COURT OF APPEALS DECISION DATED AND FILED

July 20, 2021

Sheila T. Reiff
Clerk of Court of Appeals

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*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2020AP378-CR

Cir. Ct. No. 2018CF3042

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY LAMONT JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. HANRAHAN, Judge. *Affirmed.*

Before Brash, P.J., Dugan and Donald, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Corey Lamont Jackson appeals from a judgment of conviction entered following a jury trial on criminal charges related to an incident in which Jackson shot his girlfriend. He argues that he is entitled to a new trial because rebuttal testimony from one of the State's witnesses was improperly admitted. He also argues that the trial court erred when it failed to instruct the jury with the accident jury instruction and that the interest of justice requires that he be granted a new trial. For the reasons set forth below, we affirm.

BACKGROUND

¶2 Jackson was tried in February 2019 for attempted first-degree intentional homicide—use of a dangerous weapon, first-degree reckless injury—use of a dangerous weapon, endangering safety by use of a dangerous weapon and under the influence of an intoxicant, felony bail jumping, and misdemeanor bail jumping, all as acts of domestic abuse. Also included were charges for two counts of disorderly conduct—use of a dangerous weapon and possession of a firearm by a felon. At the trial, the State called several witnesses, including Jackson's girlfriend (Parker), Parker's daughter (Natalie), and Parker's cousin (Mikayla),[1] to testify regarding the events that led to Jackson's charges.

¶3 Parker testified that Natalie woke her up around 3 a.m. on June 26, 2018, because she heard loud noises coming from downstairs. Parker said the loud noises were coming from Jackson "kicking in the bottom of the screen door

[1] Parker and Mikayla are cousins; however, because Parker is older than Mikayla, Mikayla thinks of Parker as her aunt and Natalie as her cousin.

Pursuant to WIS. STAT. RULE 809.86(4) (2019-20), we use pseudonyms to refer to the victim and other witnesses involved. All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

and getting his way into the house." Parker testified that once Jackson made his way inside, she was at the top of the stairs and she could hear Jackson "hollering, fussing and cussing." Parker told Natalie to call 911, and Parker, Natalie, and Mikayla all hid in Natalie's bedroom. Parker testified that Jackson went to the couple's bedroom, left the house, and then came back.[2]

¶4 Parker described that, when Jackson came back, "he's waving a gun around talking about he's going to shoot today, and he kept repeating it and kept repeating it and kept squeezing the trigger." Parker instructed the girls "when he leaves from in front of you[,] you all just take off and don't come back and call the police back." When the girls left, Jackson "heard them opening up the door downstairs, he ran behind them. Then [Parker] ran behind him." Jackson proceeded to push Parker outside onto the porch where he kicked her in the ribs and hit her in the head with the pistol and she "fell down the front stairs and ended up on the concrete." Parker described that once she was on the ground, Jackson "kicked [her] around." Eventually Jackson stopped, walked to the curb, came back, and then shot Parker underneath her left arm. After shooting Parker, Jackson walked back into the house, and when the police arrived, "he just walks away." Parker testified that Jackson did not offer to help Parker and "he left [her] there shot bleeding in [the] front yard." Photos were admitted into evidence of Parker's clothes from that night, which depicted a white T-shirt with a large blood stain.

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[2] According to Parker, Jackson had a half-empty bottle of Absolut vodka with him when he first entered the house. Jackson later testified that he did bring a bottle of Absolut vodka home with him, but he testified that it was nearly full. Parker described Jackson as intoxicated; Jackson testified that he had a "[c]ouple beers and maybe a shot … [o]ver the whole length of the evening."

¶5 Natalie testified that she woke up Parker the morning of June 26, 2018, when she heard noises at the door. Natalie further testified that, when Parker went to investigate the noises, she found Jackson trying to enter the house, and Natalie saw Jackson throw a beer can at Parker. Natalie then described that she hid in her bedroom and Jackson "busted into [her] room" by kicking in the door and waved a gun around. Natalie testified that Jackson said, "I am going to shoot you, [Parker]," and he pointed the gun at Parker. When Jackson left the bedroom, Natalie testified that she ran out of the house towards the Boys & Girls Club located down the block, heard Jackson yell, and heard a gunshot. She then returned to the house and saw her mother on the ground bleeding.

