COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2428-CR **Cir. Ct. No. 2008CF1519**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARTELL D. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Martell D. Rogers appeals a judgment convicting him of party-to-a-crime burglary, armed robbery and car theft, based upon his guilty pleas, and then, after a jury trial, of PTAC burglary while armed with a

dangerous weapon, armed robbery, and two counts each of false imprisonment and forceful abduction of a child. Rogers complains that the trial court erred in admitting other-acts evidence and in denying his motion for mistrial. We disagree with Rogers and affirm the judgment of conviction.

¶2 Rogers, Rachel Ritacco and Gerald Halcsik embarked on a six-week crime spree involving numerous victims in three counties. Rogers admitted to burglary, armed robbery and car theft against Dr. James Hammes. Ritacco and Halcsik implicated Rogers in the other offenses.

¶3 Rogers ultimately faced nine Racine county charges stemming from the Hammes incident; the armed robbery of Richard Therkelsen, and the armed burglary of Dr. Lawrence Smith's home, which included charges of false imprisonment/child abduction of James M., Smith's thirteen-year-old ward, and of Anthony S., a six-year-old neighbor who was visiting James.

¶4 Rogers pled guilty to the three Hammes counts after his motion to sever them failed. Over Rogers' objection, the trial court allowed the State to introduce evidence of those charges as other-acts evidence at trial. On the first day of trial, Rogers moved for a mistrial after a Sheriff's investigator referred to his criminal history and confirmed that he had called himself a "druggie." The court denied the motion, ruling that in its view the curative instructions it gave were sufficient, but advising Rogers that he could renew the motion at the end of trial. He did not. The jury found Rogers guilty on all counts.

¶5 On appeal, Rogers contends that the Hammes evidence constituted impermissible character evidence. "[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) (2009-10).[1] Other-acts evidence may be admitted, however, "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.***

¶6 Courts are to follow a three-step analysis to determine whether other-acts evidence is admissible under WIS. STAT. § 904.04(2). ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The trial court must determine, first, if the evidence is offered for an acceptable purpose; second, if the evidence is relevant; and, third, whether the danger of unfair prejudice substantially outweighs its probative value. *See* ***id.*** at 772-73. We review whether the trial court properly exercised its discretion in admitting other-acts evidence. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will not overturn the trial court's decision on an evidentiary ruling as long as the court examined the relevant facts, applied a proper standard of law and demonstrated a rational process in reaching a reasonable conclusion. ***Sullivan***, 216 Wis. 2d at 780-81.

¶7 Here, we cannot conclude that there was an erroneous exercise of discretion. The trial court ruled at the motion hearing that it would allow the evidence to help establish Rogers' state of mind. It explained:

> [S]tate of mind … encompasses everything: Planning, the situation, the purpose, the way the events occurred, things of that nature. It shows a … method because in some cases it's more important than others. But helping the jury reflect upon whether the Defendant did in fact have the intellect, ability, and purpose to commit the crime for which he's being tried.

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

¶8 Seventy-seven-year-old[2] Hammes testified that he lives on a private road and was outside washing his Maserati when he noticed an unfamiliar car with darkened windows driving slowly past. Soon after, Hammes went in the house and found Rogers in his kitchen. Rogers put a gun to Hammes' head, demanded money and valuables and, after speaking to someone on a cell phone or walkie-talkie, left in Hammes' car. Hammes identified Rogers in a photo lineup. Ritacco testified that she and Rogers were "just riding around" when they saw Hammes and Rogers "got out with the intention of taking the man's car."

¶9 Therkelsen testified that he was accosted around midnight as he and his wife walked to their parked vehicle. He said an African-American male ran from across the street, pointed a handgun at him, demanded his wallet and ran off. Ritacco and Halcsik both testified that they and Rogers were riding around when they saw a man walking, that Rogers told Ritacco to pull over, and that they believed Rogers was going to rob the man. When Rogers returned to the car, he had a wallet containing a credit card that the trio later used to make purchases.

