COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP929-CR **Cir. Ct. No. 2010CF35**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONNIE L. THUMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jackson County: THOMAS E. LISTER, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 SHERMAN, J. Ronnie Thums appeals a judgment of conviction for solicitation to commit first-degree intentional homicide, conspiracy to commit first-degree intentional homicide, and two counts of solicitation for burglary of a

dwelling, and an order denying his postconviction motion. Thums claims: (1) the evidence was insufficient to convict him of conspiracy to commit first-degree intentional homicide; (2) the circuit court improperly instructed the jury as to the "overt act" element for the crime of conspiracy to commit first-degree intentional homicide; (3) his convictions for solicitation to commit first-degree intentional homicide and conspiracy to commit first-degree intentional homicide were multiplicitous; (4) he received ineffective assistance of counsel; (5) the circuit court erred in admitting other acts evidence; and (6) the circuit court imposed an excessive fine without first ascertaining his ability to pay. We affirm in part and reverse in part.

BACKGROUND

¶2 While incarcerated at the Jackson Correctional Institute, Thums was charged with solicitation to commit first-degree intentional homicide, conspiracy to commit first-degree intentional homicide, and two counts of solicitation of the burglary of a dwelling. In March 2009, Thums' cellmate, Robert Trepanier, sent a letter to the Winnebago District Attorney advising the district attorney that Thums had offered him $10,000 to kill Thums' former wife, his two children, and the man she was currently in a relationship with. Trepanier stated in the letter that Thums had provided him with his ex-wife's name, address and a map, and Trepanier identified her name and address in the letter.

¶3 Following the district attorney's receipt of Trepanier's letter, the police arranged for Trepanier to wear a recording device and to meet with Thums. During their conversation, Thums and Trepanier discussed who Thums wanted killed and how he would like it done. A portion of the transcript of their recorded conversation is as follows:

> [Trepanier]: … How do you want me to do this? Do you want me to blow the house up? Did you want me to do the whole family?
>
> [Thums]: It's your choice man. I got no feeling for these fuckers at all fuck me? My own daughter is just fucking shittin on me and that little bitch won't even write me –
>
> [Trepanier]: How come?
>
> [Thums]: Cause they bought her that new fucking car. That little bitch dude. The whole fucking works needs to suffer as far as I'm concerned. Take what you can get out of it the fucking mess and just scoop her fucking eyeballs out blow the bitch up I don't give a fuck.
>
> [Trepanier]: You want the whole family done and the whole works?
>
> [Thums]: Yes
>
> [Trepanier]: You're sure about this?
>
> [Thums]: I'm sure.…
>
> ….
>
> [Trepanier]: How do you want this, do you want this baby blown up? Or do you want to collect the insurance? Do you want to keep what? What? I don't know.
>
> [Thums]: Kill the bitch, blow her up I don't care. She's history.
>
> [Trepanier]: The other daughter too?
>
> [Thums]: If you have to that's good enough. Whoever's in that fuckin house gotta go as far as I'm concerned.

The parties also discussed Trepanier's payment for the services he was going to provide, and Thums advised Trepanier that he could burglarize the home of his former mother-in-law, which contained valuable duck decoys:

> [Trepanier]: Send me some money. I'm gonna have this taken care of. I went this far, I told you I was gonna get the

> pictures taken, there ya go. Send uh, have your Mom send –
>
> [Thums]: She's dead.
>
> ….
>
> [Thums]: … You can get some money out of those ducks.
>
> [Trepanier]: But I need some money. I need a little money.
>
> [Thums]: I don't have any way to send you some money. I'm not getting anything anymore.
>
> ….
>
> [Trepanier]: So how we gonna do this now?
>
> [Thums]: Well I said, this bitch at her mother's place, you could grab those ducks and you could get twenty, at least ten –
>
> [Trepanier]: Does he still have those golf clubs that you were telling me?
>
> [Thums]: Oh, yeah yeah, that gold plated fuckin driver. There's also –
>
> [Trepanier]: But I need some fuckin money because I gotta hit and run.
>
> [Thums]: All you have to do is fuckin burglarize that motherfucking house then (inaudible) you'll be paid for awhile. Trust me that fuckin bitch has got cash laying around the house.

