COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP52-CR **Cir. Ct. No. 2007CF68**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CASEY J. SHELTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Casey Shelton appeals a judgment of conviction for first-degree reckless homicide and an order denying his motion for postconviction relief. Shelton contends the circuit court erroneously exercised its discretion in its admission of certain evidence. Shelton also contends that he

received ineffective assistance of counsel at trial and that, in the interest of justice, he should be granted a new trial. We affirm.

BACKGROUND

¶2 Shelton was convicted by a jury of first-degree reckless homicide of his two-month old son, Christopher. On the evening of February 27, 2007, Shelton, who was alone with Christopher and his twin brother, Charles, called emergency services seeking medical assistance for Christopher, who Shelton reported was having difficulty breathing. Medical personnel were unable to resuscitate Christopher and he was pronounced dead at approximately 7:30 p.m. Shelton explained that while he was in the process of feeding Christopher, who had problems with keeping food down and projectile vomiting, Christopher started spitting up and then choking, and appeared to be fighting for air. However, expert testimony indicated that Christopher died as a result of a traumatic brain injury, "essentially the rattling of the brain inside the head," which occurred close in time to Christopher's death.

¶3 Prior to trial, the State moved in limine seeking to introduce evidence of habit under WIS. STAT. § 904.06 (2009-10)[1] to demonstrate that

[1] All references to the Wisconsin statutes are to the 2009-10 version unless otherwise noted. WISCONSIN STAT. § 904.06 provides:

> (1) ADMISSIBILITY. Except as provided in s. 972.11(2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(continued)

Shelton had a habit of reacting violently to Christopher and Charles if either child spit-up or cried. The State also sought to introduce evidence of other acts pursuant to WIS. STAT. § 904.04(2)[2] to show Shelton's motive for acting violently toward Christopher, that motive being an obsession with cleanliness and order. This evidence included evidence pertaining to Shelton's physical conduct toward Christopher and Charles, his emotional and physical abuse of the boys' mother, Amy Uptegraw, his physical abuse of Uptegraw's other adolescent son, his threats of violence toward Uptegraw and Uptegraw's parents, and excessive drinking and controlling manner. Shelton challenged the admission of this evidence at the hearing on the State's motion in limine.

¶4 The circuit court ruled in limine that evidence regarding Shelton's behavior toward Christopher and Charles, subject to certain limitations not relevant to this appeal, was admissible evidence of habit. The circuit court did not address whether this evidence, or any of the other evidence, was admissible other acts evidence to show motive. However, the parties do not dispute that the other

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> (2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine

[2] WISCONSIN STAT. § 904.04(2) provides:

> Except as provided in par. (b), evidence 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.

acts evidence the State sought admission of in its motion in limine was admitted at trial.

¶5 Following his conviction, Shelton sought postconviction relief on the bases that he was deprived effective assistance of counsel and the jury was presented inadmissible "other acts" evidence. The circuit court denied Shelton's motion. Shelton appeals. Additional facts will be addressed below as necessary.

DISCUSSION

¶6 Shelton contends that the circuit court erroneously exercised its discretion in admitting evidence relating to Shelton's past conduct toward Christopher, Charles, Uptegraw, Uptegraw's adolescent son, and Uptegraw's parents. Shelton also contends that he is entitled to a new trial because his trial counsel was ineffective, and because the real controversy was not fully tried. We address Shelton's arguments in turn below.

A. Evidence Admissibility

¶7 We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. ***Balz v. Heritage Mut. Ins. Co.***, 2006 WI App 131, ¶14, 294 Wis. 2d 700, 720 N.W.2d 704. The circuit court has broad discretion and our review is highly deferential. ***Martindale v. Ripp***, 2001 WI 113, ¶¶28-29, 246 Wis. 2d 67, 629 N.W.2d 698. A circuit court does not erroneously exercise its discretion if the court applies the proper law to the established facts and there is any reasonable basis for the court's ruling. ***Balz***, 294 Wis. 2d 700, ¶14. We may affirm a circuit court's evidentiary decision for reasons different than those articulated by the circuit court, so long as the result was

correct. *See* ***State v. Alles***, 106 Wis. 2d 368, 391, 316 N.W.2d 378 (1982) (we may affirm the circuit court if the result was correct).

