COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP284-CR **Cir. Ct. No. 2008CF3049**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. NASH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Michael L. Nash appeals from a judgment of conviction, entered upon a jury's verdicts, on one count of first-degree intentional homicide while armed and one count of possession of a firearm by a felon. Nash also appeals from an order denying his motion for a new trial, which he sought on

the grounds that the circuit court had incorrectly admitted other acts evidence. We conclude that there was no error in the admission of the challenged evidence and that even if there were error, it was harmless. Therefore, we affirm the judgment and order.

BACKGROUND

¶2 Nash was charged with the homicide of Devin Price, who died from multiple gunshot wounds, six of which entered the back of Price's body. Nash was identified by Angel Jacobs, who testified that she saw him shoot Price.

¶3 Prior to trial, the State filed a motion *in limine* seeking to admit testimony from Robert Smith. Smith's testimony would include an admission by Nash that he had killed someone named "New York," which was Price's nickname. The State also indicated that Smith would testify that he knew Nash because he had previously purchased drugs from Nash. Nash was concerned about the reference to drug sales, but the circuit court ruled that the evidence was relevant and admissible so long as Smith could testify that Nash admitted killing Price by using either Price's name or nickname.

¶4 At trial, Smith testified that he "bought cocaine from [Nash] a few times" in 2007 and 2008 and that the drug transactions always took place in the bathroom of a specific bar. The State called his attention to his third transaction, which took place shortly after Price's murder, and asked whether there was anything unusual about it. Smith responded, "Yeah. He had a gun." Smith clarified that the "he" referred to was "Mike Mike," which is Nash's nickname. Smith testified that when he saw the gun, "Jokingly I said, well, you are not going to stick me up, are you?" Smith further testified that Nash responded by saying, "[N]o. I just have to watch my back right now.… [A] mother fucker named York

got in the way of trying to eat me and [I] had to lay the mother fucker down."[1] Evidently, the phrase "got in the way of trying to eat me" meant that Price was selling drugs in Nash's territory. The jury convicted Nash of both charges and he was sentenced to life in prison without the possibility of extended supervision for the homicide, plus a concurrent ten years for possessing a firearm.

¶5 Nash moved for a new trial, arguing that "admission of other acts evidence against him violated basic Due Process." Nash did not and does not complain about the admission of his confession or evidence that he had a gun but, rather, contends that the testimony regarding "one or more drug transactions" was prejudicial. He also asserted that the circuit court failed to conduct the proper analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), for determining whether Smith's testimony should be admitted.

¶6 The circuit court ruled that "the information Smith divulged pertaining to drug deals he made with the defendant, although not relevant to the offenses with which he was charged, was not prejudicial as the defendant contends." Thus, any error in admitting the evidence was harmless. The circuit court therefore denied the motion, and Nash appeals.

DISCUSSION

¶7 We review a circuit court's admission of other acts evidence for an erroneous exercise of discretion. *See* ***State v. Payano***, 2009 WI 86, ¶40, 320

[1] Nash did complain that "York" was not Price's nickname. In the postconviction ruling, the circuit court observed that the name was unique enough that "York" was a sufficient identifier for "New York." Moreover, defense counsel was permitted to cross-examine Smith on whether he actually heard Nash use Price's name or nickname, or whether Smith had heard the nickname elsewhere. Nash also called a police detective to further undercut Smith's testimony.

Wis. 2d 348, 768 N.W.2d 832. If the circuit court fails to articulate its reasoning, it erroneously exercises its discretion. ***Id.***, ¶41. Nevertheless, if the circuit court does not properly set out its reasoning, we do not automatically reverse but instead review the record to determine whether it supports the circuit court's decision. *See* ***State v. Marinez***, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399.

I. Other Acts Evidence

¶8 "[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) (2009-10).[2] However, § 904.04(2)(a) "does not exclude the evidence when offered for other purposes[.]" ***Id.*** Thus, there is a three-step analytical framework that we employ in determining whether other acts evidence is properly admitted. *See* ***Sullivan***, 216 Wis. 2d at 772.

> (1) Is the other acts evidence offered for an acceptable purpose … such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance[?] …
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Id. at 772-73. If other acts evidence is improperly admitted, we must then determine whether the admission is harmless or prejudicial. ***Id.*** at 773.

¶9 The proponent of other acts evidence has the burden of fulfilling the first two prongs of the ***Sullivan*** test by the preponderance of the evidence. *See* ***Marinez***, 331 Wis. 2d 568, ¶19. If the proponent satisfies the first two prongs, then the burden shifts to the opponent to show that the evidence's probative value is "substantially outweighed by the risk or danger of unfair prejudice." ***Id.***

A. Permissible Purpose

¶10 WISCONSIN STAT. § 904.04(2)(a) indicates various reasons for which other acts evidence can be admitted, though the list is illustrative and not exhaustive. ***Marinez***, 331 Wis. 2d 568, ¶18. This step is not demanding and "is largely meant to develop the framework for the relevancy determination." ***Id.***, ¶25.

¶11 In determining whether to admit Smith's testimony it appears that the circuit court considered Smith's proffered testimony in its entirety, not pieces. To that end, the circuit court concluded, both pretrial and postconviction, that the testimony was admissible as an admission against the defendant's interest. We agree that this is an acceptable purpose.

