COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP929-CR **Cir. Ct. No. 2006CF272**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK M. ZURKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Patrick Zurkowski appeals a judgment of conviction for first-degree intentional homicide.[1] He argues there was insufficient

[1] Zurkowski was also convicted of resisting arrest, but does not challenge that conviction on appeal.

evidence to demonstrate his intent to kill his wife or to rebut his claims of perfect or imperfect self-defense. Zurkowski further argues the circuit court erroneously excluded evidence of two prior acts of violence against him by his wife. We reject Zurkowski's arguments and affirm.

BACKGROUND

¶2 Zurkowski's wife, June, died in their home. The medical examiner estimated June's time of death at 11:30 a.m. on March 24, 2006. At 12:50 p.m., Zurkowski called a local funeral home and stated June had died of an apparent heart attack. He reported he had not called for an ambulance, and requested that the funeral home employees "just come and pick the body up." A funeral home employee found the call suspicious and contacted police.

¶3 Spencer Police Officer Dan Schneider arrived at the Zurkowski residence at 1:12 p.m. When Schneider asked Zurkowski if his wife needed an ambulance, Zurkowski simply walked into the house without responding. Schneider followed him into the kitchen, past a clothes dryer that was operating, and could see a body on the living room floor. Zurkowski had no visible injuries and did not say he was hurt or request medical attention. When Schneider asked Zurkowski what happened, he replied, "Self-defense and I'm not going to jail." When asked again what happened, Zurkowski stated, "She hit me first. It was self-defense." Schneider asked Zurkowski how his wife died and Zurkowski told him it was none of his business.

¶4 After several more officers arrived, Zurkowski was handcuffed and placed in a chair. He told the officers, "There is a letter you should read from my wife about things she would no longer do." Zurkowski was referring to a note indicating June would stop cooking and doing laundry if Zurkowski did not return

money to their joint checking account. Zurkowski then told the police several times that he "wasn't going to take it any more," and that he "couldn't take care of June's spending habits."

¶5 The pathologist who conducted June's autopsy concluded she died as a result of multiple blows to her head, coupled with blood in her lungs. June had bruises on her face, scalp, neck, arms, and chest, including defensive bruises on her right forearm and upper left arm. She also had scrapes on her lips, left cheek, and right eyelid, as well as blood around her nose and mouth, indicating she "had been pretty well hit around in the face." The pathologist also discovered a 2¼-inch by 1½-inch ceramic piece lodged in the back of June's throat. It had apparently cut June's tongue, contributing to the substantial blood in her lungs and stomach, which June would have inhaled while still alive. Tooth marks on the ceramic piece suggested it had been shoved into June's mouth.

¶6 A broken and bloody ceramic candy dish with teeth marks on it was found concealed beneath overturned craft bins in a spare bedroom. Another ceramic figurine found hidden in the bedroom matched other figurines from the living room and also contained June's blood.

¶7 In his trial testimony, Zurkowski admitted killing his wife, giving the following account of events after coming home from work after 10:00 a.m. on March 24, 2006. June wanted Zurkowski to fix the vacuum cleaner, but he instead put it away in the closet. Zurkowski was standing in the computer room when June "c[a]me running out of the kitchen with a knife[,] ... yelling at me to fix [the vacuum cleaner] right away, and she wanted to kill me." He described the knife as a white paring knife with a four-inch blade. Zurkowski acknowledged he never provided this account to police.

¶8 Zurkowski said he managed to knock the knife out of June's hands as they struggled into the living room, asserting June then hit him a couple of times on the head. He admitted he hit June "[a] lot," possibly with a ceramic figurine, and repeatedly kicked her in the ribs as she lay on the living room floor. Zurkowski said June was yelling and screaming, so he grabbed a ceramic candy dish off the coffee table and "shoved the [whole] dish down [June's] throat" in an effort to "[g]et her to shut up." When he pulled out the candy dish, part of it had broken off and stuck in June's throat and he was unable to remove it. He said that although June was still alive, he did not call 911.

¶9 Zurkowski stated the paring knife was a few feet away from June when he shoved the candy dish down her throat, and conceded he could have safely walked away from June instead of shoving the dish down her throat. Zurkowski said that after June was dead, he cleaned up the blood in the living room with a rag and put the bloody rag in the wash machine. He said he washed the broken candy dish and put it in the spare bedroom, but denied trying to hide it. He claimed he put the paring knife back in the kitchen drawer. Zurkowski admitted he did not observe any injuries to himself. He was convicted following a five-day jury trial, and now appeals.

