COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1878-CR **Cir. Ct. No. 2004CF7217**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVON TERRELL SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON and WILLIAM W. BRASH, III, Judges.[1] *Affirmed*.

Before Curley, P.J., Wedemeyer and Fine, JJ.

[1] The Honorable Karen E. Christenson presided over the trial and entered the judgment of conviction. The Honorable William W. Brash, III, issued the order denying the postconviction motion.

¶1 FINE, J. Davon Terrell Smith appeals a judgment entered after a jury found him guilty of second-degree intentional homicide while armed, *see* WIS. STAT. §§ 940.05(1), 939.63, and being a felon in possession of a firearm, *see* WIS. STAT. § 941.29(2). He also appeals an order denying his postconviction motion. Smith claims that: (1) his trial lawyer was ineffective; and (2) the trial court erroneously excluded evidence. We affirm.

I.

¶2 Smith was tried for shooting and killing his girlfriend, Bridgett Larry, in March of 2004.[2] At his trial, several witnesses testified that the shooting happened during a party at an apartment complex. As the party was ending, Smith and Larry began to yell at each other. Smith was on a second-story porch and Larry was in the courtyard below. During the argument, Larry got a knife, went up the stairs, and kicked open the stairwell door. Several witnesses testified that Smith then shot her several times. According to one witness, Smith shot Larry "in cold blood, not even allowing her a chance to come through the door."

¶3 Smith's theory of defense was that he shot Larry in self-defense. *See* ***State v. Head***, 2002 WI 99, ¶¶4–5, 255 Wis. 2d 194, 206–207, 648 N.W.2d 413, 419–420 (discussing perfect and imperfect self-defense). Smith testified that during the argument, Larry came into the courtyard with a knife and yelled several times that she was going to kill him. According to Smith, Larry then came up the stairs, kicked open the door, and began to walk toward Smith with the knife. Smith testified that he shot at Larry once. According to Smith, Larry stopped to

[2] During Smith's trial, Bridgett Larry was also referred to as Bridgett Crawford. To avoid any confusion, we refer to her throughout this case as Bridgett Larry.

see if she had been hit and then kept walking toward him. Smith told the jury that he fired the rest of the shots in the gun, and that Larry then fell. Smith testified that he shot Larry because he thought she was going to kill him.

¶4 As we have seen, the jury found Smith guilty of second-degree intentional homicide while armed and being a felon in possession of a firearm. Smith sought a new trial on the issues he raises on this appeal. The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Smith's motion.

II.

¶5 On appeal, Smith's claims revolve around what he contends are "two critical pieces of evidence pertaining to [his] defense" that were not presented at his trial: (1) evidence that in September of 2002, Larry stabbed her then-boyfriend Reginald Richardson; and (2) evidence that a witness was afraid of Larry's family. We look at each piece of evidence in turn.

A. *2002 Stabbing.*

¶6 Smith's trial lawyer tried to introduce evidence of the 2002 stabbing after Mary Williamson, a witness for the State, testified on direct-examination that she did not see Larry with a knife on the night of the shooting:

> Q Did you hear any other specific things that Bridgett [Larry] said to [Smith]?
>
> A She told him -- she said -- I can't exactly remember what she said, but it was something like I'm going to come up there. I'm not scared of you. I'm going to come up there and F you up.
>
> Q And when you say F, you mean I'll come up there and fuck you up?

> A Fight, yeah. She like -- she didn't -- she actually -- the knife didn't mean nothing because she didn't -- she didn't never stab nobody. It was just something to scare people.
>
> Q Well, the question is did you see her with a knife that night?
>
> A No, I did not.
>
> Q But you knew later that there was a knife found right by her?
>
> A That's what the detectives told me.
>
> Q And that didn't shock or surprise you?
>
> A No, it didn't.

On cross-examination, Williamson testified that Larry had never stabbed anyone:

> Q As a matter of fact, you said when the district attorney was asking you that as far as you're concerned, Bridgett never stabbed anyone?
>
> A She hasn't.

Smith's lawyer did not ask Williamson about the 2002 stabbing during cross-examination.

¶7 After Williamson testified, Smith's lawyer sought to introduce the prior stabbing through Richardson:

> There's information that was provided to me by the State involving a victim by the name of Reginald Richardson who was brought down from the State Prison System, that be ordered [*sic*] to produce in this case that I had to sign previously. Reginald Richardson would testify that he was involved in an argument with Bridgett [Larry] and that Bridgett [Larry] essentially stabbed him in the shoulder as he laid in bed.

Smith's lawyer claimed that the Richardson stabbing was admissible to show that Larry "was in the habit of carrying a knife," arguing that the State "opened the

door" because it had put on two witnesses who testified that they did not see Larry with a knife. The trial court denied the request, noting that Williamson "testified that [Larry] regularly carried a knife for her protection" and that "the photographs that were already marked and admitted … show a knife right there by [Larry's] hand."

