

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2012

A. John Voelker
Acting 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. 2010AP3108-CR

Cir. Ct. No. 2009CF2763

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN D. SLATER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL VAN GRUNSVEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Steven D. Slater appeals from a judgment of conviction of three counts of delivery of heroin. He argues that evidence of drug dealing obtained from a house that was not his residence was improperly admitted

other acts evidence. We conclude that the trial court properly exercised its discretion in admitting the evidence and affirm the judgment.

¶2 Three controlled drug buys were made from a person known as “Blue.” Blue was observed leaving from the house at 2847 North 22nd Street in Milwaukee before each drug transaction. The car Blue used to deliver the cocaine was registered to a woman at the 22nd Street house. A search warrant was obtained for that house. A traffic stop was made on the car Blue was in and Slater was identified as Blue and arrested. Subsequent to his arrest, the search warrant was executed. A cellular telephone, two digital gram scales found in the kitchen, two digital gram scales found inside a purse, \$140 in currency in \$20 bills, a pair of scissors, and a box of sandwich bags were recovered from the house. No drugs were found in the house.

¶3 Prior to trial, Slater moved to exclude evidence of the items seized at the 22nd Street house as other acts evidence. Although the trial court originally granted Slater’s motion on the ground that the probative value of the evidence was outweighed by the danger of unfair prejudice, after the first day of trial testimony, the trial court revisited its ruling and denied the motion to exclude the evidence. It concluded that the prosecution would be substantially prejudiced if it could not present to the jury evidence that a search was conducted at the house and what items were recovered.¹

¹ The trial court indicated that its misunderstanding that the search warrant affidavit and warrant were not signed had been an influencing factor in the original ruling. The trial court clarified that the warrant was signed.

¶4 The admissibility of evidence rests within the trial court’s discretion and the decision to admit other acts evidence is reviewed for erroneous exercise of discretion. *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399. We will sustain the ruling if we find that the trial court “‘examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach.’” *Id.* (quoted source omitted).

¶5 When deciding whether to allow other acts evidence, Wisconsin courts look to WIS. STAT. § 904.04(2) (2009-10),² and apply the three-step analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). *See Marinez*, 331 Wis. 2d 568, ¶19. Under *Sullivan*, courts must consider: (1) whether the evidence is offered for a proper purpose under § 904.04(2)(a); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. *Marinez*, ¶19. The proponent of the other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. *Id.* Once the first two prongs of the test are satisfied, the burden shifts to the opposing party to show that the probative value of the other acts evidence is substantially outweighed by the risk or danger of unfair prejudice. *Id.*

¶6 Slater concedes on appeal, and rightly so, that the first prong of the admissibility test is satisfied because the evidence is admissible to show context of

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the crime. See *State v. Shillcutt*, 116 Wis. 2d 227, 236, 341 N.W.2d 716 (Ct. App. 1983) (an admissible purpose exists when evidence furnishes part of the context of the crime). We need not specifically address the first prong of the admissibility test.

¶7 The relevance test of the second prong of the *Sullivan* framework involves two aspects—materiality, that is, whether the evidence relates to a fact or proposition of consequence, and probative value. *Sullivan*, 216 Wis. 2d at 785-86. Slater does not challenge the materiality inquiry. Identity of Slater was at issue. Evidence that the house from which he emerged before each sale possessed items related to the drug trade was of consequence to his identification as the drug seller.

¶8 Slater argues the evidence lacked any probative value. He points out that there were no fingerprints found on the scales, that there was no other personal identifiers linking him to the 22nd Street house and the evidence found there, that no drugs were found at the house, and that scissors and baggies are common household items. Although the items could have non-criminal functions within a household, they may also be evidence of drug activity, especially when a cell telephone, scales, and currency were also discovered at the house. The absence of a direct link between Slater and the items recovered from the house does not destroy the probative value of the evidence. Slater was in the house before the drug deliveries. There was a connection of both physical and temporal proximity to the house and items of drug trade found in the house.

¶9 Turning to the third prong of the *Sullivan* analysis, we conclude that Slater did not meet his burden of proof that the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice.

Nearly all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair or unfair*. In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect. Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by "improper means."

State v. Johnson, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994)
(citations omitted)

¶10 The items recovered from the house were relevant and had substantial probative value in establishing the context of the crime and Slater's identification as the drug seller. We reject Slater's contention that the evidence tended to shift the jury's focus away from the drug transactions to what was going on in the house and whether it harbored drug trafficking. The inference that items found in the house were used in Slater's drug sales was fair and permissible. There was a simple connection which did not confuse the issues or distract from Slater's theory of defense. Additionally, the danger of unfair prejudice was minimized because Slater could argue to the jury that none of the recovered items bore his fingerprints or were directly linked to his presence in the house. We are not persuaded that the danger of unfair prejudice rendered the evidence inadmissible.

By the Court.—Judgment affirmed.

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