During their conversation, Thums also drew another map for Trepanier, which depicted the location of the homes of Thums' ex-wife and her mother.

¶4 At trial, Trepanier testified that Thums had offered him money to kill Thums' ex-wife and anyone else who was in the house, and the audiotape of Trepanier's conversation with Thums was played for the jury. Thums' defense was that he had never intended on having anyone killed. He testified that

Trepanier had attempted to talk him into paying Trepanier to kill Thums' ex-wife because Trepanier wanted money, and that he had gone along with the plan so that Trepanier would not hurt him.

¶5 During the jury's deliberations, the jury sent the following question to the court concerning the element of "overt act" for the conspiracy charge:

> How do we decipher between "Act" and "Planning"?
>
> One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.
>
> In this case is the planning the act?

¶6 The jury had been instructed as follows with respect to the conspiracy charge:

> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.
>
> **Elements of the Crime that the State Must Prove**
>
> 1. The defendant intended that the crime of first[-]degree intentional homicide be committed. The crime of first[-]degree intentional homicide is committed by one who:
>
> a. Causes the death of another; and,
>
> b. Acts with the intent to kill. "Intent to kill" means that one has the mental purpose to take the life of another human being.
>
> And:
>
> 2. The defendant was a member of the conspiracy to commit the crime of first[-]degree intentional homicide.
>
> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. A

> conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.
>
> ….
>
> 3. One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.
>
> However, the act need not, by itself, be an unlawful act or an attempt to commit the crime. If there was an act which was a step toward accomplishing the criminal objective, that is sufficient.

¶7 Defense counsel suggested, and the prosecutor agreed, that the jury be informed: "the State is alleging that the drawing of the map is the act that went beyond the mere planning. That is a question of fact for you, the jury, to decide." The transcript reflects that the court then instructed the jury as follows:

> There must be an act that goes beyond mere *planning an agreement*. The State in this case alleges that the act of drafting and delivering the maps that you have seen was the necessary act which was a step toward accomplishing the criminal objective.
>
> If you conclude that it is a fact that there was an act which was a step beyond mere *planning an agreement*, then that is sufficient for purposes of the instruction and the crime of conspiracy. (Emphasis added.)

When asked by the court, defense counsel stated that he was satisfied with the additional instruction given to the jury.

¶8 The jury found Thums guilty of all four charges. The circuit court sentenced Thums to forty-two years' imprisonment, consisting of thirty years' initial confinement and twelve years of extended supervision. The court also imposed a fine on Thums in the amount of $44,887.00. Thums moved the circuit court for postconviction relief. Thums claimed that he received ineffective

assistance of counsel at trial, that the circuit court erred in instructing the jury on the "overt act" element of conspiracy, that his convictions for solicitation and conspiracy to commit first-degree intentional homicide were multiplicitous, that the court erred in admitting other acts evidence, and that the court erred in imposing an excessive fine without first determining Thums' ability to pay. The circuit court rejected Thums' claims following a hearing and denied his motion. Thums appeals.

