COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2017AP321-CR

Cir. Ct. No. 2014CF154

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ALONSO CORRAL,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER and RALPH M. RAMIREZ, Judges. *Affirmed in part; reversed in part and cause remanded.*

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

Per curiam opinions 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).

¶1 PER CURIAM. Alonso Corral appeals from a judgment of conviction and an order denying his motion for a new trial. He contends that the circuit court improperly admitted evidence against him. He further contends that his trial counsel was ineffective. Finally, he contends that he is entitled to a new trial in the interest of justice. The State, meanwhile, cross-appeals from an order granting Corral's motion for sentence modification.[1] For the reasons that follow, we affirm in part, reverse in part, and remand with directions.

¶2 In February 2014, two men named DJ and JB were sitting in a van outside an apartment building in Waukesha waiting for a friend. Two of DJ's children were also in the van. While the four of them were waiting, a man approached the van, pointed a gun at JB, and shot at him through the open window. JB ducked, and DJ drove off when the man fired a second shot. DJ and JB identified the man as Corral. Corral was arrested and charged with several crimes, including attempted first-degree intentional homicide, three counts of first-degree recklessly endangering safety, endangering safety by use of a dangerous weapon, and misdemeanor bail jumping.

¶3 The matter proceeded to trial. There, DJ and JB renewed their identification of Corral as the shooter. They testified that they knew Corral, had considered him a friend, and were positive that he was the perpetrator. On direct examination, the prosecutor asked JB several questions about how well he knew Corral. One of the questions was whether Corral was a member of the same gang

[1] The Honorable Kathryn W. Foster presided over trial and entered the judgment of conviction. The Honorable Ralph M. Ramirez presided over postconviction proceedings and entered the order denying Corral's motion for a new trial but granting his motion for sentence modification.

as JB. Corral objected to the question as calling for inadmissible other acts evidence. The circuit court disagreed and permitted JB to answer the question. JB confirmed that both he and Corral were members of the Latin Kings gang.

¶4 Corral's defense at trial was that DJ and JB were mistaken in their identification of him and that a third-party named Kenny[2] was the real shooter. In support of this defense, Corral highlighted an admission that Kenny made to police about the shooting.[3] Additionally, Corral cited other facts implicating Kenny in the crimes.

¶5 Ultimately, the jury rejected Corral's defense and convicted him on all counts. The circuit court imposed a lengthy term of imprisonment. This included the following consecutive sentences: (1) nine years of initial confinement and five years of extended supervision on the attempted homicide charge, (2) seven years of initial confinement and five years of extended supervision on two of the recklessly endangering safety charges (counts three and four), and (3) five years of initial confinement and five years of extended supervision on the last recklessly endangering safety charge (count five). The court noted that it "wanted to make sure that [it] gave value … to each person in the vehicle by the sentences [it] imposed."

¶6 Two days after sentencing, at a hearing at which neither Corral nor his counsel was present, the circuit court stated that it was making a "formal

[2] "Kenny" is a pseudonym given to the third-party because he was a juvenile at the time of trial.

[3] Kenny told police multiple versions of the shooting. In one version, he said he would take blame for it. However, in other versions, Kenny claimed that Corral was the shooter.

record" that there was a "discrepancy" at sentencing when it had "misspoke" with regard to the last recklessly endangering safety charge (count five). The court explained that it had intended to impose identical sentences on the three recklessly endangering safety charges. It observed:

> The Court apparently indicated on the record 5 years initial confinement together with 5 years of extended supervision [on the last recklessly endangering safety charge—Count 5]. Why I am saying I misspoke is because I clearly wanted to impose 7 years [of initial confinement]. And I will indicate for the record that the reason I say that is because Counts 3 and 4 were really identical counts but involved a different victim, a different passenger in the vehicle. I want to be consistent in all three of those counts.
>
> So in all other aspects the sentence that I imposed is what the sentence I wanted to impose. My thinking is that I said 5 years because I got ahead of myself, because I clearly imposed 5 years of extended supervision in each of those counts.
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> I am calling it on the record today for the simple fact that the judgment needs to be prepared and Mr. Corral is awaiting transport to the prison system. I don't want to hold up that transport. I don't want to have to do an amended judgment down the line to effectuate my intent at the time of the original sentencing, but obviously I will alert both assigned counsel to this matter.

