

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2610-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

O'CONNOR PICKLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. O'Connor Pickle appeals from a judgment convicting him of first-degree reckless homicide while using a dangerous weapon after a jury trial. On appeal, he challenges the circuit court's refusal to suppress a

statement he made to police in the absence of *Miranda*¹ warnings. We conclude that *Miranda* warnings were not necessary because Pickle was not interrogated within the meaning of *Miranda*. Pickle also challenges the circuit court's refusal to exclude from evidence statements he made five months after the shooting to the deputy who was guarding him at a hospital. We conclude that the court properly exercised its discretion in admitting the statements. We affirm the conviction.

¶2 A person must receive *Miranda* warnings if the person is in custody and under interrogation. See *State v. Armstrong*, 223 Wis. 2d 331, 352, 588 N.W.2d 606 (1999). For purposes of our decision in this case, we assume *arguendo* that Pickle was in custody within the meaning of *Miranda* when he made the statement he sought to suppress. We turn to whether Pickle was being interrogated within the meaning of *Miranda*.

¶3 Pickle sought to suppress a statement made on April 5, 1998, the day of the shooting at his home. The statement arose from Pickle's response to questions from Officer Thomas Hamm a few minutes after officers were dispatched to Pickle's house in response to a shooting.

¶4 Hamm testified at the suppression hearing that he was dispatched to Pickle's residence at approximately 1:00 a.m. on April 5, 1998, in response to a report of "shots fired, man down." Upon arriving at the scene, Hamm found the victim on Pickle's lawn with a gunshot wound. The victim's sister was yelling in the street when Hamm arrived at the scene. Hamm learned that Officer John Wenberg had already entered the house. Hamm then entered the house out of concern for Wenberg's safety. Hamm observed Wenberg talking to Pickle in a

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

bedroom. Hamm asked Pickle what happened. Pickle stated, “[T]he bastard came to the door so I shot him.” Pickle stated that the shooting had occurred at the front of the house. At that point, Hamm did not ask any more questions because it appeared that Wenberg was safe. Hamm exited the house and did not speak further to Pickle. Officer Hamm estimated that only a minute or two elapsed from the time he entered Pickle’s room until he concluded his questions.

¶5 Wenberg testified that he was dispatched to Pickle’s house. When he arrived, the victim’s brother was standing outside Pickle’s house on the wheelchair ramp, flagging down the police. Numerous police vehicles arrived at the scene at the same time. Wenberg learned from the brother that the victim had been shot by Pickle. The victim’s sister then came out the front door of the residence, screaming that Pickle had shot her brother and “he’s in there.” Wenberg looked inside the residence through the screen door. He saw a man later identified as Pickle cross in front of the door and enter a room. Wenberg entered the house and yelled at Pickle to halt. Pickle then shut and locked his bedroom door. Wenberg kicked open the bedroom door.² Pickle did not make any statement to Wenberg before Hamm entered a few seconds later.

¶6 Wenberg surmised that Pickle and Hamm had met earlier that evening as a result of a battery complaint Pickle had lodged against the victim. Wenberg testified that Hamm asked where this (the shooting) had happened, and Pickle responded that it had happened at or near the front door. Because Pickle had an injured hand and was complaining of chest pains, Wenberg transported him to the hospital but did not question him further.

² Pickle did not challenge the warrantless entry into his home in the circuit court and did not assert the warrantless entry as a basis for suppressing his statement to the police.

¶7 In its ruling on the suppression motion, the circuit court considered the totality of the circumstances. The court found that Wenberg knew that the victim's sister and brother had accused Pickle of shooting their brother and it was this information that caused Wenberg to enter the house after observing Pickle moving through the house. The court found that Hamm did not know of the victim's relatives' allegations and did not know what was happening when he entered the house seconds behind Wenberg.

¶8 We will affirm the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. See *Armstrong*, 223 Wis. 2d at 352. However, we independently determine whether those findings meet the appropriate legal standards insofar as suppression is concerned. See *id.* at 353.

¶9 Pickle first argues that the statement to the officers in his bedroom should be suppressed because it resulted from a warrantless entry into his home. The State responds that Pickle waived this issue by not raising it in the circuit court. We agree. The transcript of the suppression hearing indicates that Pickle did not make this argument to the circuit court. Therefore, it is waived on appeal. See *State v. Caban*, 210 Wis. 2d 597, 608, 563 N.W.2d 501 (1997). A litigant must raise and argue an issue with some prominence in order to allow the circuit court to address the issue and make a ruling. See *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

¶10 Pickle next argues that his statement to the officers should have been suppressed because it was given in violation of his *Miranda* rights. We conclude that Pickle's response to Hamm's question about what happened—"the bastard came to the door so I shot him"—need not be suppressed because Hamm was not interrogating Pickle within the meaning of *Miranda*. The circuit court found that

Hamm was responding to a reported shooting and saw a wounded man on the front lawn. These findings of fact are not clearly erroneous. Under these circumstances, the police were entitled to obtain information to render the scene safe and to assure that no one else was injured or in need of assistance. Hamm's question was an inquiry in the course of an investigation, not an accusation in the course of an interrogation. Therefore, *Miranda* did not apply.

¶11 We find support for our holding in *State v. Kraimer*, 99 Wis. 2d 306, 298 N.W.2d 568 (1980), where the officer's role in investigating an emergency and a potentially dangerous situation was also at issue. In *Kraimer*, police received three telephone calls from an anonymous man who was very upset, claimed to have shot his wife and had his four children in the home with him. *See id.* at 308. The police investigated and located Kraimer's house by determining that the Kraimer children had not reported to school. *See id.* at 308-09. A detective went to the house, received no response when he knocked and announced his presence, and found a windowpane missing from the back door. The detective did not know if he was investigating a prank call, a burglary or a homicide. *See id.* at 309. With the assistance of other officers, the detective entered the house without a warrant to investigate the possibility of a burglary, a homicide or danger to the children, whom a neighbor had seen playing outside in the preceding days. *See id.* at 309-10.

¶12 The officers found Kraimer and his children in the house. Kraimer thanked the officers for coming, admitting that he was the one who had called the police, and in response to the question "Where is your wife?" admitted shooting her. *See id.* at 310-11. Although Kraimer moved to suppress his statements due to the absence of *Miranda* warnings, the supreme court upheld the statements on the grounds that the detective's question was a natural reaction to the situation. *See*

Kraimer, 99 Wis. 2d at 330. Because the detective was investigating a reported emergency, “his query can only be viewed as a general-on-the-scene questioning in order to determine whether Mrs. Kraimer was present and in need of assistance.” *Id.* Therefore, the officers were not required to advise Kraimer of his *Miranda* rights because at the time the officer inquired, “he was performing an investigation of a reported emergency and crime.” *Kraimer*, 99 Wis. 2d at 330-31.

¶13 Similarly, Hamm was responding to a reported emergency and was additionally concerned about the safety of Wenberg, who had entered the home before he did. Once Hamm asked Pickle what happened, he did not question Pickle further. This is evidence which supports a conclusion that Hamm’s “what happened” inquiry was related to an investigation rather than an accusation. In entering the house and learning that Pickle had shot the victim, Hamm was able to assess the safety of Wenberg and determine whether anyone else, including Pickle, was in need of assistance. There was no reason to suppress Pickle’s statement.

¶14 We next consider Pickle’s argument that statements he made to a deputy guarding him at the hospital five months after the shooting should have been excluded from evidence because they were irrelevant and prejudicial. The deputy testified that while she was reading a book, Pickle, who seemed oriented to time and place, started talking to her about his deceased wife and her children. The deputy testified that Pickle did not like the children, particularly Wayne. Pickle told the deputy that when he got out of the hospital he was going to shoot Wayne and that it would not be the first time he shot someone. Pickle told the deputy that he takes care of business himself. According to the deputy, Pickle wanted to shoot Wayne because he and Wayne had fought over money a few years before and Wayne had beaten him. The deputy did not question Pickle or respond in any substantive way to what he said about Wayne.

¶15 The State sought to admit these statements because they were relevant to Pickle's state of mind, motive and intent to shoot the victim, particularly because Pickle claimed that he shot the victim accidentally. The court concluded that Pickle's statements were not classic other acts evidence and addressed the admissibility of the statements as a *Miranda/Goodchild*³ issue. The court found that the deputy did not interrogate Pickle and he made the statements voluntarily. The court found that the probative value of the statements outweighed their prejudicial effect and that the statements were relevant to motive and intent. The court instructed the jury that it could consider the statements for the limited purpose of assessing Pickle's motive (i.e., did Pickle have a reason to desire the result of the crime) and intent (i.e., did Pickle act with the state of mind required for the charged offense).

¶16 As a preliminary matter, we note that the court analyzed the objection to the hospital statements in the context of their voluntariness. However, the court's analysis also reflects the standards for admitting other acts evidence. We employ the other acts analysis on review.

¶17 Whether to admit evidence is within the circuit court's discretion. *See State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). We will sustain the circuit court's discretionary decision if that court examined the relevant facts, applied a proper legal standard and used a rational process to reach a conclusion that a reasonable judge could reach. *See id.* at 780-81.

³ A *Goodchild* hearing is designed to determine, inter alia, the voluntariness of a confession or admission. *See State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 264-65, 133 N.W.2d 753 (1965).

¶18 Other acts evidence is properly admitted if: (1) the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2) (1997-98),⁴ such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; (2) the other acts evidence is relevant, considering the two facets of relevance set forth in WIS. STAT. § 904.01; and (3) the probative value of the other acts evidence is 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 *State v. Gray*, 225 Wis. 2d 39, 49-50, 590 N.W.2d 918 (1999). The relevancy determination requires an assessment of probative value. See *Sullivan*, 216 Wis. 2d at 786. Thus, “[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence.” *Id.* at 787.

¶19 The circuit court found that the hospital statements were relevant to motive and intent, thereby satisfying the first two prongs of the other acts analysis, and that their probative value outweighed their prejudicial effect. We sustain the court’s discretionary decision. The court correctly noted that Pickle’s statements to the deputy were relevant to his motive⁵ and intent to shoot the victim. The evidence also was fair rebuttal to Pickle’s claim that he did not intend to shoot the victim because the rifle discharged accidentally. The court instructed the jury to consider this evidence for the limited purpose of motive and intent and not to show

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

⁵ Although motive is not an element of any crime, see *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988), “[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent ...” *State v. Johnson*, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984).

that Pickle had a bad character and acted in conformity with it. This instruction cured any danger of unfair prejudice. See *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

¶20 We also note the similarity of the substance of the hospital statements to the facts of the charged crime. In the matter of his wife's son, Pickle stated that he and Wayne had a dispute about money, Wayne had beaten him, and Pickle was going to shoot him. In the matter for which Pickle was on trial, it was alleged that Pickle had a dispute with the victim about money, the victim had beaten him, and Pickle shot the victim. The hospital statements have a tendency to make the existence of Pickle's intent in the charged crime more probable than it would be without the evidence. The evidence was not improperly prejudicial.

¶21 Even if admitting Pickle's hospital statements was error, we conclude that such error was harmless because there was other evidence that Pickle intended to shoot the victim. Intent to kill may be inferred from the nature of the victim's wounds, cf. *State v. Kramar*, 149 Wis. 2d 767, 793-94, 440 N.W.2d 317 (1989), and from the actor's conduct, see *Shelley v. State*, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The medical examiner/pathologist testified that the victim suffered a gunshot wound to the back. The bullet fragmented and the victim died in three to six minutes. The victim's brother testified that Pickle raised the rifle to his shoulder, aimed and fired one shot at the victim. This is evidence of intent which the jury was entitled to credit.

By the Court.—Judgment affirmed.

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