DISCUSSION

A. Sufficiency of the Evidence

¶9 Thums claims that the evidence was insufficient to support his conviction for conspiracy to commit first-degree intentional homicide. When conducting a review of the sufficiency of the evidence to support a conviction, we view the evidence most favorably to the State and the conviction, and will affirm the verdict unless the evidence is so lacking in probative value and force that no trier of fact could reasonably find guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶10 "'A conspiracy is an agreement between two or more persons to accomplish a criminal objective.'" ***State v. Peralta***, 2011 WI App 81, ¶18, 334 Wis. 2d 159, 800 N.W.2d 512. Under WIS. STAT. § 939.31 (2011-12),[1] the crime of conspiracy is committed by one who "with [the] intent that a crime be committed, agrees or combines with another for the purpose of committing that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

crime … if one or more of the parties to the conspiracy does an act to effect its object." Thus, the elements of conspiracy are: (1) intent by the defendant that the crime be committed; (2) agreement between the defendant and at least one other person to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy, otherwise referred to as an overt act.[2] ***Peralta***, 334 Wis. 2d 159, ¶¶18-19. *See* WIS JI—CRIMINAL 570.

¶11 Thums' challenge of the sufficiency of the evidence supporting his conviction for conspiring to commit first-degree intentional homicide is limited to the third element—"an act performed by one of the conspirators in furtherance of the conspiracy." ***Peralta***, 334 Wis. 2d 159, ¶18. At trial, the State argued, and the jury apparently agreed, that Thums' creation of the second map depicting the location of the residences of Thums' ex-wife and her mother, which was created during the recorded conversation between Thums and Trepanier, was an act performed by Thums in furtherance of the conspiracy. Thums argues that the creation of the map was not an act in furtherance of the conspiracy, but instead was "at most, part of [the] foundation of an agreement itself or planning a burglary" of his former in-law's residence. He asserts that the map "provided no more information … with regard [] to the location of Thums' ex-wife … than what was already and obviously in the possession of Trepanier." He also asserts that his failure to pay Trepanier meant the agreement had not been completed.

[2] In order for a violation of WIS. STAT. § 939.31 to occur, the crime that is the subject of the conspiracy need not be committed. ***State v. Peralta***, 2011 WI App 81, ¶18, 334 Wis. 2d 159, 800 N.W.2d 512. The focus instead is on the intent of the parties. Thus, "a person can be convicted of conspiracy even if—as is the case here—the other party to the conspiracy is an undercover agent who did not intend to commit the crime." ***Id.***

¶12 We explained in ***Peralta*** that the overt act is an act "done 'toward the commission of the intended crime,' and must go 'beyond mere planning and agreement." ***Id.*** at ¶19 (quoted source omitted). Any act "which [is] a step toward accomplishing the criminal objective … is sufficient." ***Id.*** We also explained in ***Peralta*** that "'[i]f an overt act is committed in furtherance of the conspiracy, then regardless of the act's importance to the overall scheme, there is no need to prove that the conspirators made a serious effort to carry out their agreement.'" ***Id.***, ¶22 (quoted source omitted).

¶13 In the present case, we conclude that Thums' act of drawing the map depicting where his ex-wife lived was an act "beyond mere planning and agreement," and was instead a "step toward accomplishing the criminal objective" of having Thums' ex-wife killed. *See* WIS JI—CRIMINAL 570. Drawing the map and giving it to Trepanier was not, as Thums asserts, merely part of the formation of the agreement. Rather, it was an overt act that moved the plan forward. Accordingly, we conclude that the evidence was sufficient to support Thums' conspiracy to commit first-degree intentional homicide conviction.

B. Jury Instruction

¶14 Thums contends that the circuit court erroneously instructed the jury on the third element of conspiracy to commit first-degree intentional homicide, the overt act requirement, in response to the question from the jury.

¶15 A circuit court is afforded wide discretion in developing the specific language of a jury instruction. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. Our review is limited to whether the circuit court acted within its discretion, and we will reverse and order a new trial only if the instructions, taken as a whole, communicated an incorrect

statement of law or otherwise probably misled the jury. ***State v. Randall***, 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). Whether a jury instruction provided a correct statement of the law presents a question of law, which this court reviews de novo. ***State v. Lesik***¸ 2010 WI App 12, ¶6, 322 Wis. 2d 753, 780 N.W.2d 210 (Ct. App. 2009).