¶8 Shelton argues that the circuit court erroneously exercised its discretion in admitting evidence that prior to Christopher's death, he reacted angrily or violently when Christopher and Charles cried or vomited. This included evidence that Shelton placed Charles and Christopher under blankets or put rags in their mouths to muffle their cries and that two days before Christopher died, Shelton picked Charles up out of a swing by the neck and threw him to the ground because Shelton was upset that Charles had vomited. Shelton argues that this evidence was not permissible evidence of habit under WIS. STAT. § 904.06, and was also not admissible other acts evidence to show motive under WIS. STAT. § 904.04(2).

¶9 With some exceptions not applicable here, evidence of the habit of a person is relevant to prove that the person acted consistently with that habit. *See* WIS. STAT. § 904.06(1). "Habit is a regular repeated response to a repeated, specific situation" and may be provided "by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." ***Balz***, 294 Wis. 2d 700, ¶15; § 904.06(2). "The frequency and consistency that behavior must be present to become habit is not subject to a specific formula, and its admissibility depends on the [circuit] court's evaluation of the particular facts of the case." ***Id.***, ¶15**.** While evidence of habit is admissible, such evidence must be distinguished from evidence of a person's character, which is a generalized description of a person's nature or disposition in respect to a general trait, such as honesty, temperance or peacefulness, and is generally not admissible. ***Id.***, ¶15-16; WIS. STAT. § 904.04(1).

¶10 Shelton asserts that this evidence did not establish that he "had a situation-specific pattern of behavior," but instead showed that he "sometimes responded violently to the babies' actions of vomiting or crying," and was evidence of his "character for anger, impatience or violence." We agree. The evidence that prior to Christopher's death, Shelton acted angrily or violently when Christopher and Charles cried or vomited did not rise to the status of "habit" as that term is used in WIS. STAT. § 904.06(1). The evidence proffered by the State was alleged instances of conduct. However, the instances of conduct did not form any predictable pattern. *See* ***Balz***, 294 Wis. 2d 700, ¶17. Instead, the evidence demonstrated that Shelton reacted aggressively when Christopher or Charles did something that upset him. "It is not discernible what frequency and regularity [Shelton] engaged in this behavior," and thus, "there were no 'specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.'" ***Id.*** (quoting WIS. STAT. § 904.06(2)).

¶11 Although we conclude that evidence of Shelton's reactions when Christopher or Charles cried or spit-up was not admissible evidence of habit under WIS. STAT. § 904.06, we conclude that the evidence showing that Shelton threw Charles to the ground when he spit up was admissible other acts evidence under WIS. STAT. § 904.04(2) to show Shelton's motive for acting violently toward Christopher the evening Christopher allegedly suffered his fatal injury—that motive being an obsession with cleanliness and order.

¶12 WISCONSIN STAT. § 904.04(2)(a) prohibits the admission of "evidence of other crimes, wrongs, or acts … to prove the character of a person to show that the person acted in conformity therewith." However, the statute permits the admission of other acts evidence if the evidence is offered to prove motive,

opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident. Section 904.04(2)(a).

¶13 When deciding whether to allow other acts evidence, Wisconsin courts look to WIS. STAT. § 904.04(2)(a), and apply the three-step analytical framework set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). ***State v. Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Under ***Sullivan***, courts must consider: (1) whether the evidence is offered for a proper purpose under § 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 issues, or misleading the jury. ***Sullivan***, 216 Wis. 2d at 772-73. The proponent of other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. *See* ***Marinez***, 331 Wis. 2d 568, ¶19. If the proponent does so, the burden shifts to the opposing party to show that the evidence's probative value is "substantially outweighed by the risk or danger of unfair prejudice." ***Id.***

