STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2013AP1111 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JIMMY L. POWELL,
Defendant-Appellant.

APPEAL FROM THE CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN DANE COUNTY CIRCUIT COURT, HON. STEPHEN E. EHLKE, PRESIDING.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE PROBATIVE VALUE OF POWELL'S TEN-YEAR HISTORY OF DRUG DEALING WAS SUBSTANTIALLY OUTWEIGHED BY THE RISK OF PREJUDICE.

The state asserts Powell's ten-year drug dealing history with Rabe was admissible for context and identification. Both context and identification could have been established with Rabe's testimony that he knew Powell from prior drug purchases. However, to elaborate that the relationship between the two lasted for ten years is cumulative and highly prejudicial.

Identification was not at issue. Rabe positively identified Powell at the preliminary hearing. (R.105, p.4.) In *State v. Harris,* 123 Wis. 2d 231, 365 N.W.2d 922 (Wis. App. 1985,) the state contended that the other wrongs evidence was admissible to prove identity. When making its evidentiary ruling, the trial court in *Harris* looked to the preliminary examination record where the complaining witness identified defendant during the preliminary. The court concluded that she would identify him at trial as the man who did the things alleged. It therefore ruled the other wrongs evidence inadmissible to identify defendant.

Evidence fitting a sec. 904.04(2), Stats., exception is inadmissible if the point to be proven is not at issue. *State v. Alsteen,* 108 Wis. 2d 723, 731, 324 N.W.2d 426, 430 (1982). Consequently, if identity is not at issue, the evidence is inadmissible under the identity exception. In *Harris*, the Court of Appeals found identity did not appear to be at issue. It further found the trial court could find that the complaining witness would identify the defendant and the court's ruling to exclude the

other acts evidence for the purpose of identity did not constitute an abuse of discretion. Furthermore, if identity became an issue at the trial, the court could reconsider its ruling. *State v. Harris*, 123 Wis. 2d 231, 235.

The availability of other evidence is a factor relevant to determining the admissibility of other wrongs evidence. Other wrongs evidence is not automatically admissible. It should be excluded if the motive, opportunity, intent, etc., is not substantially disputed or if the danger of undue prejudice outweighs probative value. It is not favored and ought not be used if other proof is available. *Id.*, (internal citations omitted.)

Likewise, the trial court in the instant case should have considered that Rabe had previously identified Powell at the preliminary hearing and disallowed the cumulative evidence of a ten-year relationship. Identity was not an issue at trial.

As for context, the fact that Powell had dealt drugs to Rabe for ten years did not add anything to the context that was established through Rabe's testimony that he met Powell for a drug transaction on the night in question. The jury is instructed to use their common sense would not have found it strange or unusual for a drug deal to occur in the wee hours in a dark and secluded place. It would have been sufficient to limit Rabe's testimony to his prior contacts with Powell without elaborating on the time-frame of their relationship. Had the jury not learned that Powell had sold drugs to Rabe for ten years, it would not have occurred to them that they were missing any context for the events.

Had the trial court employed a thorough analysis of the proposed evidence using *Sullivan* it would have concluded that both identity and context were not of consequence to the determination of the action, nor would the

proposed evidence have made any fact or proposition more probable. Instead, the evidence was cumulative and highly prejudicial to Powell.

The jury was confused as to what constituted utter disregard in the First Degree Reckless Injury charge. Admitting evidence of a ten-year drug dealing relationship established Powell as a career drug dealer. Career drug dealers are commonly portrayed as violent and ruthless and this propensity would have supplied the jury with a reason to find Powell acted with utter disregard for human life.

Evidence of prior crimes or occurrences should be sparingly used by the prosecution and only when reasonably necessary. Piling on such evidence as a final "kick at the cat" when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence. The use of such evidence under the adopted rule will normally be a calculated risk. *Whitty v. State,* 34 Wis. 2d 278, 297, 149 N.W.2d 557, 565–66 (1967), *cert. denied,* 390 U.S. 959, 88 S. Ct. 1056, 19 L.Ed.2d 1155 (1968).

The fact that the defense used this evidence at trial following objection is immaterial. Under Wisconsin law, a defendant does not commit strategic waiver when he unsuccessfully objects to the introduction of evidence and preemptively introduces the evidence in an attempt to mitigate its prejudicial effect. *State v. Gary M.B.,* 270 Wis. 2d 62, 76, 676 N.W.2d 475 (2004).

The error in admitting the other acts evidence was not harmless beyond a reasonable doubt.

II. THE INSTRUCTION ON ACCIDENT DID NOT ADEQUATELY COVER POWELL'S DEFENSE ELIMINATING THE NEED FOR AN INSTRUCTION ON MISTAKE.

The state asserts there was no evidence supporting the defense of mistake, because Powell did not testify specifically that he was mistaken as to the location of Rabe before he was run over. However, the testimony of Rabe provided the jury with a reasonable inference that Powell believed Rabe was still at the side of the vehicle when he drove forward.