¶16 We are dealing here with additional instructions after a jury has been initially instructed. We have held that "'[j]ust as the initial jury instructions are within the [circuit] court's discretion, so, too, is the necessity for, the extent of, and the form of re-instruction.'" ***State v. Gordon***, 2002 WI App 53, ¶9, 250 Wis. 2d 702, 641 N.W.2d 183 (quoting ***State v. Simplot***, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993)). Accordingly, "we must determine whether the [circuit] court responded to the inquiries from the jury with sufficient specificity to clarify the jury's problem without communicating an incorrect statement of the law or otherwise misleading the jury." ***Id.*** (citations omitted).

¶17 During its deliberations, the jury sent a note to the court regarding the conspiracy to commit first-degree intentional homicide charge, asking: "How do we decipher between 'Act' and 'Planning'? …In this case is the planning the act?" Both the prosecutor and Thums' trial counsel agreed that "the jury need[ed] to be reminded that an element is an act beyond mere planning." Thums' attorney recommended, and the State agreed, that the jury be told that "the State is alleging that the drawing of the map is the act that went beyond the mere planning." The circuit court then orally informed the jury:

> There must be an act that goes beyond mere planning an agreement. The State in this case alleges that the act of drafting and delivering the maps that you have seen was the necessary act which was a step toward accomplishing the criminal objective.

> If you conclude that it is a fact that there was an act which was a step beyond mere planning an agreement, then that is sufficient for purposes of the instruction and the crime of conspiracy.

After giving the jury the instruction, the court asked both the prosecutor and defense counsel if they were "satisfied with the explanation given to the jury." Both the prosecutor and defense counsel indicated that they were.

¶18 Thums argues that the circuit court erred in giving the additional instruction for the following reasons. First, he claims that the instruction endorsed the State's theory of what constituted an overt act in furtherance of the conspiracy "by referencing the State's theory of what constituted an overt act … in isolation from the defense theory that no overt act … had occurred." Second, he argues that the instruction relieved the State from proving the overt act element because the instruction implied that "it is sufficient to find [a] conspiracy existed if the jurors determine[d] that it is a fact that the defendant drafted the map." He claims that a proper statement of law would have been that the jurors had to determine whether the drawing of the map was part of reaching an agreement and planning an offense, or if the drawing of the map went beyond planning. Third, he argues that the instruction misstated the law in that it instructed the jury that "if you conclude that it is a fact that there was an act which was a step beyond mere *planning an agreement*," rather than properly instructing the jury that it could "conclude that it is a fact that there was an act which was a step beyond mere *planning and agreement* …." (Emphasis added). Thums claims that by using the word "an" rather than "and," the court "endorsed a jury finding that an act that merely constituted planning of an offense was sufficient to establish the 'overt act' element."

¶19 The law is well established that the failure to object to a jury instruction at trial forfeits the right of direct review of that instruction on appeal. *See* ***Best Price Plumbing, Inc. v. Erie Ins. Exchange***, 2012 WI 44, ¶37 n.11, 340 Wis. 2d 307, 814 N.W.2d 419; ***State v. Johnston***, 184 Wis. 2d 794, 822-83, 518 N.W.2d 759 (1994). No objection was raised by Thums to the additional instruction at trial, and in fact, Thums' attorney advised the circuit court after the instruction was given that the defense was satisfied with the instruction. Accordingly, we need not address the merits of Thums' jury instruction challenge.

¶20 However, even if we were to address the merits of Thums' challenge, we would reject his arguments. As we have already explained, the drafting and the delivery of the map, if other requirements were met, is a sufficient overt act and, therefore, the additional instruction was accurate.

C. Multiplicitousness of Offenses

¶21 Thums argues that his convictions for conspiracy to commit first-degree intentional homicide and solicitation of first-degree intentional homicide are multiplicitous and should have been merged upon conviction. Whether charges are multiplicitous is a question of law subject to our de novo review. ***State v. Schaefer***, 2003 WI App 164, ¶43, 266 Wis. 2d 719, 668 N.W.2d 760.