¶14 As stated above, the admissibility of evidence rests within the circuit court's discretion and is reviewed for an erroneous exercise of discretion, ***Sullivan***, 216 Wis. 2d at 780, and we will generally look for reasons to sustain the circuit court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). A proper exercise of discretion contemplates that the circuit court explain its reasoning; however, when the court fails to do so, we may search the record to determine if it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. If the circuit court does not provide a detailed ***Sullivan*** analysis, we are required to independently review the record. ***State v. Hunt***, 2003 WI 81,

¶4, 263 Wis. 2d 1, 666 N.W.2d 771. The circuit court did not perform a ***Sullivan*** analysis in this case, thus our review of this issue is de novo. *See* ***id.***

¶15 The first step in evaluating the admissibility of other acts evidence is to determine whether the other acts evidence is admissible for a proper purpose under WIS. STAT. § 904.04(2). ***Sullivan***, 216 Wis. 2d at 783. We conclude that the State offered other acts evidence at trial for the purpose of establishing Shelton's motive for harming Christopher, a proper purpose under § 904.04(2).

¶16 The second step is evaluating whether the evidence is relevant. "'Relevant evidence' [is any] 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. Shelton concedes that the evidence regarding the incident in which he allegedly threw Charles to the ground after vomiting two days before Christopher's death was relevant.

¶17 The final inquiry is whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03; ***Sullivan***, 216 Wis. 2d at 772-73. We have explained that "[n]early all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair or unfair*. In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect." ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citation omitted). As the opponent of the evidence, Shelton bears the burden of establishing disproportionate prejudice. *See* ***State v. Payano***, 2009 WI 86, ¶80 n.18, 320 Wis. 2d 348, 768 N.W.2d 832.

¶18 Shelton argues only that prejudice emanating from evidence of him throwing Charles to the ground outweighs the probative value of that evidence. He claims that this evidence "is the type of conduct that would clearly appeal to the jury's sympathies and 'arouse its sense of horror' such that the jury would be provoked to base its decision on a desire to punish Shelton rather than upon the circumstantial evidence that he caused Christopher's death." Evidence that Shelton reacted violently toward Charles when Charles vomited established a motive for why Shelton would harm one of his infant sons. Shelton does not explain why the prejudice he claims results from this evidence outweighs its probative value of showing his motive, and has thus failed to satisfy his burden. We conclude, therefore, that the probative value of this evidence was high and outweighed any potential prejudice.

¶19 Shelton argues that evidence that he put rags in Christopher's and Charles' mouths and blankets over their faces when they cried was improperly admitted because "it did not bear similarity to the crime because Christopher died from a head injury." Assuming, without deciding, that Shelton is correct, we conclude that the admission of this other evidence was harmless.

¶20 "Error in admitting other acts evidence is subject to harmless error analysis." ***State v. Thoms***, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). The test for harmless error is whether there is a reasonable probability that the error contributed to the conviction. *See* ***State v. Anderson***, 2006 WI 77, ¶114, 291 Wis. 2d 673, 717 N.W.2d 74. As we have seen, the jury properly heard evidence that Shelton threw Charles to the ground. And, as discussed below, the jury properly heard evidence relating to Shelton threatening Uptegraw on the way to the hospital. In light of this very inculpatory evidence, along with the strong circumstantial evidence that the fatal head injury to Christopher occurred within a

short time before his death and that Shelton was alone with Christopher prior to his death, we can confidently say that the "rags" and "blankets" evidence did not affect the verdict.

