

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1707-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ISRAEL SOTO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Israel Soto appeals from a judgment of conviction entered after a jury found him guilty of operating a motor vehicle without the owner's consent, party to a crime, contrary to §§ 943.23(4m) and 939.05, STATS.;

possession of a stolen financial transaction card, contrary to § 943.41(3)(e) & (8)(b), STATS.; theft from person, party to a crime, contrary to § 943.20(1)(a) & (3)(d)(2), STATS., and § 939.05, STATS.; and obstructing or resisting an officer, contrary to § 946.41(1), STATS. Israel Soto claims that the trial court erroneously exercised its discretion by: (1) admitting testimonial other-acts evidence concerning a cellular telephone which was stolen from a police officer's private automobile the night that Israel Soto committed the charged offenses; and (2) allowing the State to cross-examine two defense witnesses regarding specific instances when they lied to the circuit court. We affirm the judgment of conviction.

I. BACKGROUND.

This case arises from Israel Soto's involvement in a number of criminal activities which he and a group of juveniles engaged in on the night of January 6, 1997, and the early morning of January 7, 1997. According to Richell Lewis, a teenage girl who testified for the State, she and three other teenage girls, Crystal and Nicole Poytinger, and Blanca Villa, left Southridge Mall in a black van with teenagers Jesse Rios and Jose Soto around 9:00 p.m. on January 6, 1997. Lewis testified that Jose Soto was driving, and that they picked up Israel Soto at his house and began to ride around town. Lewis testified that they eventually parked the van under an expressway near National Avenue and Rios and Jose Soto left. Rios and Jose Soto then returned with a blue Cadillac, which Lewis assumed had been stolen. Lewis testified that Israel Soto then drove the van to a place underneath a bridge, and left the van there. At that point, Lewis testified that she thought the van was probably stolen.

Lewis testified that she and the others, including Israel Soto, then left in the Cadillac and drove to an area somewhere near Second Street and National Avenue. Lewis testified that she told the police that Rios, Jose Soto and Israel Soto got out of the Cadillac at Second and National to attack a drunk, middle-aged, Hispanic man and take his wallet. She stated that they did not have to hit him because he was so drunk, and that they later threw his wallet out the window because there was no money in it. Lewis testified that they then drove the Cadillac to an area around the “high one-hundred streets,” and stopped at an apartment complex. Rios and Jose Soto left and came back with a new van, which Lewis also concluded was stolen. Lewis testified that they then drove around in the van, and at different points, Rios, Jose Soto and Israel Soto got out of the van and broke into three or four different cars. Lewis testified that Rios, Jose Soto and Israel Soto returned to the van with a jacket, purse, and stereo speakers from one car, which she believed to be a Camaro, and a cellular phone and police leather gloves, which she believed had been stolen from a police officer’s car. Lewis testified that they passed the purse around the van like a hat, and that “everyone was digging through it.”

Lewis testified that they then drove the van to the east side, where they crashed into a pole near Walgreen’s. Lewis testified that, when the van hit the pole, Rios hit his head on the dashboard. Lewis testified that Rios then jumped out of the van, and acted like his head was hurt. A woman approached Rios to see if he was okay, and in the process, he snatched the woman’s purse, and then jumped back into the van, laughing. Jose Soto then started the van and drove off. Shortly thereafter, the police began to chase them. Lewis testified that, at the end of the chase, Rios slowed the van down, and Rios, Jose Soto and Israel Soto

jumped out of the van and fled. The police then chased the boys and arrested the girls who remained in the van.

Officer Karen Asplund testified that as she was chasing the van she saw Israel Soto jump out of the front passenger seat. Officer Asplund testified that Officer Reginald Hampton chased and caught Israel Soto, and that Rios and Jose Soto were also apprehended. Officer Hampton testified that when he searched Israel Soto pursuant to his arrest, he found a TYME card and a Kohl's credit card in the name of Julie Thompson in one of his pockets. The officers found a number of items in the van, including two cellular phones, a portable compact disc player, several compact discs, and a purse. The officers also discovered that the van had a peeled steering column.

After Israel Soto was arrested, he was taken to the District 5 police station, where Officer Wendy Shaw attempted to photograph him. Officer Hampton testified that Israel Soto kept putting his hands over his head, and that when Officer Shaw asked him to remove his hands, he got up and pushed her over a table. After Officer Shaw and her camera fell, several officers held Israel Soto down to get him under control. Officer James Black corroborated Officer Hampton's testimony concerning this incident, except that he testified that Officer Shaw tried to physically guide Israel Soto's hands down.