¶7 The circuit court subsequently entered a judgment of conviction reflecting its corrected sentence. It then held another hearing at which both Corral and his counsel were present. There, the court provided additional background as to how it discovered the discrepancy. It also reiterated its intent to impose identical sentences on the three recklessly endangering safety charges. The court told Corral the following:

> At the conclusion of the sentencing … after you had been returned to your jail cell and the attorneys had left the courtroom, my clerk came to see me in my office and questioned if I actually meant to impose a different

> sentence on one of the charges in terms of the actual time of imprisonment.
>
> And I want to make sure I get this correct here today. The gist of that sentence was, after I spoke with her I realized that I misspoke regarding the amount of initial confinement on one of the several charges. And because it was brought to my attention I called this matter on the record ….
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> ….
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> The error that I made was with respect to … one of the three endangering or first-degree reckless endangerings. There were three in essence identical charges in terms of the statute. The Court noted that in referencing the three passengers in the vehicle, and this Court had every intention of sentencing you, Mr. Corral, identically in all three charges. But I misspoke with respect to one of the charges in terms of the initial confinement period. And as a result the sentence that I announced in that regard was in error.
>
> And as the judgment now reads on each of these counts, it is a 12-year sentence and the term of initial confinement is the 7 years and not a 5-year period that I misspoke on one of the counts….
>
> And for that error, which is substantial and I realize that, I apologize, but I rely on the fact that if I had to make a mistake I am glad it was on one of those charges, because I in no way intended to differentiate between any of the three victims ….

¶8 Corral filed a motion for postconviction relief, seeking either a new trial or sentence modification. In it, he accused his trial counsel of ineffective assistance for failing to present evidence regarding the similarity in physical appearance between himself and Kenny. He also challenged the court's correction of his sentence, complaining that it violated his right to be present and was based upon impermissible reflection. Following a hearing on the matter, the court denied the request for a new trial. However, it granted the request for sentence

modification and ordered an amended judgment of conviction consistent with the original oral pronouncement at sentencing. This appeal and cross-appeal follow.

¶9 On appeal, Corral first contends that the circuit court improperly admitted evidence against him. Specifically, he focuses upon the testimony of JB concerning their membership in the same gang. Corral asserts that such testimony constituted inadmissible other acts evidence. Alternatively, he maintains that it was irrelevant and unduly prejudicial.

¶10 This court reviews a circuit court's decision to admit or exclude evidence under the deferential erroneous exercise of discretion standard. *See* ***State v. Vollbrecht***, 2012 WI App 90, ¶25, 344 Wis. 2d 69, 820 N.W.2d 443. We will affirm the decision if there is a reasonable basis for it in the record. ***Id.***

¶11 Here, the circuit court was not persuaded that JB's testimony constituted inadmissible other acts evidence. We agree. Although Corral's membership in a gang may have qualified as an other act, it was not offered to prove his character in order to show that he acted in conformity therewith. As a result, the statute concerning other acts evidence, WIS. STAT. § 904.04(2) (2015-16),[4] and the related analytical framework of ***State v. Sullivan***, 216 Wis. 2d 768, 771-74, 576 N.W.2d 30 (1998), did not apply.

¶12 As for Corral's alternative argument, we are satisfied that the evidence was relevant and not unduly prejudicial. *See* WIS. STAT. §§ 904.01, 904.03. Identification of the shooter was plainly a fact of consequence in the case. Evidence that JB and Corral were members in the same gang supported the State's

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[4] All references to the Wisconsin Statutes are to the 2015-16 version.

theory that JB knew Corral and could reliably recognize him. Any prejudicial effect of such evidence was mitigated by the fact that the State did not overemphasize or further explore the matter. Accordingly, the evidence's admission was proper.[5]

¶13 Corral next contends that his trial counsel was ineffective. He renews his complaint that counsel failed to present evidence regarding the similarity in physical appearance between himself and Kenny. Corral submits that such evidence would have aided the mistaken identity defense by showing that he and Kenny bore a resemblance to one another.

