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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2019AP1597-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JAMES LEE BALLENTINE,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICITION
ENTERED IN THE RACINE COUNTY CIRCUIT COURT,
THE HONORABLE MARK F. NIELSEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court properly exercise its discretion when it excluded detailed testimony about a witness's prior conviction while allowing general testimony about the witness's ability to hide drugs from police on the grounds that the detailed testimony would unfairly prejudice the State?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

INTRODUCTION

In 2017, James Ballentine sold cocaine to his son, Denmark James,¹ and upon execution of search warrants, officers discovered Ballentine also possessed cocaine. A jury convicted Ballentine of two counts of delivery of cocaine and one count of possession with intent to deliver cocaine.

Before trial, Ballentine sought to admit evidence that Denmark had once concealed drugs from police during a pat-down search. He wanted to argue, therefore, that Denmark could have concealed drugs from officers during the controlled drug buys in order to frame Ballentine. The circuit court allowed testimony about Denmark's knowledge of how to hide drugs from police, but it excluded detailed testimony about Denmark's behavior that led to a prior criminal conviction. The circuit court properly exercised its discretion in balancing the probative value against the danger of unfair prejudice.

¹ As in Ballentine's brief, the State refers to Denmark James as Denmark throughout its brief to avoid confusion.

Even if there was any erroneous exercise of discretion, any error was harmless. This Court should affirm.

STATEMENT OF THE CASE

In early 2017, on three separate days, Ballentine sold cocaine to his son, Denmark, who was acting as a confidential informant. On April 12, 2017, while executing a search warrant, officers discovered cocaine in a locked cabinet in a bathroom at a youth center and marijuana at Ballentine's home. (R. 1:2–3.) The State charged Ballentine with three counts of delivery of cocaine one to five grams at a youth center, one count of possession of one to five grams of cocaine with intent to deliver at a youth center, and one count of possession of THC. (R. 1:1–2.)

Before trial, Ballentine sought to introduce other acts evidence that Denmark had concealed drugs on his body in 2015. (R. 44:27–28.) In that incident, Denmark concealed drugs on his body that were not discovered during a search incident to arrest. (R. 44:30.) Ballentine wanted to introduce the evidence to show that Denmark had the ability to hide drugs and, therefore, may have hidden drugs during these controlled drug buys with Ballentine. (R. 44:30–31.)

The State argued that the jury would already hear testimony at trial that Denmark was a drug dealer himself and agreed to work with police to help himself. (R. 44:32.) The State asserted that the other acts evidence was not offered for a permissible purpose, and it claimed that it was unfairly prejudicial. (R. 44:32–33.)

The circuit court allowed general questions about Denmark's knowledge about hiding drugs, but it excluded specific questions about his prior conviction. (R. 44:36.) It concluded that the evidence had low probative value because the jury will know that someone can conceal drugs on their body. (R. 44:36.) Further, it noted that if Denmark lied to the

jury that he had never hidden drugs from police, then Ballentine could impeach that testimony with the prior conviction. (R. 44:36.)

At trial, the State presented evidence from Denmark that he began working with police officers after he was convicted for selling drugs and that Denmark sought a reduction in his sentence and the severity of the charges he faced. (R. 46:115–16.) When working with law enforcement, Denmark agreed to a search of his body. (R. 46:118.)

On February 15, 2016, Investigator Kevin Kupper asked Denmark to try to buy drugs from his dad, Ballentine, and Kupper provided the money for the purchase. (R. 46:119.) Kupper searched Denmark. (R. 46:119.) Kupper explained that he searched Denmark before he gave Denmark money to protect the integrity of the investigation. (R. 47:74.) He needed to be confident that Denmark was not introducing anything from outside of the controlled buy. (R. 47:74.)

Kupper explained that he would pat-down Denmark from head to toe before each controlled buy. (R. 47:75.) He had him turn his pockets inside out and remove his shoes. (R. 47:75.) Kupper would search Denmark's thigh area to make sure that there was nothing hidden in the groin area. (R. 47:75.) Kupper testified that he knew that Denmark knew how to conceal substances on his person. (R. 47:120.) After the search, Denmark met Ballentine at a youth center called the King Center. (R. 46:119.) Denmark bought cocaine from Ballentine. (R. 46:120, 128.)

On February 27, 2016, Denmark again purchased cocaine from Ballentine with money supplied by Kupper. (R. 46:133–35.) This sale happened at Ballentine's home. (R. 47:93.) Denmark recorded both drug sales, and the jury watched the video. (R. 46:126, 142.) After the purchases, Denmark gave the drugs to Kupper and Kupper searched Denmark. (R. 46:144.)

