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May 10, 2022

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You are hereby notified that the Court has entered the following opinion and order:

2020AP782-CR

State of Wisconsin v. Melvin Pride (L.C. # 2013CF5531)

Before Donald, P.J., Dugan and White, JJ.

Summary disposition orders 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).

Melvin Pride appeals a judgment convicting him of false imprisonment, as a repeater and with a domestic abuse enhancement; intimidating a victim by threatening force, as a habitual criminal and with a domestic abuse enhancement; possessing heroin with intent to deliver, as a

second or subsequent offense and as a habitual criminal; and misdemeanor battery as a repeater.¹ He also appeals the order denying his postconviction motion. Pride argues: (1) that the circuit court should not have allowed the prosecutor to cross-examine him about his prior convictions; and (2) that the victim's testimony was incredible, and therefore, there was insufficient evidence to support the verdicts. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the judgment and order but remand to the circuit court to correct the error in the judgment of conviction.

According to the criminal complaint, T.M. told police that Pride, who is her ex-boyfriend, came to her apartment on December 16, 2013, yelled at her, struck her repeatedly, knocked her to the ground, and pointed a gun at her head. T.M. said that she sustained injuries to her face and lip. T.M. said that Pride then forced her into his car at gunpoint and conducted drug transactions at several locations. T.M. said she asked Pride to take her to the hospital but Pride refused to take her. After they returned to T.M.'s apartment, Pride would not allow her to leave. The next morning, Pride threatened to harm T.M.'s mother if T.M. called the police and then he left. T.M. ran to her mother's home, and T.M.'s mother took her to the hospital.

¹ The judgment of conviction incorrectly states that Pride was convicted of misdemeanor battery with use of a dangerous weapon contrary to WIS. STAT. § 939.63(1)(a) (2019-20). Pride was convicted of misdemeanor battery as a repeater contrary to WIS. STAT. § 939.62(1)(a). We remand to the circuit court to correct this clerical error in the judgment of conviction.

All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On December 20, 2013, the police arrested Pride. When Pride was searched incident to arrest, the police found heroin in his possession. Pride told the police that he did not use heroin but had it because he intended to give it to someone else.

Pride testified on his own behalf during his jury trial. At the beginning of Pride's testimony, the prosecutor asked Pride if he had any prior convictions and Pride accurately responded that he had six prior convictions. Pride testified that the heroin he had in his possession was for his own personal use, not for someone else. He further testified that he lied in his statement to the police after his arrest when he said that the heroin was for someone else because he was embarrassed about his heroin use. During cross-examination, the prosecutor asked Pride if he was aware that delivery of a drug to another person was a more serious offense than simple possession of the drug. Pride gave conflicting answers. The prosecutor then asked Pride detailed questions about his prior convictions for possession of heroin with intent to deliver. Pride admitted that he knew that it was better for him to tell the jury that he was guilty of possession for personal use rather than delivery to another person. After the jury was excused, Pride's counsel told the circuit court that he was concerned about the prosecutor's cross-examination because the jury may hold the prior drug convictions against Pride. In response, the prosecutor suggested that the jury be given a limiting instruction, and the circuit court agreed with this suggestion and later gave an instruction to the jury.

Pride first argues that the circuit court erroneously exercised its discretion when it permitted the State to cross-examine him with detailed questions about his prior convictions for possession of heroin with intent to deliver. "[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." WIS. STAT. § 904.04(2)(a). However, other-acts evidence may be admissible "when

offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* We review the circuit court’s decision to admit “other-acts evidence for an erroneous exercise of discretion.” *State v. Hurley*, 2015 WI 35, ¶28, 361 Wis. 2d 529, 861 N.W.2d 174 (citation omitted). We “will uphold a circuit court’s evidentiary ruling if it ‘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.* (citation omitted).

The Wisconsin Supreme Court has set forth a three-part test for determining the admissibility of other-acts evidence. See *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). The first question is whether the other-acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. The second question is whether the other-acts evidence is relevant. *Id.* The third question is whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 772-73. “The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs [of the *Sullivan* test] are met by a preponderance of the evidence.” *Hurley*, 361 Wis. 2d 529, ¶58 (citation omitted). “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.” *Id.* (citation omitted).

We first address whether the other-acts evidence at issue here—details regarding Pride’s prior convictions for possession of heroin with intent to deliver elicited by the State during cross-examination—was relevant to the trial. See *Sullivan*, 216 Wis. 2d at 772. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01. The State needed to prove that Pride intended to deliver heroin to another person, an element of one of the crimes with which he was charged. Pride testified at trial that the heroin was for his personal use, not for his friend as he initially told police. Showing that Pride had previous convictions for possession with intent to deliver made it more likely that Pride knew that possessing the heroin with intent to deliver exposed him to more criminal liability than possessing heroin for his own use. The evidence was therefore relevant, satisfying one of the prongs of the *Sullivan* analysis.