¶14 At the postconviction motion hearing, Corral's trial counsel testified that he chose not to present evidence of Kenny's physical appearance because he had not thought that Kenny looked like Corral and did not want to undermine the mistaken identity defense. Counsel arrived at that conclusion after reviewing a videotape of Kenny's interview with police. He stood by that conclusion after seeing Kenny in person in the courtroom.[6]

¶15 Trial counsel's testimony makes clear that the failure to present evidence of Kenny's physical appearance was the product of a strategic decision based upon his personal observations. Corral has not shown that those observations were unreasonable. Consequently, his claim of ineffective assistance

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[5] Corral also complains that there was no limiting instruction on how the jury should use the evidence of his gang membership. Because Corral did not request such an instruction, we deem the issue forfeited. *See* ***State v. Stawicki***, 93 Wis. 2d 63, 75, 286 N.W.2d 612 (Ct. App. 1979).

[6] Kenny appeared in the courtroom outside the presence of the jury to invoke his Fifth Amendment privilege.

must fail. *See* ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.").

¶16 Finally, Corral contends that he is entitled to a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35, which allows this court to reverse a judgment "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."

¶17 We exercise our discretionary power to grant a new trial infrequently and judiciously. ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have already determined that no error occurred as to the issues raised by Corral on appeal. We are not convinced that the real controversy was not fully tried or that justice miscarried. As a result, we decline to order a new trial pursuant to WIS. STAT. § 752.35.

¶18 Having addressed the issues in Corral's appeal, we turn next to the State's cross-appeal. The State argues that the circuit court erred in granting Corral's motion for sentence modification. It submits that Corral's absence at the hearing to correct his sentence was harmless and that the corrected sentence was based upon the court's original sentencing intent, not impermissible reflection.

¶19 Under WIS. STAT. § 971.04(1)(g), a defendant has a right to be present at the imposition of sentence. A violation of that right is subject to harmless error review. ***State v. Stenseth***, 2003 WI App 198, ¶17, 266 Wis. 2d 959, 669 N.W.2d 776. An error is harmless if it does not affect the substantial rights of the defendant. ***Id.***

¶20 Once a circuit court has imposed a sentence, it may not modify it based solely upon reflection or change of mind. ***State v. Ambrose***, 181 Wis. 2d 234, 240, 510 N.W.2d 758 (Ct. App. 1993). However, a court may later correct an error in its oral pronouncement in order to conform to its original sentencing intent. *See* ***State v. Burt***, 2000 WI App 126, ¶¶1, 12, 237 Wis. 2d 610, 614 N.W.2d 42.

¶21 We agree with the State that Corral's absence at the hearing to correct his sentence was harmless. Corral was afforded a full sentencing hearing at which he appeared and had the opportunity to present witnesses, argue, and allocate. The hearing two days later was brief and held only to correct a misstatement at sentencing regarding the term of initial confinement for the last recklessly endangering safety charge (count five). Given that hearing's limited purpose, Corral's presence would not have affected its outcome.

¶22 We also agree that the corrected sentence was based upon the circuit court's original sentencing intent, not impermissible reflection. The court made clear at the hearings after sentencing that it intended to impose identical sentences on the three recklessly endangering safety charges. This is consistent with its statement at sentencing that it "wanted to make sure that [it] gave value … to each person in the vehicle by the sentences [it] imposed." There are no facts in the record to support the conclusion that the court wanted to give less value to one of the people that Corral endangered.

¶23 For these reasons, we affirm in part, reverse in part, and remand with directions. On remand, the circuit court shall enter a new judgment of conviction reflecting that Corral's sentence for count five consists of seven years of initial

confinement and five years of extended supervision, consecutive to his sentences on the other counts.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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