¶12 Even if we focus narrowly on Smith's testimony that he "bought cocaine from [Nash] a few times," we conclude that the record reveals acceptable purposes that would support the admission decision: namely, to provide context for the rest of Smith's testimony and to give the jury an opportunity to assess Smith's credibility. *See* ***id.***, ¶27.

¶13 The fact of Smith's cocaine purchases establishes how he was acquainted with Nash, and the unusual appearance of the gun at the third transaction provides context for how Nash came to admit killing Price. The entirety of the narrative also gave the jury an opportunity to evaluate Smith's credibility, including the fact that Smith was admitting his own purchase of cocaine.

¶14 Although Nash disputes that either of these purposes is what is truly meant by "context" and "credibility," we repeat that this first prong is not meant to be particularly onerous. We do not see, in this record, that the State was "'depend[ing] upon the forbidden inference of character as circumstantial evidence of conduct'" when attempting to introduce Smith's testimony. *See* ***id.***, ¶25 (quoted source omitted). Because we are satisfied that the State did not seek to introduce the drug-transaction evidence for a forbidden purpose, and that the purpose the State wanted to use the evidence for was valid, we conclude the first ***Sullivan*** prong is satisfied.

B. Relevance

¶15 The second ***Sullivan*** step is relevance. *See* ***Payano***, 320 Wis. 2d 348, ¶67. "'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.

¶16 The circuit court originally concluded that Smith's testimony was relevant because it was an admission, but only to the extent that Nash had identified his victim by name. In deciding the postconviction motion, the circuit court stated that the fact of the drugs transaction was not, by itself, "relevant to the

offenses with which [Nash] was charged[.]" The State responds on appeal that, as a whole, Smith's testimony was quite relevant, going directly to the question of whether it was Nash who shot and killed Price.

¶17 We agree with the State's general assessment. More specifically, we conclude that the drug transaction testimony was also relevant as context: without that foundational testimony, Smith's inquiry about Nash's "new" gun and the resulting confession make little sense.[3]

C. Prejudice

¶18 If the proponent of other-acts evidence fulfills its burden on the first two ***Sullivan*** prongs, the opponent has the burden of showing admission of the evidence is outweighed by the danger of unfair prejudice if the opponent expects the evidence to be excluded. ***Marinez***, 331 Wis. 2d 568, ¶19.

> Unfair prejudice results when the proffered evidence 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. The circuit court concluded that Nash had not met this burden, as "eyewitnesses to the shooting provided overwhelming evidence of the defendant's guilt in this case beyond a reasonable doubt[.]"

¶19 Nash challenges only the admission of references to drug transactions with Smith, and we conclude that those references are not unfairly

[3] If the admitted evidence was relevant, no due process violation exists. *See* ***State v. Gray***, 225 Wis. 2d 39, 63, 590 N.W.2d 918 (1999) (citing ***Estelle v. McGuire***, 502 U.S. 62, 70 (1991)).

prejudicial. That is, we do not believe admission of such evidence would cause the jury to conclude that if Nash sold cocaine to Smith, then he must have killed Price.

¶20 First, Nash establishes no logical path by which the jury would make such a leap. *Cf.* ***Payano***, 320 Wis. 2d 348, ¶94 ("[T]his is not a classic case of unfair prejudice … where the other acts evidence is so similar in nature to the charged act that there is danger the jury will simply presume the defendant's guilt in the current case[.]"). Indeed, the alleged homicide is a far more inflammatory charge than the possibility of three drug transactions. Second, Nash does not challenge Smith's testimony about Nash's confession, and the unchallenged confession itself referenced drugs as a motive. Finally, as we will explain below, there was far more damning evidence upon which the jury could conclude Nash killed Price. Thus, we conclude that the other acts evidence was not unfairly prejudicial.

II. Harmless Error

¶21 Even if our ***Sullivan*** analysis is erroneous and it was error for the circuit court to allow reference to Smith and Nash's cocaine transactions, reversal is not automatic. Instead, we must evaluate whether admission of the other acts evidence was harmless error. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." ***Sullivan***, 216 Wis. 2d at 792.

¶22 At least one eyewitness—Angel Jacobs—testified that she saw Nash shoot Price. She also testified that when she ran to Price, who was lying in the street, he told her that "Mike Mike did it." Jacobs' sister, Lillie, had seen Nash and Price shortly before the shooting, arguing in a store. A third witness testified

that she had seen "Mike Mike" in a brown hooded jacket shortly before the shooting; after the shooting, when she looked in the direction of the gunshots, she saw an individual fleeing in a similar jacket. Nash admitted to Smith that he had killed "York." Smith told police that Nash's gun was either a .45 or a 9mm weapon; it was a 9mm gun that killed Price. Nash also admitted to a cellmate that he had committed a murder.

¶23 The above is not an exhaustive list of the evidence against Nash. It is, however, sufficient for us to conclude that there is no reasonable possibility that Smith's testimony about Nash's cocaine sales contributed to the verdicts against Nash on homicide and gun possession. A new trial is not warranted.

By the Court.—Judgment and order affirmed.

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