COURT OF APPEALS DECISION DATED AND FILED

May 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1667-CR **Cir. Ct. No. 2008CF5649**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CRYSTAL P. KEITH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Crystal P. Keith appeals from an order denying her motion for postconviction relief. Keith was convicted of one count of first-degree reckless homicide for the death of her foster son, Christopher, and one count of physical abuse of a child for the treatment of her foster daughter, C.T. On appeal

Keith argues that the trial court erred in denying her motion for postconviction relief because: (1) statements by Keith's biological daughter, T.K., made after Keith's conviction, implicated Keith's husband for the death of Christopher and therefore constituted new evidence warranting a new trial; (2) an *in camera* review of T.K.'s treatment records should have been conducted; (3) expert testimony from Dr. Michael Kula, a psychologist, was wrongfully restricted and Keith's trial counsel was ineffective for failing to provide additional authority for Dr. Kula's proffered testimony; and (4) Keith's motion for a change of venue was wrongfully denied and Keith's trial counsel was ineffective for failing to renew the motion at the start of trial. We disagree and affirm the trial court.

BACKGROUND

¶2 On November 10, 2008, Keith was arrested for physically abusing her two foster children, ten-month old Christopher, and his two-year old sister, C.T. Christopher and C.T. were the biological children of Keith's brother-in-law.[1] On the night of her arrest, Keith had called 911 after noticing that Christopher's "eyes turned in" and told the 911 operator that she "just killed a baby." Soon after her arrest, Keith described the incident leading to Christopher's death[2] in great detail in a videotaped interview with Milwaukee police. Among the information provided were details of Keith hitting Christopher to make him stop crying, lifting Christopher by his feet and placing his body weight on his head, slapping and choking Christopher, and attempting to resuscitate Christopher

[1] The children were the biological children of Reginald Keith's brother. Reginald Keith is Keith's husband. Because Keith and her husband share the same last name, we refer to the defendant as "Keith" and her husband as "Reginald."

[2] Christopher died the day following Keith's arrest and was in intensive care at the time of Keith's interview.

by inserting her finger and a hairbrush down his throat to induce vomiting. Keith also provided details of the various ways in which she abused C.T., including burning C.T.'s feet with hot water, hitting C.T.'s feet so much that Keith began covering C.T.'s feet with socks to avoid anyone noticing her injuries, and slapping C.T. so hard that Keith covered C.T.'s face with a scarf to prevent Keith's husband, Reginald, from noticing.

¶3 Christopher died from his injuries the day following Keith's arrest. Keith was subsequently charged with first-degree reckless homicide on November 13, 2008. She was also charged with physical abuse of a child with respect to the abuse of C.T. A jury trial commenced on May 4, 2009, and on May 7, 2009, a jury found Keith guilty on both counts. On July 7, 2009, Keith was sentenced to sixty years' imprisonment on count one, comprised of forty years of initial confinement and twenty years of extended supervision, and fifteen years' imprisonment on count two, comprised of ten years of initial confinement and five years of extended supervision. The sentences were to be served consecutively.

¶4 In April 2010, Keith filed a postconviction motion alleging that in the months following her conviction, her biological daughter, T.K., made statements to Keith's sister, Michelle Smith Howard, in which T.K. implicated Reginald for Christopher's death. T.K. was placed in Howard's care following Keith's arrest. Howard stated that she followed instructions not to discuss Keith's circumstances with T.K., however T.K. voluntarily asked Howard: "Why does mama have to go to jail for what my daddy did?" Howard stated that T.K. also told her that: (1) Reginald would put C.T. in the bathroom all day and would "wrap her up," and that was where "the marks came from"; (2) Reginald used a hairbrush to abuse Christopher and C.T.; and (3) Reginald would drink, fall around, and beat Keith. Keith argued that T.K.'s statements were unprompted and

