COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0304-CR **Cir. Ct. No. 99-CF-78**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL J. MARINKO, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Daniel J. Marinko, Sr., appeals a judgment of conviction for homicide and burglary and an order denying his postconviction motions. He argues that: (1) the trial court erred by denying his motion to change the trial venue; (2) he was restricted in his theory of defense and presentation of evidence that a third party committed the murder; (3) the trial court erred by

allowing a witness to testify regarding statements she heard on a cassette tape; (4) he is entitled to present medical evidence that it was impossible for him to have committed the crimes; and (5) he is entitled to enter a plea of not guilty by reason of mental disease or defect. Marinko also argues that he is entitled to a new trial in the interest of justice. We disagree with Marinko's contentions and affirm the judgment and order.

BACKGROUND

¶2 On the morning of October 14, 1999, Nick Marinko, age ten, called 911 saying his mother had been murdered. Deputies from the Price County Sheriff's Department were dispatched to Jennifer Marinko's residence in Fifield. The deputies searched the home and found a woman in bed who appeared to be dead, with an injury consistent with a gunshot wound. The woman was identified as Jennifer, Daniel Marinko's ex-wife.

¶3 On October 17, a sheriff's deputy spoke with David Abel, who shared an apartment with Marinko. Abel said Marinko told him he shot "her." Able believed Marinko was referring to Jennifer, and said he knew Marinko had a .38 caliber gun.

¶4 A Wisconsin Department of Justice agent spoke to John Hanson, who lived with his wife, Theresa Walker, in the apartment directly above Marinko and Abel. Hanson stated that he and Marinko played pool on the night of October 13 and both drank heavily. They then went to a bar where Marinko got in a fist fight with another man. They went home at 12:08 a.m. on October 14. Later, at 2:30 a.m., Walker saw either Marinko or Abel walk into the apartment building.

¶5 Marinko was charged with first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1)(a)[1] and burglary while armed with a dangerous weapon, contrary to WIS. STAT. § 943.10(2)(a). Marinko moved to change venue, which the court denied because the motion was untimely and without merit. Marinko also attempted to advance a theory of defense that Abel was the murderer, including evidence that Abel had claimed to have murdered his own wife. The court rejected an offer of proof on this issue, which Marinko claims precluded him from proceeding with his theory of defense.

¶6 At trial, the State called the secretary for the Price County Sheriff's Department to testify to statements she heard on a cassette tape in which Marinko may have admitted to the murder. The State also produced a transcript of the tape for the jury. Marinko's attorney objected to the use of the transcript; however, the court overruled the objection.

¶7 The jury found Marinko guilty of both charges. He was sentenced to life in prison without the possibility of parole, and forty years consecutive to the life sentence.

¶8 Marinko made postconviction motions for a new trial on a number of grounds. First, he claimed that evidence arose during trial that would support a plea of not guilty by reason of mental disease or defect. Second, Marinko moved for a new trial to present expert medical testimony that it was impossible for him to have committed the crime because he was a poorly controlled insulin-dependent diabetic and had consumed an excessive of alcohol on the night of the murder. He claims that as a result, he was lethargic and lost all his energy. Third, Marinko

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

moved for a new trial arguing that his motion to change venue was improperly denied. The court denied the motions.

ANALYSIS

I. Motion to Change Venue

¶9 Marinko argues that he is entitled to a new trial on grounds that the jury was prejudiced due to pretrial publicity, and the court therefore should have changed the trial venue. Whether the prejudice in a county is such that a fair trial cannot be had is a discretionary determination. ***Briggs v. State***, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977). We will not overturn a discretionary decision if it is based upon the facts in the record, applies the correct law and, using a rational mental process, arrives at a reasonable result. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). However, when reviewing a trial court's discretionary decision denying a change of venue, we must independently evaluate the circumstances to determine whether there was a reasonable likelihood of community prejudice prior to and at the time of trial, and whether the jury selection process evidenced any prejudice on the part of the prospective or empanelled jurors. ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). In doing so, we consider the following factors:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id.

¶10 Generally, motions for a change of venue shall be made at arraignment unless the defendant can show cause that arose after that time. WIS. STAT. § 971.22(1). Marinko alleges that prospective jurors were prejudiced by reports on local radio and television stations and the two local newspapers. He also argues that he had good cause for filing the motion after arraignment because the information came out after the arraignment.

¶11 The record, however, only contains information regarding two newspaper stories from one local newspaper. There is nothing at all about reports on the radio or on television. Assertions of fact that are not part of the record will not be considered. ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). Therefore, we may only consider the newspaper stories.