¶22 Multiplicity arises when a single offense is charged as multiple counts rather than merged. ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. To determine whether offenses are multiplicitous, we apply a two part analysis: First, the court determines whether the charged offenses are identical in law and fact. ***State v. Beasley***, 2004 WI App 42, ¶7, 271 Wis. 2d 469, 678 N.W.2d 600. If the offenses are identical in law and fact, a presumption arises "'that the legislative body did not intend to punish the same offense under two

different statutes.'" ***Id.*** (quoted source omitted). If the offenses are not identical in law and fact, a rebuttable presumption arises that the legislature intended to permit cumulative punishment. ***Id.*** In that situation, we apply the second part of our analysis and determine whether the defendant has met his or her burden of overcoming the presumption by showing a clear legislative intent that cumulative punishments are not authorized. ***Id.***, ¶10.

¶23 Applying the two-part test to the facts of this case, we must first determine whether the offenses for solicitation to commit first-degree intentional homicide and conspiracy to commit first-degree intentional homicide are identical in law and fact. This part of the analysis inquires "whether each of the offenses … requires proof of an element or fact that the other does not." ***State v. Derango***, 2000 WI 89, ¶30, 236 Wis. 2d 721, 613 N.W.2d 833.

¶24 A conviction for solicitation to commit first-degree intentional homicide requires proof that: (1) the defendant intended that the crime of first-degree intentional homicide be committed; and (2) the defendant advised another person, by either the use of words or other expressions, to commit the crime of first-degree intentional homicide, in a manner that indicated, unequivocally that the defendant intended that crime be committed. WIS. STAT. § 939.30(1); WIS JI—CRIMINAL 550. Conspiracy to commit first-degree intentional homicide requires proof that: (1) the defendant intended that the crime of first-degree intentional homicide be committed; (2) the defendant was a member of a conspiracy to commit the crime of first-degree intentional homicide; and (3) one or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement. WIS. STAT. § 939.31; WIS JI—CRIMINAL 570.

¶25 We agree with the State that the two offenses are not identical in law because each offense requires proof of an element or elements that the other offense does not require. *See* ***Beasley***, 271 Wis. 2d 469, ¶7. Namely, conspiracy to commit first-degree intentional homicide requires proof that the defendant was a part of a conspiracy to commit the crime and the performance of an act in furtherance of that conspiracy, neither of which are proof requirements for solicitation to commit first-degree intentional homicide. Similarly, solicitation to commit first-degree intentional homicide requires proof that the defendant advised another individual to commit the crime, which is not a proof requirement for conspiracy to commit first-degree intentional homicide.

¶26 Accordingly, we conclude that Thums' convictions for solicitation to commit first-degree intentional homicide and conspiracy to commit first-degree intentional homicide are not identical in law and fact.

¶27 Because the offenses are not identical in law and fact, it is presumed that the legislature intended to permit multiple punishments for these crimes. Accordingly, we now turn to the question of whether Thums has overcome this presumption by demonstrating a clear legislative intent that cumulative punishments are not authorized. *See* ***id.***, ¶¶10, 21. Generally, we consider the legislative intent, in the context of a multiplicity analysis, in light of the following four factors: (1) all applicable statutory language; (2) legislative history and context of the statute; (3) the nature of proscribed conduct; and (4) the appropriateness of multiple punishments. ***Id.***, ¶10. However, we need not consider each of these factors individually because Thums makes only the following legislative intent arguments.