called into question the truthfulness of Keith's confession as well as the reliability of the jury verdict, thereby constituting new evidence and warranting a new trial. Keith also argued that documents pertaining to T.K.'s therapy sessions would support T.K.'s observation that Reginald was responsible for Christopher's death. Keith also argued that testimony from her expert witness, Dr. Kula, was wrongfully restricted, as additional testimony from him would have revealed Keith's history of physical and sexual abuse and various diagnoses that prove Keith does not have the same perceptions as a "normal" person and is unable to comprehend what proper parenting is. Keith's motion also alleged ineffective assistance of trial counsel for failing to offer additional authority of Dr. Kula's proffered testimony and for failing to renew a motion to change the venue because many jurors were aware of the media coverage surrounding Christopher's death.

¶5 The trial court denied Keith's motion, finding that: (1) T.K.'s statements did not constitute new evidence and it was not reasonably probable that T.K.'s statements would have led to a different outcome; (2) the standard for an *in camera* inspection of T.K.'s records had not been met; (3) trial counsel was not ineffective as to Dr. Kula's testimony and the testimony was properly excluded; and (4) trial counsel was not ineffective as to the venue issue. This appeal follows. Additional facts are included in the discussion as necessary.

DISCUSSION

I. Motion for a New Trial Based on Newly-Discovered Evidence.

¶6 Keith argues that the trial court erroneously denied her motion for a new trial based on newly-discovered evidence. Keith contends that four unsolicited statements from her daughter, T.K., made to Keith's sister, prove that Reginald was responsible for Christopher's death, not Keith. We disagree.

¶7 The decision to grant or deny a motion for a new trial is within a trial court's discretion and will only be overturned if the trial court erroneously exercised its discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. "In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a 'manifest injustice.'" ***Id.***, ¶32 (citation omitted). When a defendant moves for a new trial based on newly-discovered evidence, the defendant must prove that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking [the] evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant is able to prove all four elements, it must then be determined "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." ***Plude***, 310 Wis. 2d 28, ¶32. "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis. 2d 111, 700 N.W.2d 62 (citation omitted; brackets in ***Love***). This is a question of law that we review *de novo*. *See* ***Plude***, 310 Wis. 2d 28, ¶33.

¶8 According to Keith's postconviction motion, T.K. said the following: (1) "Why does mama have to go to jail for what my daddy did?"; (2) that her father would put C.T. in the bathroom all day and "wrap her up" and that is where C.T.'s marks came from; (3) that her father used a hairbrush to abuse Christopher and C.T.; and (4) that her father drank, would fall around, and beat Keith. In denying Keith's motion, the trial court stated that even if T.K.'s

statements met the first four requirements necessary for a new trial based on newly-discovered evidence, the statements did not create a reasonable doubt as to whether Keith was responsible for Christopher's death. The trial court reasoned that Keith's confession to Milwaukee police following Christopher's beating was so detailed and matched Christopher's autopsy report so exactly that Keith could not have so accurately described Christopher's injuries unless she was responsible for them. The trial court further found that T.K.'s statements only imply that both Keith and Reginald abused the children, not that Reginald was solely responsible for Christopher's death, therefore there was not a reasonable probability that a jury would have reasonably doubted Keith's guilt. We agree.

¶9 Keith contends that she lied during her confession to Milwaukee police and that she instructed T.K. to lie to police and say that Reginald never abused the children because Keith was fearful that Reginald would follow through on threats to kill Keith's family. She also stated that she wanted to protect Reginald. We disagree that T.K.'s alleged statements constitute newly-discovered evidence. By Keith's own admission, she stated that she instructed T.K. to lie about Reginald's abuse. Therefore statements made by T.K. pertaining to Reginald's abuse were not "newly-discovered," because Keith was aware of everything T.K. could have testified to. *See* ***State v. Jackson***, 188 Wis. 2d 187, 198-201, 525 N.W.2d 739 (Ct. App. 1994) (noting a difference between newly-discovered evidence and newly-available evidence in a case concerning the newly-available testimony of a co-defendant who refused to testify at the defendant's trial and cautioning trial courts about considering evidence "newly discovered" when it "existed all along") (one set of quotation marks omitted).

