STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERTO E. RIVERA,

Defendant-Appellant.

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

RESPONSE BRIEF OF PLANTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUES PRESENTED

1. In 1997, Alberto E. Rivera was convicted of felony murder for luring a drug dealer to a particular location to rob him; Rivera then shot and killed the dealer. In this case, Rivera was accused of luring a drug dealer to a particular location, attempting to rob him, killing him, and injuring the dealer's girlfriend, who witnessed the crime. Did the trial court erroneously exercise its discretion when it allowed the State to admit evidence of Rivera's prior conviction after Rivera raised an identity defense?

The trial court's exercise of discretion was sound.

This Court should affirm.

2. Was there sufficient evidence at trial to convict Rivera of first-degree intentional homicide and attempted first-degree intentional homicide under a party-to-a-crime theory of liability?

The jury convicted Rivera of both counts.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. This Court may resolve the issues presented by applying well-established law, and the parties' briefs should adequately set forth the relevant facts and legal standards.

INTRODUCTION

Rivera is not entitled to relief on either claim. The trial court soundly allowed the State to introduce evidence of Rivera's highly similar past crime to rebut Rivera's defense that he was not involved in the homicide and attempt in this case.

Further, the four-day trial in this case produced ample evidence that Rivera at least aided and abetted others in shooting and killing the homicide victim and shooting the surviving victim. The jury verdicts of guilt on both counts are sound. This Court should affirm.

STATEMENT OF THE CASE

Overview and pretrial ruling. After a four-day trial, a jury convicted Rivera of numerous charges, including (1) first-degree intentional homicide for the shooting death of Henry Hodges, and (2) attempted first-degree intentional homicide, for shooting and injuring Hodges's girlfriend, Beth.[1] (R. 185.) The State charged each count as a party to a crime with repeater and use-of-a-dangerous-weapon enhancers. (R. 6:1–2.)

Pretrial, the State sought to admit other-act evidence of Rivera's 1997 conviction for felony murder for his involvement in the armed robbery and shooting death of a drug dealer. (R. 10.) The court made a conditional denial of the State's motion, in which it barred the State from introducing that evidence in its case-in-chief, but it allowed the State to introduce it on rebuttal if Rivera raised a defense challenging intent, identity, motive, or modus operandi.[2] (R. 14:3–4; 196:15–17.)

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[1] "Beth" is a pseudonym for the surviving victim. *See* Wis. Stat. § (Rule) 809.86(4).

[2] The Honorable Ellen R. Brostrom made the initial pretrial ruling. (R. 14; 196.) Subsequently, the case rotated to the Honorable Jeffrey A. Wagner's calendar. In the final pretrial hearing, the parties alerted Judge Wagner to the other-act ruling (R. 219:6–7), and Judge Wagner confirmed that, based on Judge Brostrom's order, the evidence of the prior conviction could come in depending on Rivera's case-in-chief (R. 219:6–7).

A summary of relevant trial evidence follows.

The State's case-in-chief. Beth testified that on the evening of April 8, 2015, her boyfriend, Hodges, picked her up in a Chevy Tahoe to go out to eat. (R. 223:5–7.) En route, Hodges received a call from Rivera, whom Beth knew to be Hodges's friend and whom she had met five or six times before. (R. 223:7.) After taking the call, Hodges told Beth that he would be making a stop at Rivera's apartment, a place Beth testified she had been before. (R. 223:7–10.) They arrived at Rivera's apartment building, and Hodges went inside while Beth waited in the Tahoe and occupied herself with her cell phone. (R. 223:10.)

After 10 or 15 minutes, Beth saw someone walking from the building to the Tahoe. (R. 223:11.) She first assumed it was Hodges and unlocked the car, but it was Rivera, who approached the passenger side and told Beth that Hodges "said, [l]ook under his seat." (R. 223:12.) Beth bent to look under the seat but saw nothing. (R. 223:13.) When she rose back up, Rivera was aiming a gun with a laser sight at her head. (R. 223:12–13.) Rivera told Beth to get in the back of the truck and keep her head down. (R. 223:14.)

