STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP670-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEANDRE D. ROGERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

ISSUES PRESENTED

1. Deandre Rogers was charged with a robbery where the perpetrators used a Jeep. At a hearing on one of Rogers' motions in limine, the State proffered that police had found Rogers' fingerprint on a similar-looking Jeep that was stolen. Did the circuit court properly use its discretion when it ruled that the evidence that the Jeep was stolen was admissible other-acts evidence? And if the court erred, was the error harmless?

The circuit court ruled that the evidence was admissible. This Court should affirm that ruling or find the alleged error harmless.

2. When the State elicited testimony that the Jeep was stolen in order to explain why police checked it for fingerprints, did the circuit court correctly overrule Rogers' hearsay objection? And if the court erred, was the error harmless?

The circuit court ruled that the evidence was not hearsay when it overruled Rogers' objection. This Court should affirm that ruling or find the alleged error harmless.

3. Four robbery witnesses identified Rogers when they each viewed a photo array with six people's pictures. During closing argument, the prosecutor used simple math to determine the odds of all four witnesses misidentifying Rogers. Did the circuit court properly use its discretion when it concluded that the prosecutor's math comment was within her wide latitude in closing argument? And if the court erred by overruling Rogers' objection to the math, was the error harmless?

The circuit court ruled that the prosecutor's comment was proper when it overruled Rogers' objection. This Court should affirm that ruling or find the alleged error harmless.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

A jury convicted Rogers of four counts related to two robberies. His theory of defense was that the victims had misidentified him. The men who committed one of the robberies drove an older, gray Jeep Cherokee. A similar-looking Jeep was stolen in the same general area in Milwaukee around the time of that robbery. Police found Rogers' fingerprint on the stolen Jeep.

This appeal mainly concerns the circuit court's two separate rulings allowing the State to introduce evidence that the Jeep with Rogers' fingerprint was stolen. Rogers moved the circuit court to exclude that evidence. The court held a hearing on the motion and, based on the State's proffer, concluded that the stolen-Jeep evidence was admissible other-acts evidence. The State later elicited testimony that the Jeep was stolen in order to explain why police checked it for fingerprints, not to prove that it was in fact stolen. The court overruled Rogers' hearsay objection to that testimony.

Both of those rulings were proper. Had the jury not known why police checked the Jeep for fingerprints, it would have been misled to believe that the Jeep with Rogers' fingerprint was necessarily the same Jeep that was used in

one of the robberies. Misleading the jury in that way would have been prejudicial to Rogers' defense.

The other issue on appeal is about the State's closing argument. During rebuttal closing argument, the prosecutor said that because four witnesses identified Rogers after each viewed six pictures, there was a 1-in-1,296 chance that all four witnesses misidentified Rogers. The circuit court properly exercised its discretion when it ruled that the prosecutor acted within her considerable latitude during closing argument. Even Rogers recognizes that the prosecutor was using simple math: each of the four witnesses had a one-in-six chance of picking his picture, and 1/6 times 1/6 times 1/6 times 1/6 equals 1/1,296. The prosecutor's use of simple math was a reasonable inference based on the evidence.

STATEMENT OF THE CASE

On March 7, 2014, Deandre Rogers shoplifted from a gas station in Milwaukee and fled with his friends in a stolen car. (R. 1:3.) Two days later, a gray 2000 Jeep Cherokee was stolen around 6:00 p.m. on 65th Street in Milwaukee. (R. 1:4.)

The next day, March 10, an older-model gray Jeep Cherokee pulled up alongside a pedestrian, T.J., in Milwaukee around 2:00 p.m. (R. 1:3; 65:32.) Several people got out of the Jeep and robbed T.J. (R. 1:4; 65:33–34.) Police showed a photo array to T.J., and he identified Rogers as one of the men who robbed him. (R. 1:4; 65:35–36, 58–61.)

Later on March 10, around 9:40 p.m., police found the Jeep that had been stolen the previous day. (R. 1:4.) Police recovered Rogers' fingerprint from the back passenger door. (R. 1:4.)

On March 11, J.M. parked her GMC Yukon in her driveway around 6:30 p.m. (R. 1:4; 66:18.) As she was opening the tailgate on her vehicle, someone from behind knocked her to the ground. (R. 1:4; 68:19.) She looked up and saw a man standing over her while holding a "race baton." (R. 1:4; *see also* R. 66:20.) The man took her keys, drove away in her vehicle, and "gave [her] the finger." (R. 66:19–21.) Her four-year-old child saw the whole incident. (R. 66:21.) J.M. identified Rogers as the perpetrator when police showed a photo array to her. (R. 1:4; 66:21–22, 38, 51.)

On March 13, Rogers and another man robbed T.R. at gunpoint while she was in her garage with her ten-year-old son, V.R. (R. 1:5; 66:61–64.) Rogers pointed a gun at T.R.'s head and told her to get onto the ground. (R. 1:5; 66:62.) T.R. took a while to get down because she had a bad leg, so Rogers struck her with his gun. (R. 66:62.) Both T.R. and V.R. identified Rogers as one of the robbers when they each viewed a photo array with police. (R. 1:5; 66:73, 82–84.)