The victims also testified at trial. Sandra Coffin testified that she was walking East on Brady Street when a young man "[k]ind of fell out of the front seat" of a van that came around the corner. She was about four feet from the van and asked if he was okay. As she went up to him, he snatched her purse and jumped back into the van. Coffin was located four hours later by the police and identified her purse at the police station. She identified Israel Soto at the police

station, and testified at trial, contrary to others, that Israel Soto was the person who stole her purse. Dawn Fatla testified that she parked her 1990 Chevy Lumina Van on the street in front of her apartment at about 11:00 p.m on January 6, 1997, and that police officers informed her around 4:00 a.m. on January 7, 1997, that her van had been stolen and involved in an accident. Julie Thompson testified that on the evening of January 6, 1997, she left her jacket, purse and gloves in the trunk of her boyfriend's white Camaro, and later discovered that the items were missing. Thompson later identified the items found in Fatla's van as her belongings. Finally, Officer Darin Leveraus testified that on the night Israel Soto committed the charged offenses, he saw a person climb out of his Jeep Wrangler and jump into a blue Cadillac containing a number of occupants. Officer Leveraus testified that at this time his cellular phone was stolen from his Jeep. Officer Asplund testified that one of the cellular phones found in the van belonged to Officer Leveraus.

Finally, Jose Soto testified for the defense that the van which was involved in the chase was the same van that Rios had at Southridge Mall, and that someone had lent Rios the van, but that he did not have the key, because the person who lent Rios the van had lost it. Jose Soto denied robbing any drunk Hispanic men, and stated that he did not recall driving in a Cadillac. Nicole and Crystal Poytinger also testified for the defense. Unlike Jose Soto, they testified that they had driven in two vans and a Cadillac. Finally, Israel Soto testified. His version of the events was that although they had driven around in two vans and a Cadillac, he stayed in the back of the van, and did not participate in robbing the Hispanic man, or in stealing any cars or vans. Jose Soto, the Poytinger sisters, Israel Soto and Lewis all testified that Rios, not Israel Soto, was in the front

passenger seat of the van, and that it was Rios who jumped out of the van and snatched Coffin's purse.

With respect to the incident at the police station, Jose Soto testified that a woman began the incident by reaching over and grabbing Israel Soto, who was rubbing his eyes, by the throat. When Israel Soto tried to remove her hand from his throat, a police officer pushed a red button, knocked Israel Soto down, and began beating him. Israel Soto claimed, with respect to the incident, that a female police officer called him a criminal and that he protested. The woman then got mad and grabbed him by the throat, so he pushed her off. Israel Soto testified that an officer then grabbed his hand and hit it, hit his head against the floor, and then beat him.

Israel Soto was charged with theft from person, party to a crime; obstructing or resisting an officer; possessing a stolen financial transaction card; and operating a motor vehicle, without the owner's consent, party to a crime. Following a jury trial, Israel Soto was convicted of all four charges. Israel Soto now appeals.

II. ANALYSIS.

A. Admission of other-acts evidence under § 904.04(2), STATS.

Israel Soto claims that the trial court erroneously exercised its discretion by admitting Officer Leveraus' testimony concerning the theft of his cellular telephone on the night that Israel Soto committed the charged offenses. We are not persuaded.

A circuit court's decision whether to admit other-acts evidence is discretionary. See *State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501

(1983). We will uphold the circuit court's evidentiary ruling if we find that the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrative rational process, reached a reasonable conclusion. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). In the instant case, the circuit court did not express its reasoning in admitting the other-acts evidence but, instead, simply denied defense counsel's objections. Therefore, we must independently review the record to determine whether it provides a basis for the circuit court's decision. *See Pharr*, 115 Wis.2d at 343, 340 N.W.2d at 502 (when a circuit court fails to set forth its reasoning, the appellate court independently reviews the record to determine whether it provides a basis for the circuit court's exercise of discretion). We conclude that the circuit court properly admitted the other-acts evidence.

The supreme court has recently reiterated the three-step analytical framework which circuit courts must follow when determining the admissibility of other-acts evidence under § 904.04(2), STATS.:

(1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(3) Is the probative value of the other acts evidence 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? See Wis. Stat. § (Rule) 904.03.

State v. Sullivan, 217 Wis.2d 768, ___, 576 N.W.2d 30, 32-33 (1998) (footnote omitted).

In this case, the other-acts evidence concerning the theft of Officer Leveraus' cellular phone was admissible to establish Israel Soto's knowledge, which is an acceptable purpose under § 904.04(2), STATS. For the knowledge exception to be applicable, the other-acts evidence must concern: (1) a prior act of the defendant; (2) which results in the defendant being more likely to have the state of knowledge that is in dispute in the charged case. See *State v. Evers*, 139 Wis.2d 424, 441, 407 N.W.2d 256, 264 (1987).

The other-acts evidence which was admitted in this case consisted of Officer Leveraus' testimony concerning the theft of his cellular phone on the night that Israel Soto committed the charged offenses. Officer Leveraus testified that on January 7, 1996, he heard the alarm go off on his Jeep Wrangler, which was parked in front of a friend's house on 3230 South 32nd Street. He looked out the window and saw a person crawl out of the window of his Jeep and jump into a late model Cadillac. He and his friend went out into the street and soon observed that the Cadillac was driven by a young looking Hispanic man and had at least four, if not more, people in it. Officer Leveraus got the license plate and ran it and discovered that the Cadillac had been stolen. Officer Leveraus also testified that he discovered his cellular phone had been stolen from his Jeep. Later in the trial, Officer Karen Asplund testified that the police found two cellular phones, along with a portable compact disc player, several compact discs, and a purse, in the van from which Israel Soto fled before he was arrested. Officer Asplund testified that

one of the phones had a Wisconsin driver's license number engraved on it and that it was determined that this phone belonged to Officer Leveraus.