The truck had three seating areas: a front, a middle row, and a back row. (R. 223:14.) Beth climbed into the back row and put her head down, while Rivera moved back to the middle row, where he sat with the gun on his lap. (R. 223:14–15, 17.)

Beth saw an African-American man get into the driver's seat and drive the truck behind Rivera's residence. (R. 223:18–19.) Beth heard Rivera make a phone call, "and he tells them to bring him down." (R. 223:18.) Soon after, Hodges was pushed into the middle of the truck. Beth did not get a good look at Hodges, but she could tell that something covered his mouth and that he could not walk on

his own. (R. 223:19.) Beth heard Rivera ask Hodges multiple times where the money was, and Hodges said he did not have any. (R. 223:20.) Rivera then told Hodges to direct them to his house to make sure he had no money there. (R. 223:20–21.)

They drove for 10 minutes to Hodges's house. (R. 223:21.) Beth testified that when they stopped, a second car pulled up along the passenger side; the person in that car indicated that he forgot Hodges's house keys. (R. 223:22–23.) Rivera said that they had to drive back to get the keys. (R. 223:24.) Beth noted that they drove less than five or six minutes before stopping. (R. 223:24.) Then, Beth heard Rivera tell Hodges, "Let me holler at Ra Ra real quick." (R. 223:25.) Beth heard the door open and two gunshots coming from where Rivera was seated in the middle row. (R. 223:26.)

Beth kept her head down, but she felt someone moving over the back of the middle seat and over her. (R. 223:27.) She heard another two shots but did not feel them, and at some point she heard the Tahoe's door close. (R. 223:28.) Two or three minutes later, she felt blood coming over her head and described "[t]rying to figure out if I got shot in my head. Trying to see if [Hodges] was fine. He didn't move when I called his name." (R. 223:27.)

Beth got out of the Tahoe and ran to a nearby apartment building, where a resident called 911. (R. 223:29.) Police arrived and took Beth to a hospital; she had been shot in both arms and hands, and a bullet had grazed her head. (R. 223:28–29.) On the way to the hospital, Beth told police that Rivera was the shooter. (R. 223:30–31.)

Responding police officers also discovered Hodges's lifeless body inside the Tahoe. Hodges had been shot in the head. (R. 224:14–15.) His hands and legs were bound with extension cords. (R. 222:65–66.) Duct tape covered his

mouth. (R. 222:66.) Based on powder stippling around the entrance wound, the medical examiner estimated that the gun discharged from about "several inches to maybe a foot" away. (R. 224:15.) Hodges also had been shot in the left knee. (R. 224:16.) Both bullets passed through Hodges's body. (R. 224:14–16.)

Police found two fired 9mm bullets around the middle row of seats: one was embedded in carpet on the floor, and the other ended up inside Beth's purse, which had been sitting in the space between the front driver and passenger seats, just in front of the middle row. (R. 222:17–19, 66, 68, 81.) A firearms and tool mark expert testified that those two bullets were discharged by the same gun. (R. 222:55–56.) Police also found a spent bullet that had landed in some shopping bags in the cargo area behind the back row. (R. 222:39–43.) According to the expert, that bullet was a .380 caliber that had been discharged from a different gun. (R. 222:56.)

Police also found three fired 9mm shell casings. One was behind Hodges's body. (R. 222:29–30, 47–48.) Another was under the middle seat. (R. 222:35.) The third was on the back row seat. (R. 222:38.) The expert concluded that all three casings were discharged by the same gun. (R. 222:58.)

Although Beth only knew the gunman as "Alberto" and did not know his last name, police were able to narrow down Rivera as the "Alberto" whom Beth named. (R. 223:68–73.) When shown a photograph of Rivera, Beth immediately identified him with 100 percent certainty as the shooter. (R. 223:32–33, 77–78.) She also identified him in a live lineup four months after the shooting. (R. 223:38, 52.) Hodges's brother also knew the Alberto with whom his brother had associated; he led police to the apartment where he knew Alberto to live. It was the same building to which Hodges and Beth had driven on the night of the murder. (R. 223:72–74.)