On March 23, the State charged Rogers with nine counts stemming from this crime spree: misdemeanor retail theft, armed robbery for the March 10 crime against T.J., robbery (use of force) for the March 11 crime against J.M., armed robbery (use of force) as a party to the crime for the March 13 crime against T.R., four related counts of bail jumping, and operating a vehicle without the owner's consent as a party to the crime for the March 7 crime. (R. 1:1–3.) The theft of a Jeep on March 9 did not result in a charge against Rogers. (R. 1:1–3.)

On June 10, 2014, Rogers filed a general motion to exclude any other-acts evidence at his trial. (R. 14.) Three days later, Rogers filed a motion in limine to exclude any evidence about the theft of the Jeep on which his fingerprint was found. (R. 18:1.) He argued, among other things, that this Jeep was not necessarily the same Jeep that T.J.'s robbers used. (R. 18:2.)

Also on June 13, Rogers pled guilty to the retail-theft and operating-without-consent charges. (R. 62:10.) Pursuant to a plea agreement, the State moved to dismiss the bail-jumping count stemming from the retail theft. (R. 62:12.) The court granted the State's motion. (R. 62:12–13.)

The circuit court held a hearing on Rogers' motion in limine a week later. (R. 63.) In its proffer, the State explained that a 2000 gray Jeep Cherokee was stolen on March 9 between 3:00 and 6:00 p.m. on North 65th Street in Milwaukee. (R. 63:8.) Six men robbed T.J. on March 10 around 2:00 p.m. on West 78th Street. (R. 63:8.) The robbers used a gray Jeep Cherokee, and T.J. identified Rogers as one of the robbers. (R. 63:8.) About seven hours after T.J. was robbed, police recovered the stolen Jeep on North 108th Street and found Rogers' fingerprint on it. (R. 63:8.) The robbery thus occurred about "midway" between where the Jeep was stolen and where police recovered it. (R. 63:8.) Rogers frequented those areas and had friends who lived there. (R. 63:9.) As the prosecutor explained, evidence about the stolen Jeep would be highly relevant if the State could establish that Rogers had contact with the Jeep during the roughly 24-hour time period when it was stolen. (R. 63:8–9.) The State offered to introduce the fingerprint evidence without telling the jury that the Jeep was stolen. (R. 63:9.) But the State argued that "what's much more relevant is the fact that [the Jeep was] gone for less than 24 hours." (R. 63:9.) The State clarified that it was not arguing that Rogers had stolen the Jeep or that he even knew that it was stolen. (R. 63:12.)

Rogers argued that the stolen-Jeep evidence was "way too speculative" because the stolen Jeep might not have been the same Jeep that T.J.'s robbers used. (R. 63:11.) Rogers also argued that the stolen-Jeep evidence would be inadmissible hearsay unless the Jeep owner testified about it being stolen. (R. 63:13.)

The circuit court concluded that the stolen-Jeep evidence was admissible other-acts evidence under the three-step test from *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (R. 63:18–21.) Under the first step, the court concluded that the State had offered the stolen-Jeep evidence for proper purposes: identity, context and background, and plan or preparation. (R. 63:18–19.) As for context and background, evidence that the Jeep was stolen explained why police checked it for fingerprints. (R. 63:19.) Under the second step, the evidence was relevant to identification because the men who robbed T.J. had used a similar Jeep and police had found Rogers' fingerprint on "that type of vehicle" "within the relative short time frame in which the crime is reported and the vehicle is recovered." (R. 63:19–20.) Under the third step, the court concluded that although the evidence was prejudicial, it was not unfairly prejudicial. (R. 63:20–21.) The court noted that Rogers could argue to the jury that the stolen Jeep with his fingerprint was "not necessarily the same" Jeep that T.J.'s robbers used. (R. 63:20.) Rogers could also argue that his fingerprint had gotten onto the stolen Jeep in an innocent way. (R. 63:20.) The court offered to give a cautionary instruction about the stolen Jeep. (R. 63:21.)

At Rogers' trial, a Milwaukee police officer testified that fingerprints were removed from a "later model Jeep Cherokee." (R. 65:53–55.) In response to a question about the Jeep's color, the officer testified that the Jeep "was stolen on March 10." (R. 65:53.) Rogers objected, saying, "hearsay, irrelevant. No foundation, not responsive." (R. 65:53–54.) The court sustained the objection. (R. 65:54.) The officer then said that the Jeep was gray. (R. 63:54.) He again testified moments later that the Jeep had been reported stolen on March 9. (R. 65:55.) Roger objected on hearsay grounds, but the court overruled his objection after the State said that it

was not eliciting that testimony to prove the truth of the matter asserted. (R. 65:55.)

Later that day, a Milwaukee Police Department forensic investigator similarly testified that he "was sent to a recovered stolen auto"—specifically, a 2000 Jeep Cherokee. (R. 66:5–6.) He testified that he recovered fingerprints from it. (R. 66:6.) Rogers did not object to any of that testimony. (R. 66:5–6.) A Milwaukee Police Department latent print examiner testified that he analyzed the fingerprints and that they were Rogers'. (R. 66:11–12.)