A third sale occurred on April 4, 2016. (R. 46:145.) Kupper searched Denmark's vehicle before and after this sale. (R. 46:146.) At the King Center, Denmark gave Ballentine the money supplied by Kupper and Ballentine gave Denmark cocaine. (R. 46:147.) Ballentine stored the drugs under the sink in a locked bathroom. (R. 46:150–51.)

Denmark testified that he never brought drugs to Kupper that he did not receive from Ballentine. (R. 46:156.) On cross examination, Denmark described that Kupper would pat him down and check in his pockets, socks, and shoes. (R. 46:174.) Denmark admitted that he had hidden drugs in the past, and he knew how to keep drugs from being found during a search. (R. 46:188.)

On April 12, 2016, officers executed a search warrant at the King Center. (R. 46:206.) Officer Jessica Shapiro testified that during the execution of the warrant, she found five knotted bags of crack cocaine under a sink in a locked bathroom. (R. 46:209, 213.) That same date, officers executed a search warrant at Ballentine's home. (R. 47:107.) Officer Theodore Schlitz located marijuana in a closet of a bedroom in the home next to Ballentine's cell phone. (R. 47:12, 26.)

A crime lab analyst tested the substances recovered at the King Center and sold to Denmark, and each contained cocaine. (R. 46:35–40, 46.) Kupper testified that he had no concern that the drugs Denmark turned over had been hidden on Denmark. (R. 47:76.)

At closing, Ballentine argued that Denmark admitted to knowing how to hide drugs on his person. (R. 48:33.) He then argued that the video evidence never showed Ballentine and Denmark exchange money or drugs. (R. 48:33–35.) The jury found Ballentine not guilty for possession of THC and for the first delivery of cocaine. (R. 48:65–66.) The jury found Ballentine guilty of two counts of delivery of cocaine and one count of possession with intent to deliver cocaine for the

cocaine discovered at the King Center during the execution of the search warrant. (R. 48:66.)

The court sentenced Ballentine to seven years of imprisonment for the possession with intent to deliver cocaine. (R. 38:4.) On the delivery of cocaine counts, the court imposed and stayed two ten-year sentences and placed Ballentine on probation for five years. (R. 38:1.)

Ballentine appeals his judgment of conviction. (R. 39.)

STANDARD OF REVIEW

This Court reviews a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Mayo*, 2007 WI 78, ¶ 31, 301 Wis. 2d 642, 734 N.W.2d 115. Reviewing courts will sustain a circuit court's decision as long as it "examined the relevant facts, applied a proper standard [of law], and reached a reasonable conclusion using a demonstrated rational process." *Id.*; see also *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998). Further, if a circuit court failed to articulate its reasoning, reviewing courts "independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *Sullivan*, 216 Wis. 2d at 781.

ARGUMENT

- I. The circuit court properly exercised its discretion in excluding detailed testimony about an incident where Denmark hid drugs during a search.**
 - A. The court applies a three-part test that governs admissibility of other acts evidence.**

The admissibility of other acts evidence is governed by Wis. Stat. §§ 904.04(2) and 904.03. *Sullivan*, 216 Wis. 2d at 781 The Wisconsin Supreme Court set forth a three-part test for determining whether other acts evidence is admissible. *Id.*

at 772–73. That test instructs circuit courts to consider whether: (1) the other acts evidence was offered for an acceptable purpose; (2) the evidence is relevant; and (3) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or delay. *Id.*

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. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399 (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.*

B. The circuit court’s decision to exclude other acts testimony was not erroneous.

Ballentine sought to present evidence that Denmark had previously hidden drugs from officers even after a pat-down search to bolster his argument that Denmark framed him for the drug sales. (R. 13.) He wanted to go into detail about a prior conviction where Denmark hid the drugs after a pat down search, but he dropped them in the police bathroom during a break in interrogation. (R. 13.)

The circuit court concluded that whether Denmark knew how to hide drugs was offered for a permissible purpose, it was relevant, and was not unfairly prejudicial. (R. 44:36.) It allowed Ballentine to question Denmark about whether he knew how to conceal drugs so that they would not be found during a pat down search. (R. 44:35.) And if Denmark lied and said that he did not know how to conceal drugs, Ballentine could go into the details of Denmark’s prior conviction. If Denmark told the truth about knowing how to conceal drugs,

Ballentine could not bring up the prior conviction. This ruling was a proper exercise of the circuit court's discretion.

The State concedes that the evidence was offered for an acceptable purpose. Ballentine was not offering the evidence to show that Denmark had a character for dishonesty and that he acted in conformity with that character. Instead, Ballentine sought to offer the evidence to show that Denmark had the knowledge required to hid drugs from police during a pat down search. (R. 44:35–36.) That is an acceptable purpose. *See* Wis. Stat. § 904.04(2).