¶12 The first story was a November 9, 2000, article in the *Park Falls Herald* that reported events surrounding Marinko's sentencing on bail jumping and failure to pay child support. It also reported on a motion hearing in the homicide case. The second story was in the *Park Falls Herald* on November 16, 2000, and was about complaints by Jennifer's family against the district attorney, the court, and the Price County victim's assistance office. Marinko argues that these articles were inflammatory because they quoted the court's statement that Marinko was a failure as a person, and reported prosecution arguments as fact. However, an unflattering opinion concerning a defendant expressed by a sentencing court in an unrelated matter is not necessarily so inflammatory as to require changing venue. In addition, news that is purely informational, as these articles were, may inform possible members of a jury, but do not necessarily create prejudice. ***State ex rel. Hussong v. Froelich***, 62 Wis. 2d 577, 594, 215 N.W.2d 390 (1974).

¶13 Additionally, the articles were published almost four months before the trial began. The supreme court has noted that a delay of four months is enough to prevent the necessity of a change of venue. ***McKissick v. State***, 49 Wis. 2d 537, 546-47, 182 N.W.2d 282 (1971). Furthermore, the State did not participate in adverse publicity, nor does Marinkko claim it did.

¶14 Finally, the jury selection process excluded jurors who could not be impartial. The court asked prospective jurors whether they had read or heard anything that would prevent them from deciding the case on the facts. Any jurors who responded positively were excused. The jurors who were eventually selected said they could decide the case on the facts and said they were not prejudiced against either party. At no point did Marinko object or comment that the jury was not impartial. In fact, even now Marinko has not offered any evidence that would indicate the jury's verdict was the result of prejudice. As a result, we conclude that Marinko received a fair trial before an impartial jury. *See* ***id.*** at 546-47.

II. Defense Theory that Abel Committed the Murder

¶15 Marinko argues that he is entitled to a new trial because he was restricted from presenting his theory of defense that Abel killed Jennifer. Marinko contends that the court erred by limiting his cross-examination of Abel on the grounds that the killing of Abel's wife would be an attack on Abel's credibility by extrinsic evidence. Instead, Marinko contends that he should have been able to show that Abel had the motive, method and ability to commit the Jennifer's murder, and it was plausible that he did so. *See* ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

¶16 Whether to admit or exclude evidence is within the discretion of the trial court, and we review that decision using the erroneous exercise of discretion

standard. ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994).

¶17 Marinko argues that his cross-examination of Abel was limited. The record contradicts Marinko's claim. First, Abel was called as a defense witness. As a result, Marinko's attorney's questioning of Abel was on direct examination, not cross-examination. Second, the court did allow Marinko to ask Abel whether he admitted killing his own wife, which Abel did admit. Although the court did not allow Marinko to introduce extrinsic evidence, Abel's admission made its use unnecessary.

¶18 Additionally, Marinko contends that he made an offer to prove that Abel had the motive, method, and ability to commit the murder, as required by ***Denny***. We note that some of the references presented by Marinko's brief are not supported by citations to the record. This violates WIS. STAT. RULE 809.19(1)(d) and (e). We decline to embark on our own search of the record, unguided by references and citations to specific testimony. RULE 809.19(1)(e) requires parties' briefs to contain "citations to the … parts of the record relied on …." We have held that where a party fails to comply with the rule, "this court will refuse to consider such an argument …." ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (citation omitted).

¶19 Based on the evidence that is cited, we conclude that the trial court properly exercised its discretion by holding that Marinko did not satisfy the ***Denny*** test. Abel's admission that he murdered his own wife does not show that Abel had a motive to kill Jennifer. Marinko argues that Abel had the opportunity to commit the murder because no one knew where Abel was during the time the murder was committed. However, ***Denny*** requires more than possible grounds for suspicion.

Denny, 120 Wis. 2d at 623. The single fact that no one can say where Abel was does not show opportunity. Marinko has not been able to connect Abel with the murder beyond mere speculation. As a result, Marinko has not satisfied the ***Denny*** test.

¶20 Finally, the record does show that Marinko's attorney was able to suggest during closing arguments regarding the possibility of Abel's involvement in the murder. Marinko's attorney stated that "all roads lead back to David Abel," and pointed out that Abel's wife had died under similar circumstances. As a result, even if it was error to exclude the evidence, Marinko was not harmed because his attorney was able to suggest to the jury that Abel committed the murder. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543-45, 370 N.W.2d 222 (1985).

III. Testimony of the Secretary

¶21 Marinko argues that he is entitled to a new trial because the trial court erred by allowing the secretary from the sheriff's department to testify and by allowing the admission of a transcript of a cassette tape. Whether to admit or exclude evidence is within the discretion of the trial court, and we review that decision using the erroneous exercise of discretion standard. ***Jackson***, 188 Wis. 2d at 196.