The jury also heard about photo arrays that police had shown to the witnesses of the robberies. Police showed a photo array to T.J., J.M., T.R., and V.R. (R. 65:58–61; 66:48–51, 82–84.) Each photo array had pictures of six different people. (R. 65:39, 57–60; 66:48–50, 68, 82–83.) All four witnesses picked Rogers' picture. (R. 65:35–36, 58–61; 66:21–22, 38, 51, 73, 82–84.)

During jury instructions, the court said, "Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." (R. 67:72.) It told the jurors that they were the sole judges of the witnesses' credibility and that they had to decide the case based solely on the evidence. (R. 67:53, 70.)

The court also gave a lengthy cautionary instruction on the evidence that police had found Rogers' fingerprint on a stolen Jeep. (R. 67:71–72.) It told the jury not to consider that evidence "to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged." (R. 67:72.) It also said to consider that evidence only on the issue of identification and for context and background. (R. 67:71–72.)

The State's closing argument relied heavily on the victims' identifications of Rogers. (R. 67:78–86, 98–107.) The State referred to a stolen Jeep only once. It said that Rogers

had failed to mention in his opening statement that his fingerprint "was found on the rear, passenger door of that stolen vehicle." (R. 67:83–84.)

In his closing argument, Rogers argued that the robbery victims had misidentified him. (R. 67:86–98.) He suggested that the men who robbed T.J. did not use the stolen Jeep with Rogers' fingerprint but instead used a different Jeep. (R. 67:89.)

The prosecutor said during rebuttal, "I'm not a math person, lucky I have a partner here who is." (R. 67:104.) The prosecutor said that "[f]our different people looked at photo arrays with six people in each photo array. The odds of misidentification by all four of those individuals—I have it written down—is 1 in 1,296." (R. 67:104–05.) Rogers objected, arguing that "there's no testimony or basis for that at all." (R. 67:105.) The prosecutor replied, "If you could do the math—." (R. 67:105.) The court overruled the objection, saying that the prosecutor's comment was "argument." (R. 67:105.)

The jury convicted Rogers of the March 10 robbery of T.J., the March 13 robbery of T.R., and the two related bail-jumping counts. (R. 67:53–54, 56–57; 68:3–4.) It acquitted Rogers of the March 11 robbery of J.M. and the related bail-jumping count. (R. 67:55–56; 68:4.)

Rogers appeals his judgment of conviction. (R. 55.)

SUMMARY OF ARGUMENT

I.A. The circuit court properly used its discretion when it denied Rogers' motion to exclude evidence that the Jeep on which police found his fingerprint had been stolen. The evidence was relevant to identification, credibility, plan or preparation, and context and background. The circuit court reasonably used its broad discretion when it concluded that

the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

I.B. Further, if the circuit court improperly admitted the stolen-Jeep evidence, the error was harmless. That evidence was insignificant and might have helped Rogers' defense. The prosecutor did not rely on that evidence to suggest that Rogers was guilty. The circuit court's limiting instructions removed any danger of unfair prejudice. And the jury showed that it did not improperly rely on that evidence because it acquitted Rogers of the only robbery that involved a stolen vehicle.

II.A. The circuit court correctly overruled Rogers' hearsay objection to a police officer's testimony about the stolen Jeep. The evidence was not hearsay because the State did not offer it to prove the truth of the matter asserted. The State instead used the evidence to explain why the police checked the Jeep for fingerprints.

II.B. Further, if the stolen-Jeep evidence was inadmissible hearsay, it was harmless for the same reasons that the circuit court's denial of Rogers' motion in limine was harmless.

III.A. The circuit court properly used its discretion when it concluded that the prosecutor's use of simple math was within her considerable latitude during closing argument. The calculation was a reasonable inference from the evidence that four witnesses each viewed six pictures in a photo array.

III.B. Further, if the court misused its discretion, its jury instructions made the prosecutor's math comment harmless.

ARGUMENT

I. The circuit court properly used its discretion when it denied Rogers' motion in limine to exclude evidence that a Jeep on which police found his fingerprint had been stolen; further, this alleged error was harmless.

A. Controlling legal principles

This Court reviews a circuit court's ruling on a motion in limine "under a discretionary standard" and will affirm "if the trial court made a reasonable decision based on the pertinent facts and applicable law." *F.R. v. T.B.*, 225 Wis. 2d 628, 649, 593 N.W.2d 840 (Ct. App. 1999) (citation omitted). This Court determines whether the circuit court "reasonably exercised its discretion" "based on the evidence available at the motion in limine." *See State v. Bustamante*, 201 Wis. 2d 562, 573, 549 N.W.2d 746 (Ct. App. 1996).

This Court likewise "review[s] a circuit court's admission of other-acts evidence for an erroneous exercise of discretion." *State v. Marinez*, 2011 WI 12, ¶ 17, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted). Under that standard, this Court upholds a decision admitting other-acts evidence "unless . . . no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted).

