RECEIVED
03-09-2020
CLERK OF COURT OF APPEA
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 of a Judgment of Conviction entered in Racine County Circuit Court,
the Hon. Mark F. Nielsen, presiding.

REPLY BRIEF

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument.....1

I. Ballentine was entitled to introduce evidence of Denmark successfully hiding drugs from police after being arrested and searched for dealing drugs.....1

A. The Third Step Of The *Sullivan* Other Act Test Is The Section 904.03 Balancing Test. 2

B. The State Has Failed To Address The Court's Rationale For Excluding The Evidence Under Section 904.03: That It Would Be A Waste Of Time. 4

C. The State Failed To Establish That The Danger Of Unfair Prejudice Substantially Outweighed The Probative Value Of The Denmark Evidence.....6

II. The State Has Failed To Meet Its Burden Of Proving That The Exclusion Of The Evidence Was Harmless Beyond A Reasonable Doubt. 10

Conclusion 14

Certifications..... 100

TABLE OF AUTHORITIES

Cases

Jensen v. Clements, 800 F.3d 892 (7th Cir. 2015) 11

Neder v. United States, 527 U.S. 1, 19 (1999) 10

State v. Anker, 2014 WI App 107, 357 Wis. 2d 565, 855 N.W.2d 483 6

State v. Beamon, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681 11

State v. Head, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413 9

State v. Hunt, 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 771 6

State v. Mayo, 2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115 11

State v. Poth, 108 Wis. 2d 17, 321 N.W.2d 115 (1982) 5

State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998) .....passim

Statutes

Wis. Stat. § 904.02 ..... 2, 7

Wis. Stat. § 904.03 .....passim

Wis. Stat. § 904.04 ..... 2, 7, 9

Wis. Stat. § 906.09 7

ARGUMENT

I. Ballentine was entitled to introduce evidence of Denmark successfully hiding drugs from police after being arrested and searched for dealing drugs.

The circuit court's explicit rationale for why it was denying Ballentine's motion to introduce evidence of the details of Denmark successfully hiding drugs while searched by police was that "[i]t would be time wasting to present evidence on it if it's not in dispute.... I won't let you waste time by introducing evidence on [a] conceded point." (44:35-36; App. 110-111). The court was obviously excluding the evidence under the "time wasting" consideration of Wis. Stat. § 904.03; *i.e.*, because "its probative value [was] substantially outweighed ... by considerations of ... waste of time."

The state does not address, let alone defend, the circuit court's rationale. Indeed, the state flat-out misrepresents the court's reasoning as being based on another consideration under Section 904.03, unfair prejudice. (State Br. at 9). The State also misunderstands the relationship between Section 904.03 and *State v. Sullivan*, 216 Wis.2d 768, 782-83, 576 N.W.2d 30 (1998) misrepresents Ballentine's argument, and misapplies the "unfair prejudice" test. Each is discussed in turn.

A. The Third Step Of The *Sullivan* Other Act Test Is The Section 904.03 Balancing Test.

Sullivan observed that "other act" evidence invokes three separate evidentiary rules: that the evidence is offered for a proper purpose, i.e. not the individual's character, under Wis. Stat. § 904.04; that the evidence is relevant under Wis. Stat. § 904.02; and that the "probative value [of the 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. *Sullivan*, 216 Wis.2d at 781 (*quoting* Section 904.03). Application of these three evidentiary rules comprises the three-step "*Sullivan*" test for the admissibility of other act evidence. *Id*. at 771-72.[1]

However, the State asserts that the final step under *Sullivan* is for the court to "determine the danger of unfair prejudice." (State Br. at 8). The State thus truncates this part of *Sullivan* to one consideration under Section 904.03 – "unfair prejudice" – when the *Sullivan* court explicitly and repeatedly included *all* of the Section 904.03 considerations in describing step three. 216 Wis.2d at 771-773, 781, 789 and n. 3. Indeed, given that *Sullivan* simply recognizes that Section 904.03

[1] The state properly concedes that the Denmark evidence passed the first two parts of the *Sullivan* test. (State Br. at 7).

applies to all evidence, including other act evidence, it would make no sense for *Sullivan* to limit the third step of the test to just "unfair prejudice."

The State's odd reading of *Sullivan* leads to two missteps in it analysis. First, as discussed below, it limits its argument to the "unfair prejudice" consideration of Section 904.03, and thereby fails to substantively address the actual Section 904.03 consideration that the circuit court relied upon to exclude the evidence: that it would be a "waste of time."

Second, the State twice mischaracterizes Ballentine's argument as being that the circuit court erred by not applying a prejudice test under Section 904.03. The State first claims that "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 [Section] 904.03." (State Br. at 10, *citing* Ballentine Br. at 20-21). Later, the State writes that "Ballentine argues that [Section] 904.03 is only relevant on the prejudice analysis, but not whether the evidence would be a waste of time." (State Br. at 10).

This is not true. At no point does Ballentine assert that the circuit court erred by applying Section 904.03, or suggest that there was any daylight between the third step of *Sullivan* and Section 904.03. Instead, Ballentine pointed out that the circuit court had actually applied the "waste of time"

consideration of Section 904.03, even though the court later referred to the "prejudicial effect" of the evidence when summarizing its ruling. (Ballantine Br. at 20-21).[2] Ballentine also argued that to the extent that the court *was* applying the "unfair prejudice" consideration, it was erroneously exercising its discretion because it failed to make any substantive analysis on the record. (Ballentine Br. at 20-21). The State's characterization of Ballentine's argument is simply off the mark.

B. The State Has Failed To Address The Court's Rationale For Excluding The Evidence Under Section 904.03: That It Would Be A Waste Of Time.

The State also misrepresents the circuit court's holding. The State asserts, without citation to the record, that

> [t]he [circuit] 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.

(State Br. at 9). The court said nothing of the sort. Although the prosecutor made an "unfair prejudice" argument similar to one now made by the State (44:33; App. 108), the circuit court based its decision on the "waste of time" consideration under Section

[2] Specifically, Ballentine wrote "Defendants often invoke [S]ection 904.03 to exclude other act [evidence] due to 'the danger of unfair prejudice.' However, the court's substantive analysis relied on another consideration, the 'waste of time.' Wis. Stat. § 904.03." (Ballentine Br. at 20).

904.03. Specifically, the circuit court reasoned that "[i]t would be time wasting to present evidence on it if it's not in dispute.... I won't let you waste time by introducing evidence on [a] conceded point." (44:35-36; App. 110-111).

While it is true that the court did utter the words "prejudicial effect" when summarizing his ruling, it is clear that this was a reflexive shorthand for the test under Section 904.03, which in criminal cases is often invoked by defendants to argue that evidence of their bad acts would be unfairly prejudicial at their trial. See, e.g., *Sullivan*, 216 Wis.2d 789–90. The circuit court at no point makes the substantive unfair prejudice analysis urged by the state below and now here. When the court's comments are taken as a whole, it is plain that it was basing its decision on the "waste of time" consideration of Section 904.03, not the "unfair prejudice" consideration. *See State v. Poth*, 108 Wis. 2d 17, 24, 321 N.W.2d 115, 119 (1982) (finding that "the trial court simply misspoke when it appeared to place the burden of proof on the defendant.")

Because the State mischaracterizes the circuit court's rationale as relying on the "unfair prejudice" consideration, it does not respond to Ballentine's argument that the circuit court's reliance on the "waste of time" consideration was an erroneous exercise of its discretion. That is, at no point does the State argue that that the probative value of the Denmark evidence was substantially outweighed by time considerations. Accordingly, the state has

waived any argument to the contrary. "The State does not directly respond to [the] argument, and therefore concedes the issue. We will not abandon our neutrality to develop arguments for the parties, so we take the State's failure to brief the issue as a tacit admission…." *State v. Anker,* 2014 WI App 107, ¶ 13, 357 Wis. 2d 565, 855 N.W.2d 483 (citation omitted).

C. The State Failed To Establish That The Danger Of Unfair Prejudice Substantially Outweighed The Probative Value Of The Denmark Evidence.

This Court may uphold the decision below on the "unfair prejudice" ground even if the circuit court did not. However, the state did not meet its burden of showing that the danger of unfair prejudice "substantially outweighed" the probative value of the Denmark evidence. *State v. Hunt*, 2003 WI 81, ¶ 53, 263 Wis. 2d 1, 33, 666 N.W.2d 771, 786 ("it is the opponent of the admission of the evidence who must show that the probative value of the evidence is substantially outweighed by unfair prejudice.)

"Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it 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." *Sullivan*, 216 Wis. 2d at 789–90. In *Sullivan*, "the danger of unfair prejudice was that the jurors would be so influenced by the other acts evidence that they would be likely to

convict the defendant because the other acts evidence showed him to be a bad man." *Id*.

Here, the State clams that "[t]he 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." (State Br. at 9). The State points to Wis. Stat. § 906.09, which allows a party to impeach the credibility of a witness with evidence of how many times the witness has been convicted of a crime. (State Br. at 9-10).

This argument is wrong for several reasons. While it is true that Section 906.09 only authorizes impeachment by the number of convictions, and not by the substance of the criminal conduct, Ballentine was not seeking to impeach Denmark's credibility. Instead, as the State concedes, Ballentine's proper purpose for introducing the evidence was to demonstrate that Denmark had the knowledge and the ability to actually hide drugs from police officers searching his body for drugs. (State Br. at 7). This evidence was relevant regardless of whether or not Denmark testified.

So while it is true that section 906.09 does not allow impeachment of witnesses with the underlying facts of a conviction, it was still admissible as substantive evidence under Sections 904.02 and 904.04, and it was the State's burden to show that it

should not be admitted under 904.03. In short, the only balancing test that is germane here is the test under 904.03, not 906.09. Accordingly, the analogy to Section 906.09 is inapt.

Relatedly, the State argues that the court's decision was rational because if Denmark lied about his knowledge of how to hide drugs, "then his truthfulness came into question." (State Br. at 9). However, this again ignores the fact that Denmark's ability to hide drugs was relevant even if he had never testified, as it demonstrated another possible source of the drugs that Denmark gave to the police after the controlled buys: Denmark himself. Further, a party may not introduce extrinsic evidence to impeach a witness on a collateral matter. Wis. Stat. § 906.08(2). Thus, the court's ruling that Ballentine *could* introduce extrinsic evidence of Denmark hiding drugs from the police if he denied knowing how suggests that the court did not view the issue as collateral. However, this is inconsistent with the court's ruling that Ballentine could not introduce this evidence in the first instance, and further demonstrates why the court's decision was not "rational." (Ballentine Br. at 15-16).

In addition, the State's assertion that juries "[n]ormally, a jury would not be able to hear the details of past criminal convictions, but instead only hear the number of convictions" is simply not true when, as here, a party seeks to introduce other act evidence. (State Br. at 9). Often the other act evidence is evidence that the defendant, witness, or

victim engaged in some kind of criminal conduct. For instance, evidence of the defendant's *modus operandi* will necessarily cause the introduction of prior criminal behavior. Wis. Stat. § 904.04(1). In self-defense cases, the defendant may introduce evidence of the defendant's knowledge of the putative victim's prior violent conduct. *State v. Head*, 2002 WI 99, ¶ 127, 255 Wis. 2d 194, 253, 648 N.W.2d 413, 441.

Moreover, the State fails to acknowledge that the State itself introduced the evidence of Denmark's criminal conduct. Specifically, the State adduced from Denmark that he began working for the State after he was "convicted of a crime for selling drugs." (46:115). The State does not explain how the evidence Ballentine sought to admit – that Denmark successfully hid drugs from the police when he was arrested – was more "prejudicial" than the State's own evidence that Denmark had been convicted for selling drugs.

Finally, regarding the "probative value" side of the balancing test, the State first relies on the circuit court's dubious assertion that a common juror would understand that a person could conceal drugs from a police officer searching that person for drugs. (State Br. at 7). On the contrary, most people would believe that police officers know what they are doing, and would find drugs when looking for them. (*See* Ballentine Br. at 15-16).

The state also points to Investigator Kupper "impl[ying] that it was possible to hide drugs[.]"

(State Br. at 8). However, as Ballentine explained in his opening brief, the details of Denmark successfully hiding drugs from the police was highly probative, much more so than the evidence that he "knew" in the abstract how to hide drugs. (Ballentine Br. at 15-19). The State does not address any of the points Ballentine made in this regard. Nor does the State explain how the danger of unfair prejudice "substantially outweighs" the probative value of this evidence.

***

For these reasons, the court's exclusion of the Denmark evidence was in error.

II. The State Has Failed To Meet Its Burden Of Proving That The Exclusion Of The Evidence Was Harmless Beyond A Reasonable Doubt.

The State has not proven beyond a reasonable doubt that the erroneous exclusion of the details of Denmark previously hiding drugs from the police was harmless.

The high standard of the "harmless error" test is born out of respect for the defendant's constitutional right to have their guilt determined by a jury of their peers. *Neder v. United States*, 527 U.S. 1, 19 (1999). When an appellate court is considering evidence that the jury never had a chance to see or hear, the appellate court must be careful not to usurp the jury's factfinding role. *Id*.

Thus, an "error is harmless if the beneficiary proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115 (citation and quotation marks omitted). When determining whether an error is truly "harmless," the court considers the totality of the circumstances, including the nature of the defense. *State v. Beamon*, 2013 WI 47, ¶ 27, 347 Wis. 2d 559, 576, 830 N.W.2d 681, 690; *Mayo*, 2007 WI 78, ¶ 48; *see also Jensen v. Clements*, 800 F.3d 892, 903-06 (7th Cir. 2015) (granting federal habeas relief where harmless error analysis by state appellate court erroneously considered only evidence supporting conviction).

The State begins by claiming that "the evidence against Ballentine was overwhelming[.]" (State Br. at 12). However, this is belied by the fact that Ballentine was acquitted on two of the charges.

The State then points to the secret videos taken by Denmark. According to the State, the videos show Ballentine handing Denmark an object. First, State does not cite to the point in the videos when the transfers allegedly occur. Second, the State concedes that the videos do not actually "show the object in Ballentine's hand." (State Br. at 12). Third, the parties disputed whether the videos actually showed an object being transferred from Ballentine to Denmark. Fourth, none of the audio suggests that there is a drug transaction occurring.

Fifth, even if Ballentine transferred an object to Denmark, given their father-son relationship it could have been any number of small objects besides drugs: cash, keys, etc. Ballentine passing an object to Denmark was not inconsistent with Ballentine's defense that Denmark had already hidden drugs somewhere on his person before the alleged controlled purchase.

Also, a careful view of the video and photographic evidence casts significant doubt for Ballentine's conviction on Count 3, for the delivery of cocaine to Denmark on April 4, 2016, as well as Count 4, the possession with intent charge for cocaine found at the youth center on April 12, 2016. The April 4, 2016 transaction allegedly occurs in a bathroom with walls painted blue and white. (R. 26, Ex. 32 at 10:16:03). Denmark then goes alone into a different bathroom with white walls. (Id. at 10:16:50). While Denmark is alone in the bathroom, he had the opportunity to retrieve the drugs from wherever he hid them on his body to give to the police. Or, Denmark could have hidden the drugs in that bathroom. When police executed the search warrant and found drugs at the youth center, it was in a bathroom with white walls only – like the bathroom where Denmark was alone – rather than a bathroom with white and blue walls, *i.e.* the bathroom where the alleged transaction with Ballentine occurred. (23:34; 46:209).

The State also points to evidence to doubt Denmark's credibility, such as his three prior

criminal convictions and his appearance in orange prison clothing. (State Br. at 12). However, arguing that Denmark lacked credibility is an argument for why the state's case was weak and why the court's error was not harmless. If the jury had been inclined to disbelieve Denmark, then it is likely that the convictions were based not on Denmark's testimony, but on finding it implausible that Denmark would have been able to hide drugs from the police during their initial search.

Thus, the excluded evidence went right to the heart of Ballentine's defense. While Ballentine could still make an argument that Denmark hid the drugs on his person, he had to rely on evidence that Denmark knew in the abstract how to hide drugs. The jury was deprived of the details demonstrating that Denmark had both the knowledge and the ability to hide drugs in even more difficult circumstances. For the reasons stated in Ballentine's initial brief, the detailed evidence was highly probative, and its exclusion was not harmless. (Ballentine Br. 15-19).

CONCLUSION

For the reasons stated above and in the initial brief, Ballentine is entitled to a new trial.

Dated this 9th day of March, 2020.

Respectfully submitted,

Thomas B. Aquino
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of March, 2019.

Signed:

Thomas B. Aquino
Assistant State Public Defender