DISCUSSION

¶10 Zurkowski challenges the sufficiency of the evidence adduced at trial to support the intent element of first-degree intentional homicide and overcome his claims of perfect or imperfect self-defense.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless *the evidence, viewed most favorably to the state and the conviction*, is so lacking in probative value and force that no trier of fact,

> acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (emphasis added). Moreover, the jury is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See* ***id.*** at 506. "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶11 Despite acknowledging the proper appellate standard of review set forth above, Zurkowski asserts, "Nonetheless, the evidence in the record must be sufficiently strong that it excludes every alternative reasonable hypothesis consistent with the Defendant's innocence." He then bases his arguments primarily on this improper standard. To the extent Zurkowski's arguments rely on this standard, which applies only in the circuit court, we must reject them. *See* ***Poellinger***, 153 Wis. 2d at 503-08 ("Although the trier of fact must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, ... that rule is not the test on appeal.").

¶12 Zurkowski argues it would be reasonable to conclude June's killing was accidental because there is no single fatal wound to indicate an intent to kill, it was an accident that part of the ceramic dish he shoved down her throat broke off,

there is no evidence he planned to kill her, and he testified he did not intend to kill her.

¶13 That Zurkowski killed June through a combination of repeated blows and cutting her tongue with a ceramic object he crammed in her mouth, rather than by killing her via a single fatal wound, does not demonstrate a lack of intent to kill. Zurkowski acknowledged he also repeatedly kicked June in the ribs while she was laying on the ground and he was standing above her and that she no longer had the knife when he was jamming the ceramic dish in her mouth. Zurkowski also ignores the fact that he chose not to call for an ambulance after the struggle despite knowing June was dying. Further, regardless whether he intended that the dish break off in her mouth, he intentionally forced the dish in there, leaving tooth marks in the ceramic.

¶14 Zurkowski also ignores evidence suggesting he planned to kill June. Although not an element the State was required to prove, there was circumstantial evidence of prior planning. A bank employee testified, and identified supporting documentary evidence, that, the day before June's death, Zurkowski sought rate quotes for life insurance to pay off the couple's mortgage.

¶15 In light of the overwhelming evidence presented, the jury could reasonably reject Zurkowski's self-serving claim that he did not intend to kill his wife. In addition to the facts just discussed, Zurkowski cleaned up the scene, hid the bloodied ceramic dish, and called a funeral home to dispose of June's body, falsely reporting she suffered a heart attack. A jury could reasonably conclude these facts demonstrated Zurkowski was attempting to hide his culpability. There was more than adequate evidence on which the jury could reasonably rely to conclude Zurkowski intentionally killed June.

¶16 Zurkowski does not present separate argument concerning the State's burden to overcome his claims of perfect or imperfect self-defense. Nonetheless, we observe the evidence adduced at trial was adequate to support findings that Zurkowski had neither an actual nor reasonable belief that the amount of force he used was necessary. *See* WIS. STAT. §§ 939.48(1), 940.01(2)(b).[2] Additionally, the jury was aware Zurkowski was uncooperative with the police when they asked what happened, and failed to mention June's alleged attack with a paring knife, further undermining Zurkowski's self-defense claims.

¶17 We next address Zurkowski's argument that the circuit court erroneously excluded ***McMorris***[3] evidence consisting of two alleged prior acts of violence June committed.[4]

> [W]hen self-defense is raised as an issue, … the defendant may, in support of the defense, establish what the defendant believed to be the victim's violent character by [attempting to prove] prior specific instances of violence within [the defendant's] knowledge at the time of the incident.

State v. Wenger, 225 Wis. 2d 495, 507, 593 N.W.2d 467 (Ct. App. 1999) (modified consistent with ***State v. McClaren***, 2009 WI 69, ¶21, 318 Wis. 2d 739, 767 N.W.2d 550). Admissibility of ***McMorris*** evidence is not automatic, and the evidence may not be used to support an inference about the victim's actual conduct during the incident. ***State v. Head***, 2002 WI 99, ¶128, 255 Wis. 2d 194,

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] Referring to ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

[4] Zurkowski fails to identify the circuit court's reasoning for excluding the evidence. He merely represents that it was "disallowed."

648 N.W.2d 413. The admission of ***McMorris*** evidence implicates the exercise of discretion by the circuit court. ***Id.***, ¶129. "As with any 'other acts evidence,' the evidence is subject to the application of the balancing test involving the weighing of probative value against the danger of unfair prejudice, and considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ***McClaren***, 318 Wis. 2d 739, ¶21; *see* WIS. STAT. § 904.03. Further, a circuit court has the responsibility to vet the evidence prior to admission to ensure it is valid ***McMorris*** evidence. ***McClaren***, 318 Wis. 2d 739, ¶21.

¶18 Here, after hearing Zurkowski's proposed testimony, the circuit court denied his request to testify about the alleged other acts, concluding it was not valid ***McMorris*** evidence. The court reasoned the testimony regarding the incidents could not have contributed to any fear of bodily harm Zurkowski had on the day of the killing.