Other-acts evidence is admissible if (1) it is offered for a permissible purpose under Wis. Stat. § 904.04, (2) it is relevant, and (3) its risk of unfair prejudice does not substantially outweigh its probative value. *Marinez*, 331 Wis. 2d 568 ¶ 19 (citing *Sullivan*, 216 Wis. 2d at 772–73). "The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence." *Id.* (citations omitted). "Once the proponent of the other-acts evidence establishes

the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." *Id.* (citations omitted).

B. The circuit court properly used its discretion when it denied Rogers' motion in limine to exclude evidence that a Jeep was stolen.

The circuit court reasonably concluded that the stolen-Jeep evidence met all three prongs of the test for admitting other-acts evidence.[1]

1. The State offered the stolen-Jeep evidence for proper purposes.

"Identifying a proper purpose for other-acts evidence is not difficult and is largely meant to develop the framework for the relevancy examination." *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 861 N.W.2d 174 (citations omitted). "The proponent need only identify a relevant proposition that does not depend upon the forbidden inference of character as circumstantial evidence of conduct." *Id.* (citation omitted).

---

[1] The State questions whether the stolen-Jeep evidence is other-acts evidence and thus subject to Wis. Stat. § 904.04, which requires that other-acts evidence be offered for a proper purpose. *See State v. Dukes*, 2007 WI App 175, ¶¶ 28–30, 303 Wis. 2d 208, 736 N.W.2d 515 (noting the tendency to improperly classify evidence as other-acts evidence and concluding that the evidence at issue was not other-acts evidence). The State, however, assumes for the sake of argument that it is other-acts evidence.

The circuit court here correctly concluded that the State had offered the stolen-Jeep evidence for proper purposes: identity, context and background, and plan or preparation. (R. 63:18–19.) Wisconsin Stat. § 904.04(2) lists "preparation," "plan," and "identity" as proper purposes for admitting other-acts evidence. *Payano*, 320 Wis. 2d 348, ¶ 63 n.12. And Wisconsin courts have "recognized that context, credibility, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)." *Marinez*, 331 Wis. 2d 568, ¶ 27 (citing *State v. (John) Hunt*, 2003 WI 81, ¶ 58, 263 Wis. 2d 1, 666 N.W.2d 771).

Rogers does not seem to dispute that the State offered the stolen-Jeep evidence for an acceptable purpose. He argues, though, that the circuit court "abandoned plan or preparation as a purpose" because it later did not mention that purpose in its limiting instruction on the stolen-Jeep evidence. (Rogers Br. 18.) That argument fails. This Court "may consider acceptable purposes for the admission of evidence other than those contemplated by the circuit court." *(John) Hunt*, 263 Wis. 2d 1, ¶ 52 (citation omitted). Thus, this Court may consider plan and preparation even if the circuit court later abandoned that rationale.

In short, the stolen-Jeep evidence met the first prong for being admissible other-acts evidence.

2. The stolen-Jeep evidence was relevant.

Evidence is relevant if it "relates to a fact or proposition that is of consequence to the determination of the action" and "has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Hurley*, 361 Wis. 2d 529, ¶ 77 (quoting *Sullivan*, 216 Wis. 2d at 785–86). "Whether evidence is relevant under Wis. Stat. § 904.02 and should be admitted lies within the

discretion of the trial court." *State v. Eison*, 2011 WI App 52, ¶ 10, 332 Wis. 2d 331, 797 N.W.2d 890 (citation omitted).

The circuit court here acted reasonably when it concluded that the stolen-Jeep evidence was relevant, for three reasons.

First, the stolen-Jeep evidence was relevant to identifying Rogers as one of the men who committed the March 10 robbery of T.J. "Juries are allowed to draw reasonable inferences based on the evidence." *State v. Badzinski*, 2014 WI 6, ¶ 48, 352 Wis. 2d 329, 843 N.W.2d 29 (citations omitted). Based on the State's proffered evidence, the jury could have reasonably inferred that the robbers used a stolen Jeep and that Rogers' fingerprint got onto the Jeep during the brief period during which it was stolen. Those inferences would have helped to establish Rogers' identity as one of the men who robbed T.J. The State proffered that a gray Jeep Cherokee was stolen on March 9, 2014, in Milwaukee. (R. 63:8.) Six men robbed T.J. in Milwaukee a little less than 24 hours later. (R. 63:8.) The robbers used a gray Jeep Cherokee, and T.J. identified Rogers as one of the robbers. (R. 63:8.) About seven hours after T.J. was robbed, police recovered the stolen Jeep in Milwaukee and found Rogers' fingerprint on it. (R. 63:8.) The robbery occurred about "midway" between where the Jeep was stolen and where police recovered it. (R. 63:8.) Rogers frequented those areas and had friends who lived there. (R. 63:9.) Based on the reasonable inferences from the State's proffered evidence, the stolen-Jeep evidence was relevant to identifying Rogers as one of the robbers.