Likewise, the State concedes that the evidence was relevant. The fact that Denmark had previously hidden drugs from police made it slightly more possible that he could hide drugs during the controlled buys with Ballentine. Relevancy is the tendency to make a fact more probable than without the evidence. Wis. Stat. § 904.01. As the circuit court concluded, it was relevant. (R. 44:37.)

On the third prong, whether the probative value outweighs the danger of unfair prejudice, the circuit court sought to strike a balance. It wanted Ballentine to be able to present the relevant information about Denmark's ability to hide drugs, without allowing the jury to hear the details of Denmark's prior drug conviction. The circuit court acted properly.

The probative value of the evidence comes from its relevancy. *State v. Payano*, 2009 WI 86, ¶ 81, 320 Wis. 2d 348, 768 N.W.2d 832. A court's "main consideration in assessing probative value of other acts evidence 'is the extent to which the proffered proposition is in substantial dispute.'" *Id.* (citation omitted). Or framed differently, how badly does the party seeking introduction need the other act evidence? *Id.*

Here, the circuit court concluded that the evidence had low probative value because the jury will know that someone can conceal drugs on their body. (R. 44:36.) This conclusion

was supported by the trial testimony. Kupper testified that he went through a pat-down search of any person helping with a controlled drug buy. (R. 47:74–75.) He implied that it was possible to hide drugs from officers and wanted to know that he could trust the person working as an informant. (R. 47:74.) The jury likely already knew that people conceal drugs from police officers, but even if it did not know that, Kupper’s testimony articulated the need for a search before a controlled buy. (R. 47:74–75.)

Next, the court must determine the danger of unfair prejudice. Unfair prejudice happens when the proffered evidence tends to influence the outcome by improper means. *Sullivan*, 216 Wis. 2d at 789–90. It may include evidence that “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.” *Id.*

A witness can be impeached with the fact that he had prior convictions. Wis. Stat. § 906.09(1). A witness may be asked whether he has ever been convicted of a crime and, if yes, how many times. *Id.* This inquiry is allowed because there is a presumption that “a person who has been convicted of a crime is less likely to be a truthful witness than a person who has not been convicted.” *State v. Kruzycki*, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995). But the witness cannot be questioned about the details of the nature of the prior conviction. Wis. Stat. § 906.09(1).

To be sure, Ballentine did not seek to introduce the details surrounding Denmark’s prior conviction to impeach his truthfulness, but instead, he sought to impeach Denmark’s knowledge required to hide drugs during a police search. (R. 44:35–36.) But that fact alone does not make Wis. Stat. § 906.09 irrelevant. The balancing test set forth in Wis. Stat. § 906.09 demonstrates a requirement that the circuit

court balance the probative value of the details against the danger of unfair prejudice.

Here, the circuit court struck a balance similar to the one contemplated by Wis. Stat. § 906.09. It did not exclude all evidence relating to Denmark's knowledge about hiding drugs during a police search. But it limited the details to minimize the risk of unfair prejudice. By doing so, the court did not foreclose any of Ballentine's argument. Ballentine argued during closing that Denmark framed him. (R. 48:33–35.)

The court concluded that to allow details of the conviction would cause unfair prejudice because the proffered evidence tends to influence the outcome by improper means. *See Sullivan*, 216 Wis. 2d at 789–90. The information about Denmark's criminal history would cause unfair prejudice because it would allow the jury to know the details of Denmark's criminal past. Normally, a jury would not be able to hear the details of past criminal convictions, but instead only hear the number of convictions. The court properly exercised its discretion.

Ballentine argues that the circuit court failed to employ a rational process because it determined that the evidence became more probative if Denmark denied that he knew how to hide drugs. (Ballentine's Br. 16.) Here, the court discussed the facts and the relevant legal standard. It concluded that the probative value would be outweighed by the unfair prejudice if the jury heard all the details of Denmark's prior conviction. (R. 44:35–36.)

Specifically, the court concluded that if Denmark denied that he knew how to hide drugs, the evidence became more probative. (R. 44:36.) That was a rational conclusion. If Denmark lied about hiding drugs, then his truthfulness came into question. Then, the details of his prior conviction became probative as evidence of his truthfulness and to rebut his denial.

Ballentine also argues that the circuit court failed to consider relevant facts. (Ballentine’s Br. 17–18.) But the circuit court plainly knew the relevant facts. The circuit court was the same court where Denmark was convicted. (R. 44:29–30.) It knew the details of Denmark’s case first-hand. Ballentine invites this Court to reexamine the facts, apply the relevant standards, and reach a different conclusion. (Ballentine’s Br. 17–18.) This Court should reject that invitation. It must review the decision under an erroneous exercise of discretion standard. *See Mayo*, 301 Wis. 2d 642, ¶ 31.