¶10 We will not analyze all of the elements that a defendant must prove in a motion for a new trial based on newly-discovered evidence because "[i]f the

newly discovered evidence fails to pass any one of these five tests, it is not sufficient to warrant a new trial." ***Sheehan v. State***, 65 Wis. 2d 757, 768, 223 N.W.2d 600 (1974). We have already determined that the evidence is not newly-discovered. However, even if the evidence did prove all of the elements, we cannot conclude that T.K.'s statements would have changed the results of Keith's trial. Shortly after Keith's arrest, Keith gave a detailed, three and one-half hour confession to Milwaukee police in which she described in great detail the manner in which Christopher was beaten to death and the various ways in which C.T. was tortured. The detailed confession was made prior to the issuance of Christopher's autopsy report. Keith's description of the injuries Christopher sustained the night of his death is corroborated by the autopsy report and medical treatment reports. Further, Keith took sole responsibility for the abuse the children suffered and stated that Reginald never harmed the children when she made her confession. She also admitted the abuse to Dr. Kula months after she was charged, in the context of a psychological evaluation. We cannot conclude that a reasonable probability exists that the results of Keith's trial would have been different as a result of T.K.'s statements. T.K.'s statements only indicate that Reginald may also have been abusing the children, not that Keith was not responsible for Christopher's death. Therefore, Keith did not meet the newly-discovered evidence standard.

II. *In Camera* Inspection.

¶11 Keith also contends that the trial court erroneously denied her request for an *in camera* inspection of T.K.'s psychological treatment records. Keith argues that T.K. began counseling to address the various issues that arose from the abuse in her household and that an *in camera* inspection of the treatment

records would reveal each parent's role, or lack thereof, of the abuse for which Keith was convicted. We disagree.

¶12 A defendant seeking an *in camera* inspection of confidential records must make a preliminary showing setting forth "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298. Information is necessary to a determination of guilt or innocence if it creates a reasonable doubt that would not otherwise exist. ***Id.*** The defendant's request must be based on more than mere speculation as to what the records contain and show more than a mere possibility that they will contain evidence of use to the defense. ***Id.***, ¶33. The court must then "look at the existing evidence in light of the request and determine … whether the records will likely contain evidence that is independently probative to the defense." ***Id.***, ¶34.

¶13 Keith's request for an *in camera* inspection does not meet the appropriate standard for a court-review of confidential treatment records. Keith's motion was based on her assumption that T.K. "likely … told her therapist about what she observed in the house because these events would have been important in T.K.'s life." Keith's request is based on pure speculation. Other than the alleged statements to Keith's sister, nothing in the record supports Keith's contention that T.K. made statements pertaining to which of her parents bore the responsibility for the abuse in her home. T.K. began periodically seeing a therapist after she was placed in her aunt's home, following her mother's arrest. Nothing in the record points to proof of anything T.K. may have said to her therapist and "the mere contention that [T.K.] has been involved in counseling ... is insufficient." *See* ***id.***,

¶33. The trial court was correct in its finding that sifting through T.K.'s treatment records would be nothing more than a "fishing expedition."

III. Dr. Kula's Testimony.

¶14 Keith also argues that the trial court erred when it restricted the testimony of Dr. Kula at trial pertaining to Keith's own history of abuse and when it denied her claim that her counsel was ineffective for failing to provide additional authority for Dr. Kula's proffered testimony. We disagree.