Second, the stolen-Jeep evidence was relevant to context and background—in a way that *helped* Rogers' defense. At the motion in limine hearing, the circuit court determined that the stolen-Jeep evidence would provide relevant context and background by explaining why police checked a Jeep for fingerprints. (R. 63:18–19.) The court

noted that Rogers could argue to the jury that the stolen Jeep with his fingerprint was "not necessarily the same" Jeep that T.J.'s robbers used. (R. 63:20.) Had the circuit court excluded all evidence about a Jeep being stolen, the jury would not have known that there may have been two different Jeeps. The jury instead would have been misled into thinking that the police checked a Jeep for fingerprints because it necessarily was the same Jeep that T.J.'s robbers used. Misleading the jury in that way would have been prejudicial to Rogers' defense.

Third, the stolen-Jeep evidence was relevant to plan and preparation as well as witness credibility because it could help prove that T.J. was robbed. Evidence is relevant to plan and preparation if it tends to show how a defendant planned to escape after committing a robbery. *See State v. Pharr*, 115 Wis. 2d 334, 345–47, 340 N.W.2d 498 (1983). Criminals sometimes use stolen cars to flee after committing robberies. *See, e.g.*, *State v. Oswald*, 2000 WI App 3, ¶ 1, 232 Wis. 2d 103, 606 N.W.2d 238 (1999); *State v. Feela*, 101 Wis. 2d 249, 253, 304 N.W.2d 152 (Ct. App. 1981), *overruled on other grounds by Pharr*, 115 Wis. 2d at 345 n.8. A witness's credibility is always a fact of consequence. *Hurley*, 361 Wis. 2d 529, ¶¶ 81–82. Here, evidence that a Jeep had been stolen could have helped the State prove that T.J. was robbed. The State proffered that a Jeep was stolen near the area where T.J. said that he was robbed, the robbery occurred about 24 hours after the Jeep was stolen, and T.J. said that the robbers used a similar Jeep. (R. 63:8–9.) A reasonable inference from these facts is that someone stole a Jeep to serve as a getaway vehicle for the robbery. This inference had a tendency to support T.J.'s claim of being robbed because it supported his credibility and helped show planning and preparation behind the robbery.

It does not matter that the circuit court did not rely on this credibility rationale. This Court may affirm an other-acts ruling "for reasons not stated by the circuit court." *Hunt*, 263 Wis. 2d 1, ¶ 52 (citation omitted).

It also does not matter that the planning and credibility rationales involve a matter that was undisputed at trial—that T.J. was robbed. Evidence satisfies the second step of the other-acts test if it is relevant to an element of a crime, even if the element is undisputed at trial. *Payano*, 320 Wis. 2d 348, ¶ 69 n.15. The State is required to prove every element of a crime at trial, even an element that is undisputed. *Id.* The stolen-Jeep evidence was relevant to proving not only that Rogers robbed T.J., but also to proving that T.J. was robbed at all.

Rogers argues that the circuit court misused its discretion for two reasons. Neither argument has merit.

First, he argues that the circuit court erred because it did not consider how the fact that the Jeep was stolen would be relevant. (Rogers Br. 18–20.) He seems to concede that evidence about his fingerprint being found on a Jeep was relevant, but he instead argues that evidence about a Jeep being stolen was irrelevant. (*Id.*) He is wrong. The circuit court explained the relevance of the evidence that the Jeep was stolen. The court said that the evidence had probative value because the men who robbed T.J. used a Jeep and because police found Rogers' fingerprint on "that type of vehicle" "within the relative short time frame in which the crime is reported and the vehicle is recovered." (R. 63:19–20.) In other words, probative value stemmed from the possible inference that Rogers' fingerprint got onto the Jeep during the brief time period while it was stolen and used in a robbery.

Further, "the trial court's failure to explain its reasoning does not mandate reversal; [the court of appeals] will search the record for reasons to support the court's decision." *State v. Jensen*, 2007 WI App 256, ¶ 34, 306 Wis. 2d 572, 743 N.W.2d 468 (citation omitted). Thus, it does not matter whether the circuit court considered how the evidence about a Jeep being stolen was relevant. This evidence was relevant for the reasons stated above.

Second, Rogers argues that the stolen-Jeep evidence was irrelevant to context and background. (Rogers Br. 20–21.) He suggests that the jury should have heard that police checked a Jeep for fingerprints because it had been used in a robbery. (*Id.*) But the State did not prove that the stolen Jeep with Rogers' fingerprint was the same Jeep that T.J.'s robbers used. The jury would have been misled to believe otherwise—to Rogers' detriment—had the circuit court done what Rogers now claims it should have done.

In short, the circuit court properly exercised its discretion when it found the stolen-Jeep evidence relevant.

3. The circuit court properly concluded that the risk of unfair prejudice did not substantially outweigh the probative value of the stolen-Jeep evidence.

"Evidence that is relevant 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" *Hurley*, 361 Wis. 2d 529, ¶ 87 (quoting Wis. Stat. § 904.03 (2011–12)). This balancing test "favors admissibility." *State v. Speer*, 176 Wis. 2d 1101, 1115, 501 N.W.2d 429 (1993). A circuit court has "broad discretion" when applying this balancing test. *Nowatske v. Osterloh*, 201 Wis. 2d 497, 503, 549 N.W.2d 256 (Ct. App. 1996) (citation omitted).