In order to convict Israel Soto of operating a motor vehicle without the owner's consent, party to a crime, the State needed to prove that Israel Soto knew that the owner of the van which he was riding in on Brady street did not consent to the driving or operation of the van. *See* § 943.23(4m), STATS. Additionally, in order to convict Israel Soto of possessing a stolen financial transaction card, the State needed to prove that Israel Soto had reason to know that the financial transaction cards found in his possession had been stolen. *See* § 943.41(3)(e), STATS. Therefore, because knowledge was at issue in Israel Soto's case, the first prong of the three-part analytical framework is satisfied.

The second prong of the test is also satisfied, because Officer Leveraus' testimony related to Israel Soto's knowledge, a fact which was of consequence to the determination of the action, and tended to make it more likely that Israel Soto knew that the car and financial transaction cards were stolen. Lewis testified that Jose Soto picked her up in a van at Southridge Mall and then picked up Israel Soto later. Lewis testified that after they picked up Israel Soto, they got into a blue Cadillac. This evidence suggests that this was the vehicle which Leveraus saw after his Jeep was broken into. Officer Leveraus' cellular phone, stolen from his Jeep, was found in the van from which Israel Soto fled. Therefore, the evidence tended to show that Israel Soto was one of the group of individuals in the Cadillac when Leveraus' cellular phone was stolen, and that Israel Soto knew that the group was stealing things that night, including the van they were driving at the end of the evening and the financial transaction cards found in Israel Soto's possession. Although this evidence did not conclusively establish Israel Soto's knowledge, in order to be relevant, it only needed to tend to

make it more likely that Israel Soto knew the van and financial transaction cards were stolen. Therefore, the other-acts evidence satisfies the second prong of the test.

The other-acts evidence also satisfies the third prong of the test. Although the evidence may have been prejudicial, in order to be excluded, the probative value of the evidence must have been *substantially outweighed* by the danger of *unfair* prejudice. See § 904.03, STATS. 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*, 217 Wis.2d at ___, 576 N.W.2d at 40. In this case, the jury already had been presented with evidence that Israel Soto was involved in a number of different thefts on the evening of the charged crimes. Therefore, the fact that the jury was presented with evidence of one more theft was unlikely to have improperly influenced the jury. Thus, Officer Leveraus’ testimony was properly admitted.

In sum, Officer Leveraus’ testimony met all three prongs of the analytical framework used to determine whether other-acts evidence should be admitted. Although the trial court did not state its reasons for admitting the testimony, the record provides a basis for the circuit court’s decision, and therefore, it will be upheld.

B. Impeachment of defense witnesses under § 906.08, STATS.

Israel Soto claims that the trial court erroneously exercised its discretion by allowing the State to impeach Crystal and Nicole Poytinger with lies

they told the circuit court on the day prior to their testifying in this case. Again, we are not persuaded.

Originally, although defense counsel subpoenaed Crystal and Nicole Poytinger, neither juvenile appeared pursuant to those subpoenas. On December 18, 1997, the circuit court issued body attachments for the girls, and they were picked up the same afternoon by the sheriff's department and brought before the court. The girls told the court that they did not come to court because they had been picked up by TABS, the truant abatement program. The next morning, the circuit court informed the parties that the girls had lied to the court, because the deputies checked with the TABS program, and they had not been detained by them. When confronted with this information, the girls acknowledged to the deputies that they had failed to come to court because the weather was too cold. During the cross-examination of Crystal and Nicole Poytinger, the circuit court allowed the prosecutor to ask whether the girls had lied to the trial court the previous day by telling the court that they did not appear in court because they had been picked up by the TABS program. Nicole Poytinger denied that she had lied but Crystal Poytinger admitted that she had lied. No extrinsic evidence was introduced to prove that either of the Poytinger sisters had lied.

Under § 906.08(2), STATS., specific instances of the conduct of a witness, if probative of truthfulness or untruthfulness and not remote in time, may be inquired into on cross-examination of the witness, but may not be proved by extrinsic evidence.¹ The fact that Crystal and Nicole Poytinger had lied to the

¹ Section 906.08(2), STATS., reads:

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an

(continued)

circuit court the day before they testified was clearly probative of the girls' character for truthfulness, and was obviously not remote in time. Therefore, we conclude that the evidence was admissible under § 906.08(2). Additionally, we are unpersuaded by Israel Soto's claim that the evidence should have been excluded as unfairly prejudicial under § 904.03, STATS. The jury had ample reason to question the Poytinger girls' credibility apart from the evidence that they had lied to the court. Both girls admitted that they had been riding around that evening with three young men who, according to the evidence, had committed a series of crimes. Crystal Poytinger even admitted that when they were riding around in the Cadillac, she knew Jose Soto had stolen it. In addition, both Nicole and Crystal Poytinger's testimony appears from the record to have been generally incredible. Therefore, we conclude that the circuit court properly exercised its discretion in admitting the evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