¶28 Thums argues that the legislature did not intend to allow convictions for both solicitation to commit first-degree intentional homicide and conspiracy to commit first-degree intentional homicide because it has prohibited individuals from being convicted of both an attempt to commit a crime and the commission of the crime, and because it has prohibited individuals from being convicted of both solicitation or conspiracy offenses as well as being a party to the crime of the underlying completed offense. *See* WIS. STAT. §§ 939.72(3) and 939.66(4) (prohibiting conviction for the crime charged and for attempt to commit that crime), and WIS. STAT. §§ 939.72(1) and (2) (prohibiting conviction for solicitation or conspiracy as well as being party to the completed crime). However, as pointed out by the State, Thums was not convicted of first-degree intentional homicide and attempt to commit first-degree intentional homicide. Nor was he convicted of being a party to the crime of first-degree intentional homicide. To the extent Thums means to suggest that these are informative comparisons, we fail to discern his logic. So far as we can tell, the situations covered by the legislature are different and not helpful with respect to resolving the challenge made by Thums. Thus, Thums has not shown clear legislative intent not to allow convictions for solicitation and conspiracy to commit the same underlying crime based on the legislature's prohibition of convictions for both a crime and an attempt to commit that crime or for being a party to that crime.

¶29 Thums' only other argument is that allowing separate punishments for solicitation to commit first-degree intentional homicide and conspiracy to commit first-degree intentional homicide is not appropriate because it is fundamentally unfair. He argues that in this case, the facts underlying his solicitation and conspiracy convictions "stem from the same acts and aim towards the same purpose," and, citing ***Monoker v. State***, 582 A.2d 525, 529 (Md. 1989),

argues that other jurisdictions have found convictions for both solicitation and conspiracy to be "fundamentally unfair where 'the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it.'"

¶30 In ***Monoker***, the Maryland Supreme Court applied the rule of lenity because it was unable to determine whether the Maryland Legislature intended to permit convictions for both solicitation and conspiracy. Under that rule, if the Maryland court is "unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, [the court], in effect, give[s] the defendant the benefit of the doubt and hold that the crimes do merge." ***Id.*** Thums has not directed this court to any legal authority, and we have not found any in our admittedly non-exhaustive search, that Wisconsin has a rule of lenity identical to that in Maryland. In Wisconsin, when there is doubt as to the meaning of a criminal statute, we apply a rule of lenity and interpret the statute in favor of the accused. *See* ***State v. Cole***, 2003 WI 59, ¶13, 262 Wis. 2d 167, 633 N.W.2d 700. However that rule of lenity applies to ambiguity in the statute itself, not to ambiguity in the legislature's intent. Furthermore, the law is clear that where two crimes are different in fact and law, we apply a rebuttable presumption that the legislature intended separate punishments. *See* ***Beasley***, 271 Wis. 2d 469, ¶7. Accordingly, we find Thums' reliance on ***Monoker*** to be unpersuasive.

¶31 Thums has not met his burden of showing clear legislative intent that multiple punishments were not authorized by the legislature, and our own review of the four factors does not suggest that Thums missed a viable legislative intent argument. Accordingly, we reject his challenge.

D. Ineffective Assistance of Counsel

¶32 Thums contends that he is entitled to a new trial because his trial counsel was ineffective. However, we conclude that Thums has not met his burden.

¶33 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 performance, a defendant must show that his lawyer's acts or omissions were not reasonable under the prevailing professional norms. ***Id.*** at 688. 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]the 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.

¶34 Thums argues that his trial counsel was ineffective because counsel failed to put before the jury documentary evidence that Thums had reported to prison officials that he had been attacked by Trepanier. We are not persuaded that counsel's failure to present this evidence was prejudicial. Thums argues that the evidence would have diminished Trepanier's credibility, in particular with respect to Trepanier's testimony that neither he nor Thums reported an altercation between them, which strengthened their relationship and trust in one another. Thums also claims that evidence that he reported that he had been attacked by

Trepanier would have bolstered his own credibility with regard to his claim that he "played along with the murder for hire discussions in an effort to protect himself from further abuse [by Trepanier] without any intent that actual harm would come to anyone." This argument fails because it ignores the timing of Thums' report to prison authorities and evidence of a subsequent recantation.