¶15 At trial, but outside of the presence of the jury, Keith's counsel made an offer of proof to the court about Dr. Kula's testimony. Keith's counsel argued that Dr. Kula diagnosed Keith with various psychological disorders and that the factual bases for those diagnoses—Keith's physical and sexual abuse during her own upbringing—impact Keith's perception and comprehension of her actions. The trial court allowed Dr. Kula to testify about his diagnoses and the general characteristics of people with those diagnoses, but did not allow Dr. Kula to testify about Keith's history of abuse. Dr. Kula then testified, in the presence of the jury, that Keith suffered from a schizoid personality disorder, major depressive disorder, general anxiety disorder, post-traumatic stress disorder, and obsessive-compulsive disorder. Dr. Kula also testified that Keith had an IQ of 74.

¶16 A trial court has great discretion in determining whether to admit or exclude evidence. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554 (Ct. App. 1994). We will reverse such a determination only if the trial court erroneously exercised its discretion. ***Id.*** Further, expert testimony is admissible only if it is relevant. ***State v. Pittman***, 174 Wis. 2d 255, 267, 496 N.W.2d 74 (1993). Determination of relevance is also within a trial court's discretion. ***Id.***

¶17 With regard to psychological/psychiatric testimony, our supreme court has held that "'a [psychologist] may not give his or her opinion on the issue of capacity to form intent if that opinion rests in whole or in part on the defendant's mental health history.'" ***State v. Morgan***, 195 Wis. 2d 388, 410, 536 N.W.2d 425 (Ct. App. 1995) (citation omitted). "[Psychological] opinion testimony which tends to prove or disprove intent is 'neither competent, relevant, nor probative.'" ***Id.*** (citation omitted). Although all expert opinion evidence from a mental health expert is not considered inadmissible, "'a [psychologist] is not permitted to testify as to the effect of a defendant's [psychological] condition on his or her capacity to form the requisite intent.'" ***Id.*** at 411 (citation omitted).

¶18 Although a charge of reckless homicide does not carry an intent element,[3] Keith's argument centers on what she considers her mental inability to form the state of mind necessary to commit the crimes for which she was convicted. The trial court permitted Dr. Kula to testify about his various diagnoses as well as the general characteristics of those diagnoses and the jury was free to infer on its own how characteristics of those diagnoses may have impacted Keith's perception and comprehension. The trial court did not err when it limited Dr. Kula's testimony to just that.

¶19 Keith's trial counsel was also not ineffective for failing to offer additional authority for Dr. Kula's proffered testimony. To succeed on a claim for ineffective assistance of counsel under the Sixth Amendment, a defendant must make sufficient showings under the two-part test put forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first part of the test requires a defendant to show that counsel's performance was deficient. ***Id.*** at 687. "This requires

[3] *See* WIS JI—CRIMINAL 1020.

showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** The second part of the test requires a showing that the deficient performance prejudiced the defendant. ***Id.*** "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.***

¶20 Keith's counsel made an offer of proof before the trial court in which he put forth Dr. Kula's credentials, explained what he thought was the relevance of the proffered testimony, and cited authorities that he thought supported his position. We cannot conclude that this amounted to deficient performance. We therefore do not reach the prejudice question. *See* ***id.***

IV. Change of Venue.

¶21 Finally, Keith argues that the trial court erred in denying Keith's pretrial motion for a change of venue and in denying her postconviction motion stating that her trial counsel was ineffective for failing to renew the motion for a change of venue at the time of trial.

¶22 In the months following Christopher's death, local media ran stories about the foster care system in Milwaukee, highlighting the details of Christopher's death. During *voir dire*, twelve members of the original forty-member jury pool admitted to media exposure on the issue. Fourteen members of the original pool were chosen, six of whom were among those admitting media exposure. Keith contends that she did not receive a fair trial because of the publicity surrounding Christopher's death and the extent to which some of the jurors were aware of the publicity. We disagree.