¶6 Mikayla testified that she was running away from the house with Natalie and Jackson "was just saying he was going to watch [Parker] die right here." Mikayla then stated that "[i]t got pretty quiet" and then "we heard the shot." She testified that she then returned to the house with Natalie, the police were there, and Parker was on the ground bleeding.

¶7 Jackson testified in his own defense. He stated that the gun accidentally discharged. Jackson testified that he attended a family barbecue that night and used his keys to open the door to the house. He stated that he had his hands full with a bag of food that he brought home from the barbecue, and the glass in the door fell out when he tried to open the metal security door and the main door while he had his hands full and he was propping one of the doors with his foot. He explained that he tried to put the glass back into the door and smashed his finger, at which point he became upset "and using all kind of expletives that you use when you get hurt."

¶8 Jackson stated that he then found a bag of trash on the entryway landing and an empty can of "really low grade malt liquor that none of us in the house would drink." He said that he bent down to pick up the can and throw it in the trash at the top of the stairs and noticed the handle of a handgun sticking out of a potted plant. He described that he took the firearm out of the plant, went inside his house, and confronted Parker about who the firearm belonged to and what it was doing in the plant on the stairs. Jackson said that he found Parker watching TV, the two argued about the gun, and Jackson proceeded to search the house to see if there was someone else there who owned the gun.

¶9 Jackson further testified that he went down to the porch after he heard the door close, noticed the girls were gone, and found Parker on the porch smoking a cigarette. He explained that he continued to argue with Parker at that point when "something strange with the firearm happen[ed]." Jackson explained,

> I'm sitting there talking to her. I'm standing on the top of the porch right at the very top of the porch. She's at the bottom stair down there. I'm facing towards the Boys & Girls Club looking down the block. She's at the bottom of the stairs. The gun discharges while I'm talking to her[.]

¶10 Jackson denied that he pointed the gun at Parker, and testified that when the gun discharged,

> [Parker was s]itting there looking at me hollering. When the gun went off, she never even moved. She didn't react. She didn't flinch. She didn't do anything. She was just sitting there looking at me. I never even knew that she was hit.

¶11 Jackson testified that he stayed on the porch with Parker for about five more minutes while Parker continued smoking her cigarette and when he heard the police coming he walked away. On cross-examination, Jackson explained, "I didn't want to be standing there with a gun in my hand when the

police pulled up reporting to the scene of a shooting." Jackson was further questioned:

> Q. … So your testimony today is you shot a woman who was wearing a white shirt and for approximately five minutes you stood there and you saw no evidence of that person being shot? That's your testimony today?
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> A. No. My testimony is that the gun accidentally discharged, and I didn't see that she was hurt. And I walked off when I saw police coming, and I wouldn't have walked off if I knew that she was hurt.
>
> Q. So you never saw any blood on her shirt after you shot her?
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> A. No, I did not. That's my woman. I was in love with her at the time. I wouldn't have just left her laying and bleeding on the ground with her daughter sitting there looking who I helped raise for the last ten years.

¶12 Over the objection of trial counsel, the trial court found that Jackson's statements opened the door for the State to bring in prior acts of domestic abuse between Jackson and Parker, and upon further questioning, Jackson continued to deny that he would ever hurt Parker and denied that he had ever been involved in a prior incident where he hurt Parker.

¶13 Also over the objection of trial counsel, the trial court allowed the State to call Natalie in rebuttal to testify to a prior incident of domestic abuse that occurred roughly two years prior to the trial in which she recalled seeing Jackson "stomping" on her mother, while her mother was on the floor of the bedroom.

¶14 The jury found Jackson guilty of all counts except for the count of attempted first-degree intentional homicide and one count of disorderly conduct, and the trial court sentenced Jackson to a total sentence of forty-four years of

imprisonment, composed of twenty-six years of initial confinement and eighteen years of extended supervision. This appeal follows.[3]

DISCUSSION

¶15 On appeal, Jackson argues that the trial court improperly admitted Natalie's rebuttal testimony, that the trial court should have instructed the jury with the accident jury instruction, and that the interest of justice requires that he be granted a new trial. We address each argument in turn.