"[N]early all evidence operates to the prejudice of the party against whom it is offered. . . . The test is whether the resulting prejudice of relevant evidence is *fair* or *unfair*." *Payano*, 320 Wis. 2d 348, ¶ 88 (ellipsis in *Payano*) (citation omitted). "The specific danger of unfair prejudice when using other acts evidence 'is the potential harm in a jury's concluding that because an actor committed one bad act, he necessarily committed the crime with which he is now charged.'" *Id.* ¶ 89 (citation omitted).

The circuit court here properly used its broad discretion when it concluded that the stolen-Jeep evidence was admissible under this balancing test. As explained above, this evidence had high probative value to establish that Rogers robbed T.J. and to establish context and background. The circuit court concluded that this evidence was not unfairly prejudicial. (R. 63:20.) The court said that Rogers could argue to the jury that his fingerprint had gotten onto the stolen Jeep in an innocent way and that this Jeep was not necessarily the one that T.J.'s robbers had used. (R. 63:20.) The court also said that it could give a cautionary instruction. (R. 63:21.) Further, there was no suggestion that Rogers had stolen the Jeep or that he had known that it was stolen. Thus, the stolen-Jeep evidence did not have the risk of unfair prejudice that is associated with other-acts evidence. The circuit court reasonably concluded that the nonexistent risk of unfair prejudice did not substantially outweigh the probative value of this evidence.

In sum, the circuit court properly used its discretion when it denied Rogers' motion in limine to exclude the stolen-Jeep evidence.

C. Further, if the circuit court misused its discretion when it denied Rogers' motion in limine to exclude the stolen-Jeep evidence, the error was harmless.

An erroneous admission of evidence is subject to harmless error analysis. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). This Court reviews *de novo* whether an error was harmless. *State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

"For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270). "In other words, 'an error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Martin*, 343 Wis. 2d 278, ¶ 45).

A court considers "the totality of the circumstances" to determine whether an error was harmless. *State v. (James) Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. In doing so, a court may consider several non-exhaustive factors, including: "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27 (citation omitted).

Here, the evidence that a Jeep was stolen was harmless for five reasons.

First, the stolen-Jeep evidence was insignificant. At most, it was other-acts evidence dealing with a collateral issue that was relevant only to one of the three robberies

with which Rogers was charged. Rogers' defense was that the robbery victims had misidentified him. (R. 67:86–98.) This case thus hinged on whether the jurors believed the robbery victims. Whether some unknown person had stolen a Jeep—which may or may not have been the same Jeep that was used in one of the robberies—had no effect on Rogers' theory of defense.

Second, the circuit court gave limiting instructions about the stolen-Jeep evidence. "Limiting instructions substantially mitigate any unfair prejudicial effect." *Hurley*, 361 Wis. 2d 529, ¶ 89 (citation omitted). They may even eliminate it entirely. *Id.* The circuit court here instructed the jury not to consider the evidence about police finding Rogers' fingerprint on a stolen Jeep "to conclude that the defendant is a bad person and for that reason is guilty of the offenses charged." (R. 67:72.) It also instructed the jury to consider this evidence only on the issue of identification and for context and background. (R. 67:71–72.) These instructions helped remove any prejudicial effect that this evidence could have had on Rogers.

Third, the prosecutor did not suggest during closing argument that the fact that a Jeep had been stolen somehow helped prove Rogers' guilt. The prosecutor did not argue that Rogers had stolen the Jeep or even that he had known that it was stolen. The prosecutor's closing argument instead relied heavily on the victims' identifications of Rogers. (R. 67:78–86, 98–107.)

Fourth, the stolen-Jeep evidence *helped* Rogers' defense. The State never proved that the Jeep that T.J.'s robbers used was necessarily the stolen Jeep on which police found Rogers' fingerprint. By letting the jury hear that police checked a Jeep for fingerprints *because it had been reported stolen*, the court avoided misleading the jury into thinking that this Jeep was necessarily the same one from T.J.'s robbery. Indeed, Rogers suggested during closing

argument that the stolen Jeep was not the Jeep from the robbery. (R. 67:89.) The stolen-Jeep evidence thus helped Rogers' defense by weakening the State's fingerprint evidence.

Fifth, the jury acquitted Rogers of robbing J.M., even though it convicted him of the other two robberies for which he stood trial. (R. 67:55; 68:3–4.) Of those three robberies, the one against J.M. was the only one that involved an allegation that the robber stole the victim's vehicle. Had the jury inferred from the stolen-Jeep evidence that Rogers was a car thief, it would have been more likely to convict him of robbing J.M. than of the other two robberies. That the jury acquitted him of robbing J.M. shows that it did not draw that improper inference.

In sum, the circuit court properly used its discretion when it denied Rogers' motion in limine to exclude the stolen-Jeep evidence. In any event, this alleged error was harmless.

II. The circuit court properly overruled Rogers' hearsay objection to a police officer's testimony that a Jeep with Rogers' fingerprint was stolen.