¶35 Both Thums and Trepanier testified at trial that they fought each other, and neither initially reported the incident to authorities. Thums testified that on April 3, 2009, approximately four days after the fight occurred, a unit manager questioned him about the fight and he acknowledged that Trepanier had hit him, after which Thums was placed in segregation for sixteen days while the fight was investigated. Trepanier testified that both he and Thums ultimately denied that the fight took place, which resulted in both of them being placed in segregation for a lesser period of time than if they had admitted to the fight. In light of this testimony, documentary evidence that Thums reported the fight with Trepanier to officials would have been cumulative. Accordingly, we are not persuaded that had counsel presented documentary evidence that Thums reported the fight with Trepanier to officials, there is a reasonable probability that the result of the proceeding would have been different.

¶36 Thums argues that his trial counsel was ineffective because counsel failed to request his presence or consult with him prior to responding to jury questions submitted to the court during the jury's deliberations and prior to suggesting an answer to the jury's question regarding the overt act element of conspiracy to commit first-degree intentional homicide. Assuming without deciding that trial counsel was deficient in failing to request his presence or consult with him, Thums has failed to demonstrate that the trial was rendered unreliable or the proceeding fundamentally unfair as a result.

¶37 Thums also asserts that counsel's performance was deficient because: (1) counsel argued that the jury should review an unredacted letter from Trepanier to the district attorney in which Trepanier stated that "[Thums] told me about a cold case that happened in 1965 West of Omro, (Wolton). Something like that 14 year old kid Henry Hobart shot in a field …," and (2) counsel suggested, and failed to object to, the additional instruction given to the jury with respect to the "overt act" element, which he claims "effectively endorsed the State's theory of the case." Although Thums argues that these actions were prejudicial to him, Thums has failed to develop a separate argument as to why it was deficient performance for counsel to seek to present the jury with the letter, or why it was deficient for counsel to go along with the instruction.

¶38 In addition, we are not persuaded that Thums was prejudiced by the information in the letter or the additional instruction. In denying Thums' postconviction motion, the circuit court concluded that it:

> [did] not believe that there is even a remote possibility that the result of the trial would have been different. The evidence established that Thums was a volatile, revengeful, dangerous, unbalanced, and non-credible person. There was overwhelming evidence of his guilt[]. His former wife and even the jurors were terrified by him. The reliability of the results of this trial were unaffected errors claimed by the appellate counsel and the Court has great confidence in the outcome reached by the jury.

We agree. Although Thums denied that he intended to have Trepanier kill his ex-wife and daughters, or burglarize the residence of his former mother-in-law, the jury heard the audiotape of the conversation between Thums and Trepanier, a portion of which is detailed above in ¶3. During that conversation, Thums told Trepanier that he wanted his ex-wife and daughters killed and that Trepanier could burglarize the home of his ex-wife's mother for payment. The content of Thums'

statements to Trepanier belie the assertion that he was responding to a perceived threat from Trepanier. And, Thums admitted that he drew the maps depicting the location of his ex-wife's home and gave them to Trepanier. Simply stated, we are not persuaded that but for counsel's alleged errors, the result of the proceeding would have been different.

E. Other Acts Evidence Admissibility

¶39 Thums contends that the circuit court erroneously exercised its discretion by admitting evidence pertaining to a prior stalking conviction which involved him putting a knife into the driver's seat of an ex-girlfriend's car because evidence relating to that conviction was inadmissible other acts evidence.