¶21 Shelton next argues that the circuit court erroneously exercised its discretion in admitting additional other acts evidence, which he generally describes as evidence regarding his treatment of Uptegraw, Uptegraw's son, and Uptegraw's parents, to show motive under WIS. STAT. § 904.04(2). We will assume, without deciding, that Shelton is correct that the evidence regarding Shelton's treatment of Uptegraw, her son, and her parents, was not admissible other acts evidence to show motive. We conclude, however, that evidence was nevertheless admissible as part of the panorama of evidence relevant to a particularly probative and damning piece of evidence, namely that Shelton threatened Uptegraw on the way to the hospital on the evening Charles died. Uptegraw testified that, when she was in the car with Shelton going to the hospital, Shelton threatened to "kill [Uptegraw's] family if [she] said anything." This threat is strong evidence of consciousness of guilt. *See* ***Bowie v. State***, 85 Wis. 2d 549, 553, 271 N.W.2d 110 (1978) (evidence of threats by a defendant is "circumstantial evidence of consciousness of guilt"). This was not a threat that came out of nowhere. To give Uptegraw's threat testimony credibility, it was necessary to provide context. Uptegraw's testimony regarding her history with Shelton and, for example, Shelton's threatening behavior toward her other family members provided that context. Furthermore, it helped explain why, immediately following Christopher's death, Uptegraw portrayed Shelton as a good father, but then in April 2007, approximately two months after Christopher's death, informed police that Shelton was abusive and/or threatening toward her, her adolescent son, her parents, and Christopher and Charles. *See* ***State v. Sharp***, 180 Wis. 2d 640, 655,

511 N.W.2d 316 (Ct. App. 1993) ("[u]nder the rule of completeness, otherwise inadmissible evidence will be admissible"). In sum, the challenged evidence gives context to Shelton's inculpatory threat and to explain Uptegraw's initial assertion that Shelton was a good father.

¶22 Finally, Shelton argues that the circuit court erroneously exercised its discretion by admitting over his objection evidence that approximately one week before Christopher died, he called the residence of Uptegraw's mother, where Uptegraw had gone to stay after Shelton had gone to a bar to drink, more than a dozen times and threatened to "crack [Uptegraw's mother's] skull open" if she did not wake Uptegraw up. Shelton argues that this evidence was not relevant and should not have been admitted. We disagree. As we have explained, this evidence was relevant to give context to Uptegraw testimony regarding Shelton's threat and why Uptegraw feared Shelton. *See* ***id.***

B. Ineffective Assistance of Counsel

¶23 Shelton contends that he is entitled to a new trial because his trial counsel was ineffective; however, he has failed to establish that counsel's performance was both deficient and prejudicial.

¶24 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** at 697. To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the

defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 689. Thus, in order to succeed on the prejudice aspect of the Strickland analysis, "[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.*** at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997) (citation omitted).

¶25 Shelton argues that his trial counsel was ineffective because counsel failed to request a limiting jury instruction on the other acts evidence admitted at trial. He claims that "a cautionary instruction here was critical" in light of the "enormous volume of testimony of [his] prior bad acts." Shelton has failed, however, to demonstrate that assuming without deciding that trial counsel was deficient in failing to request a jury instruction on other acts evidence, the trial was rendered unreliable or the proceeding fundamentally unfair as a result.

¶26 Shelton also argues that trial counsel's performance was deficient because counsel failed to raise a hearsay objection at trial to the jury viewing the partially redacted videotaped recording of a statement Uptegraw made to police April 2007. At Shelton's postconviction hearing, trial counsel testified that he did not object to the playing of the videotaped statement because he wanted the jury to see Uptegraw's demeanor during the tape and to contrast that with what counsel described as a very different demeanor on the witness stand. We cannot conclude that trial counsel's stated reason for not raising an objection to the videotaped

recording is "outside the wide range of professionally competent assistance" when one considers that had trial counsel raised an objection to the video recording, the State could have had Uptegraw testify in person at trial regarding the statements she made in the April 2007 statement. ***Strickland***, 466 U.S. at 690.

C. New Trial in the Interest of Justice

¶27 Shelton asks this court to exercise our power of discretionary reversal under WIS. STAT. § 752.32. Shelton argues that the real controversy was not fully tried because the jury was presented with inadmissible evidence at trial. We have considered and rejected Shelton's arguments regarding the allegedly inadmissible evidence. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing…." ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989). Accordingly, we decline Shelton's request.

CONCLUSION

¶28 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

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