From Rabe's direct testimony:

Q And again, I appreciate your original drawing here. When you got out, you're on the right side of that rectangle that represents Mr. Powell's car, right?

A Yes.

Q And when the defendant got out, did he get out of the driver's side or did he crawl over the passenger side?

A Yes. He got out the driver's side. (R.113, p.171.)

From Rabe's cross-examine testimony at trial:

Q When you got out of the SUV, you left the door open or did you shut the door?

A The door was open.

Q And did it remain open or did you shut it?

A It remained open.

Q At some point you were thrown to the ground just before the SUV ran over your head, is that right?

A Yes.

Q And you were thrown to the ground located on this passenger side of the vehicle, is that right?

A Correct.

Q You weren't in front of the vehicle. You weren't behind it. You were at the side of it, right?

A Yes.

Q And then you were run over, the head by the tire. That's how it went down.

A Yes, right rear tire.

Q Did the -- are you saying the car circled around to do that or how did the car get to you? It just pulled forward?

A Just pulled forward, yes.

Q And it would have had to make a dramatic probably steering to get that tire over you because you're on the side of the car. Would you agree with that?

A No. I wouldn't agree with that.

Q Do you know specifically how you got under the car?

A No.

Q But you're sure you were on the ground to the side of the car. That's clear, right?

A Correct. (R.113, pp. 223-224.)

From Powell's direct testimony:

Q When you hopped in the car, which door did you hop into?

A I ran back around and got into the driver's side. (R.114, p. 271.)

Also, from Powell's direct testimony:

Q Did you see Mr. Rabe before the vehicle hit him?

A No.

Q Did your vehicle in fact hit him?

A I assume it did.

Q Did you try to hit him?

A No. (R.114, p. 274.)

The testimony of both Rabe and Powell confirm Rabe was at the side of the vehicle when he was knocked down and run over, that Powell did not see Rabe before he was hit, and the fight took place on the side of the vehicle where Powell had fled. Since there was no testimony suggesting Rabe moved from the location of the fight, the jury would have been able to infer that when Powell fled from the fight, Rabe remained in the last location where he was seen and it was an honest mistake when Rabe was knocked down and run over.

The State argues there is no intent element required for the crime therefore an instruction on mistake is inapplicable. However, the First Degree Reckless Injury requires a finding of criminal recklessness. Criminal recklessness requires an awareness by the defendant that his conduct created the unreasonable and substantial risk of death or great bodily harm. It is the awareness of that unreasonable and substantial risk of death or great bodily harm which would be negated by the mistake instruction.

The instruction on accident does not cover the fact that Powell was mistaken as to the whereabouts of Rabe prior to the impact and was insufficient. It merely offers the defense's general assertion that what occurred was an accident.

III. THE SUPPLEMENTAL INSTRUCTION MISSTATED THE LAW AND SHOULD BE ANALYZED UNDER THE PLAIN ERROR DOCTRINE.

Under the doctrine of plain error, an appellate court may review error that was otherwise waived by a party's failure to object properly or preserve the error for review as a matter of right. The existence of plain error will turn on the facts of the particular case. *State v.*

Mayo, 301 Wis. 2d 642, 734 N.W.2d 115 (2007). Where a defendant is convicted in a way inconsistent with the fairness and integrity of the judicial proceedings, a court should invoke the plain error rule in order to protect its own public reputation. *Virgil v. State,* 84 Wis. 2d 166, 267 N.W.2d 852 (1978).

In the instant case, the misstatement of the law did not allow the jury to consider evidence before and after Rabe was injured. Allowing the jury to only consider evidence Powell's operation of his vehicle forced the jury to decide utter disregard only on the conduct which caused the injuries. Without the evidence of conduct before and after Powell's operation of his vehicle, the jury would not have evidence to weigh whether Powell acted with utter disregard.

Furthermore, the erroneous jury instruction created a mandatory presumption when the court instructed that the crime of First Degree Reckless Injury involved the period of time while Powell was operating his motor vehicle. In essence, once the state proves that Powell operated the vehicle which caused Rabe's injuries, he is guilty of First Degree Reckless Injury. Additionally, it eliminated the possibility of a finding of Second Degree Reckless injury by telling the jury the operation of Powell's vehicle related to the greater charge of the first degree.

It was a fundamental and substantial error to not instruct the jury that it could and should consider the totality of the circumstances when evaluating whether Powell acted with utter disregard.