Police made efforts to identify and investigate Rivera's accomplices. (R. 224:33; 225:11.) They were able to link a fingerprint found on a duct tape roll to a man named Levell Drew (R. 224:32–33), although they were unable to link Drew to the crime through any other fingerprints or DNA (R. 224:105, 110). During the investigation, police showed Beth a photo array with Drew as the target; Beth did not recognize Drew as the gunman or otherwise being one of the men involved in the incident. (R. 225:140–46.) Rivera also later identified "Ra Ra" as Terrance Jackson. (R. 225:51.) But it was not clear based on the evidence presented whether police otherwise found sufficient evidence to charge Drew or Jackson for their involvement in the crimes.

Police also found evidence that Rivera, in the afternoon before Hodges's murder, made changes to his cell phones, ostensibly to avoid police connecting him to Hodges. In the afternoon before the murder, Rivera deactivated his then-current cell phone and activated a new phone and number at a cell phone store. (R. 224:124–34.) Immediately after, Rivera went to a different store, where Rivera purchased and activated a second new phone. (R. 224:135–39.) According to the call records from that phone, which police found in the trunk of Rivera's car, the only outgoing calls on it went to Hodges. (R. 225:7–9.)

Rivera's testimony. Rivera denied shooting Hodges or Beth, and he denied being in the Tahoe when the shooting occurred. (R. 225:45–46.) Rivera said that he and Hodges sold drugs together. (R. 225:46–47.) According to Rivera, Hodges supplied the drugs, Rivera would sell them, and then Rivera would pay Hodges back. (R. 225:48–49.)

Rivera agreed that he called Hodges on the evening of his murder and asked him to bring a supply of drugs for Rivera to sell the next day. (R. 225:54–55.) He was at his apartment with two friends—Drew and Jackson—neither of whom was friends with Hodges. (R. 225:58, 67–68.) Rivera

claimed that while he was waiting for Hodges to arrive, a buyer called and was ready to do business. (R. 225:57.) So, Rivera testified, he left his apartment before Hodges arrived to make that sale. (R. 225:57–58.) Rivera said that Drew and Jackson remained at his apartment, though Rivera denied telling them that Hodges was on his way there. (R. 225:58–59, 95.)

Rivera claimed that when he returned, his apartment door was open, the lights were off, and no one was there. (R. 225:60–62.) Rivera found a set of keys on the counter and called Jackson, asking him where he was. (R. 226:65.) According to Rivera, Jackson told Rivera to come to 36th and Greenfield. (R. 225:65.)

Rivera complied. When he arrived at the intersection, he saw Jackson get out of the driver's side of Hodges's Tahoe. (R. 225:66–67.) Rivera claimed he knew something was wrong, because Jackson would not have normally driven Hodges's car. (R. 225:67–68.) Jackson told Rivera to follow him; Jackson got back in the Tahoe, and Rivera followed him into an alley. (R. 225:70.) Rivera said that Jackson got out of the Tahoe, opened the rear passenger door, and shot his gun twice inside. (R. 225:70.) According to Rivera, Jackson then jumped into the car Rivera was driving; Drew got out of the rear passenger side of the Tahoe and joined Jackson and Rivera. (R. 225:72.) Rivera said that they drove back to his apartment in silence. (R. 225:72–74.)

During his testimony, Rivera acknowledged his 1997 felony murder conviction, for which he had been released from confinement just a year and a half before Hodges's murder. (R. 225:91–92.) Rivera testified that that crime involved Rivera and a coactor luring a drug dealer to a particular location with a promise to buy drugs, holding that dealer at gunpoint in his car to look for money and drugs, and then, after finding none, shooting and killing the dealer. (R. 225:83–87, 92–102.) Rivera claimed that in the 1997

case, he shot the dealer by accident, but he acknowledged that he pleaded guilty to the felony murder charge. (R. 225:87–88.)

Verdict and sentence. The jury found Rivera guilty of all counts, including first-degree intentional homicide as a party to a crime for Hodges's death and attempted first-degree intentional homicide as a party to a crime for Beth's injuries. (R. 185.) The court sentenced Rivera to a life sentence without eligibility for extended supervision, in addition to consecutive and concurrent sentences on the other counts. (R. 185:1–3.)

Rivera appeals.

