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OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

No. 2018 AP 952-CR

ALBERTO E. RIVERA,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE JEFFREY A. WAGNER, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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STATE OF WISCONSIN
C O U R T O F A P P E A L S

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ISSUES PRESENTED

1. Whether it was prejudicially unfair to allow admission of other acts evidence to rebut Mr. Rivera's identity defense.

The State's pretrial motion to admit other acts evidence was denied but the pretrial court below found if Mr. Rivera raised a defense of identity, *inter alia*, other acts would be admissible to rebut his defense.

2. Whether there was sufficient evidence to convict Mr. Rivera of 1st Degree Intentional Homicide and Attempted 1st Degree Intentional Homicide.

The court below denied the defense motion to dismiss after the close of the evidence.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Rivera's criminal convictions by a jury of 1st degree murder and attempted 1st degree murder.

2. Proceedings Below

On April 16, 2015, complaint number 15-CF-1640 was filed in Milwaukee County Circuit Court charging Mr. Rivera with a violation of §941.29(2), *Wis. Stats.* (Felon with a Gun, Repeater) (1). On August 26, 2015, Mr. Rivera appeared with appointed counsel. (191). Bail was set at \$25,000 and preliminary hearing was set for September 3, 2015. (191:7-8)

On September 3, 2015, Mr. Rivera waived his right to a preliminary hearing. (5)(192). On that date, an Information was filed adding the charges of 1st Degree Intentional Homicide, Attempted 1st Degree Homicide and 2 counts of Armed Robbery. (6)(192:4). Arraignment was held October 8, 2015 and Mr. Rivera entered a not guilty plea by counsel. (195:3).

On November 9, 2015, the State filed a motion to introduce other acts evidence at trial. (10)(11). On December 4, 2015, defense counsel filed the response to the motion. (12). The motion was heard on December 18, 2015. (196). On January 4, 2016, the court below issued its written decision denying the motion but finding if Mr. Rivera used, *inter alia*, a defense of identity, the State could present the other acts in rebuttal. (14).

Jury trial took place July 10-13, 2017. (220)(221)(222)(223)(224)(225)(226)(227). Mr. Rivera took the stand in his own defense. (225:45-131). On July 13, 2017, the jury returned its verdict of guilty on all charges. (178).

On October 18, 2017, the court sentenced Mr. Rivera to life imprisonment without eligibility for extended supervision on the murder and to consecutive terms of 30 years (20 confinement and 10 extended supervision) for the attempted murder and 10 years (5 confinement and 5 extended supervision) for the weapon possession. The court further sentenced Mr. Rivera to concurrent terms of 30 years each on the 2 armed robbery counts (20 years confinement and 10 years extended supervision each). (185)(229). The court denied presentence credit. (185:3).

Notice of Intent was filed October 18, 2017 (184) and Notice of Appeal was filed May21, 2018. (40).

3. Facts of the Offense

The surviving victim testified Mr. Rivera ordered her at gunpoint to get in the back of a vehicle and keep her head down. (223:13 [line 24] – 14 [line 5]). She complied by getting into the third seat, putting her head down and crossing her arms over her forehead. (223:14 [line 4] – 17 [line 4]). Then, she swore, Mr. Rivera got into the vehicle in the middle

passenger seat which was in front of her. (223:17 [lines 7-18]). Then Mr. Rivera made a phone call telling someone to “bring him down.” (223:18 [lines 1-18]). She continued to keep her head down. (223:18 [lines 19-23]). Persons she could not see pushed the male victim into the middle seat. He was restrained, preventing him from talking or moving. (223:19 [line 10] - 20 [line 3]). Mr. Rivera repeatedly demanded money from him. (223:20 [lines 4-8]). After he denied having any money, the vehicle went to the male victim’s house as Mr. Rivera wanted to see if there was any money there. Her head was still down. (223:20 [lines 10-23]). After arriving, the door on her side of the vehicle opens and she hears 2 shots, a pause and she hears another shot. (223:24 [line 21] – 28 [line 7])(223:43 [line 10]). She did not see anyone shoot. (223:26 [lines 12-13])(223:42 [lines18-19]).

Argument

I. ALLOWING ADMISSION OF THE OTHER ACTS EVIDENCE WAS PREJUDICIAL ERROR.

A. Standard of Review

Generally evidence rulings are discretionary, but where they are based on an error of law, the reviewing court reverses for erroneous exercise of discretion. *State v. Daniels*, 160 Wis.2d 85, 100, 465 N.W.2d 633 (1991). Furthermore, where the evidence question involves application of a statute, the review is *de novo*. *State v. Franklin*, 2004 WI 38, ¶5, 270 Wis.2d 271. Finally, whether admission of evidence is constitutional is reviewed *de novo*. See, *e.g.*, *State v. Moats*, 156 Wis.2d 74, 93-94, 457 N.W.2d 299, 308 (1990).

B. Discussion

It is well settled where other acts evidence is sought to be admitted to prove identity, the court

must use stricter standards of probativeness and relevancy because of the greater prejudice that accompanies such evidence. *State v. Kuntz*, 160 Wis.2d 722, 749, 467 N.W.2d 531, 541 (1991); *Whitty v. State*, 34 Wis.2d 278, 294, 149 N.W.2d 557, 564 (1967). Specifically, to admit other acts for identity, there must be “so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant.” *State v. Fishnick*, 127 Wis.2d 247, 263-264, 378 N.W.2d 272, 281 (1986). And see *U.S. v. Murray*, 103 F.3d 310, 318 (3d Cir.1997)(opn. per Alito, J.)(applying federal evidence rule on which §904.04, *Wis. Stats.* is based, earlier murder was not a “signature killing” and reversing due to prejudice from its admission).