¶22 The secretary, Lynn Wallace, testified that she listened to a tape on which Marinko may have stated that he committed the murder. Wallace testified that there were parts of the tape that were unintelligible, but that Marinko may have said "yeah" or "uh-huh" when asked if he killed Jennifer. Marinko contends these answers constituted opinion evidence and Wallace was not qualified to testify as an expert.

¶23 Marinko never objected at trial based on whether Wallace was an expert witness. In order to preserve an objection for appeal, a party must object in the trial court on the same grounds as alleged in the appeal. ***State v. Waites***, 158 Wis. 2d 376, 390, 462 N.W.2d 206 (1990). As a result, Marinko has waived his right to appeal on this ground.

¶24 Marinko did object to use of the transcript at trial, arguing that it was inaccurate and that the jury should decide what was on the tape. He did not at any time present his own version of the transcript. The seventh circuit has held that where a party disputes the accuracy of a government's transcript but does not offer its own transcript, the trial court had not abused its discretion by permitting the use of the government's transcript. ***United States v. Howard***, 80 F.3d 1194, 1199 (7th Cir. 1996).

¶25 Additionally, the jurors were given a copy of the transcript of the tape. The court advised them that it was for taking notes and that they were to decide for themselves what the tape said. It is presumed that a jury follows the court's instructions. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). As a result, because Marinko did not object at trial to Wallace's testimony, and because the jury was properly instructed regarding the transcript, we conclude that the trial court did not err by allowing the testimony and the use of the transcript.

IV. New Medical Evidence

¶26 Marinko argues that he is entitled to a new trial to present testimony of medical experts that it was impossible for him to have committed the crime due to a combination of his poorly controlled diabetes, excessive drinking and a head injury sustained in a fight on the night of the murder. He contends that the murder

took a lot of planning and effort that he was incapable of under these circumstances.

¶27 Marinko had the burden of proving by clear and convincing evidence that he was entitled to a new trial. *See* ***State v. Brunton***, 203 Wis. 2d 195, 206-07, 552 N.W.2d 452 (Ct. App. 1996). Whether to grant a new trial is within the trial court's discretion, and we will not overturn that decision unless the court erroneously exercised its discretion. ***State v. Eison***, 194 Wis. 2d 160, 171, 533 N.W.2d 738 (1995).

¶28 The record does not contain a transcript of a motion hearing on this issue. As a result, we are unable to review the questions of fact or determine the sufficiency of the evidence to support the trial court's findings. ***Stelloh v. Liban***, 21 Wis. 2d 119, 122, 124 N.W.2d 101 (1963). In the absence of a transcript, we assume that "every fact essential to sustain the judgment was proved [sic] upon the trial." ***Id.*** at 124. Thus, we cannot say that the trial court erroneously exercised its discretion by denying the motion for a new trial.

V. Plea of Not Guilty by Reason of Mental Disease or Defect

¶29 Marinko argues that he is entitled to enter a plea of not guilty by reason of mental disease or defect based on evidence produced at trial. He contends that he does not remember what happened on the night of the murder and again raises the issue of his poorly controlled diabetes combined with excessive drinking that night.

¶30 Whether to grant Marinko's request to change his plea to add a plea of not guilty by reason of mental disease of defect is within the trial court's discretion. ***State v. Kazee***, 192 Wis. 2d 213, 221, 531 N.W.2d 332 (Ct. App.

1995). We will uphold the trial court's decision if it is consistent with the facts on record and established legal principles. ***Id.*** at 222.

¶31 A plea of not guilty by reason of mental disease or defect must be entered sufficiently in advance of trial so as to permit suitable notice to the prosecutor and time for implementation of procedures mandated by WIS. STAT. § 971.16. ***Kazee***, 192 Wis. 2d at 222. If the plea is entered late, the defendant must show why the change of plea was entered late and why it is appropriate by making an offer of proof laying out the elements of the defense, as set out in § 971.15, that show a basis for the plea. ***Id.*** at 222-23.

¶32 Marinko did not attempt to enter a plea of not guilty by reason of mental disease or defect until after his conviction. Marinko does not state why the plea was not entered timely, other than that evidence at trial gave rise to the plea. He argues the fact that he lost consciousness or any recollection of consciousness gives rise to his defense of not guilty by reason of mental disease or defect. However, he does not explain why he only became aware of this fact during the trial, rather than earlier. Additionally, we again have no transcript of the motion hearing on this issue. As a result, we cannot evaluate any evidence Marinko may have presented at that time. *See* ***Stelloh***, 21 Wis. 2d at 122. Therefore, we conclude that the trial court was within its discretion in determining that Marinko did not satisfy his burden of showing why he should be able to change his plea.

By the Court.–Judgment and order affirmed.

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