ARGUMENT

I. The circuit court soundly exercised its discretion in allowing admission of Rivera's 1997 felony-murder conviction.

A. This Court defers to the circuit court's discretionary decision-making regarding other-act evidence.

This Court will sustain an evidentiary ruling if "it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998). If the circuit court does not fully exercise its discretion, this Court will uphold the circuit court's decision if the record contains facts that would support a proper and full exercise of discretion. *Id.* at 781.

Other-act evidence must satisfy *Sullivan*'s three-part test to be admissible. First, the proponent must offer it for an acceptable purpose under Wis. Stat. § 904.04(2). *Sullivan*, 216 Wis. 2d at 772. Second, the evidence must be relevant

under Wis. Stat. § 904.01. *Id.* Third, the circuit court must be satisfied that the probative value of the other-act evidence is not 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 under Wis. Stat. § 904.03. *Id.* at 772–73.

B. The evidence of Rivera's highly similar 1997 conviction satisfied all three *Sullivan* prongs.

Rivera does not dispute that the first *Sullivan* prong was met, nor can he. Here, the court identified the purposes for which the evidence of Rivera's 1997 conviction could come in: identity, motive, intent, and modus operandi, to the extent that Rivera's defense raised those points. (R. 14:3–4.) Those are all identified permissible purposes. *See Sullivan*, 216 Wis. 2d at 772.

Further, the second prong was satisfied because the past conviction was probative to Rivera's raised identity defense, which was that Jackson and Drew committed the crimes and that he was unaware of what they were doing until it was too late.

"Where other-acts evidence is used for identity purposes, similarities must exist between the 'other act' and the offense for which the defendant is being tried." *State v. Fishnick*, 127 Wis. 2d 247, 263, 378 N.W.2d 272 (1985) (citing *Sanford v. State*, 76 Wis. 2d 72, 80, 250 N.W.2d 348 (1977), and Wis. JI-Criminal 275). Similarities that "tend to identify the defendant as the proponent of an act also tend to ensure a high level of probativeness in the other-acts evidence." *Id.* For a court to admit other-act evidence for purposes of identity, "there should be such a concurrence of common features and 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." *Id.* at 263–64 (footnote omitted).

Here, there were significant parallels between Rivera's 1997 crime and Hodges's murder, which occurred just 16 months after Rivera was released on parole from the 1997 conviction. The 1997 conviction involved Rivera conspiring with a coactor to lure a drug supplier to a particular location with the promise of a sale. But instead of buying drugs, Rivera and the coactor worked together to hold the supplier hostage in his car while they searched his car and home for money and drugs. When they found nothing, Rivera shot the supplier twice and went on the run until he could not do so any longer.

Rivera's 2015 crime bears nearly all the earmarks of Rivera's 1997 felony murder. Here, Rivera called Hodges, a drug supplier, and asked him to come to his place and supply him with drugs to sell. When Hodges arrived, Rivera and his coactors bound him and brought him back to his car, where they searched for drugs and money, and where they demanded Hodges direct them to his house where they could continue searching for drugs and money. Like in 1997, Rivera and his coactors came up short, having found no money or drugs. Like in 1997, Rivera sought to leave no surviving victims, shooting both Hodges and Beth twice. And as he did in 1997, after the shooting, Rivera again went on the run. Against that background, the circuit court soundly determined that there was "a concurrence of common features" between the two crimes. *See Fishnick*, 127 Wis. 2d at 263–64.

Finally, the third *Sullivan* prong was also satisfied. The great similarity between the two crimes to the issue of identity ensured a high level of probativeness. *See Fishnick*, 127 Wis. 2d at 263. That high probative value was not significantly outweighed by danger of unfair prejudice,

confusion of the issues, misleading the jury, or undue delay. *See* Wis. Stat. § 904.03; *Sullivan*, 216 Wis. 2d at 772–73.

