.[4]

II. Due Process.

¶28 Next, Miller contends that his due process rights were violated because the circuit court rejected his request, before trial, that the State provide further details to Miller about the other acts evidence beyond the State's proffer. Miller argues, further, that this failure to disclose caused him prejudice at trial.

¶29 Miller's contention fails because he has not made any cognizable argument as to *how* he was prejudiced by not having further details before trial

[4] Miller also asserts that the circuit court did not have sufficient information to adequately determine whether the other acts evidence was admissible. Because we conclude that the State's other acts evidence was admissible, it necessarily follows that this argument from Miller must fail.

about the prior cocaine sales from Miller to Haukom. Miller does not explain what information he did not have a chance to put into evidence because the State did not disclose this information before trial. Further, he has not explained which other witnesses he would have called, or what any witness would have said to the jury, if only he had this information prior to trial. So, we conclude Miller was not prejudiced by the lack of this information before trial and we reject Miller's due process argument.

III. Newly Discovered Evidence.

¶30 Miller moved in the post-conviction court for a new trial based on newly discovered evidence. Miller contends that the newly discovered evidence undermines Haukom's credibility on the issue of whether Miller was entrapped. Miller's motion for a new trial had three factual bases: (1) Haukom told law enforcement in 2009 that, at the time, Daniel Hawk, another person from whom Haukom purchased drugs at the request of law enforcement, was her main supplier of illegal drugs; (2) a criminal contempt case pending against Haukom was dismissed by the Columbia County District Attorney's Office a few days after Miller's trial ended; and (3) Hawk told law enforcement that Haukom lied about Hawk's drug-related activities. We conclude, as did the post-conviction court, that Miller's motion does not warrant a new trial.

A. Applicable Standards.

¶31 To set aside a judgment of conviction based on newly discovered evidence, such evidence must be sufficient to show that a defendant's conviction was a "manifest injustice." ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. The moving party must show, by clear and convincing evidence, that: (1) the evidence was discovered after the conviction; (2) the defendant was not

negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.*** If a defendant is able to prove all four of those criteria, then it must be determined whether a reasonable probability exists that, had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. ***Id.***, ¶33 (citing ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62). We will reverse the post-conviction court's decision on these issues only if there was an erroneous exercise of discretion. ***Id.***, ¶31.

B. Hawk as the Main Supplier.

¶32 Miller contends that Haukom's credibility was damaged because Haukom told law enforcement that Hawk was her main supplier of illegal drugs starting in February 2009. Miller argues that this contradicts Haukom's statements at trial that she bought cocaine from Miller over twenty times from 2006 to 2008.

¶33 We will assume, without deciding, that this statement from Haukom meets all four criteria for newly discovered evidence. However, the statement does not raise a reasonable doubt as to Miller's guilt because the two statements of Haukom are not inconsistent and do not impugn her credibility. Haukom, by her own account, stopped buying illegal drugs from Miller in 2008. Therefore, in February 2009, she would have had a "main supplier" of illegal drugs that was not Miller.

¶34 Without any inconsistency between the statements, there cannot be any adverse inference about Haukom's credibility and this statement cannot form the basis for a new trial.

C. Contempt Charge Dismissal.

¶35 Next, Miller claims that Haukom's credibility could be further impeached because, after the trial, a criminal contempt charge against her, pending at the time of trial, was dismissed. We agree with the post-conviction court that this information is not newly discovered evidence because it is cumulative.

¶36 The first reason this argument falls flat is that, before Haukom took the stand, the State said in open court that it decided to dismiss the criminal contempt charge against Haukom because Haukom's acts were caused by miscommunication from the district attorney's office to Haukom. As a result, the fact of the post-trial dismissal of the charge against Haukom is not newly discovered evidence because it is cumulative.

¶37 Miller also contends that the State's declaration that it would dismiss the charge is not controlling because Haukom denied whether the contempt charge would be dismissed. But, the record shows otherwise. When asked whether she expected that the charge would be dismissed if she testified at trial, Haukom initially said, "no," but then immediately thereafter, and before the next question, stated, "I'm not sure." She also testified that she did not expect any benefit on that case from her testimony. Haukom's testimony was consistent with the district attorney's statements before Haukom took the stand and what Miller already knew. Haukom's testimony was that it appeared to her that the charges were going to be dismissed but *not* because she would testify, and she could not control what the district attorney would do in the future.

¶38 For those reasons, we agree with the post-conviction court that Miller has not met his burden to show by clear and convincing evidence that the alleged newly discovered evidence is not cumulative.

D. Hawk's Statements.

¶39 Finally, Miller requests a new trial based on the fact that Hawk told law enforcement that Haukom lied to police about Hawk's drug-related activities. We agree with the post-conviction court that, even if this is newly discovered evidence, this statement "doesn't amount to much when taken in context" and there is no reasonable probability that, had the jury heard this evidence, the jury would have had a reasonable doubt about Miller's guilt.

¶40 Miller acknowledges that Hawk said he used illegal drugs with Haukom, but Miller focuses on Hawk's allegations that Haukom lied to police in some respects about: (1) Hawk's sales of illegal drugs to her; and (2) types and amounts of illegal drugs Hawk possessed. The fact that Hawk disagrees to an extent with details Haukom gave to police in the context of Hawk's own conduct (not Miller's conduct) is far afield from the type of "strong" perjury-type evidence required to show that there is a question about a witness's credibility such that a new trial is needed. *See* ***Plude***, 310 Wis. 2d 28, ¶47; *see also* ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1971) (citing ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968)) (The fact that newly discovered evidence has some value in impeaching the credibility of a witness, generally, is "not a basis for a new trial on that ground alone.").

¶41 That conclusion is confirmed because Miller wants to use the statements of Hawk to support his claim of entrapment. However, the record establishes that Miller's entrapment allegations were weak at best and consisted of no more than Miller's testimony that Haukom flirted with him and that Haukom asked him to sell marijuana to her in three phone calls. That testimony did not

meet Miller's burden to establish that Haukom used "*excessive* incitement, urging, persuasion, or temptation." ***Hilleshiem***, 172 Wis. 2d at 9.[5]

¶42 So, we conclude that this newly discovered evidence from Daniel Hawk would not cause a reasonable doubt as to Miller's guilt.

¶43 In summary, we conclude that the post-conviction court properly denied Miller's motion for a new trial based on newly discovered evidence.

CONCLUSION

¶44 For those reasons, we affirm the judgment of conviction of the circuit court and the order of the post-conviction court.

By the Court.—Judgment and order affirmed.

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

[5] Also harming Miller's entrapment defense was his admission that he traded Vicodin for the marijuana he sold to Haukom. This directly rebuts his entrapment defense because it shows his propensity to traffic in illegal drugs.