¶8 On appeal, Smith raises two claims related to the 2002 stabbing: (1) his trial lawyer was ineffective because the lawyer did not argue that the prior stabbing was admissible other-acts evidence, *see* WIS. STAT. RULE 904.04(2)(a); and (2) the trial court erroneously excluded the 2002 stabbing because it was admissible to impeach Williamson's testimony that Larry had never stabbed anyone. We begin with Smith's ineffective-assistance claim.

¶9 In order to prove ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. In order to succeed on prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶10 At the ***Machner*** hearing, Smith's lawyer testified that he did not try to introduce the 2002 stabbing as other-acts evidence because Smith did not know about the stabbing when he shot Larry. *See* ***McMorris v. State***, 58 Wis. 2d 144,

152, 205 N.W.2d 559, 563 (1973) (defendant claiming self-defense may introduce specific instances about which the defendant knew when he or she claimed to be acting in self-defense). Smith argues that his trial lawyer misread the law because, according to Smith, the prior stabbing was admissible under WIS. STAT. RULE 904.04(2)(a) even though Smith did not know about it at the time of the shooting.

¶11 Whether other-acts evidence should be admitted requires the application of a three-part test: (1) whether the evidence is offered for a permissible purpose under WIS. STAT. RULE 904.04(2)(a); (2) whether the evidence is relevant under WIS. STAT. RULE 904.01; 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, *see* WIS. STAT. RULE 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 772–773, 576 N.W.2d 30, 32–33 (1998). Smith's claim fails on the first requirement.

¶12 WISCONSIN STAT. RULE 904.04(2)(a) prohibits the introduction of other-acts evidence "to prove the character of a person in order to show that the person acted in conformity therewith." The rule does not, however, exclude evidence when offered for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Ibid.***[3] Smith contends that the prior stabbing was admissible to show Larry's motive, intent, and plan. We disagree.

[3] WISCONSIN STAT. RULE 904.04(2)(a) provides, as material:

(continued)

¶13 An act is not admissible to show motive unless it "provided a reason for committing the charged offenses or that there was some link between them." *See* ***State v. Cofield***, 2000 WI App 196, ¶12, 238 Wis. 2d 467, 474, 618 N.W.2d 214, 217. Motive thus does not apply here.

¶14 Similarly, evidence showing a plan "requires more than a similarity between the prior act and the offense charged; there must be a linkage between the two events that permits the conclusion that the other act led to the commission of the offense charged." ***State v. DeKeyser***, 221 Wis. 2d 435, 448, 585 N.W.2d 668, 674 (Ct. App. 1998), *overruled on other grounds by* ***State v. Veach***, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447; *see also* ***Cofield***, 2000 WI App 196, ¶13, 238 Wis. 2d at 474–475, 618 N.W.2d at 217 ("There must be some evidence that the prior acts were a step in a plan leading to the charged offense, or some other result of which the charged offense was but one step."). There is no evidence that the prior stabbing was "a step in a plan" to stab Smith.

¶15 Finally, whatever intent Larry may have had during the 2002 stabbing does not show that Larry intended to stab Smith. The incidents are not sufficiently connected in time, place, or circumstances to be probative of Larry's state of mind. The 2002 stabbing is evidence only of *propensity*—that is, that because Larry had stabbed someone before she was likely to do it again. This is the very purpose forbidden by WIS. STAT. RULE 904.04(2)(a). Accordingly, the

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> [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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

prior stabbing was not admissible as other-acts evidence, and Smith's trial lawyer was not deficient for failing to seek its admission.

¶16 Smith also contends that the trial court erroneously exercised its discretion when it excluded the prior stabbing because he claims it was admissible under ***State v. Sonnenberg***, 117 Wis. 2d 159, 344 N.W.2d 95 (1984), to impeach Williamson's testimony that Larry carried a knife for protection and had never stabbed anyone. *See* ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (trial court's decision to admit or exclude evidence discretionary). Smith misreads ***Sonnenberg***.

¶17 Cross-examination on a collateral matter is limited and the examiner must abide by a witness's answers. ***Sonnenberg***, 117 Wis. 2d at 175 n.5, 344 N.W.2d at 103 n.5. "[T]he impeachment of a witness on the basis of collateral facts introduced by extrinsic evidence is forbidden." ***Id.***, 117 Wis. 2d at 175, 344 N.W.2d at 102–103; *see also* WIS. STAT. RULE 906.08(2).[4] Whether Richardson's testimony about the 2002 stabbing was admissible under ***Sonnenberg*** thus turns on two questions: (1) whether it was extrinsic; and (2) whether it was collateral. *See* ***id.***, 117 Wis. 2d at 168–169, 344 N.W.2d at 99–100. It is undisputed that Richardson's testimony was extrinsic evidence. ***Id.***, 117 Wis. 2d at 168, 344

[4] WISCONSIN STAT. RULE 906.08(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

N.W.2d at 99 (extrinsic evidence includes "testimony obtained by calling additional witnesses"). We thus turn to whether the 2002 stabbing was collateral.