¶23 A "[c]hange of venue is a constitutional and statutorily guaranteed right where adverse community prejudice will make a fair trial impossible." ***Tucker v. State***, 56 Wis. 2d 728, 733, 202 N.W.2d 897 (1973). To establish a presumption of prejudice, a defendant must prove there is a reasonable likelihood a fair trial cannot be held in that county. ***Briggs v. State***, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977). The trial court has the discretion to grant or deny a motion to change venue because it "is on the ground and in a position to sense, in a way that this court cannot, the true sentiment of the community and to judge much more correctly whether it is such as to prevent a fair trial on the part of the defendant[]." ***Id.*** at 325, 329 (citations and quotation marks omitted). However, we also independently evaluate the evidence and 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 selected jurors. ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). In our independent evaluation of the pretrial publicity, we look at 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.

State v. Fonte, 2005 WI 77, ¶31, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted).

¶24 There is no dispute as to the amount of publicity, the State's lack of involvement in the publicity, the severity of the charges and Keith's conviction of

both charges. Therefore, we focus on the inflammatory nature of the publicity, the *voir dire* process and the extent to which the jurors were familiar with the publicity.

A. The inflammatory nature of the publicity.

¶25 "Where reporting is objective, informational and noneditorial, it is not considered prejudicial." ***Briggs***, 76 Wis. 2d at 327. "A court looking to the inflammatory nature of the publicity should be primarily concerned with the manner in which the information was presented. Uneditorialized news of an informational nature may inform possible members of a jury, but this does not necessarily make the information objectionable." ***Id.*** "News reports become objectionable when they editorialize, amount to 'rabble rousing' or attempt to influence public opinion against a defendant." ***Id.***

¶26 The bulk of the news reports attached to Keith's motion center around foster care and reform efforts to the foster system following Christopher's death. The reports contain factual information about the system, case workers and reform efforts. Reports focusing mainly on Christopher's death also just contained factual information about what happened to Christopher and C.T. and do not amount to "rabble rousing." *See* ***id.*** Factual reports of a newsworthy event are not considered prejudicial. ***Id.***

B. Jury Selection and Juror Familiarity with the Publicity.

¶27 In addressing the factors concerning jury selection, Keith's brief implies that because six of the fourteen selected jurors had seen or read news stories mentioning Christopher's death, the trial court showed insufficient concern regarding the influence of pretrial publicity and that this insufficient concern

forced Keith to use a preemptory strike on a juror that should have been stricken for cause, rather than on another juror with media exposure. We disagree.

¶28 Of the twelve jurors who claimed some familiarity with Keith's case, two were struck for cause for admitting impartiality, two were not questioned individually because enough potential jurors had already been selected, one was struck because he said his own experience with child abuse might render problems, and one was struck peremptorily after admitting influence from the publicity. The remaining six claimed limited memory of what they read or saw and all claimed they could be impartial. Both parties thoroughly questioned the potential jurors about their media exposure and their abilities to remain impartial and both parties were free to use their peremptory strikes. Although Keith contends that she did not have enough strikes to "cure the problem" of jurors with media exposure, our supreme court noted that "there is always going to be some overlap between prospective jurors whom a defendant believes should be removed for cause and prospective jurors whom the defendant would simply prefer not to have on the jury." ***State v. Lindell***, 2001 WI 108, ¶115, 245 Wis. 2d 689, 629 N.W.2d 223. "'A defendant is entitled to a jury which will insure him [or her] a fair and impartial trial, but not to an unlimited choice in an attempt to secure a jury which will acquit him [or her].'" ***Id.*** (citation omitted; brackets in ***Lindell***). We are satisfied that the record reflects that great care was taken in the jury selection process, minimal difficulty was encountered and the selected jurors had minimal familiarity with the publicity.

¶29 We also conclude that Keith's counsel was not ineffective for failing to renew the motion after an impartial jury was selected. We have put forth the standard for determining whether trial counsel was ineffective and cannot conclude that counsel's performance was deficient. All of the selected jurors

indicated minimal familiarity with Keith's case and affirmed that they could be impartial.

CONCLUSION

¶30 For the foregoing reasons, we affirm the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.