I. Admissibility of Natalie's Rebuttal Testimony

¶16 Jackson argues that Natalie's rebuttal testimony about the prior incident of abuse was impeachment, by extrinsic evidence, of Jackson's testimony where he denied prior incidents of abuse and, therefore, was improperly admitted. The State, in turn, argues that Natalie's rebuttal testimony was properly admitted, albeit under the theory of other-acts evidence. Jackson asserts that the State withdrew a motion to admit other acts of domestic abuse between Jackson and Parker before the start of the trial.[4] Thus, Jackson argues that the State should not

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[3] After conviction, but before sentencing, trial counsel moved to withdraw as Jackson's counsel and new counsel was appointed. Jackson filed multiple *pro se* motions that the trial court did not address. After sentencing, Jackson filed a Notice of Right to Pursue Postconviction relief. The trial court issued a written order stating that because postconviction counsel may be appointed the court would not consider the *pro se* motions.

[4] The State initially filed a motion to join the charges in this case with other domestic abuse charges in another earlier pending case. In a separate motion, the State moved to alternatively admit the facts from the earlier domestic abuse case during the trial in this case. The trial court addressed both motions at the same hearing. As a part of its decision to grant the motion for joinder, the trial court stated that the facts in the earlier case would be admissible, in the underlying case before us, as other wrongful acts. Because the cases were joined for trial, the State advised the trial court that it was withdrawing the motion to admit the wrongful acts. As an aside, we note that the State moved to dismiss the earlier case without prejudice before the start of the trial in this case.

now be allowed to make this argument both on the basis of forfeiture and judicial estoppel. We agree with the State and conclude that Natalie's rebuttal testimony was properly admitted as other-acts evidence.[5]

¶17 WISCONSIN STAT. § 904.04(2)(a) "prohibits the admission of evidence of a defendant's other bad acts to show that the defendant has a propensity to commit crimes." ***State v. Marinez***, 2011 WI 12, ¶18, 331 Wis. 2d 568, 797 N.W.2d 399. However, other-acts evidence may be admissible in certain circumstances, and we review the admissibility of other-acts evidence under a three-step process. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). First, we consider whether the other-acts evidence is offered for a permissible purpose under § 904.04(2). ***Sullivan***, 216 Wis. 2d at 772. Second, we ask whether the evidence is relevant under WIS. STAT. § 904.01. ***Sullivan***, 216 Wis. 2d at 772. Third, we consider whether, under WIS. STAT. § 904.03, "the probative value of the other acts evidence substantially outweigh[s] 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[.]" ***Sullivan***, 216 Wis. 2d at 772-73. Because we are confronted with an incident of domestic abuse as defined in WIS. STAT. § 968.075(1)(a), the greater latitude rule found in § 904.04(2)(b)1. applies to our

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[5] The State argues in the alternative that the admission of Natalie's testimony is harmless error. We do not address the State's harmless error argument because we conclude that the testimony was properly admitted as other-acts evidence. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

Additionally, we do not address Jackson's arguments regarding the admissibility of Natalie's testimony under the theory of impeachment by extrinsic evidence or that the State cannot now raise an argument regarding admissibility of Natalie's testimony as other-acts evidence. "[W]e may affirm on grounds different than those relied on by the trial court." ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

review of each step of the process. *See* ***State v. Dorsey***, 2018 WI 10, ¶35, 379 Wis. 2d 386, 906 N.W.2d 158.

¶18 "The applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion." ***Sullivan***, 216 Wis. 2d at 780. "Even if a circuit court fails to set forth the basis for its ruling, we will nonetheless independently 'review the record to determine whether it provides an appropriate basis for the circuit court's decision.'" ***Marinez***, 331 Wis. 2d 568, ¶17 (citation omitted).

¶19 In this case, the State argues that Natalie's testimony regarding the prior incident in which Jackson was "stomping" on Parker was offered for the purpose of proving that the shooting did not occur as the result of an accident, or in other words, that Jackson acted with intent. *See* ***Sullivan***, 216 Wis. 2d at 773 (combining intent and absence of accident). In his defense, Jackson testified that the shooting was an accident, and he supported his defense by testifying that he had never before hurt Parker, and that he would not have left Parker lying there if he knew she was hurt. Thus, in rebuttal, the State called Natalie to testify that Jackson stomped on Parker on a prior occasion roughly two years earlier to show that Jackson's conduct was not accidental and that in fact he understood and was aware of the risk of harm he created the night he shot Parker.