A. Controlling legal principles

"A trial court's decision to admit evidence is discretionary, and this court will uphold that decision if there was a proper exercise of discretion." *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 697 N.W.2d 811 (citation omitted). However, this Court reviews *de novo* whether a statement is admissible as a hearsay exception. *State v. Joyner*, 2002 WI App 250, ¶ 16, 258 Wis. 2d 249, 653 N.W.2d 290.

"Hearsay evidence is generally not admissible except as otherwise provided by rule or statute." *Britt*, 203 Wis. 2d at 38 (citing Wis. Stat. §§ 908.02, 908.03). "Hearsay is 'a

statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *Id.* (quoting Wis. Stat. § 908.01(3)). If "evidence is offered not to prove the truth of the matter asserted," then "the evidence is by definition not hearsay." *State v. Eugenio*, 219 Wis. 2d 391, 411, 579 N.W.2d 642 (1998) (citation omitted). An out-of-court statement is *not* offered for its truth if it is "offered for the limited purpose of explaining the actions of investigating officers." *State v. Hines*, 173 Wis. 2d 850, 859, 496 N.W.2d 720 (Ct. App. 1993).

B. The officer's testimony about a Jeep being stolen was not hearsay because it was offered to explain the investigating officers' actions.

The State here elicited a police officer's testimony that a Jeep had been stolen in order to explain the actions of investigating officers, not to prove that the Jeep had in fact been stolen. A Milwaukee police officer testified that fingerprints were removed from a gray 2000 Jeep Cherokee. (R. 65:54–55.) When he testified that the Jeep had been reported stolen on March 9, the circuit court overruled Rogers' hearsay objection. (R. 65:55.) A Milwaukee Police Department forensic investigator similarly testified, without objection, that he "was sent to a recovered stolen auto"—specifically, a 2000 Jeep Cherokee. (R. 66:5–6.) He testified that he recovered fingerprints from it. (R. 66:6.) A Milwaukee Police Department latent print examiner testified that the fingerprints were Rogers'. (R. 66:11–12.) The testimony about the Jeep being stolen showed why the police checked it for fingerprints. Without this important background testimony, the jury would have been misled into thinking that the police checked this Jeep for fingerprints because it necessarily was the same Jeep that T.J.'s robbers had used.

The State's closing argument helps show that it elicited the stolen-Jeep evidence for a nonhearsay purpose. *Cf. State v. Kutz*, 2003 WI App 205, ¶ 37, 267 Wis. 2d 531, 671 N.W.2d 660 (concluding that certain evidence was hearsay because the State mentioned it three times during closing argument "and one of those references was clearly used to convey" the truth of the matter asserted). The State made only one reference to a stolen Jeep during closing argument. It said that Rogers had failed to mention in his opening statement that his fingerprint "was found on the rear, passenger door of that stolen vehicle." (R. 67:83–84.) The State was merely criticizing Rogers for overlooking the fingerprint evidence in his opening statement. The State was not clearly saying that the Jeep was in fact stolen, nor was it suggesting that this fact somehow helped prove Rogers' guilt. Rather, the State was using the word "stolen" to specify which vehicle it was referring to.

In short, the circuit court correctly overruled Rogers' hearsay objection.

C. In any event, if the circuit court improperly overruled Rogers' hearsay objection, the alleged error was harmless.

Further, the circuit court's overruling of Rogers' hearsay objection was harmless for the same reasons that the circuit court's denial of Rogers' motion in limine was harmless. And there is another reason why overruling the hearsay objection was harmless: evidence that is erroneously admitted is harmless if it is cumulative with other, unobjected-to evidence. *See Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., S.C.*, 2005 WI App 217, ¶ 33, 287 Wis. 2d 560, 706 N.W.2d 667. Rogers objected when an officer testified that the Jeep with Rogers' fingerprint was stolen, but Rogers did not object when a forensic investigator later testified to the same effect. (R.

65:54–55; 66:5–6.) That the officer's testimony at issue was cumulative with unobjected-to testimony further shows that the alleged error was harmless.

In sum, the circuit court correctly overruled Rogers' hearsay objection. And even if the court erred, the error was harmless.

III. The circuit court properly used its discretion when it overruled Rogers' objection to the prosecutor's use of basic math during closing argument; further, this alleged error was harmless.

A. Controlling legal principles

"'[C]ounsel is allowed considerable latitude in closing arguments,' and is permitted to draw any reasonable inference from the evidence." *Hurley*, 361 Wis. 2d 529, ¶ 95 (citations omitted). "[I]t is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury." *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). A prosecutor may use "simple arithmetic" during closing argument. *See United States v. Turzitti*, 547 F.2d 1003, 1007 (7th Cir. 1977). If a prosecutor made an improper comment during closing argument, a defendant is not entitled to a new trial if the comment was harmless. *See State v. Delgado*, 2002 WI App 38, ¶ 18, 250 Wis. 2d 689, 641 N.W.2d 490.