Following these rules, the pretrial judge denied the State’s motion to admit Mr. Rivera’s 1997 murder conviction as an other act. (14). But then it incomprehensibly ordered the conviction could come in on rebuttal if Mr. Rivera raised a defense, *inter alia*, of identity. (14:3-4). Other acts evidence is, of course, admissible on rebuttal, *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458 (1977), but the rules of admissibility for it are the same. *State v. Sonnenberg*, 117 Wis.2d 159, 169-174, 344 N.W.2d 95, 100-102 (1984). That is to say, by allowing the conviction to be admitted as rebuttal after finding it inadmissible, the pretrial court below was permitting exactly what *Sonnenberg, supra*, prohibits, *i.e.*, permitting inadmissible other acts evidence in rebuttal.

C. Prejudice

The time honored Wisconsin test for prejudicial error, whether constitutional or not, was laid down in *State v. Dyess*, 125 Wis.2d 525, 543, 370 N.W.2d 222 (1985). To avoid reversal, the State has the burden of

showing “there is no reasonable possibility that the error contributed to the conviction.” *Id.* See *State v. Sullivan*, 216 Wis.2d 768, 792, 576 N.W.2d 30, 41 (1988)(“The conviction must be reversed unless the court is certain the error did not influence the jury.”).

Mr. Rivera’s defense was identity (221:80 [defense opening argument]) and he was on trial for 1st degree murder. The prosecutor’s closing argument to the jury emphasized the other murder conviction. (226:49 [line 3] – 50 [line 18]). “It should go without saying that evidence in a murder trial that the defendant committed another prior murder poses a high risk of unfair prejudice.” *Murray, supra*, 103 F.3d at 319 (murder conviction reversed since government could not show it was probable jury uninfluenced by erroneous admission).

Furthermore, counsel notes the surviving victim repeatedly testified she did not see who fired the shots. (223:26 [lines 12-13])(223:42 [lines18-19]). Her testimony showed other persons were present inside and outside the vehicle (223:19 [lines 5-9])(African American driving car)(223:19 [lines 11-23])(“They” push other victim into car)(223:22 [line 7] – 23 [line 4])(another person drives another car up to passenger side where Mr. Rivera is) and the State’s firearms examiner testified the shells found could have been from as many as 3 different weapons. (222:60 [line 24] – 61 [line 1]). So, the State’s case on identity was not strong and it was probable the jury was influenced by the evidence of the other murder.

II. THE EVIDENCE OF MURDER AND ATTEMPTED MURDER WAS INSUFFICIENT.

A. Standard of Review

“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979) (emphasis in original). Whether the evidence is direct or circumstantial, the test is the same. *State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990)

B. Additional Facts

The surviving victim repeatedly testified she did not see who fired the shots. (223:26 [lines 12-13])(223:42 [lines 18-19]). Her testimony showed other persons were present inside and outside the vehicle (223:19 [lines 5-9])(African American driving car)(223:19 [lines 11-23])(“They” push other victim into car)(223:22 [line 7] – 23 [line 4])(another person drives another car up to passenger side where Mr. Rivera is) and the State’s firearms examiner testified the shells found could have been from as many as 3 different weapons. (222:60 [line 24] – 61 [line 1]).

C. Discussion

The direct evidence noted above does not show who fired the fatal shots. The conclusion it was Mr. Rivera is based entirely on the surviving victim’s circumstantial testimony that she heard shots coming from above and in front of her. (223:24 [line 21] – 28 [line 17]) (in Appendix). This was immediately after the door next to her opened. She testified the door opened. She heard 2 shots. There was brief pause. She heard another shot and the door closed. (223:24 [lines 22-25]).

Nothing in this testimony identifies who was shooting. Did the person or persons who opened the door shoot? Shots fired by persons in the open doorway would be consistent with her testimony. The jury impliedly found Mr. Rivera, sitting in the seat in front of her fired the shots, but the victim-witness never saw that. She testified “like somebody

is over my head.” (223:24 [line 23]). Later, the prosecutor tried to lead her into saying a person was trying to climb over her (223:26 [line 24] – 27 [line 10]), but she only testified “you can feel someone over your - - just over the seat.” (223:27 [lines 8-9]). But even if she was able to feel a person over her, even someone who was climbing over the seat, there was another person, the driver, in the car. The testimony is consistent with this person moving or climbing above her.

So, counsel submits this circumstantial evidence does not show who was shooting. Furthermore, when it is considered 2 different caliber of bullets were found (222:50-61), this indicates more than one person was shooting.

Therefore, the evidence was insufficient to prove beyond a reasonable doubt Mr. Rivera was the person who fired the 3 shots the witness heard.

Conclusion

Counsel respectfully submits the foregoing demonstrates the Court should reverse and remand for a new trial.

Dated: July 30, 2018

Respectfully submitted,

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Attorney for Appellant
RIVERA

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APPELLANT'S APPENDIX CERTIFICATION

I hereby certify this appendix complies with §809.19(2)(a) and contains: 1) a table of contents; 2) relevant trial court record entries; 3) the findings or opinion of the trial court; and 4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required 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 names of juveniles, with a notation that the portions of the record have been so produced to preserve confidentiality and with appropriate references to the record.

Dated: July 30, 2018

So Certified,

Tim Provis
Attorney for Appellant
Bar No. 1020123

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 1,915 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on July 30, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: July 30, 2018

So Certified,

Signature: _____

Timothy A. Provis

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