COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2414-CR **Cir. Ct. No. 2016CF29**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN W. FORGUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Judgment affirmed; order reversed and cause remanded for further proceedings*.

¶1 KLOPPENBURG, P.J.[1] Shawn Forgue appeals the judgment of conviction entered after a jury verdict finding Forgue guilty of misdemeanor

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

battery (domestic abuse) and misdemeanor disorderly conduct (domestic abuse), and the order of restitution. Forgue argues that the circuit court erroneously exercised its discretion by denying his motion to admit evidence concerning one prior incident of the victim's violent conduct and two other acts by the victim. Forgue also argues that the record is insufficient to support the court's restitution order. For the reasons discussed below, I reject Forgue's challenges to the court's evidentiary decisions and, therefore, affirm the judgment of conviction. Based on the State's concession as to the insufficiency of the record to support the restitution order, I reverse the order and remand for a new hearing on restitution.

BACKGROUND

¶2 The State charged Forgue with six offenses related to an altercation in March 2015 with his then-girlfriend, T.S. T.S. claimed that Forgue initiated the attack, and Forgue claimed that T.S. initiated the attack and that he struck at her to defend himself.

¶3 To support his theory of the case—that he reasonably acted to defend himself from T.S.[2]—Forgue moved to admit evidence about previous incidents of violent conduct by T.S. and evidence about other acts of T.S. involving domestic abuse and alleged stolen mail. At a pretrial motion hearing, the circuit court admitted evidence about two incidents of violent conduct and excluded all proffered evidence of other acts.

[2] Under WIS. STAT. § 939.48, a person may assert self-defense as a defense to criminal liability "if the person reasonably believes that another is unlawfully interfering with her person, and if the person uses such force as the person reasonably believes is necessary to prevent or terminate the unlawful interference." ***State v. Head***, 2002 WI 99, ¶64, 255 Wis. 2d 194, 648 N.W.2d 413 (emphasis omitted).

¶4 A jury convicted Forgue of two counts—misdemeanor battery and misdemeanor disorderly conduct—and acquitted him of the remaining four counts.

¶5 After the trial, the circuit court held a hearing to determine the amount of restitution to award to T.S. and the Wisconsin Department of Justice Crime Victim Compensation Program. After the hearing, the court issued its restitution order, ordering Forgue to pay $269.50 to T.S. for "lost wages due to trial" and $1,000 to the Crime Victim Compensation Program.

¶6 Forgue appeals the circuit court's decisions excluding evidence of one prior incident of the victim's violent conduct and excluding evidence of two other acts by the victim. Forgue also appeals the order setting the amount of restitution.

DISCUSSION

¶7 Forgue argues that the circuit court erroneously exercised its discretion by denying his motion to admit evidence concerning one prior incident of the victim's violent conduct and two other acts by the victim. Forgue also argues that the record is insufficient to support the court's restitution order. I address each argument in turn.

I. The circuit court's decisions excluding evidence of one incident of violent conduct and evidence of two other acts

¶8 Generally, "whether to admit or deny evidence rests in the sound discretion of the circuit court, which we will not overturn absent an erroneous exercise of discretion." ***State v. Novy***, 2013 WI 23, ¶21, 346 Wis. 2d 289, 827 N.W.2d 610. The question on review is not whether we would have allowed admission of the evidence in question. *See* ***State v. Veach***, 2002 WI 110, ¶55, 255

Wis. 2d 390, 648 N.W.2d 447. Rather, if the circuit court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach," we will affirm its decisions. ***Id.*** (quoted source omitted).

A. The circuit court did not erroneously exercise its discretion when it excluded evidence of one incident of violent conduct by T.S.

¶9 In ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), our supreme court held that "an accused in a prosecution for assault or homicide [may] support a self-defense claim by proving prior specific instances of the victim's violence of which the accused was aware at the time of the assault to establish the accused's state of mind about the danger the victim posed." ***State v. Daniels***, 160 Wis. 2d 85, 94, 465 N.W.2d 633 (1991). A defendant who raises self-defense in a prosecution for assault and provides the factual basis to support that defense, "may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident." ***McMorris***, 58 Wis. 2d at 152.

¶10 Admissibility of the proffered evidence is not automatic, and the evidence may not be used to support an inference about the victim's actual conduct during the incident. ***Head***, 255 Wis. 2d 194, ¶128. Rather, the evidence is admissible only with respect to the defendant's state of mind, that is, only to the extent the evidence bears on the reasonableness of the defendant's apprehension of danger. ***Id.*** The admission of ***McMorris*** evidence "rests in the exercise of sound and reasonable discretion of the circuit court." ***Daniels***, 160 Wis. 2d at 96.

¶11 The circuit court here admitted evidence of two incidents of violent conduct by T.S. against Forgue: (1) when T.S. "lung[ed]" at Forgue with a skateboard and then injured herself when she "smacked the skateboard on the bannister"; and (2) when T.S. took off her shoe and "smacked" Forgue in the face while he was driving, knocking out one of his teeth. The court excluded evidence of a third incident in which T.S. began driving erratically with "road rage," causing Forgue to fear for his safety in the car. On appeal, Forgue argues that the court erroneously exercised its discretion when it excluded evidence of the road rage incident.

¶12 The circuit court explained that T.S.'s road rage jeopardized both her and Forgue and was "maybe unwise conduct [and] turbulent," but that it did not bear on whether Forgue would feel the "need to strike" her as a result. Forgue argues that the court improperly considered whether it would be reasonable for Forgue to strike T.S. in self-defense during the road rage incident, rather than whether T.S.'s road rage was the sort of conduct that would cause Forgue to fear for his safety at the time of the March 2015 incident.

¶13 Forgue reads the circuit court's explanation too narrowly. The circuit court's remarks read in context indicate that the circuit court believed the incident to be irrelevant: the court did not see the evidence as making it reasonable for Forgue to feel like he needed to defend himself at any time from T.S., saying "that doesn't seem to be a logical result." Forgue himself stresses that the incident must be relevant to Forgue's "knowledge of T.S.'s violent behavior *towards* him," but, as the court noted, the road rage incident did not involve T.S.'s violent behavior towards Forgue. The court reasoned that whether T.S. was an erratic driver was not relevant to whether Forgue would feel he had to defend himself in future situations involving T.S.

¶14 In sum, the circuit court examined the relevant facts, applied the proper standard of law, and used a rational process to reach a reasonable conclusion when it excluded evidence of the road rage incident.[3]

B. The circuit court did not erroneously exercise its discretion when it excluded evidence of two other acts by T.S.

¶15 In ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), our supreme court outlined the three-part analytical framework used to determine the admissibility of other acts evidence: (1) whether the evidence is "offered for an acceptable purpose … such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"; (2) whether the evidence is relevant, meaning that it is of consequence to the action, and has probative value; and (3) and whether the probative value of the evidence 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."

¶16 Admissible other acts evidence does not include "bad conduct evidence only when offered to prove the character of a person in order to show that [she] acted in conformity therewith." ***State v. Kaster***, 148 Wis. 2d 789, 797-98, 436 N.W.2d 891 (Ct. App. 1989) (internal quotation marks omitted). The decision of whether to admit other acts evidence is left to the discretion of the circuit court. ***Sullivan***, 216 Wis. 2d at 780-81.

[3] Because I conclude that the circuit court did not err in excluding evidence of the road rage incident, I do not address the parties' arguments as to whether any error was harmless. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶17 Forgue argues that the circuit court erroneously exercised its discretion when it excluded evidence of two other acts—a prior domestic violence offense by T.S. and T.S. having allegedly stolen mail—which Forgue sought to present "to show T.S.'s motive, intent, and plan to falsely accuse him of domestic violence" at the March 2015 incident. I address and reject Forgue's argument as to each other act as follows.

1. Evidence of a prior domestic violence offense by T.S.

¶18 Forgue sought to present evidence that in 2008, T.S. was arrested for a domestic violence offense after a physical altercation with her then-boyfriend, and that she admitted to law enforcement that she had been enraged and struck him, saying "if I have to go to jail, at least it was worth it." T.S. ultimately pled no contest to a criminal disorderly conduct charge. Forgue argues that T.S.'s experience of having been arrested for the prior domestic violence offense shows that T.S. had a motive to initiate the attack and risk arrest and then falsely accuse Forgue in order to avoid arrest.

¶19 While Forgue offered the evidence of the prior domestic violence offense for motive, which is a permissible purpose, the circuit court determined that the evidence was not relevant to show motive. The court reasoned that "everybody" knows that they are likely to be arrested if they commit a crime, and that they are more likely to avoid arrest if they deny committing the crime, "regardless of any prior incidents they had," and that the defense could cross-examine T.S. as to her knowledge of these topics. The court determined that evidence of the domestic violence offense "really is more propensity" evidence, and therefore not relevant. Finally, the court determined that presenting evidence

of the prior domestic violence incident would be "too likely to confuse the issues here," and Forgue does not take issue with that determination.

¶20 In sum, the circuit court reviewed the relevant facts, applied the proper standard of law, and used a rational process to reach a reasonable conclusion when it excluded evidence of T.S.'s prior domestic violence offense.

2. Alleged stolen mail

¶21 Forgue also sought to present evidence that, a week or two before the March 2015 incident, he had discovered that T.S., an employee of the United States Postal Service, had other people's undelivered mail in the residence that he shared with T.S., indicating that T.S. allegedly stole the mail. During the March 2015 incident, according to Forgue, he told T.S. to leave the residence, T.S. responded that she would accuse him of domestic violence if he made her leave, and Forgue countered that he would tell the police she was stealing mail. According to Forgue, T.S. responded that if he did, she would "kill him in his sleep," a threat that Forgue said he recorded at that time. Forgue argues that the alleged stolen mail evidence shows that T.S. had a motive to falsely report Forgue for domestic violence before he reported her for mail theft, and that the evidence was relevant to T.S.'s credibility.

¶22 The circuit court allowed Forgue to testify about his telling T.S. to leave the residence and her response, including that she would accuse him of domestic violence and her threat to kill him in his sleep, a recording of which was played for the jury. However, the circuit court excluded any evidence about the stolen mail. The court determined that the stolen mail evidence had little probative value and was needlessly cumulative because Forgue could provide the jury with evidence of T.S.'s asserted motivation to "mak[e] something up" by

testifying about his telling T.S. to leave and T.S. replying that she would report him to the police and shoot him in his sleep. The court determined that the evidence of an, as of yet, uncharged offense also had "potential for confusion of the issues" that "outweighs any probative value," and Forgue does not take issue with that determination.

¶23 In sum, the circuit court reviewed the relevant facts, applied the proper standard of law, and used a rational process to reach a reasonable conclusion when it excluded evidence that T.S. allegedly stole mail.

3. Forgue's reliance on ***State v. Echols***

¶24 Forgue supports his arguments for admitting the evidence of the two other acts by citing ***State v. Echols***, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768, but that case is inapposite. In ***Echols***, a school bus driver charged with assaulting a student sought to admit the student's disciplinary records as other acts evidence to show the student's knowledge of a behavioral contract providing that she would be expelled for misbehaving on the bus, and to show that the student's motive to accuse the bus driver of misconduct was to prevent being expelled for her own misconduct shortly before the alleged assault. ***Id.***, ¶¶2-4. The evidence here, of a seven-year-old domestic violence offense and an alleged stealing of mail, is not at all like the concretely consequential behavioral contract in ***Echols***. In addition, Forgue does not explain how the decision in ***Echols*** helps him overcome the circuit court's determination here, as to the evidence of both other acts, that the potential for confusion outweighs any probative value.

¶25 In sum, Forgue fails to show that the circuit court erroneously exercised its discretion in excluding the evidence of the two other acts.[4]

II. The circuit court's restitution decision

¶26 WISCONSIN STAT. § 973.20(1r) provides, in relevant part, that, when imposing a sentence, a circuit court "shall order the defendant to make full or partial restitution ... to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record." Under WIS. STAT. § 973.20(13)(a), the circuit court must consider, among other factors, the amount of loss suffered by "any victim as a result of a crime considered at sentencing" when determining whether and how much restitution to order. Under WIS. STAT. § 973.20(14), the victim of a crime bears "[t]he burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing."

¶27 Before restitution can be ordered, the victim must also prove by a preponderance of the evidence, WIS. STAT. § 973.20(14)(a), that there is "a causal nexus" between "the 'crime considered at sentencing' and the disputed damage." ***State v. Canady***, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (quoted sources omitted). To prove causation, the "victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage. The defendant's actions must be the 'precipitating cause of the injury' and the harm must have resulted from 'the natural consequence[s] of the actions.'" ***Id.*** (citation omitted; brackets in original).

[4] Because I conclude that the circuit court did not err in excluding evidence of the two other acts, I do not address the parties' arguments as to whether any error was harmless. *See* ***Barrows***, 352 Wis. 2d 436, ¶9.

¶28 Determinations of restitution, including whether there is a sufficient nexus between the defendant's criminal conduct and any damage for which restitution is ordered, are left to the sound discretion of the circuit court. ***Id.***, ¶¶6, 12. In cases where the circuit court inadequately sets forth its reasoning, or fails to fully explain its ruling, we "independently review the record to determine whether it provides a basis for the [circuit] court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶29 Forgue argues that record does not support the restitution order as to the amount of damages awarded and as to the causal connection between Forgue's crime and those damages. The State agrees, stating that the record is insufficient to support the amount awarded because the "prosecutor failed to file supporting documentation regarding the amount of restitution in the case." Therefore, as requested by Forgue and agreed to by the State, this case is remanded to the circuit court for a new hearing on restitution.

CONCLUSION

¶30 For the reasons stated above, I reject Forgue's challenges to the circuit court's evidentiary decisions and, therefore, affirm the judgment of conviction. However, based on the State's concession as to the insufficiency of the record to support the restitution order, I reverse the order and remand for a new hearing on restitution.

By the Court.—Judgment affirmed; order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.