B. The circuit court properly overruled an objection to the prosecutor's simple math.

During rebuttal closing argument, the prosecutor addressed Rogers' mistaken-identity theory of defense. The prosecutor said, "I'm not a math person, lucky I have a partner here who is." (R. 67:104.) The prosecutor then said that "[f]our different people looked at photo arrays with six people in each photo array. The odds of misidentification by

all four of those individuals—I have it written down—is 1 in 1,296." (R. 67:104–05.) Rogers objected, arguing that "there's no testimony or basis for that at all." (R. 67:105.) The prosecutor replied, "If you could do the math—." (R. 67:105.) The court overruled the objection, reasoning that the prosecutor's comment was "argument." (R. 67:105.)

The circuit court properly used its discretion when it ruled that the prosecutor's comment was within her considerable latitude in closing argument. The prosecutor indicated that she arrived at the 1-in-1,296 figure based on the evidence that four witnesses each viewed a photo array with six pictures. The prosecutor's math was a reasonable inference based on that evidence. Indeed, Rogers recognizes that the prosecutor's math was simple. Rogers correctly explains that "[i]f photos were selected randomly, the chance of picking the defendant's photo is 1 in 6. . . . Carried out to four witnesses, this [chance] becomes 1 in 1296 (6 x 6 x 6 x 6)." (Rogers Br. 32.) The prosecutor's use of simple math was proper.

Rogers raises four contrary arguments, but none has merit.

First, he argues that the prosecutor relied on "evidence from a source outside the record, the prosecutor's 'partner.'" (*Id.* at 31.) But the prosecutor did not rely on *evidence* from her partner. Her partner had done a simple math calculation based on the evidence that four witnesses each viewed six photos. The prosecutor merely relayed that calculation to the jury.

Second, Rogers argues along similar lines that the prosecutor improperly "vouche[d] for the reliability of [her] partner." (*Id.*) A prosecutor's vouching for a witness's credibility is improper because it can "jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *United States v. Young*, 470

U.S. 1, 18–19 (1985). There is no vouching concern here because the prosecutor's math comment was an argument based on the evidence, not a reference to evidence outside of the record. Further, Rogers has not explained why the propriety of the prosecutor's math comment hinged in part on whether the prosecutor had done the math herself.

Third, Rogers argues that the prosecutor's math comment was incorrect. (Rogers Br. 31–33.) Although he concedes that the math would be correct if the victims had randomly chosen a picture during the photo arrays, he contends that the risk of misidentification is not the same as the odds of randomly selecting a particular picture. (*Id.*) That contention might be right. For example, if four witnesses to a crime were presented with a suggestive photo array with six pictures, they probably would have a higher than 1-in-1,296 chance of all picking the one suggestive photo. But a prosecutor's argument by inference only needs "an evidentiary basis, however slight, for the logical conclusion he or she suggests in the closing argument." *State v. Smith*, 2003 WI App 234, ¶ 24, 268 Wis. 2d 138, 671 N.W.2d 854. The prosecutor here had at least a slight evidentiary basis for calculating a 1-in-1,296 chance of misidentification. That calculation was a *reasonable* inference from the evidence that four victims each viewed six pictures, even if it was not the only plausible inference.

Fourth, Rogers relies on *Affett v. Milwaukee & Suburban Transportation Corporation*, 11 Wis. 2d 604, 612, 106 N.W.2d 274 (1960). (Rogers Br. 30.) But the *Affett* court held that closing arguments should not use math formulas to calculate damages for pain and suffering. *Affett*, 11 Wis. 2d at 609–12. The court's concern was that such formulas were "arbitrary" and had "no foundation in the record." *Id.* at 612. *Affett* does not control here. Rogers' case does not involve the use of a formula to calculate damages; it simply involves an observation about the mathematical probability of error. And

the prosecutor's math comment here was reasonable, not arbitrary, and had a basis in the record.

C. Further, even if improper, the prosecutor's math comment was harmless.

In any event, if the prosecutor's math comment was improper, it was harmless. The prosecutor did not vouch for the credibility of the victims, and Rogers does not argue otherwise. The circuit court instructed the jury, "Remarks of the attorneys are not evidence." (R. 67:72.) It also told the jurors that they were the sole judges of the witnesses' credibility and that they had to decide the case based solely on the evidence. (R. 67:53, 70.) These instructions "alleviate the likelihood that jurors placed any significant weight on the prosecutor's comments other than the weight that came from their own independent examination of the evidence." *State v. Miller*, 2012 WI App 68, ¶ 22, 341 Wis. 2d 737, 816 N.W.2d 331 (citations omitted). The court also instructed the jury, "If the [attorneys'] remarks suggested certain facts not in evidence, disregard the suggestion." (R. 67:72.) This instruction "is similarly presumed to have eliminated any prejudice." *State v. Adams*, 221 Wis. 2d 1, 18, 584 N.W.2d 695 (Ct. App. 1998) (citation omitted). Indeed, that the jury acquitted Rogers of one of the three robberies shows that the jury did not rely on the prosecutor's math comment.

In sum, the circuit court properly used its discretion when it ruled that the prosecutor's math comment was within her considerable latitude in closing argument. And even if the circuit court erred, the math comment was harmless.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm Rogers' judgment of conviction.

Dated this 7th day of September, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@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 7355 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 7th day of September, 2017.

_____
SCOTT E. ROSENOW
Assistant Attorney General