Here, when the prosecutor discussed the 1997 crime during closing, he emphasized that the jury was to consider it only in regard to the issue of identity: "When you're using the 1997 case, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged." (R. 226:87.) He made clear that "[i]t cannot be considered as he's a bad guy or he's a killer. It must never be done. That's not the way it works." (R. 226:49–50.) Moreover, the court instructed the jury that it was to weigh the 1997 crime on the purposes of its admission. (R. 226:9–10.) It warned the jury that "[i]t's not to be used to conclude that the defendant's a bad person and for that reason is guilty of the offense charged." (R. 226:10–11.) This Court presumes that juries follow their instructions, *see State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), and there is nothing here to suggest that that presumption is unwarranted.

C. Rivera's arguments fail.

Rivera argues that the court initially ruled the evidence to be inadmissible but "incomprehensibly" deemed it admissible in rebuttal. (Rivera's Br. 5.) But there was nothing incomprehensible about the court's ruling. The trial court ruled on the other-act evidence motion six months before the trial began. (R. 14.) At that point, it was not clear whether Rivera would be contesting identity and the other proposed purposes in the case. Therefore, it was premature for the court make a definitive ruling on whether the third *Sullivan* factor was satisfied. Accordingly, it made a reasonable conditional ruling prohibiting the State from introducing the evidence in its case-in-chief, but allowing it to use it if Rivera opened the door to any of the permissible

purposes, including identity. As it turned out, Rivera contested identity, which properly opened the door to admission of evidence of the very similar previous crime.

Rivera claims that the circuit court's ruling is contrary to *State v. Sonnenberg*, 117 Wis. 2d 159, 174, 344 N.W.2d 95 (1984), but in so doing, he misstates the holding of *Sonnenberg*. The rule in *Sonnenberg* is "that the impeachment of a witness on the basis of collateral facts introduced by extrinsic evidence is prohibited." *Id.* at 174. Here, the evidence of Rivera's past highly similar crime was not "collateral and inadmissible" evidence; rather, it was admissible other-act evidence once Rivera made identity an issue in the case. *Sonnenberg* simply is not on point.

Finally, Rivera argues that the error here was not harmless. (Rivera's Br. 5–6.) But this Court need not reach harmless error, because Rivera has failed his burden of explaining why the *Sullivan* factors were unsatisfied here. He cannot demonstrate any erroneous exercise of discretion by the circuit court in allowing this evidence in based on Rivera's defense theory. This Court should affirm.

II. The evidence was sufficient to convict Rivera of first-degree and attempted first-degree intentional homicide.

This Court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it."

Id. Thus, this Court "will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

To prove first-degree intentional homicide, the State had to prove that Rivera caused the death of Hodges and acted with the intent to kill. *See* Wis. JI-Criminal 1010 (2000). To prove attempted first-degree intentional homicide, the State had to prove that Rivera acted "toward the commission of" the crime of first-degree intentional homicide as to Beth. *See* Wis. JI-Criminal 580 (2013). Further, the State charged Rivera on both counts as a party to a crime, which provides that "[i]f a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly commits it." Wis. JI-Criminal 407 (2005).

Here, Beth testified that she knew Rivera, that he approached her while she sat in the Tahoe, that he aimed a gun at her head, that he ordered her to move to the back and duck down, that he sat in the seat in front of her as Hodges was moved into the Tahoe, that she heard Rivera say something, that she immediately heard two gunshots from the middle seat, that she felt the person in the seat ahead of her crawling over the seat to where she was, and that she heard two more shots. Beth was shot in the arms and head. Hodges was shot in the head and knee. Given that and the other evidence supporting Rivera's guilt, the jury was entitled to believe that testimony over Rivera's self-serving version of events and find him guilty on both counts.

Rivera argues that the evidence was not sufficient to prove that Rivera actually fired the shots that killed Hodges and that injured Beth, given that Beth did not see him

actually shoot. (Rivera's Br. 7–8.) But Rivera disregards that he was charged as a party to a crime on both counts. Accordingly, while the State's theory was that Rivera did the actual shooting, the jury only had to believe that Rivera aided and abetted someone else in shooting Hodges and Beth. The evidence was more than sufficient to do that, and Rivera offers no argument to the contrary.

In sum, Rivera is not entitled to relief on either claim.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 4th day of October, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@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 3,943 words.

_____
SARAH L. BURGUNDY
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 4th day of October, 2018.

_____
SARAH L. BURGUNDY
Assistant Attorney General