Additionally, not allowing the jury to consider what happened before Powell's operation of the vehicle, the jury could not consider what the defendant was doing, why the defendant was engaged in that conduct, and how obvious the danger was. The jury therefore

could not consider evidence that Rabe escalated the fight by pulling a knife, that Powell was fleeing from a fight, that Powell suffered injuries, or evaluate that Powell's effort to flee the area was in response to having received those injuries and in fear for his own life. In eliminating the conduct after Rabe was injured, the jury could not consider that Powell returned to the scene, asked if Rabe was okay and if the police were called; evidence which pointed to Powell's regard for human life. Given that any evidence of what occurred before and after Powell operated his vehicle was removed from the jury's consideration, the finding that utter disregard existed is flawed. The verdict is suspect as it is based on an incomplete statement of the law as it relates to utter disregard.

In sum, the erroneous instruction prejudiced Powell's defense by removing from consideration mitigating evidence relating to utter disregard.

IV. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH CAUSED ACTUAL PREJUDICE TO POWELL.

Trial counsel did not make a strategic decision by not ensuring the trial court made a thorough analysis using *Sullivan* of the other acts evidence the State sought to admit. Instead, trial counsel acquiesced to the trial court's finding without challenge. Inclusion of this evidence was highly prejudicial to Powell as it portrayed Powell as a career criminal who had escaped justice numerous times. No amount of minimizing the fact that Powell had sold drugs to Rabe over a ten-year period would have removed the impression that Powell was a drug dealer and thereby violent and ruthless. An attorney well versed in criminal law would have

put forth a vigorous argument in opposition to such highly prejudicial evidence against a client.

Trial counsel asserted that the supplemental instruction was favorable to Powell. However, this ignores Powell's overall defense which was that it was an accident because he was mistaken as to Rabe's position when he moved his vehicle forward. The evidence trial counsel focused on in both opening and closing statements was that of the events which occurred before Powell operated the vehicle. However, when it came to the jury's question about utter disregard, trial counsel allowed that critical evidence to be disregarded.

The State asserts Powell benefitted from the supplemental instruction in that the jury was prevented from considering the various contentions made by the State at trial, namely that it was Powell who pulled a knife, demanded Rabe's money, returned to the scene and slit Rabe's throat. However, these theories were rejected by the jury when it acquitted Powell on Attempted Homicide and Armed Robbery. The jury, having concluded it was not Powell who was pulled the knife and slit Rabe's throat was left with the sole issue of whether Powell's conduct in operating his vehicle was criminally reckless and showed an utter disregard for human life. Had the jury been able to consider the totality of the circumstances, including the fact that Powell was attempting to flee from an altercation and that he did in fact return to inquire about Rabe and whether help had been summoned there is a reasonable probability the jury would have acquitted Powell.

V. EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE CONVICTION.

The evidence the State refers to in its brief, except for the intoxicated Ryckman's perception that Powell intentionally ran over Rabe, was all

evidence that the jury was instructed not to consider when evaluating whether Powell showed an utter disregard for human life. The fact that Rabe suffered injuries and that his alleged cash was never recovered, does not support a finding that Powell acted in utter disregard. To take the State's position would mean that the jury misapplied the supplemental instruction.

If the State takes the position that the supplemental instruction was proper as given, then it cannot argue that the evidence the jury was instructed to disregard was sufficient to support the conviction.

VI. THE BAIL MONEY ON THE ACQUITTED COUNTS SHOULD BE RETURNED.

It may not make sense that the court commissioner set the bail at $10,000 per count, but that is what occurred. Requiring bail money is a condition to assure the defendant's appearance for trial. The trial court has discretion as to how to set conditions including requiring the deposit of cash.

The bail sheets are credited specific to each count and the posters had an expectation that the money deposited would relate to each count and not to the case as a whole. Wisconsin Statute § 969.03(4) requires a judgment of conviction before converting the cash bail to restitution. There being no judgments of conviction on the acquitted counts means that the money should be returned and not used for restitution.

In instances where charges are dismissed the bail money is returned and the State has not explained why it should be any different for acquitted counts. Nothing in the statute provides for a lay of claim on all money deposited for the purposes of restitution. The

purpose behind holding the money for restitution is not thwarted by returning money on acquitted counts.

CONCLUSION

WHEREFORE, for the reasons explained above, Defendant-Appellant Jimmy L. Powell respectfully requests the Court of Appeals reverse the order of the Circuit Court denying postconviction relief, vacate the conviction, and order a new trial. Further, that the Court of Appeals find that the bail deposits on Counts 1 and 3 were erroneously paid to the victim and order the bail money returned to the posters.

Dated: December 6, 2013

Respectfully submitted,

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BRIEF CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,771 words.

Dated: December 6, 2013

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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
IOWA COUNTY)

I, Suzanne Edwards, a licensed Wisconsin attorney, hereby certify that copies Defendant-Appellant's Reply Brief in Appeal No 2013AP1111 CR were placed in the U.S. Mail, with proper postage affixed this 6th day of December, 2013, addressed to the following as indicated below:

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Dated: December 6, 2013

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ELECTRONIC SUBMISSION CERTIFICATION

I hereby certify that the electronic version of the reply brief in Case No. 2013AP1111 CR is identical to the printed version.

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