¶20 Natalie's testimony about the prior incident accordingly rebuts Jackson's innocent explanation that the shooting was an accident because he would never hurt Parker. *See* ***State v. Johnson***, 181 Wis. 2d 470, 492, 510 N.W.2d 811 (Ct. App. 1993) ("[The witness'] testimony was not admitted to demonstrate Johnson's propensity to rob; it was admitted to rebut Johnson's exculpatory explanation to the police officer[.]"). "Evidence of other acts may be

admitted if it tends to undermine an innocent explanation for an accused's charged criminal conduct." ***Sullivan***, 216 Wis. 2d at 784. Therefore, Natalie's testimony was admitted for the permissible purpose of proving intent or absence of accident under WIS. STAT. § 904.04(2)(a), and thus, the State has met its burden under the first step of the analysis.

¶21 Moving to the second step, we consider "the two facets of relevance." ***Sullivan***, 216 Wis. 2d at 772; *see also* WIS. STAT. § 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). "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." ***Sullivan***, 216 Wis. 2d at 772. "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." ***Id.*** "[T]he probative value of the other acts evidence depends on its nearness in time, place and circumstances to the alleged crime." ***State v. Barreau***, 2002 WI App 198, ¶37, 257 Wis. 2d 203, 651 N.W.2d 12.

¶22 The State argues that Natalie's testimony is relevant because it relates to a fact of consequence, namely whether Jackson's conduct towards Parker the night of the shooting was accidental, and makes the possibility that the shooting resulted from an accident more or less probable. We agree.

¶23 As we have described, Jackson presented an accident defense and supported his defense by testifying that he would never hurt Parker, the inference

he asked the jury to adopt being that the shooting must have been an accident. Natalie's testimony that she saw Jackson stomping on Parker is logically related to Jackson's accident defense as a prior instance when Jackson did not act accidentally towards Parker and was aware of the risk of harm created to Parker. *See* ***Dorsey***, 379 Wis. 2d 386, ¶48 (stating that other-acts evidence is "of consequence" when it is logically related to an element).

¶24 Also, just as Jackson's statement that he would not hurt Parker makes Jackson's accidental conduct more probable, Natalie's statement that she had previously seen Jackson stomping on Parker makes his accidental conduct less probable. Natalie's testimony of a recent incident involving Jackson stomping on Parker is a prior incident similar to the one to be proven here. *See* ***Sullivan***, 216 Wis. 2d at 787 ("[I]f a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable." (citation omitted)). The State, therefore, has shown that Natalie's testimony regarding the prior incident between Jackson and Parker is relevant.

¶25 Last, the probative value of Natalie's testimony substantially outweighs 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. As the State points out, Natalie's testimony had high probative value given that the actors are the same, the conduct was recent, and the events immediately preceding the shooting were of the same or similar character. Evidence is excluded only if the probative value is "*substantially outweighed*." ***Marinez***, 331 Wis. 2d 568, ¶41 (emphasis added). Given the probative value of Natalie's testimony about the fact of whether Jackson would accidentally hurt Parker, any danger in admitting the evidence is substantially outweighed by that probative value.

¶26 Accordingly, we conclude that Natalie's rebuttal testimony was properly admitted, and Jackson is not entitled to a new trial based on his argument that Natalie's testimony was improperly admitted.

II. Accident Jury Instruction

¶27 Jackson additionally argues that the trial court erroneously exercised its discretion when it denied Jackson's request to instruct the jury with the accident jury instruction on the first-degree reckless injury charge because Jackson's entire defense was premised on the gun accidentally discharging. The State argues that the jury instructions that were given adequately covered Jackson's accident defense and that Jackson was not entitled to the specific accident jury instruction because his accident defense was thoroughly discredited during the trial. In the alternative, the State argues that any error by the trial court for failing to give the accident jury instruction was harmless. We conclude that the trial court properly denied Jackson's request that the accident jury instruction be given because the given instructions adequately covered Jackson's accident defense. *See* ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996).

¶28 "A [trial] court has broad discretion in deciding whether to give a requested jury instruction." ***State v. Stietz***, 2017 WI 58, ¶12, 375 Wis. 2d 572, 895 N.W.2d 796. "However, a circuit court must exercise its discretion in order 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Coleman***, 206 Wis. 2d at 212 (citation omitted). In addition to other requirements, a criminal defendant is entitled to a jury instruction on a theory of defense if "the defense is not adequately covered by other instructions." ***Id.*** at 212-13.

¶29 “Accident is a defense that negatives intent, and may negative lesser mental elements.” ***State v. Watkins***, 2002 WI 101, ¶41, 255 Wis. 2d 265, 647 N.W.2d 244. Thus, for example, “[i]f a person kills another by accident, the killing could not have been intentional,” ***id.***, and “an accident defense cannot succeed if the [S]tate proves intent,” ***id.***, ¶42.

¶30 Accordingly, the accident jury instruction states,

> The defendant contends that [he] did not act with [the requisite intent], but rather that what happened was an accident.
>
> If the defendant did not act with the [requisite intent] required for the crime, the defendant is not guilty of that crime.
>
> Before you may find the defendant guilty of [the charged crime], the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant [acted with the requisite intent].

WIS JI—CRIMINAL 772. The comments to this jury instruction likewise recognize that “the [S]tate overcomes the defense by proving [the mental] element beyond a reasonable doubt.” WIS JI—CRIMINAL 772 cmt. The comments further recognize that “it can be argued that a special jury instruction is not necessary” because “[a] jury finding that the element is established necessarily establishes that evidence of accident is not sufficient to negate that element.” ***Id.*** The footnotes also explain that “evidence that a firearm discharged accidentally would tend to show the absence of intent to kill [required for intentional homicide] but may not tend to show the absence of awareness of the risk of death or great bodily harm” required for reckless injury. WIS JI—CRIMINAL 772 n.3.

¶31 In this case, the jury found Jackson guilty of first-degree reckless injury, which by necessity requires the jury to find that Jackson acted with the

requisite mental state—awareness of the risk that the conduct created an unreasonable and substantial risk of death or great bodily harm and his conduct showed utter disregard for human life. The accident instruction was, therefore, not required, and it was sufficiently covered by the instructions that were already given to the jury. *See* ***Coleman***, 206 Wis. 2d at 212-13.

¶32 During the closing instructions, the trial court instructed the jury on first-degree reckless injury saying:

> [T]he State must prove every element of the offense charged beyond a reasonable doubt. First degree reckless injury as defined in Section 940.23(1) of the Criminal Code of Wisconsin is committed by one who recklessly causes great bodily harm to another human being under circumstances that show utter disregard for human life.
>
> Before you may find the defendant guilty of first degree reckless injury, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present….
>
> Second -- or two, the defendant caused great bodily harm by criminally reckless contact [sic]. Criminally reckless conduct means the conduct created a risk of death or great bodily harm to another person, and the risk of death or great bodily harm was unreasonable and substantial, and the defendant was aware that his conduct created the unreasonable and substantial risk of great bodily harm.
>
> Three, the circumstances of the defendant's conduct showed utter disregard for human life. In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors. What the defendant was doing, why the defendant was engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for life, and all other facts and circumstances relating to the conduct.

¶33 The jury was instructed that, in order to find Jackson guilty, it was required to find that Jackson "was aware that his conduct created the unreasonable

and substantial risk of great bodily harm" and that Jackson's conduct "showed utter disregard for human life." Jackson's accident defense amounts to an argument that Jackson was not aware of the risk created by his conduct and that he did not show utter disregard for Parker's life. The trial court already instructed the jury that it could not convict Jackson if Jackson was not aware of the risk created by his conduct or that he did not show utter disregard for Parker's life.

¶34 Therefore, the jury instructions that the trial court read to the jury adequately covered Jackson's accident defense and a specific instruction on accident was not required. Consequently, the trial court did not erroneously exercise its discretion when it denied Jackson's request for the accident instruction and instead found that the accident instruction "doesn't add much" and to "really be superfluous."

III. Interest of Justice

¶35 Lastly, Jackson argues that the interest of justice requires that he be granted a new trial. Pursuant to WIS. STAT. § 752.35, "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried," we may reverse the judgment or order appealed from, "regardless of whether the proper motion or objection appears in the record." A miscarriage of justice may be found when there is "a probability of a different result on retrial such that a new trial in the interest of justice is warranted." *See* ***State v. Kucharski***, 2015 WI 64, ¶46, 363 Wis. 2d 658, 866 N.W.2d 697. "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795

N.W.2d 456 (citation omitted). We only exercise our power to grant a discretionary reversal in exceptional cases. ***Id.***

¶36 In short, this is not an exceptional case in which the record suggests that the real controversy has not been fully tried or there was any miscarriage of justice. Natalie's rebuttal testimony was properly admitted, albeit under a different theory than was raised below, and the trial court did not erroneously exercise its discretion when it declined to give the accident jury instruction. We, therefore, decline to exercise our power to grant a new trial in the interest of justice.

By the Court.—Judgment affirmed.

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