¶10 The break-in at Smith's house occurred when James and Anthony were known to be home alone. Ritacco testified that her daughter used to babysit James and her son is James' age. To find out when Smith would be home, she and Rogers stopped at the house on the pretext of wanting James' phone number for her son. A short while later, the trio returned. Ritacco waited in the car while the men forced the boys at gunpoint to search the house for money and valuables.

[2] Rogers complains that Hammes was described as "elderly" at the severance motion hearing when "[n]othing there, or subsequently in the record, gives the doctor's age." Hammes' date of birth is provided in the probable cause section of the complaint.

¶11 The trial court instructed the jury on the Hammes incident's limited purpose. The jury was told that the evidence was received solely on the issues of opportunity, intent, plan, identity, context or background, and not for whether Rogers acted in conformity with a certain character trait or to conclude that he was guilty because he is a bad person. *See* WIS. JI–CRIMINAL 275. A cautioning instruction normally is sufficient to cure any adverse effect attendant to the admission of other-acts evidence. *See* ***Sullivan***, 216 Wis. 2d at 791.

¶12 Besides establishing Rogers' identity, the Hammes evidence showed a common scheme and similarity of conduct. Committed within a relatively short time, each crime involved Rogers, with Ritacco as the driver, "casing" victims made vulnerable by age or location, and making demands at gunpoint for money and valuables. Two of the three showed a disregard for private dwellings. We conclude that the trial court properly exercised its discretion in admitting the Hammes evidence.

¶13 Rogers next contends that the trial court erred in denying his motion for a mistrial. We review a trial court's decision on a motion for mistrial for an erroneous exercise of discretion. ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.***

¶14 Sheriff's investigator Shawn Barker testified about Rogers' statement in which he admitted to committing the Hammes offenses. Asked if Rogers explained why he had done it, Barker replied that Rogers "had said something to the effect that he had been robbing people I believe since—" Rogers objected that it was "outside," and requested a sidebar. After the sidebar, the

reporter read the question back and Barker replied, "Yeah, he had said something to the effect that he had been involved in some robberies since the age of 16." Rogers again objected, offering no reason. The court instructed the jury that the evidence "about other robberies since he was 16" was "inadmissible in the way it came in" so that, unless proved in another way, the jury was to "disregard it in your deliberations entirely. It is immaterial at this point to what we are deciding in this case. It is not in any way to be held against Mr. Rogers in that respect. Give it no credibility."

¶15 The second incident occurred when the prosecutor asked the investigator whether Rogers had acknowledged that "he was just another druggie being a druggie in the wrong place." Rogers objected that the question was leading. The court ruled:

> Well, what I'm going to do, since it's been answered, I'm going to allow it to stand essentially for two reasons. One, it's an admission against interest at this point that may or may not be material. I'm going to let you argue at the time of closings whether it's material or not. He said it. It's a situation that he's admitted with regards to drug activity. But I'll give the jury a cautionary instruction that that is not to be used as … evidence with regards to the crimes in this case. It's simply … what he said at that time during the interview. I don't know any other way to handle it at this point because the jury has heard the answer and it's somewhat innocuous with regard to the charges.
>
> Now, jury, you heard what I said, and I mean it. It's got nothing to do with what we're dealing with here today. Whether Mr. Rogers was using drugs at some time in his life or not clearly had nothing to do with what we're talking about with the Hammes situation. So disregard that entirely in your deliberations with regards to the questions on the verdicts you may have in this case.

¶16 Rogers argues that a properly given curative instruction merely would have admonished the jury to "disregard the last question and answer." He

directs us to ***State v. Jennaro***, 76 Wis. 2d 499, 511, 251 N.W.2d 800 (1977), where the court simply instructed the jury to "disregard all of the testimony given by this last witness." Here, Rogers asserts, the court improperly incorporated comments about his history of robbery and drug activity into the instructions, rendering them "toxic." We disagree.

¶17 Not all errors warrant a mistrial; "the law prefers less drastic alternatives, if available and practical." ***State v. Bunch***, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). A curative instruction presumptively erases any potential prejudice. ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). ***Jennaro*** does not state "the" way to give a proper curative instruction or suggest that a court may not precisely identify the evidence to be disregarded. Rogers has not defeated the presumption that the instructions as given erased any potential prejudice.

By the Court.—Judgment affirmed.

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