Finally, Ballentine asserts that the circuit court erred by not applying the third *Sullivan* factor—whether the probative value outweighs the danger of unfair prejudice—because it relied upon Wis. Stat. § 904.03. (Ballentine’s Br. 20–21.) But when other acts evidence is offered for the proper purpose and relevant, then it is admissible unless the State “demonstrates that ‘its probative value is 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.’” *Payano*, 320 Wis. 2d 348, ¶ 80 (quoting Wis. Stat. § 904.03).

Ballentine argues that Wis. Stat. § 904.03 is only relevant on the prejudice analysis, but not whether the evidence would be a waste of time. But Ballentine fails to cite to any support for the proposition that courts can only consider a portion of Wis. Stat. § 904.03 when applying the third *Sullivan* prong. The State finds no support for Ballentine’s argument. The court stated that Ballentine could not ask about the details of Denmark’s prior act unless Denmark disputed it because then “it would be more probative than prejudicial.” (R. 44:36–37.) The court applied the proper standard.

The circuit court placed proper limits on Ballentine's potential cross examination of Denmark. The circuit court made its ruling using the appropriate legal standards, sufficiently explained its rationale on the record, and came to a reasonable conclusion. The circuit court's decision was *not* a decision that no reasonable court could make. *See Payano*, 320 Wis. 2d 348, ¶ 51. This Court should affirm.

II. Any possible error in exclusion of the evidence was harmless.

A. If the circuit court erroneously exercised its discretion, the error was harmless.

The circuit court excluded the testimony because it was improper other acts evidence. (R. 44:35–36.) Even if this Court concludes that the circuit court improperly denied Ballentine the right to question Denmark of the details of his prior history hiding drugs, any error was harmless and does not warrant a new trial.

1. Legal principles

“Wisconsin’s harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1).” *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189) (footnote omitted). Whether a trial error is harmless is a question of law reviewed *de novo*. *State v. Harrell*, 2008 WI App 37, ¶ 37, 308 Wis. 2d 166, 747 N.W.2d 770.

The question is whether “it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’” *Harvey*, 254 Wis. 2d 442, ¶ 49 (citation omitted).

2. Any error was harmless.

First, the evidence against Ballentine was overwhelming, and, importantly, established through both Denmark's testimony *and* video evidence of the drug sales.

Ballentine was convicted of selling drugs to Denmark on two occasions. The jury saw video from both drug deals. (R. 25:Ex. 31; 26:Ex. 32.) The videos from the two drug deals that the jury convicted Ballentine on show Ballentine's face clearly. (R. 25:Ex. 31; 26:Ex. 32.) In both, you could see Ballentine hand Denmark something. (R. 25:Ex. 31; 26:Ex. 32.) While the video does not show the object in Ballentine's hand, the hand-to-hand exchange coupled with Denmark's testimony was important evidence that allowed the jury to convict Ballentine. Denmark's testimony was important to the trial, but certainly not the only evidence.

Likewise, the jury heard evidence that Denmark was a criminal and knew how to hide drugs on his body to avoid detection during a search. Denmark appeared at trial wearing orange prison clothing. (R. 46:114.) He testified that he had been convicted of three crimes. (R. 46:114.) He told the jury that he was supposed to set up Ballentine. (R. 46:116.) The jury knew that the convictions were for delivery of cocaine and heroin. (R. 46:117.) And finally, he testified that he had previously concealed drugs on his body so that people could not find them during a search. (R. 46:188.)

Based on this testimony, Ballentine was able to argue to the jury that Denmark set him up so that Denmark would get a reduction in his own charges. Ballentine argued that Denmark admitted to setting Ballentine up. (R. 48:33.) He reminded the jury that Denmark testified that he knew how to hide drugs on his person and Kupper knew that too. (R. 48:33.)

Given that other evidence—both testimonial and physical evidence—corroborated Denmark’s account, it is clear that the outcome would have been the same had the jury also heard more details about the circumstances surrounding when Denmark previously hid drugs on his body and avoided detection in an unrelated matter.

Therefore, even if the circuit court erred in excluding the evidence, that error was harmless. It is clear that a rational jury would have found Ballentine guilty absent the error. *See Harvey*, 254 Wis. 2d 442, ¶ 49. This Court should affirm.

CONCLUSION

This Court should affirm Ballentine’s judgment of conviction.

Dated this 19th day of February 2020.

Respectfully submitted,

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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 3552 words.

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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 19th day of February 2020.

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