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DISTRICT IV

March 6, 2025

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

2024AP672-CR State of Wisconsin v. Cynthia M. Dominguez (L.C. # 2023CF155)

Before Kloppenburg, P.J., Nashold, and Taylor, 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).

We granted the State's petition to review the circuit court's non-final order in which it ordered a new trial after a jury found Cynthia Dominguez guilty of attempted first-degree intentional homicide of an unborn child as a party to the crime. The court determined that it was plain error to admit certain evidence at trial because the evidence should have been excluded as inadmissible hearsay. Based on our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2023-24).[1] We summarily reverse based on Dominguez's concession that the circuit court erred in determining that the evidence at issue should have been excluded as inadmissible hearsay, and on Dominguez's forfeiture of her newly raised arguments on appeal that we can affirm the court's decision on the alternative grounds that the evidence was not relevant and that its probative value was substantially outweighed by the risk of unfair prejudice.

During the jury trial, the State presented, and the circuit court admitted, 18 electronic messages from Dominguez's co-actor to the victim, 16 of which were sent before the incident that formed the basis for the charge, and two of which were sent after. Dominguez objected to the admission of six of the messages sent before the incident that purported to come from an account other than the co-actor's, for lack of foundation. The court overruled the objection based on the victim's testimony explaining in detail that the six messages were sent by the co-actor. Dominguez did not object to the admission of the remaining 12 messages.

After the jury entered its verdict, the circuit court granted the State's motion to enter judgment on the verdict and denied Dominguez's motion to grant judgment notwithstanding the verdict. Before the case proceeded to sentencing and the entry of a judgment of conviction, the circuit court sua sponte reconsidered those rulings and directed the parties to submit briefs addressing whether the 16 electronic messages sent to the victim before the incident were inadmissible hearsay. The court ordered the parties to address whether: (1) the messages were properly admitted as statements of a coconspirator; (2) some other evidentiary rule supported

[1] All references to the Wisconsin Statutes are to the 2023-24 version unless otherwise noted.

admission of the messages, including whether they were offered for the truth of the matter asserted; (3) if the messages were inadmissible hearsay, it was plain error to admit them; and (4) "for the above reasons *or any other reason,* the Court should grant Dominguez'[s] motion for judgment notwithstanding the verdict, order a new trial, or take some other action." (Emphasis added.)

The State in its brief to the circuit court argued that the 16 electronic messages either were "not hearsay or fit a statutory exception" to the hearsay rule. Specifically, the State argued that the messages were admissible because they did not assert a fact but were relevant as a present sense impression or to show the co-actor's state of mind and intent in the months leading up to the incident, were statements by a coconspirator, or were statements against interest.

Dominguez in her response brief to the circuit court argued that the 16 messages were inadmissible hearsay. Specifically, Dominguez argued that the messages were offered for the truth of the co-actor's mindset, did not fit the coconspirator exception to hearsay, were not expressions of the co-actor's state of mind, and did not fit the exception for statements against interest, and that some of the messages were not properly authenticated. Dominguez further argued that the admission of the 16 messages was plain error and entitled her to a new trial.

The State in its reply brief to the circuit court argued that Dominguez forfeited the right to challenge the admissibility of ten of the electronic messages because she did not object to their admission at trial, and that the only avenue available for Dominguez to pursue a challenge to the admission of those messages was an ineffective assistance of counsel claim. The State also argued that the court had properly exercised its discretion in overruling Dominguez's objections on foundation grounds concerning the other six messages, and that Dominguez forfeited

objections to admission of these messages on hearsay or other grounds. The State reiterated its arguments that all of the 16 messages were properly admitted because they were not offered for the truth of the matter asserted or fit exceptions to hearsay such as present sense impression, state of mind, or statement against interest. The State further argued that the admission of the 16 messages was not plain error and Dominguez was not entitled to a new trial.

The circuit court concluded that all of the 16 electronic messages were inadmissible hearsay and rejected the State's arguments that the messages were not hearsay or fit an exception to the hearsay rule. The court also concluded that the admission of the 16 messages was plain error, the error was not harmless, and Dominguez was entitled to a new trial.

In her response brief on appeal, Dominguez for the first time concedes that all 16 of the electronic messages were not inadmissible hearsay. However, Dominguez argues that we should affirm the circuit court's determination that the admission of the messages was plain error and that the error was not harmless, because only two of the messages sent before the incident were relevant and, even if all 16 of the messages were relevant, their unfair prejudicial effect substantially outweighed their probative value.[2]

[2] In the circuit court's post-verdict proceedings, Dominguez challenged the admission of only the 16 electronic messages sent before the incident, and in its order the circuit court addressed only those 16 messages. In this court, Dominguez appears to assert that all 18 of the messages, including the two messages sent immediately after the incident, were inadmissible based on the new arguments that she raises for the first time on appeal. However, Dominguez is the respondent on appeal and she did not cross-appeal on the basis that the circuit court erred in not also determining that the two post-incident messages should have been excluded. Accordingly, to the extent that she challenges the court's failure to also determine that the two post-incident messages should have been excluded, that challenge is not before us. In reply to Dominguez's new arguments, the State addresses all 18 messages. But, the State is not aggrieved by the circuit court's order admitting the two post-incident messages. Accordingly, this opinion addresses only the 16 messages that the circuit court determined should have been excluded because they were inadmissible hearsay.

In its reply brief on appeal, the State notes that Dominguez's arguments based on relevance and unfair prejudice present "a brand-new theory that no one involved in the case had contemplated until now." Dominguez implicitly concedes as much when she asserts that we can search the record to affirm the circuit court's decision to exclude the electronic messages on the alternative grounds that all 16 messages were not relevant and that their probative value was substantially outweighed by the risk of unfair prejudice. However, the case law Dominguez cites does not support the assertion that this court can search the record to affirm the circuit court's decision when, as here, the "alternative grounds" for excluding the messages were not raised by Dominguez at trial or in her post-verdict briefing and were never considered by the circuit court.

For example, in ***State v. Hunt***, 2003 WI 81, ¶¶4, 15-20, 25, 263 Wis. 2d 1, 666 N.W.2d 771, the parties addressed the three-part test in ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), in their arguments to the circuit court about the admission of other-acts evidence, but the court did not fully explain its reasoning under the three-part test and also referenced an impermissible purpose when it admitted the evidence. Our supreme court ruled that, in that circumstance, an appellate court may search the record to "affirm the circuit court's decision for reasons not stated by the circuit court." ***Hunt***, 263 Wis. 2d 1, ¶¶4, 52. The court confined those "reasons not stated by the circuit court" to reasons relating to the ***Sullivan*** analysis raised by the parties: "[W]e hold that the court of appeals is required independently to review the record if the circuit court fails to provide a detailed ***Sullivan*** analysis. Based upon our independent review of the record, we hold that there were reasonable bases justifying the circuit court's decision to admit the other-acts evidence pursuant to ***Sullivan***." ***Id.***, ¶4. In contrast, here, the parties did not in the circuit court raise any arguments related to relevance or unfair prejudice as grounds for

reviewing the court's admission of the electronic messages, and the court did not address those grounds.

Thus, in this case, unlike in ***Hunt***, the circuit court did not decide to exclude the 16 electronic messages pursuant to the legal standard that Dominguez now, for the first time on appeal, argues the court should have applied. In these circumstances, the standard of review that governs our review of the circuit court's decision requires that we reject Dominguez's assertion that we can search the record to affirm the court's decision. As Dominguez acknowledges, a circuit court's decision to admit or exclude evidence is discretionary. *See* ***Hunt***, 263 Wis. 2d 1, ¶34. We review circuit court decisions to admit or exclude evidence for an erroneous exercise of discretion. ***Allsop Venture Partners III v. Murphy Desmond SC***, 2023 WI 43, ¶23, 407 Wis. 2d 387, 991 N.W.2d 320. "When a circuit court fails to set forth its reasoning [for a discretionary decision], it has been held that an appellate court independently should review the record to determine whether it provides an appropriate basis for the circuit court's decision." ***Hunt,*** 263 Wis. 2d 1, ¶34; *see also* ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.***, 2005 WI App 217, ¶55, 287 Wis. 2d 560, 706 N.W.2d 667 ("When the [circuit] court's reasoning is inadequate or incomplete, we may independently review the record to look for additional reasons to support the court's exercise of discretion.").

However, "a discretionary decision must be supported by 'evidence in the record that discretion was in fact exercised.'" ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 407, 588 N.W.2d 236 (1999) (quoted source omitted). Here, while the circuit court clearly exercised its discretion to exclude the 16 electronic messages as inadmissible hearsay, it neither was requested to nor did exercise its discretion to review the admission of the 16 messages on the grounds that they were not relevant and that their probative value was substantially

outweighed by the risk of unfair prejudice. Dominguez essentially asks that this court exercise discretion on those grounds instead. But, this court "may not exercise the [circuit] court's discretion." ***State v. Hydrite Chem. Co.***, 220 Wis. 2d 51, 65, 582 N.W.2d 411 (Ct. App. 1998).