¶18 A matter is collateral if it does not meet the following test: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" ***Id.***, 117 Wis. 2d at 169, 344 N.W.2d at 100 (internal quotation marks and citation omitted). As we have seen, the 2002 stabbing was not admissible under WIS. STAT. RULE 904.04(2)(a). Other than the forbidden "propensity" use of the evidence, Smith's only purpose was to contradict Williamson's testimony that Larry carried knives for protection and had never stabbed anyone. Accordingly, Richardson's testimony about the 2002 stabbing was inadmissible under ***Sonnenberg***.

¶19 As noted earlier, Smith's trial lawyer did not do what ***Sonnenberg*** permitted, that is ask Williamson on cross-examination about the 2002 stabbing. Smith does not claim on this appeal that his trial lawyer was ineffective for not doing so. Accordingly, we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (issues not briefed are waived).

B. *Fear of Larry's Family.*

¶20 Smith claims that the trial court erroneously sustained the State's objection when Smith's trial lawyer asked a witness, Lakesha Spearman, whether she knew who had apparently threatened her and of whom she was afraid. Spearman was subpoenaed by the defense but testified for the State. Before Spearman testified, Smith's lawyer asked the court if Spearman's therapist could accompany Spearman because she was afraid to come to court:

> [S]he informed me that she was very scared about coming in…. [S]he apparently has received threats from people who [*sic*] she believes are the victim's family as well as having things like -- and this is her characterization -- or her house shot up and something about a bomb being placed nearby her house.
>
> And that was a little bit more unclear in terms of who [*sic*] she attributed that to. But she believes that she is being held responsible for the victim's death in this case because she introduced the defendant to the victim and then also invited her to the party where she was obviously murdered at. So she's being held responsible for it by the family.

The trial court let the therapist sit in the front row of the gallery while Spearman testified.

¶21 On cross-examination, Smith's lawyer asked Spearman why she was reluctant to testify:

> Q Ms. Spearman, I can see that this is a little bit difficult for you, right?
>
> A Um-hmm.
>
> Q Okay. You've been sitting there and you've been kind of quiet the entire time and looking down even when you were asked questions. Is there a reason why you're looking down and you're acting that way?
>
> A Scared, frightened.
>
> Q What are you scared of?
>
> A Someone is going to do something to me.
>
> Q I'm sorry. What?
>
> A Somebody is going to do something to me.
>
> Q Do you know who?

At that point, the State objected and the trial court sustained the objection. Smith contends that this was error. He argues that, without Spearman's testimony that

she was afraid of Larry's family, "commonsense dictates the distinct possibility that jurors concluded that Spearman was afraid of Smith," particularly in light of Spearman's testimony that Smith shot Larry in cold blood.

¶22 Evidence of a witness's bias must have a logical and rational connection to the fact of the bias of the witness. ***State v. Williamson***, 84 Wis. 2d 370, 384, 267 N.W.2d 337, 343–344 (1978). Further, admissible evidence must be based on more than speculation or conjecture. *See* ***State v. Scheidell***, 227 Wis. 2d 285, 305, 595 N.W.2d 661, 671 (1999). The crux of Smith's claim is that, based on what Spearman told Smith's trial lawyer, the alleged threats were "apparently … from people who [*sic*] she believes are the victim's family," and that the alleged shooting at Spearman's house and the alleged planting of a bomb near Spearman's house were also done by those whom she "believes" were members of Larry's family. If true, of course, Spearman's belief might give Spearman a motive to testify against Smith. But the question Smith's trial lawyer *actually* asked Spearman, "Do you know who?" would, based on the offer of proof by Smith's lawyer, have to be answered "no." Thus, the trial court properly sustained the State's objection to the question.

¶23 Smith's lawyer *could have* asked, or, if prevented from asking by the trial court, made an offer of proof, whether it was Spearman's *belief* (as opposed to knowledge) that Larry's family was responsible for the things that made Spearman afraid. *See* WIS. STAT. RULE 901.03(1)(b) (offer of proof). Smith's trial lawyer did not, however, ask or try to ask that question, and Smith does not argue on appeal that his trial lawyer was thereby ineffective. Thus, we do not consider it. *See* ***Reiman Assocs., Inc.***, 102 Wis. 2d at 306 n.1, 306 N.W.2d at 294 n.1.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.