COURT OF APPEALS
DECISION
DATED AND RELEASED

August 13, 1997

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.

NOTICE

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No. 96-2704-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEBBIE A. RAMOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Debbie A. Ramos appeals from a judgment convicting her of being party to the crime of first-degree intentional homicide with a weapon and from an order denying her postconviction motion. On appeal, she challenges the admission of evidence concerning a bloodstained shirt she wore the

night of the murder and her parole eligibility date. Because we conclude that the trial court did not misuse its discretion in either respect, we affirm.

In November 1992, Ramos was convicted in the murder of her husband, who was bludgeoned to death. In ***State v. Ramos,*** No. 93-2448-CR (Wis. Ct. App. Aug. 10, 1994) (***Ramos I***), we reversed her conviction in the interest of justice due to the erroneous admission of late discovered blood spatter evidence on the shirt she wore the night of the murder. Ramos was then convicted on retrial.

In order to address the evidentiary ruling Ramos challenges on appeal, we must discuss ***Ramos I***. In ***Ramos I,*** evidence of blood spatters on Ramos's shirt was not discovered until the third day of the State's case-in-chief. *See* ***id.,*** slip op. at 3. The State crime lab's previous tests on the shirt had not revealed the presence of blood. The State argued that the bloodstains or spatters on the shirt were consistent with the blood spatters found on the wall of the Ramoses' bedroom where the murder took place and would permit an inference that the defendant was present during the murder. Ramos objected to the evidence on the grounds of surprise and prejudice, particularly because she had claimed in her opening statement that she was not in the room during the murder. Counsel also argued that he would not be able to counter the evidence effectively. The court ordered the crime lab to test the shirt for blood.

On the fifth day of the first trial, the prosecutor reported that two of the four spots on the shirt tested positive for human blood of an unknown type. The trial court admitted evidence of blood on the shirt and the State's blood spatter analysis. The State's expert testified that the blood spatters on the shirt were consistent with the medium velocity bloodstains found at the murder scene.

Ramos did not present any evidence to counter this testimony. *See* ***id.,*** slip op. at 4-6.

In ***Ramos I,*** we attributed the failure to locate blood evidence on the shirt to the prosecution because it had custody and control of the shirt until trial started, despite Ramos's request to view all evidence in the case. *See* ***id.***, slip op. at 7.[1] We concluded that the State's failure to exercise due diligence in discovering the evidence deprived Ramos of a pretrial opportunity to consider the evidence and its ramifications. *See* ***id.***, slip op. at 8. In holding that the trial court erred in admitting the blood evidence on the shirt, we also focused on the difficulty Ramos faced in locating and obtaining an expert opinion from a blood spatter analyst in the middle of trial. *See* ***id.***, slip op. at 9.

Having concluded that the shirt should have been excluded from evidence, we went on to hold that the late discovery of blood on the shirt and presentation to the jury of blood spatter evidence which Ramos could not effectively counter under the circumstances resulted in the real controversy not being tried. The late discovery deprived her of the opportunity to prepare a full defense to the State's case, which was significantly enhanced by the blood spatter evidence.[2] We therefore reversed Ramos's conviction in the interest of justice and ordered a new trial.

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[1] In its respondent's brief in the pending appeal, the State disputes the facts surrounding discovery of the blood on the shirt. ***Ramos I*** is the law of this case and we will not revisit the facts of that case.

[2] We acknowledged that Ramos's trial testimony that the shirt belonged to her nephew and that she had not washed it before wearing it did not effectively counter the State's blood spatter analysis.

In May 1995, prior to the second trial, Ramos moved to suppress the crime lab test results on the shirt on the grounds that the stains were excised and consumed in testing, thereby depriving her of the ability to obtain her own tests and to view the spatters on the shirt. The shirt was not photographed prior to testing. Ramos argued that having to rely on the State's blood spatter analyst to describe the stains was prejudicial to her ability to defend.

The State countered that Ramos did not object to testing the stains during the first trial and expressed confidence in the crime lab's ability to test for blood on the shirt.[3] The State argued that consumption of the stains was inevitable in testing but that the excised portions of the shirt were indicative of the location and size of the stains. The court agreed with the State that consumption of the stains did not render related evidence inadmissible. The court then granted Ramos a continuance to locate a blood spatter analyst.

At the second trial in November 1995, the crime lab technician, Elaine Canales-Willson, testified that two of the four stains on the shirt tested positive for human blood of an unknown type. On cross-examination, Canales-Willson stated that her tests did not determine when the blood was deposited on the shirt. She attributed enzyme inactivity on the stains to numerous factors, including the size of the sample being tested, the age of the stain or the fact that the garment had been laundered prior to testing. She also admitted that she failed to notice the bloodstains during her analysis of the evidence prior to the first trial.

Michael Heintzman, an evidence technician for Kenosha City and County, testified that there were medium velocity bloodstains in the room where

[3] Ramos had the same attorney for both trials.

the murder occurred and similar stains on the shirt. He opined that if the defendant wore the shirt that night, the stains indicated that she was no more than five feet from the body or the weapon when one of the blows was struck. On cross-examination, Heintzman was questioned regarding his recollection of the appearance of the stains and their location on the shirt. In response to questions designed to support Ramos's claim that the shirt belonged to her nephew and became stained when he hit his wife in the nose, Heintzman confirmed that under certain circumstances a nosebleed could have caused the stains on the shirt. However, on redirect, Heintzman testified that the angle of the stains on the shirt was not consistent with a nosebleed.

The defense did not present a blood spatter expert. However, Lavell Hewlett, Ramos's nephew, testified that Ramos borrowed his clothes on occasion and had borrowed the bloodstained shirt prior to the murder. When he last wore the shirt, Lavell explained that he had an argument with his wife during which he struck her and caused a severe nosebleed. On cross-examination, Hewlett testified that he could not say that any of the blood from his wife's nose got on the shirt. Hewlett confirmed that his wife's nosebleed was the only occasion when he was in proximity to blood while wearing the shirt. Hewlett testified that the shirt was not cleaned before Ramos wore it.

Hewlett's wife, Tresa Hewlett, testified that she lent Ramos the shirt (and matching shorts) and confirmed the nosebleed incident described by her husband.

Ramos contends that the trial court misused its discretion in admitting the bloodstained shirt and related testimony into evidence at the second trial because ***Ramos I*** precluded use of this evidence. *See* ***State v. Lindh,*** 161

Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991) (the admission of evidence is within the trial court's discretion).

Ramos reads ***Ramos I*** too broadly. We reversed Ramos's first conviction because the belated production of the evidence precluded her from defending against it. We did not rule the evidence inadmissible; rather, we held that the manner in which the evidence came to light precluded the real issue from being tried. Between our August 1994 reversal and the November 1995 retrial, Ramos had an opportunity to prepare a defense to the shirt evidence. We need only look at Ramos's cross-examination of the crime lab technician (Canales-Willson) and the blood spatter analyst (Heintzman) and the presentation of testimony from the shirt's owner and his wife as to how the shirt became bloodstained to see that Ramos had the opportunity denied her in the first trial. In the period between our reversal and the new trial, Ramos was able to prepare a defense to this evidence.

Ramos next argues that the destruction of the stains during testing should have precluded admission of the evidence. Again, we disagree. First, we note that when the evidence came to light during the first trial, Ramos expressed confidence in the crime lab's ability to test the evidence and did not make any request to preserve the appearance of the stains.

Second, it is often the case that tests consume the evidence. Absent bad faith by the State or its agents, consumption of the evidence in testing does not preclude its admission. *See* ***Carlson v. Minnesota,*** 945 F.2d 1026, 1029 (8th Cir. 1991). As we stated in ***Ramos I,*** the State's handling of the shirt at the first trial displayed a lack of due diligence. *See* ***Ramos I,*** slip op. at 8. However, there was no evidence of bad faith or misconduct.

Given that Ramos was able to defend against this evidence at the second trial and that the trial court did not misuse its discretion in admitting it, we conclude that the real controversy was tried and discern no grounds to reverse her conviction on retrial.

Ramos also challenges her sentence—life in prison with parole eligibility at seventy years—as improperly premised on her failure to admit her guilt. Specifically, Ramos cites the trial court's remark at sentencing that she had not retracted her testimony at the first trial in which she denied involvement in the murder.[4] The trial court characterized her trial testimony as perjury and lamented that by perjuring herself Ramos kept the victim's family from learning the circumstances of the death. Ramos contends that the trial court impermissibly based its parole eligibility date on her failure to admit her guilt.

We disagree with Ramos's characterization of the trial court's sentencing remarks. Ramos's testimony in the first trial was introduced by the State at the second trial. In sentencing Ramos after the second trial, the trial court incorporated its remarks from the first sentencing. At the first sentencing, the trial court considered the proper factors in setting a parole eligibility date: the gravity of the offense, the defendant's character and the need to protect the public. *See* ***State v. Borrell,*** 167 Wis.2d 749, 773, 482 N.W.2d 883, 892 (1992). The court considered the brutality of the crime, Ramos's history of criminal activity and her character, her lack of remorse, and the need to protect the public, particularly since the crime was pre-planned. In denying her postconviction challenge to her second

[4] Ramos did not testify at the second trial.

sentence, the trial court clarified that its sentence was based on her perjury during the first trial, not on her failure to admit guilt.

We conclude that in referring to Ramos's perjured testimony during the first trial, the trial court was commenting on her credibility. This was an appropriate consideration under ***United States v. Grayson,*** 438 U.S. 41, 50-55 (1978), which is the current law in this area. ***Grayson*** deems a defendant's truthfulness in testifying probative of the defendant's attitudes toward society and prospects for rehabilitation. Therefore, the defendant's truthfulness is relevant to sentencing. *See* ***id.*** at 50. We disagree that Ramos's sentence was a punishment for exercising her right to a jury trial.

By the Court.—Judgment and order affirmed.

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