Turning to whether the evidence was admitted for an acceptable purpose, WIS. STAT. § 904.04(2)(a) provides that other-acts evidence may be admissible when offered for a purpose other than to show that the defendant had bad character and was acting in conformity therewith. *See id.* For example, other-acts evidence may be offered “to undermine an innocent explanation for an accused’s charged criminal conduct.” *Sullivan*, 216 Wis. 2d at 784. Here, the questions the prosecutor asked about Pride’s prior convictions on cross-examination were aimed at undermining the credibility of Pride’s testimony that he intended to consume the heroin himself, which would expose him to lesser criminal liability. As such, the questions were admissible for an acceptable purpose under § 904.04(2). The testimony therefore satisfies another prong of the *Sullivan* test.

Turning to the third *Sullivan* prong, the question is whether the probative value of the evidence was substantially outweighed by the risk or danger of unfair prejudice. “Nearly all evidence operates to the prejudice of the party against whom it is offered.” *State v. Johnson*, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994). “The test is whether the resulting prejudice of relevant evidence is *fair or unfair*.” *Id.* “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.'" *Id.* Evidence is unfairly prejudicial if it has "a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Sullivan*, 216 Wis. 2d at 789-90.

When the prosecutor questioned Pride about the two drug convictions, the jury already knew that Pride had six prior convictions. The fact that two of those convictions were for possession of heroin with intent to deliver is not information that would arouse the jury's horror or provoke it to act based on something other than the law in the context of all the trial evidence, which included testimony about Pride's sustained violent behavior toward the victim. The two prior drug convictions were relatively unremarkable compared to the testimony about Pride's other actions. Because the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, it was admissible under the third prong of *Sullivan*.²

Moreover, Pride's counsel asked the circuit court for a cautionary instruction regarding the jury's consideration of Pride's prior drug convictions. The circuit court and the prosecutor agreed with Pride's counsel that the jury should be given a cautionary instruction. During the closing instructions, the circuit court read the following cautionary instruction to the jury:

² Pride points out that the circuit court did not explicitly conduct its *Sullivan* analysis on the record. Where, as here, the circuit court does not explicitly exercise its discretion on the record, we may affirm if the circuit court's exercise of discretion is implicit from the court's determination. *State v. Gary M.B.*, 2004 WI 33, ¶26, 270 Wis. 2d 62, 676 N.W.2d 475.

Specifically evidence has been presented that the defendant has two prior convictions for possession of controlled substance with intent to deliver. You may consider this evidence only on the issue of the defendant's credibility.

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait, that the defendant acted in conformity with that trait ... or character ... with respect to the offense charged in this case.

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 the defendant is a bad person and for that reason is guilty of the offense charged.

We presume jurors follow the instructions given by the court. *See State v. Dorsey*, 2018 WI 10, ¶55, 379 Wis. 2d 386, 906 N.W.2d 158. Therefore, any unfair prejudice was cured by the jury instruction.

Pride next argues that the other-acts evidence was not admissible under WIS. STAT. § 906.09. This argument is beside the point. Section 906.09 is a separate basis for the admissibility of other-acts evidence. We have concluded that the evidence was admissible under WIS. STAT. § 904.04(2). Therefore, it does not matter whether the evidence was also admissible under § 906.09.

Pride next contends that, if we conclude that his counsel failed to object and he therefore waived his right to challenge the other-acts evidence, he received ineffective assistance of counsel. Pride's counsel objected, and we have addressed Pride's other-acts argument on the merits. Therefore, we do not consider Pride's argument that he received ineffective assistance of counsel. *See State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

Finally, Pride argues that T.M.'s testimony was inherently incredible and, therefore, there was insufficient evidence to support the jury's guilty verdicts. T.M. initially told the police that Pride placed a gun against her temple, forced her from her home while pointing the gun at her, and pointed the gun at her while she was in his vehicle. However, at trial T.M. testified that Pride threatened her by mentioning that he had a gun in the trunk of his car but he never took it out of the trunk. She also denied telling police that Pride had held the gun to her temple or pointed a gun at her. After T.M. testified, the police officer who took T.M.'s initial statement presented testimony to the jury about the statement she made to him.

The conflict between T.M.'s statement to the police and her testimony at trial presented a credibility issue for the jury to resolve. The jury is tasked with determining the weight and credibility of the testimony, including any inconsistencies in the testimony of a witness. *See Thomas v. State*, 92 Wis. 2d 372, 381-82, 284 N.W.2d 917 (1979). The contradictions in T.M.'s testimony did not render all of her testimony incredible. Moreover, there was other circumstantial evidence adduced at trial implicating Pride. Therefore, there was sufficient evidence to support the convictions.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this case is remanded to the circuit court to correct the judgment of conviction to reflect that Pride was convicted of misdemeanor battery as a repeater contrary to WIS. STAT. § 939.62(1)(a), rather than misdemeanor battery with use of a dangerous weapon contrary to WIS. STAT. § 939.63(1)(a).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals