

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 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. 97-2378-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KELLY R. CONNERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL NOWAKOWSKI, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Kelly Connors appeals from a judgment convicting him of first-degree intentional homicide. The issues are whether the trial court properly excluded expert testimony concerning Connors' mental state; whether Connors waived his claim that certain out-of-court statements should have been

admitted; and whether the court properly responded to a jury question during deliberations. We affirm.

Connors confronted his estranged wife's boyfriend in a parking lot, and shot him to death. He then left the scene and drove his car into a bridge abutment at high speed, in an apparent attempt to kill himself.

At trial, witnesses testified to Connors' disturbed mental state in the weeks before the shooting. Connors had already tried suicide once because of his marital difficulties, and had threatened it at other times. There was also testimony suggesting that he was reaching a crisis point at the time of the shooting, and had purchased the gun he used to kill the victim in order to shoot himself.

With the above evidence, Connors sought to establish an adequate provocation defense to the charge of first-degree homicide. On that issue, Connors also offered testimony from two psychiatric experts regarding how his alcohol consumption, depression and other stress factors caused him to lose control at the time of the shooting. The trial court refused to allow that testimony for three reasons. First, Connors failed to disclose the doctors' written reports before trial. Second, the court determined that expert testimony on a defendant's state of mind at a particular time is inadmissible. Third, the court found that the experts based their conclusions on Connors' potentially self-serving version of events.

The trial court also excluded as hearsay numerous out-of-court statements offered by Connors' witnesses.

At the close of evidence the trial court instructed the jury on first and second-degree intentional homicide. During deliberation the jury requested a clearer explanation of the element of adequate provocation. Connors asked the

court to answer the jury by instructing it that the State has to prove the absence of adequate provocation beyond a reasonable doubt. The trial court refused that request and instead referred the jury to the pattern instruction already given.

The trial court properly excluded evidence from Conners' psychiatric experts. Conners violated his discovery obligation because he did not disclose the experts' written reports until after the trial commenced. He did not show good cause for his delinquency. Exclusion was therefore mandatory. *See* § 971.23(7m)(a), STATS.; *see also State v. Wild*, 146 Wis.2d 18, 27, 429 N.W.2d 105, 108 (Ct. App. 1988). Additionally, expert testimony on the defendant's intent at the time of a killing is inadmissible because an expert cannot determine a defendant's state of mind or, by analogy, the defendant's level of self-control at a particular time during a particular event. *Steele v. State*, 97 Wis.2d 72, 97-98, 294 N.W.2d 2, 13-14 (1980).

Conners has waived his claim that the trial court erred by excluding certain hearsay testimony. In each of the several instances the State objected to a question by Conners' counsel on the grounds that it called for a response based on hearsay. In each instance counsel for Conners accepted the ruling without offering the explanations presented on appeal as to why the response was not inadmissible hearsay. Once a hearsay objection is presented, the party offering the evidence has the burden to prove its admissibility. *State v. Peters*, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991).

The trial court properly answered the jury's question on the element of adequate provocation. The trial court referred the jury to the instruction on adequate provocation already provided. Counsel for Conners proposed that the court also instruct the jury that the State's burden is to prove an absence of

provocation beyond a reasonable doubt. However, the referenced instruction twice informed the jury of that fact in plain language. The trial court reasonably concluded that a third additional reminder was not necessary.

By the Court.—Judgment affirmed.

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