¶19 Zurkowski's recollection of the two incidents was foggy, even though they had purportedly occurred only weeks before. He testified that approximately one month before he killed June, she had "[p]ointed [a paring] knife" at him while in the kitchen, "probably getting [lunch] ready," possibly peeling potatoes. Zurkowski said June did not say anything to him, and he agreed when asked, "And for no reason she just turned and pointed the knife at you[?]. Zurkowski said he "[j]ust walk[ed] away" without saying anything to her and proceeded either to watch television or go to sleep. Although he asserted he was "scared," he also said he was "tired" and "didn't give a damn," and that he possibly went to sleep because it "[d]idn't enter [his] mind" that she would come after him.

¶20 Zurkowski testified that a couple of weeks later, June again "[p]ointed" the same type of paring knife at him, "probably" while she was in the kitchen preparing food, but he did not recall where either of them was standing. She was "probably" cooking at the time, although Zurkowski did not recall what. When asked whether he was talking to her, he responded, "I doubt it." At one point, Zurkowski testified June said nothing to him, but at another point, stated she "probably said something," but made no verbal threats. Zurkowski said June "maybe came after [him] a little bit." Asked to explain, he stated, "She maybe just walked—maybe took a step forward." Zurkowski was asked: "So, she just, for no known reason, came at you with a knife; right?" This led to the following exchange:

> A. [Zurkowski] Unless it was about the bank statements.
>
> Q. Okay, and so were you talking about the bank statements?
>
> A. I doubt it.
>
> Q. Did she say something to you about the bank statements?
>
> A. I doubt it.
>
> ....
>
> Q. So ... you weren't talking about the bank statements?
>
> A. No.
>
> Q. Were you talking about something else with money?
>
> A. I doubt it.
>
> ....
>
> A. Like I said, I don't recall.
>
> Q. So she just pointed this knife at you; right?
>
> A. Yes.

Zurkowski was also asked what June did with the knife: "She just held it up in front of her? Is that what you're saying?" Zurkowski responded, "Yes." When asked what he did after June pointed the knife at him, Zurkowski responded, "Went on with my life." He explained he again just walked away, this time out to the garage. He was "[n]ot really" scared and reiterated that he "went on with [his] life," adding that he later returned and ate his lunch. Zurkowski told no one about either incident.

¶21 The circuit court properly concluded Zurkowski's hazy testimony did not fall into the realm of ***McMorris*** evidence of prior violent acts. There were no verbal threats accompanying the "pointing" of the knife, which occurred during food preparation in the kitchen. Indeed, Zurkowski provided very little context in which to consider the incidents. There was little or no discussion before, during, or after the pointing. Further, the incidents were not significant enough to produce a fear of bodily harm. Zurkowski merely walked away and "went on with his life." Under these facts, the pointing of the knife, without more, can hardly be said to constitute a violent act. Furthermore, for the same reasons, the court reasonably concluded the testimony was inadequate to demonstrate any effect on Zurkowski's state of mind when he killed June.

¶22 We also agree with the State that even if the circuit court erred by excluding the evidence, it would constitute harmless error. The evidence had, at best, minimal probative value regarding Zurkowski's belief that he was in danger of bodily harm because June was violent, or the reasonableness of such a belief. Further, there was overwhelming evidence that Zurkowski had neither an actual nor reasonable belief that the amount of force he used was necessary. The excluded evidence would not have bore on these independent considerations. We

are confident that even if the jury had heard the excluded evidence, the result of the trial would have been the same.

¶23 Finally, we observe Zurkowski's appellate counsel filed a deficient appendix. An appellant's brief must "include a short appendix containing, at a minimum, the findings or opinion of the circuit court and limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." WIS. STAT. RULE 809.19(2)(a). Zurkowski's brief's appendix contains only the judgment of conviction. "A judgment of conviction tells us absolutely nothing about how the trial court ruled on a matter of interest to the appellant." ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367.

¶24 Counsel also falsely certified that the brief's appendix complied with the rule. Filing a false certification is a serious infraction not only of the rule, but also of SCR 20:3:3(a), which prohibits knowingly making false statements of fact or law to a tribunal. ***Id.***, ¶24. Counsel's omission places an unwarranted burden on the court and is grounds for imposition of a penalty pursuant to WIS. STAT. RULE 809.83(2). ***Id.***, ¶25. Accordingly, we sanction Zurkowski's attorney for providing a deficient appendix and a false certification, and direct that he pay $150 to the clerk of this court within thirty days of the date of this opinion.

By the Court.—Judgment affirmed; attorney sanctioned.

Not recommended for publication in the official reports.