The ultimate issue on appeal is whether the circuit court's admission of the 16 electronic messages sent to the victim before the incident was plain error because the messages were not relevant and because their probative value was substantially outweighed by the risk of unfair prejudice, when Dominguez did not object at trial or in her post-verdict briefing to their admission on those grounds. A defendant claiming plain error has the initial burden of showing "that there was an error." ***State v. Jorgensen***, 2008 WI 60, ¶56, 310 Wis. 2d 138, 754 N.W.2d 77 (Abrahamson, C.J., concurring). As just explained, to determine whether there was an error here requires that this court review a post-verdict discretionary decision based on issues that were neither raised nor considered by the circuit court. This circumstance leads us directly to the forfeiture rule.

When, as here, a party fails to specifically raise an issue before the circuit court in a manner that allows the court to address the issue and correct any potential error, the party forfeits that issue on appeal. ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177; *see* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."). "We make exceptions to the rule in cases where the new issue is a question of law and has been fully briefed by both sides, and the question presented is of sufficient public interest to merit a decision." ***State v. Gaulke***, 177 Wis. 2d 789, 794, 503 N.W.2d 330 (Ct. App. 1993). Nothing in Dominguez's appellate briefing persuades us

that those reasons against applying the forfeiture rule exist here. To the contrary, the record demonstrates that there are good reasons to apply the rule in this case.

The record shows that Dominguez had the opportunity in the post-trial proceedings to raise her arguments that it was plain error to admit the 16 electronic messages because they were not relevant and because their probative value was substantially outweighed by the risk of unfair prejudice. While the circuit court's order directing the parties to brief the admissibility of the 16 messages was focused on issues related to hearsay, the court expressly directed the parties to address whether, for "*any other reason*, the Court should grant Dominguez'[s] motion for judgment notwithstanding the verdict, order a new trial, or take some other action." (Emphasis added.)

Had Dominguez raised the arguments that the circuit court should have excluded the 16 electronic messages because they were not relevant and because their probative value was substantially outweighed by the risk of unfair prejudice, the court and the parties could have directly addressed those arguments, and there may have been no need for the parties or this court to spend time on appellate arguments about whether the messages should have been excluded. *See* ***Huebner***, 235 Wis. 2d 486, ¶12 ("Raising issues at the [circuit] court level allows the [circuit] court to correct or avoid the alleged error in the first place, eliminating the need for appeal."). In addition, the rule requiring litigants to raise issues in the circuit court "gives both parties and the circuit court notice of the issue[s] and a fair opportunity" to address them; it deters attorneys from "'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal"; and it "enable[s] the circuit court to avoid or correct any error with minimal disruption of the judicial process." ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.

Applying the forfeiture rule here promotes judicial efficiency and economy and fair litigation. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶26, 338 Wis. 2d 114, 808 N.W.2d 155 (We decline to consider new arguments or theories when doing so would "seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party."); ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (the forfeiture rule "is based on a policy of judicial efficiency"). Applying the forfeiture rule here also promotes the rule of deferential review of discretionary decisions by the circuit court. *See* ***Allsop Venture Partners III***, 407 Wis. 2d 387, ¶23 ("As long as the circuit court 'examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion,' we will not disturb its ruling." (quoted source omitted)).

In addition, if we now considered Dominguez's arguments that it was plain error to admit the electronic messages because they were not relevant and because their probative value was substantially outweighed by the risk of unfair prejudice, we might accept them and affirm the circuit court or reject them and reverse the circuit court. In the latter case, we would be blindsiding the court, based on entirely new theories that were not presented to the court when it made its decision after a jury trial that concluded over one year ago. Far from promoting judicial efficiency or fairness in litigation, such a result would encourage parties to develop new arguments on appeal—regardless of how much time, money, and judicial resources could have been conserved had the argument been timely raised in the circuit court. In sum, to proceed with the review that Dominguez asks this court to undertake would undermine the purposes of the forfeiture rule set forth above.

Accordingly, we summarily reverse the circuit court's decision ordering a new trial based on its determination that it was plain error to admit the 16 electronic messages because they were inadmissible hearsay, based on Dominguez's concession on appeal that the messages were not hearsay and on Dominguez's forfeiture of her newly raised arguments on appeal that we can affirm the court's decision on the alternative grounds that the evidence was not relevant and that its probative value was substantially outweighed by the risk of unfair prejudice.

Therefore,

IT IS ORDERED that the order is summarily reversed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals