STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP913-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN J. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL, THE HONORABLE JEFFREY A. CONEN, AND THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2013AP913-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN J. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL, THE HONORABLE JEFFREY A. CONEN, AND THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Brian J. Anderson, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.[1]

ARGUMENT

Anderson was convicted following a jury trial of first-degree intentional homicide while using a dangerous weapon for the shooting death of Joseph Hall (29:1). He argues on appeal that the trial court erred when, in a pretrial ruling, it prohibited him from using some of the *McMorris* evidence he sought to introduce at trial to support his claim that he acted in self-defense. He also argues that the trial court erred when it allowed the State to introduce other-acts evidence relating to an incident that occurred three weeks before he shot Mr. Hall. Because neither of those claims has merit, this court should affirm the judgment of

[1]After briefing was completed in this appeal, Anderson filed a motion for leave to file a supplemental brief-in-chief. In an order entered on November 12, 2013, the court of appeals ordered that the briefs that had been filed be struck and that new briefs be filed. This is the State's brief in response to Anderson's new brief-in-chief.

conviction and the order denying postconviction relief.[2]

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED SOME OF ANDERSON'S PROFFERED *MCMORRIS* EVIDENCE.

Prior to trial, Anderson filed a motion seeking permission to introduce evidence of Mr. Hall's prior violent acts and his "[a]ggressive, violent, [and] [t]hreatening character trait" (6:1-3). The trial court ruled that three instances of prior violent acts would be admissible (6:2; 50:69-72; A-Ap. B-2 to B-5), that one of Mr. Hall's prior acts would be admissible if the State opened the door by introducing Anderson's statement to the police (6:2; 59:6-7; R-Ap. 114-15),[3] and that the remaining eight instances would not be admitted (6:2; 50:69-72; A-Ap. B-2 to B-5). Anderson argues on appeal that the trial court erroneously

---

[2]Judge Dennis R. Cimpl presided over the pretrial proceedings and made the evidentiary rulings that Anderson challenges on appeal. Judge Jeffrey A. Conen presided over the trial and entered the judgment of conviction. Judge Ellen A. Brostrom presided over the postconviction proceedings and entered the order denying Anderson's postconviction motion.

[3]Anderson asserts that the court denied his request to admit evidence that Mr. Hall told Anderson that Hall "killed his form[er] drug partner sometime around 1985." Anderson's brief at 6. While the court did initially exclude that evidence (50:69; A-Ap. B-2), it later held that that evidence would be admissible if the State opened the door by introducing Anderson's statement to the police (6:2; 59:6-7; R-Ap. 114-15).

exercised its discretion when it excluded that evidence.

In its original appellate brief, the State argued that any error in excluding some of the *McMorris* evidence was harmless because there was no evidence introduced at trial that Anderson was acting in self-defense when he shot Mr. Hall and that without evidence placing self-defense into issue, there was no basis for introducing any *McMorris* evidence. The State noted that Anderson had alleged in his postconviction motion that his trial lawyer did not explain to him that by waiving his right to testify, he was "in effect, totally giving up any defense that [he] had in the trial," including self-defense (34:2) and had further alleged that his trial counsel was ineffective for that reason (34:3). The State noted that Anderson had not argued on appeal that his trial lawyer was ineffective and asserted that he had, therefore, abandoned that claim.

In his new brief-in-chief, Anderson argues that if he waived the right to appeal the *McMorris* ruling by not testifying, his trial counsel was ineffective for advising him that his decision not to testify would not waive his right to appeal the ruling. *See* Anderson's brief at 14-16. In light of that resurrected claim, the State will forgo its argument that any error in partially excluding the *McMorris* evidence was harmless and will limit its argument to explaining why Anderson has failed to demonstrate on appeal that the trial court erroneously exercised its discretion.

A. Applicable legal standards.

Evidence of a victim's violent character and past violent acts is often referred to as *McMorris* evidence. *See State v. Head*, 2002 WI 99, ¶24 n.5., 255 Wis. 2d 194, 648 N.W.2d 413. The term "*McMorris* evidence" refers to *McMorris v. State,* 58 Wis. 2d 144, 150, 205 N.W.2d 559 (1973), a case in which the supreme court held that a defendant who had established a "sufficient factual basis to raise the issue of self-defense" should be allowed to submit evidence of his personal knowledge of prior specific acts of violence by the victim of his assault. *See Head*, 255 Wis. 2d 194, ¶24 n.5.

The admission of *McMorris* evidence "rests in the exercise of sound and reasonable discretion by the trial court." *McMorris,* 58 Wis. 2d at 152. When considering whether to admit *McMorris* evidence, "[t]he circuit court should exercise care that the evidence of specific violent acts of the victim not be allowed to extend to the point that it is being offered to prove that the victim acted in conformity with his violent tendencies." *State v. Daniels*, 160 Wis. 2d 85, 96, 465 N.W.2d 633 (1991). As the supreme court has explained:

> The accumulation of evidence as to a particular violent act of the victim, which is within the knowledge of the defendant who alleges self-defense may go beyond the legitimate purpose of establishing what the defendant believed to be the violent character of the victim and reach the point where it is only offered to prove the victim acted in conformity with the prior violent behavior. It is the duty of the trial judge to exercise discretion in excluding evidence which is offered in such a manner. . . .

Id. at 96-97 (quoting *McAllister v. State*, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976)).

A circuit court's decision to admit or exclude evidence is reviewed under an erroneous exercise of discretion standard. *State v. Ford,* 2007 WI 138, ¶30, 306 Wis. 2d 1, 742 N.W.2d 61.

B. The trial court properly exercised its discretion.

Anderson has not shown that the circuit court erroneously exercised its discretion when it excluded some of his proffered *McMorris* evidence. One problem with his argument is that his description of the prior acts is taken primarily from the proffer he made in his motion in limine (6:1-2) rather from his testimony at the evidentiary hearing on that motion. That is important because the court based its ruling on Anderson's testimony, not the written proffer (50:69-72; A-Ap. B-2 to B-5). Indeed, when the court excluded the prior acts proffered in paragraph h ("That Mr. Hall told the Defendant that Mr. Hall threatened a man who mocked his (Mr. Hall's) wife, and that he used a shotgun to threaten the man" (6:2), *see* Anderson's brief at 7), it did so because Anderson had not testified about that purported incident at the hearing (50:63).

Another problem with Anderson's argument is that he does not discuss the court's specific rulings on each of the items and present a developed argument as to why each of those rulings was wrong. He asserts that those rulings were "simply wrong" because "[w]hether the victim had a weapon at the time of his death is not a factor as to whether evidence of the victim's violent tendencies should be admitted" and

"[w]hether the victim's statement about God forgiving a few murders is a philosophical question is not a controlling factor on admitting *McMorris* evidence," Anderson's brief at 9-10, but makes no effort to explain those conclusory assertions or link them to a specific proffered prior act. The court should decline to consider Anderson's undeveloped arguments. *See State v. O'Connell,* 179 Wis. 2d 598, 609, 508 N.W.2d 23 (Ct. App. 1993) ("We do not consider undeveloped arguments").

One of the reasons the court excluded several items of the proffered *McMorris* evidence was their remoteness in time (50:69-70; A-Ap. B-2 to B-3). The evidence proffered in paragraphs a and b related to Hall's purported killing of a drug-dealing partner in 1984 or 1985 (6:2; 49:14). The evidence proffered in paragraph d related to an incident in which Hall purportedly lifted up his son's car while his son was in the car and threatened to kill his son; that incident occurred about fifteen or sixteen years before Anderson shot Hall (6:2; 50:53). The evidence proffered in paragraph e was that Hall told Anderson that in 1985 or 1986 Hall had slashed the throat of person who was attempting to rob Hall (6:2; 49:15-16).

The court also excluded on remoteness grounds evidence of an incident not mentioned in Anderson's motion but which Anderson testified about at the hearing. That incident involved a threat Mr. Hall purportedly made to a friend of Hall's son fourteen years earlier after Hall's son gave some stolen jewelry to the friend (49:26-27; 50:70; A-Ap. 70). The court also excluded the evidence proffered in paragraph g relating to threats made at a Dunkin' Donuts (6:2) because Anderson did not know when that incident occurred

(50:51, 69-70; A-Ap. B-2 to B-3). That incident happened at least ten years earlier because Anderson testified that he had known Hall for ten years and that Hall had told Anderson about the incident throughout the years Anderson had known Hall (59:3, 51).

Anderson argues that "[t]he court went far beyond its duty in a *McMorris* issue by making a determination of remoteness." Anderson's brief at 9. However, he cites no authority for the proposition that a court may not consider remoteness when determining whether to allow the defendant to introduce *McMorris* evidence. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). More importantly, he is wrong. As a general rule, it is within a circuit court's discretion to decide whether other-acts evidence is too remote to be relevant. *State v. Hunt,* 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771. More specifically, the supreme court in *McMorris* quoted with approval a Delaware court's holding that the defendant's knowledge of specific acts of violence by the victim and the victim's general reputation for violence is admissible "'subject, of course, to exclusion in a proper case for remoteness.'" *McMorris*, 58 Wis. 2d at 151 (quoting *State v. Gordon*, 181 A. 361, 362 (Del. Oyer & Term. 1935)).

In *State v. Boykins*, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984), this court held that the trial court erroneously exercised its discretion when it excluded on the ground of remoteness evidence of prior violent acts of the victim that occurred less than one year before the charged offense. *See id.* at 277-78. In this case, in contrast, the excluded incidents purportedly occurred about

twenty-five years prior to the charged homicide (paragraphs a, b, and e), about fourteen to sixteen years prior to the homicide (paragraph d and the stolen jewelry incident), and at least ten years prior to the homicide (paragraph g).

Anderson's failure to present a developed argument is particularly glaring with respect to his contention that the court's ruling "gutted" his defense. Anderson's brief at 9. In this case, the court ruled that the following *McMorris* evidence was admissible:

- Paragraph c, that Mr. Hall's son told Anderson that Hall took medication to control his temper and violent outbursts and that Anderson had observed Mr. Hall taking prescribed medications that Anderson believed to be for that purpose (6:2; 50:69; A-Ap. B-2).

- Paragraph j, that Mr. Hall told Anderson that Hall would kill Hall's property manager and the property manager's family if Hall were evicted from his apartment (6:2; 50:70; A-Ap. B-2).

- Paragraph k, that Mr. Hall told Anderson that Hall would shoot Hall's son in the face and that he threatened to kill his (Hall's) brother-in-law because of a dispute and lawsuit that led to Hall's moving in with Anderson (6:2; 50:70; A-Ap. B-2).

In addition, while the court initially ruled that it would not allow Anderson to introduce the evidence in paragraph a that Mr. Hall told Anderson that Hall had shot and killed Hall's former drug partner in 1984 or 1985 (6:2; 49:14; 50:69; A-Ap. B-2), it later ruled that that evidence would be admissible if the State introduced

Anderson's statement to the police (6:2; 59:6-7). At the outset of the trial, the court confirmed that the three items of *McMorris* evidence were admissible and that the other item would be admissible if the State introduced Anderson's statement (62:5-7).

Anderson makes no attempt to explain why the court's ruling "gutted" his self-defense claim. The evidence in paragraphs c, j, and k related to recent alleged acts by Mr. Hall that, if believed by the jury, would demonstrate that Hall repeatedly threatened to kill people and that Hall required medication to control his temper and violent outbursts. The court also left open the possibility that evidence that Mr. Hall told Anderson that Hall had killed a man twenty-five years earlier could be admitted.

Anderson argues that the trial court "seemed to engage in a credibility determination which was not appropriate" when deciding which evidence would be allowed. Anderson's brief at 8. The State agrees that it would not have been proper for the court to exclude *McMorris* evidence because it did not believe Anderson. However, the court made its comments about Anderson's credibility after it had ruled on each item of the proffered *McMorris* evidence, and the court said nothing about Anderson's credibility as it made its ruling item by item (50:69-72; A-Ap. B-2 to B-5). Moreover, the court's comment on Anderson's credibility was limited to its observation that it did not believe that Anderson was being truthful when he testified that he and Mr. Hall only discussed the prior incidents in the last thirty to forty-five days (50:71; A-Ap. B-4). The court expressed no opinion on whether Anderson was being truthful when he said that Mr. Hall had told him about the prior incidents; the court's

skepticism was addressed to when Hall spoke with Anderson about these things, not whether he had.

As previously noted, the supreme court has cautioned trial courts that they should "exercise care that the evidence of specific violent acts of the victim not be allowed to extend to the point that it is being offered to prove that the victim acted in conformity with his violent tendencies." *Daniels*, 160 Wis. 2d at 96. The trial court in this case followed that admonition by allowing Anderson to introduce evidence of recent specific violent acts while excluding evidence of purported violent acts that occurred more than ten years before Anderson killed Mr. Hall and in some cases (paragraphs a, b, and e) twenty-five years earlier. Anderson has not shown that the trial court erroneously exercised its discretion when it excluded some of the *McMorris* evidence he sought to introduce at trial.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED THE OTHER-ACTS EVIDENCE.

Anderson also argues that the trial court improperly allowed the State to introduce evidence that three weeks prior to the homicide, Anderson, believing that his girlfriend was having an affair, climbed on to the roof of her garage and overheard her landlord and two other men talking about her in a sexual manner (8:1). Anderson then went to his home, got a gun, and returned to his girlfriend's house, where he severely beat the men (8:2).

Anderson argues that the trial court erroneously exercised its discretion when it

admitted this evidence.[4] He contends that the evidence was not relevant because "Mr. Hall was not and had never been the target of Anderson's rage or jealously," Anderson's brief at 12, and that the prejudicial impact of this evidence outweighed its probative value because "[t]he incident has nothing to do with any element of the crime and does not go to motive as the State contends." *Id*. at 11-12.

Anderson's argument ignores the evidence, which the State discusses below, that links the shooting of Mr. Hall to Anderson's anger and jealousy stemming from his belief that another of his housemates, Marshall Provost, was having an affair with Anderson's girlfriend. Because Anderson has not shown that the trial court erroneously exercised its discretion when it admitted the other-acts evidence, this court should reject that claim.

A. Background.

At the hearing on his motion to admit *McMorris* evidence, Anderson testified that on the day of the shooting, September 16, 2010, he lived with Marshall Provost, Matthew Hall, and Joseph Hall (2:1; 49:5-6).[5] Anderson testified that about a week earlier, he began to suspect that Provost was having an affair with his girlfriend, Nikita McClain (2:2; 50:7). Because of those suspicions,

[4]Anderson's appendix does not include the trial court's ruling on the State's motion to admit the other-acts evidence. A transcript of the hearing on that motion, which includes the court's oral ruling, is appended to this brief.

[5]All subsequent references to "Hall" or "Mr. Hall" are to the victim of the shooting, Joseph Hall.

Anderson placed an audio recorder in the living room (50:14).

Three days before the shooting, Anderson said, he "sat down with Joe Hall and Marshall Provost and addressed the situation between me and my girlfriend slash fiancee and asked Marshall to leave" (49:6). Anderson testified that Provost denied the affair and that the only reason he believed Provost was because Hall assured him that nothing was happening (50:16).

Anderson testified that the day before the shooting, he listened to a recording made the previous night while he was at work and "found out that in fact Nikita was sleeping with Marshall and that Marshall had lied to me" (50:16). He said that he hoped that Hall did not know about that "because that means that now I am dealing with Joe and Marshall but my hope was that Joe had no knowledge and that Marshall had lied to Joe as well" (50:17).[6]

---

[6]A detective testified at trial that there were two files on a recorder he found in Anderson's bedroom, one of which was about seven hours long and the other about twenty minutes (65:49-50). The detective testified that he had listened to the recordings and that there were only two things on them that he could discern: Marshall Provost appeared to answer a phone, and someone coming to the door and then someone saying "he's not here, come back later" (65:51). The detective said that the remainder of the recording had music and other things that he could not discern what was going on (*id.*).

Nikita McClain testified at trial that she had not been having an affair with Provost (66:44). She also testified about Anderson's repeated accusations in the weeks prior to the shooting that she was sleeping with Provost (66:42-47, 56-58). Mr. Provost also testified that he did not have a sexual relationship with Ms. McClain (66:71).

Anderson did not sleep that night because he listened to the recording all night and was angry (50:25). That morning, he testified, he armed himself with Mr. Hall's shotgun and went into the basement, hoping that Ms. McClain and Mr. Provost would return to the house and he would catch them in the act (50:27-28). His intent, he said, was "to tell Marshall to get out of my house" (50:28). He had the shotgun, over which he had placed a water bottle to act as a silencer, "so that Marshall would know that I was serious, so if he tried anything I would shoot him" (*id*.)

Anderson sat in the basement for six hours (50:27). When Provost came home around 3:30 p.m., Anderson went upstairs to confront him (50:29-31). However, by the time Anderson got upstairs, Provost was leaving the house (50:31). Anderson went back to the basement, waited for about another hour and fifteen minutes, and then came back upstairs (50:32). He took the bottle off the shotgun and put the gun back in Hall's room (*id*.). Anderson called Hall "just to see where [he] was" and learned that Hall was at work (*id*.).

Anderson testified that he collected Provost's belongings and put them on the porch (50:32-33). He then got the shotgun and waited to confront Provost (*id*.). The prosecutor asked Anderson why "[i]t wasn't enough to tell him to leave with the clothes, you had to confront with the shotgun?" (50:33). Anderson responded, "because in the back of my mind my hope is that Joe [Hall] is not involved in any way but if he is involved that puts me in a very precarious situation. Now I am dealing with a multiple confessed murderer [Hall] and his best friend of 30 years [Provost] who have now conspired against me to allow the 50 year old [Provost] to sleep with

my fiancee in my bed after I have opened up my place of residence to both of them while they were homeless" (*id*.).

Anderson testified that he was standing in the threshold of the kitchen, holding a shotgun with a water-bottle silencer, when Mr. Hall entered the house (50:35). Anderson says that he told Hall that Hall was his friend and that "this is between me and Marshall" and that he told Hall to sit down (*id*.). According to Anderson, Hall gave him "an aggressive scowl that made believe he was going to disarm me" (50:36). Hall moved towards him with his arms up, Anderson said, at which point Anderson "stepped back, pulled the gun back and pulled the trigger" (50:38-39).

Anderson asserted that it was not until after he was arrested that he realized that Mr. Hall was "one of the most devious people [he] ha[d] ever met" and he denied that he had shot Hall for that reason (50:18-19, 34). He contradicted that statement, however, by testifying that "[i]t wasn't until Joe walked into the front door and reacted like he did that I knew that he knew" (50:19).

There also was evidence at trial that Anderson believed at the time of the shooting that Hall had betrayed him by lying about Provost's affair with Anderson's girlfriend. Anderson's father testified that Anderson called him the night of the shooting (66:87). Anderson's father testified that he asked Anderson what had happened and that Anderson said that Marshall Provost "fucked his fiancee" (66:88). Anderson's father asked Anderson what Hall had to do with it, and Anderson answered, "Joe knew about it and he lied to me" (66:89; *see also* 66:98).

At the conclusion of the *McMorris* evidence hearing, after the court had ruled that some of the *McMorris* evidence was admissible (50:69-72; A-Ap. B-2 to B-5), the State said that because it now knew that Anderson would be asserting a self-defense claim, it would be asking the court to allow other-acts evidence (50:72-73; A-Ap. B-5 to B-6). The State then filed a motion to admit evidence that three weeks prior to the homicide, Anderson, believing that his girlfriend was having an affair, climbed on to the roof of her garage and overheard her landlord and two other men talking about her in a sexual manner; that Anderson went to his home, went into Hall's room and grabbed the same shotgun he later used to kill Hall; that Hall persuaded Anderson not to take the shotgun; that Hall instead got a handgun; and that he returned to his girlfriend's house, where he severely beat and pistol-whipped the men who had made sexual comments about his girlfriend (8:1-2).

The trial court granted the motion (53:11-12; R-Ap. 111-12). The court ruled that the evidence was offered for the permissible purposes of providing context and evidence of jealousy and motive (*id.*). The court found that the evidence was relevant because it happened within three weeks of the shooting and because Mr. Hall and Mr. Hall's shotgun were involved in the prior incident (53:12; R-Ap. 112). The court also found that the evidence, while prejudicial, was not unfairly prejudicial (*id.*).

B. Applicable legal standards.

"Wisconsin Stat. § 904.04(2)(a) prohibits the admission of evidence of a defendant's other bad acts to show that the defendant has a propensity to commit crimes." *State v. Marinez*, 2011 WI 12,

¶18, 331 Wis. 2d 568, 797 N.W.2d 399. "However, other-acts evidence that is offered for a purpose other than the prohibited propensity purpose is admissible if it is relevant to a permissible purpose and is not unfairly prejudicial." *Id.* (citing Wis. Stat. § 904.04(2)(a) and *State v. Sullivan,* 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998)). "[T]he law concerning the admissibility of other crimes evidence creates neither a presumption of exclusion nor a presumption of admissibility." *State v. Speer*, 176 Wis. 2d 1101, 1116, 501 N.W.2d 429 (1993).

In *Sullivan*, the supreme court articulated a three-step test to determine whether other-acts evidence is admissible.

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence 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? *See* Wis. Stat. § (Rule) 904.03.

Sullivan, 216 Wis. 2d at 772–73 (footnote omitted).

The court of appeals reviews a trial court's decision to admit other-acts evidence under an erroneous exercise of discretion standard. *State v. Kimberly B.*, 2005 WI App 115, ¶38, 283 Wis. 2d 731, 699 N.W.2d 641. The question on review is not whether the appellate court would have allowed admission of the evidence in question. *Id.* Instead, if the trial 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," the reviewing court will affirm its decision. *Id.* (citation omitted). Even if a circuit court fails to set forth the basis for its ruling, a reviewing court will nonetheless independently review the record to determine whether it provides an appropriate basis for the circuit court's decision. *Marinez*, 331 Wis. 2d 568, ¶17.

C. The evidence was offered for an acceptable purpose.

"Th[e] first step in the *Sullivan* analysis is not demanding." *Marinez*, 331 Wis. 2d 568, ¶25. "Wisconsin Stat. § 904.04(2)(a) contains an illustrative, and not exhaustive, list of some of the permissible purposes for which other-acts evidence is admissible." *Id.*, ¶18. "The purposes for which other-acts evidence may be admitted are 'almost infinite' with the prohibition against drawing the propensity inference being the main limiting factor." *Id.*, ¶25. "As long as the State and circuit court have articulated at least *one* permissible

purpose for which the other-acts evidence was offered and accepted, the first prong of the *Sullivan* analysis is met." *Id.*

In this case, the trial court found that the evidence was offered for the permissible purposes of providing context and evidence of jealousy and motive (53:11-12; R-Ap. 111-12). Anderson agrees that "these are acceptable reasons." Anderson's brief at 12. That concession is appropriate. *See Marinez*, 331 Wis. 2d 568, ¶27 ("context, credibility, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)"); *Hunt*, 263 Wis. 2d 1, ¶58 ("Other-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case."); *Sullivan*, 216 Wis. 2d at 772 (motive is a permissible purpose). Here, the other-acts evidence helped to place the current charge in the context of Anderson's extreme jealousy and anger towards anyone he perceived to have any sexual interest in his girlfriend.

D. The other-acts evidence was relevant.

The second prong of *Sullivan* "is significantly more demanding than the first prong but still does not present a high hurdle for the proponent of the other-acts evidence" because of "'[t]he expansive definition of relevancy in Wis. Stat. § 904.01.'" *Marinez*, 331 Wis. 2d 568, ¶33 (quoted source omitted). Wisconsin Stat. § 904.01 defines "relevant evidence" as "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." *See Hunt*, 263 Wis. 2d 1, ¶63.

Anderson concedes that the other-acts evidence would have been relevant had he shot Marshall Provost, but argues that it was not relevant because Joseph Hall was not the target of his anger or jealousy. He writes:

> The State states, and the court ruled, that the evidence was admissible because it provided "context" as to what Anderson did. It provided evidence of jealousy and motive. All these are acceptable reasons and might outweigh the prejudice to Anderson in some circumstances; however, all of this misses the point. It is conceded that Anderson shot Mr. Hall, but Mr. Hall was not and had never been the target of Anderson's rage or jealousy. Anderson thought that Provost was having an affair with McClain. All this evidence might have been relevant if Provost was the victim, but he was not.

Anderson's brief at 12 (record citation omitted).

Anderson's contention that Mr. Hall "was not and had never been the target of Anderson's rage or jealousy" is refuted by the record. Prior to the hearing on the State's motion to admit the other-acts evidence, Anderson had testified at the *McMorris* hearing that Mr. Hall was "one of the most devious people [he] ha[d] ever met" (50:18) because, he believed, that Hall had lied to him when Hall reassured Anderson that Provost was not having an affair with McClain. He further testified that "[i]t wasn't until Joe walked into the front door and reacted like he did that I knew that he knew" about the affair (50:19).

In addition, as discussed above, there also was evidence at trial that Anderson believed at

the time of the shooting that Hall had betrayed him by lying about Provost's affair with Anderson's girlfriend. Anderson's father testified that when Anderson called him the night of the shooting, he asked Anderson what had happened and Anderson responded that Marshall Provost "fucked his fiancee" (66:88). When Anderson's father asked Anderson what Hall had to do with it, Anderson answered, "Joe knew about it and he lied to me" (66:89).

Anderson's own words thus provided a link between his jealous anger over the affair he believed that Provost was having with his girlfriend and his belief that Hall was conspiring with Provost to hide the affair. Evidence of Anderson's prior, violent jealous actions was relevant because it provided a motive for Anderson to respond violently when he thought that Hall had betrayed him by helping Provost conceal the affair. That evidence makes it more probable that Anderson intended to shoot and kill Hall that night and less probable that Anderson shot Hall in self-defense, as defense counsel asserted in his opening statement (64:25-29). Accordingly, the trial court properly exercised its discretion when it determined that the other-acts evidence was relevant. *See* Wis. Stat. § 904.01 (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").

E. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

With regard to the third prong of the *Sullivan* analysis, Anderson bears the burden of establishing that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. *See Marinez*, 331 Wis. 2d 568, ¶41. "'"Unfair prejudice" does not mean damage to a party's cause since such damage will always result from the introduction of evidence contrary to the party's contentions.'" *State v. Doss*, 2008 WI 93, ¶78, 312 Wis. 2d 570, 754 N.W.2d 150 (quoted source omitted). "'Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.'" *Id*.

"Because the statute provides for exclusion only if the evidence's probative value is *substantially outweighed* by the danger of unfair prejudice, [t]he bias, then, is squarely on the side of admissibility." *Marinez*, 331 Wis. 2d 568, ¶41 (emphasis and brackets in original; quotation marks and quoted source omitted). "'Close cases should be resolved in favor of admission.'" *Id*.

Anderson's argument under *Sullivan*'s third prong is flawed because his assertion that the probative value of the other-acts evidence was substantially outweighed by its prejudicial effect on the jury relies on his contention that the other-acts evidence had no probative value whatsoever

because he was angry at Marshall Provost, not Joseph Hall. *See* Anderson's brief at 11-13. That contention is wrong because there was evidence that Anderson was angry at Hall because he believed that Hall knew that Provost was having an affair with Ms. McClain and lied to Anderson about it. As discussed in the prior section of this brief, Anderson told his father shortly after the shooting that Provost "fucked his fiancee" (66:88) and, when Anderson's father asked Anderson what Hall had to do with it, Anderson answered, "Joe knew about it and he lied to me" (66:89).

The attack just three weeks before the shooting on the men whom Anderson believed had made sexual comments about Ms. McClain showed that Anderson was extremely jealous and that he was willing to employ violence against anyone whom he perceived might threatened his relationship with her. Anderson's own statements demonstrated that he believed Hall had lied when Hall told Anderson that Provost was not having an affair with McClain. The other-acts evidence thus was highly probative of Anderson's jealous and angry state of mind on the night of the murder.

It is Anderson's burden to establish that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶41. Because Anderson's argument depends on the erroneous claim that the other-acts evidence had no probative value, he has failed to carry that burden.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 6th day of December, 2013.

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,837 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of December, 2013.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2013AP913-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN J. ANDERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL, THE HONORABLE JEFFREY A. CONEN, AND THE HONORABLE ELLEN R. BROSTROM, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar No. 1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 6th day of December, 2013.

_____

Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 6th day of December, 2013.

_____
Jeffrey J. Kassel
Assistant Attorney General