COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1460-CR **Cir. Ct. No. 2010CF655**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. LUCKETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EUGENE A. GASIORKIEWICZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Antonio Luckett appeals from a judgment convicting him of a total of eleven counts of battery, possession of THC and cocaine, threats to injure, possession of a firearm by a felon, and bail jumping and

from an order denying his motion for postconviction relief. On appeal, Luckett argues that the trial court erred in admitting six-year-old other-acts evidence or, alternatively, that defense counsel ineffectively failed to adequately object to its admission. Luckett also asserts that the prosecutor's opening-statement, closing-argument, and rebuttal comments urged the jury to view the other-acts evidence as propensity evidence, and that defense counsel failed to object to it and request a curative instruction.[1] We reject his contentions and affirm.

¶2 Luckett's then wife, Pamela, went to police and reported that Luckett came home with marijuana and cocaine, accused her of infidelity and, angrily demanding that she help bag the drugs, took a swing at her, but missed and hit their young daughter instead, then repeatedly punched Pamela in the face, and threatened to shoot "seventeen rounds" if she called the police. Pamela said she recently had seen him in the house with a gun. A search of the home revealed the drugs and two guns. In a subsequent recorded jail call between Luckett and Pamela, he threatened to kill her.

¶3 Luckett was tried on a fourteen-count information. Luckett's defense was that Pamela had framed him. He claimed the guns and drugs were Pamela's and that she lied to police as she admittedly had done in the past. Pretrial, the State moved to allow it to present evidence of four prior incidents in which Luckett used physical violence against Pamela and other women. The trial court ruled that two 2004 "other acts," including police photos of the resultant injuries, were admissible to show the absence of mistake or accident, and to put

[1] The trial court gave a curative instruction. We discuss this aspect of his claim no further.

the nature of Luckett's and Pamela's relationship in context. In one incident, he beat up Pamela. In the other, he kicked in the door of Pamela's sister's home and punched the sister in the face when she tried to keep Luckett away from Pamela. The court disallowed 2001 and 2003 incidents not involving Pamela. The court instructed the jury that the evidence was received only to help determine whether Luckett "acted with the state of mind required" for the charged offenses and "to provide a more complete presentation of the evidence relating to [those charges]." *See* WIS JI—CRIMINAL 275. The jury found Luckett guilty of misdemeanor battery, possession of THC and cocaine with intent to deliver, two counts of felony possession of a firearm by a felon, five counts of misdemeanor bail jumping, and threats to injure. It acquitted him of physical abuse of a child, the associated misdemeanor bail jumping, and witness intimidation.

¶4 Luckett filed a postconviction motion arguing that defense counsel was ineffective for not adequately objecting to the other-acts evidence. The court denied the postconviction motion after a ***Machner***[2] hearing. Luckett appeals.

Alleged Trial Court Error

¶5 Luckett first argues that the other-acts evidence was inadmissible propensity evidence, was not relevant to the charged offenses and was unfairly prejudicial. We review a trial court's admission of other-acts evidence for an erroneous exercise of discretion. ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. We will uphold its evidentiary ruling if the court "examined the

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.***

¶6 WISCONSIN STAT. §§ 904.04(2)(a) and 904.03 (2011-12)[3] govern admissibility of other-acts evidence. Briefly stated, if the evidence shows nothing more than the defendant's propensity to act a certain way, the evidence is not admissible. ***State v. McGowan***, 2006 WI App 80, ¶18, 291 Wis. 2d 212, 715 N.W.2d 631. Rather, other-acts evidence must be offered for an acceptable purpose, it must be relevant as defined in WIS. STAT. § 904.01, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶7 After carefully examining the four other-acts events the State hoped to introduce, the trial court limited admission to the two that involved Pamela, then further limited that evidence to prevent the jury from hearing that Luckett had beaten Pamela with a metal broom. The court relied on context and absence of

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

> [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. 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.

WISCONSIN STAT. § 904.03 provides:

> Although relevant, evidence may be excluded if its probative value is 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.

All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

mistake or accident to admit the evidence. "Other-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case." ***Hunt***, 263 Wis. 2d 1, ¶58. Here, the other acts helped to place the current charges in the context of the Lucketts' continuing discord and to explain the control Luckett wielded over Pamela, her resultant fear of him, and that her past lies to police were to protect Luckett after he promised to change. *See* ***id.***, ¶¶58-59.

¶8 The other-acts evidence also tended to show that Luckett had the mental purpose to cause bodily harm, or at least was aware that his conduct was practically certain to do so. Regardless of how Luckett framed his defense, the State still had to prove the element of intent. *See* ***State v. Hammer***, 2000 WI 92, ¶25, 236 Wis. 2d 686, 613 N.W.2d 629 ("If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element."). It is not fatal that "state of mind" was specifically referenced only in the cautionary instruction. *See* ***Hunt***, 263 Wis. 2d 1, ¶59. Absence of mistake or accident is "state of mind" or "intent" said another way.

¶9 As to the second ***Sullivan*** factor, the court determined that the other-acts evidence was relevant to some of the charged offenses. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." WIS. STAT. § 904.01.

> "The measure of probative value in assessing relevance is the similarity between the charged offense and the other act." Similarity is demonstrated by showing the "nearness of time, place, and circumstance" between the other act and the alleged crime. It is within a circuit court's discretion to determine whether other-acts evidence is too remote. [R]emoteness must be considered on a case-by-case basis.

Hunt, 263 Wis. 2d 1, ¶64 (citations omitted). When assessing remoteness, the court considers "the opportunities presented over that period for the defendant to repeat the acts." *See* ***State v. Clark***, 179 Wis. 2d 484, 494-95, 507 N.W.2d 172 (Ct. App. 1993) (citation omitted). Noting that Luckett was in prison from 2005 to 2009, the court concluded that the earlier evidence of violence directed toward Pamela still was relevant to show context and absence of mistake or accident and, as indicated by the jury instruction it gave, state of mind.

¶10 Under the third step of the ***Sullivan*** analysis, the trial court reasonably concluded that the risk of unfair prejudice did not substantially outweigh the probative value of the other-acts evidence. Nearly all evidence is prejudicial to the party against whom it is offered. ***State v. Murphy***, 188 Wis. 2d 508, 521, 524 N.W.2d 924 (Ct. App. 1994). Luckett argued that the evidence was unfairly prejudicial because it essentially told the jury that if he beat her before he likely beat her again. We disagree.

¶11 Unfair prejudice results when the evidence tends to influence the outcome by improper means or causes the jury to base its decision on something other than the established propositions in the case. ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). As noted, the evidence was relevant to context and state of mind. Luckett has not met his burden of showing that the other acts' probative value was substantially outweighed by an unfair prejudicial effect. *See* ***Hunt***, 263 Wis. 2d 1, ¶75.

¶12 The trial court applied the proper law to the facts, explained its reasoning, and concluded that the other-acts evidence satisfied all three prongs of the ***Sullivan*** test. It also gave the jury an appropriate cautionary instruction, which goes far to cure any adverse effect attendant to the admission of other-acts

evidence. *See* ***State v. Fishnick***, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985). We affirm the court's exercise of discretion.

Trial Counsel Performance

¶13 Alternatively, Luckett argues that trial counsel ineffectively failed to adequately object to the other-acts evidence. 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." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious as to deprive the defendant of a fair trial and a reliable outcome. ***Id.*** at 689. "[T]he 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). Deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will not upset findings of fact unless they are clearly erroneous, but we decide de novo the legal questions of whether counsel's performance was deficient or prejudicial. ***Id.***

¶14 Luckett asserts that when the State advised the trial court at the pretrial ***Sullivan*** hearing that it intended to use the other-acts evidence for absence of mistake and accident, counsel deficiently failed to inform the court that it did not factor into the defense, but instead conceded that mistake and accident amounted to an acceptable purpose. There are several problems with this argument. First, the evidence would have been admitted anyway because it was offered for another acceptable purpose: context and background. Second, the trial

court found that counsel "vehemently object[ed]" to the evidence at the hearing and again at trial "appropriately objected and argued that the scope of the admitted prior acts had been overstepped by the State." These findings are not clearly erroneous. Counsel's concession therefore did not render the result of the trial unreliable or the proceeding fundamentally unfair.

¶15 Luckett next complains that counsel deficiently failed to object at trial when the State allegedly improperly used the other-acts evidence to show propensity. The prosecutor said in her opening statement that the evidence would show that Luckett's and Pamela's relationship was abusive "almost from the beginning" and similarly argued at closing that Pamela repeatedly took Luckett back despite their problematic history "[b]ecause, according to her testimony, he said he'd change. He promised things would be different. But do you really see anything different between the 2004 incident and the one that happened May 13th, 2010?" On rebuttal, the prosecutor responded to defense counsel's argument that if Pamela really had been punched as she told police, it would have left "very observable evidence." Instead, two police officers had testified that they saw no physical injuries on Pamela or the child. The prosecutor commented that the photos of Pamela's 2004 beating showed "huge bruises … but they aren't on her face. Does that mean that they don't exist? Does that mean that they're all just making this up?"

¶16 Defense counsel testified at the ***Machner*** hearing that he did not object during trial to the testimony so as not to emphasize it to the jury. He also explained that he generally does not object during opening statements or closing arguments unless a comment is "very egregious" because juries tend to view such objections as "rude" and "interrupting." Trial strategy decisions reasonably based in law and fact generally do not constitute ineffective assistance of counsel. *See*

State v. Hubanks, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). Also, the prosecutor merely laid out the evidence that would be, and then was, presented, and responded to the defense argument that the absence of visible injury did not rule out that Luckett struck Pamela. The prosecutor did not invite the jury to draw the conclusion that Luckett acted in conformity with some character trait. Beyond that, the court already had ruled the evidence admissible. The failure to voice an objection that would have been overruled is not deficient performance. *See* ***State v. Traylor***, 170 Wis. 2d 393, 405, 489 N.W.2d 626 (Ct. App. 1992).

¶17 The court's finding that counsel's explanations were "logical" is not clearly erroneous and the court's instruction to the jury that counsels' comments and arguments are not evidence, coupled with the instruction on the other-acts evidence proper use, presumably were followed. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Because Luckett fails to establish that counsel's actions were outside the range of professionally competent assistance, we need not consider the prejudice prong. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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