¶40 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. A court properly exercises its discretion if it applies the proper law to the established facts and there is any reasonable basis for the court's ruling. ***Id.***

¶41 WISCONSIN STAT. § 904.04(2)(a) prohibits the admission of "evidence of other crimes, wrongs, or acts … to prove the character of a person in order to show that the person acted in conformity therewith." Other acts evidence is admissible, however, if the evidence is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Id.***

¶42 When deciding whether the admission of other acts evidence should be allowed, 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 § 904.02; (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 satisfies his or her burden, the burden then shifts to the opposing party, who must show that the evidence's probative value is "substantially outweighed by the risk of danger of unfair prejudice." ***Id.***

¶43 The circuit court ruled that evidence pertaining to Thums' prior stalking conviction was proper for the purpose of rebutting "unequivocal[]" testimony by Thums that "he has never engaged in any plan that involved intent to harm another person," in light of the fact that intent was a "consequential fact" in the case. The court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice and, therefore, allowed the prosecution to cross-examine Thums regarding his prior conviction. [3]

¶44 Thums does not dispute the court's determination that offering the evidence to establish intent is a proper purpose. He argues only that the evidence

[3] Thums asserts that the circuit court did not conduct a ***Sullivan*** analysis of the other acts evidence, but instead "recited the ***Sullivan*** factors, but ultimately ruled that it was proper to admit … [the evidence] in order to impeach [him]." We find this assertion to be without merit. As directed by ***Sullivan***, the circuit court analyzed whether the evidence was offered for a proper purpose, was relevant, and whether its probative value was outweighed by the potential for substantial prejudice.

was not relevant and that prejudice emanating from evidence pertaining to his prior stalking conviction outweighs the probative value of that evidence.

¶45 Evidence is relevant so long as it has "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. Thums argues that evidence pertaining to his intent with respect to his stalking conviction was not relevant because his prior conviction and the present one are "wholly separate case[s]" and he had admitted to the prior conviction. We disagree. At trial, Thums was questioned regarding the comments he made to Trepanier during their recorded conversation and his intent to cause harm to his ex-wife, her husband, and his daughters. Defense counsel asked Thums: "But you're denying that you had any intent to do any of those nasty things?" Thums answered: "Yes, I'm denying that. I never had any intent. I've never, never set a plan or any intent to ever go out and harm anyone."

¶46 The circuit court found that Thums unequivocally testified that "he never engaged in any plan that involved intent to harm another person." We conclude that evidence that Thums placed a knife in the driver's seat of his ex-girlfriend's vehicle was relevant to rebut Thums' claim that he never had the intent to harm anyone or made a plan to harm anyone.

¶47 Having determined that the evidence was relevant, we now turn to the question of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See* 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 (citations omitted). As the opponent of the evidence. Thums bears the burden of establishing disproportionate prejudice. *See* ***Marinez***, 331 Wis. 2d 568, ¶19.

¶48 Thums asserts that the evidence was "greatly prejudicial," but does not develop an argument as to *why* the evidence was disproportionately prejudicial. Thums has thus failed to satisfy his burden. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion by admitting the other acts evidence at issue here.

F. Fine Imposition

¶49 Thums contends the circuit court erroneously exercised its discretion in imposing a fine on him in the amount of $45,000 without first determining his financial ability to pay. Thums timely raised the issue of ability to pay in his postconviction motion, and the State concedes that it was necessary for the circuit court to make a determination on that issue. *See* ***State v. Kuechler***, 2003 WI App 245, ¶13, 268 Wis. 2d 192, 673 N.W.2d 335. *See also* ***State v. Ramel***, 2007 WI App 271, ¶15, 306 Wis. 2d 654, 743 N.W.2d 502 (stating it is necessary for a circuit court to "determine … whether a defendant has the ability to pay a fine if the court intends to impose one.") The State further concedes that the circuit court failed to determine Thums' ability to pay and therefore it is appropriate to remand to the circuit court to determine whether Thums had the financial ability to pay the fine. Accordingly, we reverse that portion of the judgment imposing the fine and that portion of the circuit court's order rejecting Thums' challenge of the fine, and remand the proceeding back to the circuit court with directions that the court hold a hearing to determine Thums' ability to pay the fine.

CONCLUSION

¶50 For the reasons discussed above, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

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

Not recommended for publication in the official reports.