COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1864-CR **Cir. Ct. No. 2009CF37**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. NIESEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: DALE L. ENGLISH, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 NEUBAUER, P.J. After a 2009 trial, a jury found Thomas C. Niesen guilty of first-degree intentional homicide in the July 1976 stabbing death of nineteen-year-old Kathleen Leichtman. The judgment of conviction was entered, and Niesen was sentenced to life in prison. Niesen appeals directly from

the judgment of conviction, challenging the sufficiency of the evidence to support his conviction and several evidentiary rulings by the trial court. We affirm.

There is Sufficient Evidence to Support the Conviction.

¶2 We first address Niesen's challenge to the sufficiency of the evidence. In reviewing the sufficiency of the evidence to support a conviction, we may not substitute our 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. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶3 At trial, the court informed the jury that "[t]he district attorney, the attorney for defendant, and the defendant, have stipulated to or agreed to the existence of certain facts, and you must accept these facts as conclusively proved." We begin with the stipulated facts, which all support the jury's verdict.

> (1) On July 15, 1976, at 2:10 a.m., a citizen named David A. Webster was returning from work when he saw the body of Kathleen Leichtman lying on Rolling Meadows Drive, at which time he called the police and did not touch the body.
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> (2) Twenty-five minutes earlier, at 1:45 a.m. a citizen named Robert Besseger drove on Rolling Meadows Drive where Leichtman's body was later found; at that time there was no body.
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> (3) On July 15, 1976, sperm belonging to Niesen was found in the vagina of the deceased body of Kathleen Leichtman. No other sperm was found at that time.
>
> (4) As a matter of science, the sexual activity which resulted in Niesen's sperm being located in the body of Leichtman on July 15, 1976, must have occurred at sometime between zero and twenty-six hours prior to her death.

¶4 With the stipulated facts in mind, we summarize the evidence presented at trial in support of the jury's verdict.

¶5 The doctor who performed Leichtman's autopsy testified that her cause of death was bleeding to death from a deep and gaping neck wound and three more superficial wounds inflicted by a sharp instrument, most likely a sharp knife.[1]

¶6 A police officer testified that on the night of July 15, 1976, he was called to the scene because he was told "they had a murder and they needed some assistance." When he arrived, he saw the body in the roadway and, upon investigation, saw signs of struggle in the nearby cornfield, with trails of blood leading to the body.

¶7 Leichtman had been rooming with Rochelle Lyon in July 1976 and both were go-go dancers at the Other Place, a club in Fond du Lac. Lyon danced at the club on July 14, 1976, and Leichtman was scheduled to dance the next few nights. Before going on stage on July 14, Lyon saw Leichtman at the bar with a man she described as having dark, wavy, shoulder-length hair and glasses. Later, while standing next to the same man, Leichtman told Lyon she was going out to

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[1] The element of intent is not at issue. In his brief, Niesen "concedes proof of the 'intent' element" pointing to the coroner's testimony and acknowledging "[t]he evidence constituted that someone intended to cause Leichtman's death beyond a reasonable doubt."

In order to convict for first-degree intentional homicide, the State was required to prove that Niesen violated WIS. STAT. § 940.01(1), which states: "whoever *causes* the death of another human being with *intent* to kill that person is guilty of a Class A felony." (Emphasis added.)

At issue then is whether it was Niesen who caused Leichtman's death. Niesen argues that the State did not "establish by sufficient evidence beyond a reasonable doubt it was Niesen who wielded the knife which killed Leichtman."

"get high" and would be "right back." Lyon saw the man leave with Leichtman at 11:00 p.m. Lyon never saw Leichtman again. Lyon identified a photo taken of Niesen in 1976 as "similar" to the man she saw Leichtman leave with to "get high" on July 14, 1976.

¶8 Tom Cichocki, who was a customer at the Other Place on July 14, 1976, testified that he thought he and Leichtman had made arrangements to go out that night, but when he came in, she did not say hello and instead he saw her leave with another man. The man she left with was about 5'10"-5'11", solid build, black, wavy hair and glasses. Cichocki agreed that Niesen's 1976 photo looked similar to the man Leichtman left with on July 14, 1976.

¶9 Niesen's sister, Lori Paulson, confirmed that the 1976 photo was of her brother Tom and that it accurately depicted how Niesen appeared in 1976. Paulson testified that Niesen was under the influence of drugs on "most days" in 1976, that his behavior was "erratic" and he was often out of control.

¶10 When interviewed by the police in 2009, Niesen confirmed that he was a heavy drug user in July 1976 when he lived in Appleton.

¶11 Lance Shuck testified that he and Niesen would go to the clubs together and use drugs. He indicated that Niesen would routinely try to pick up girls by asking if they wanted to "get high."

¶12 After being shown the 1976 photo of Niesen, Renota Shuck, Lance's wife, a dancer at the Other Place in 1976, identified Niesen as the person in the photo: "That's Tom." She testified that in 1976 she saw Niesen carry a knife, at times it was a three and one-half inch blade jackknife and other times it was a lock

blade knife with a four-inch blade. She further testified that Niesen carried a knife some of the times they hung out at the bars in downtown Appleton.

¶13 Niesen's former wife, Ja Cee Crull, was interviewed by Fond du Lac detectives in January 2009 regarding the death of Leichtman. Crull also testified at trial as to what she had told detectives in 2009. In the mid-1980s, Crull was a dancer at the Other Place. She met Niesen there in 1985 when he offered her cocaine. They frequented the Other Place. They got married and stayed together for fifteen months in 1985-86. Crull did not formally divorce Niesen until 1997. She and Niesen did drugs their entire time together and Niesen had been using drugs at least as far back as 1975 or 1976. Crull became sober in 1999. Crull indicated that Niesen "always" carried a knife with a three and one-half inch blade and a release button at the bottom, even when they went out to clubs such as the Other Place. Crull was shown State's exhibit 45 and testified that it was similar to the knife she saw Niesen carry in 1985-86. This knife was the knife Niesen turned over to police when he was interviewed in February 2009; the manufacturer confirmed that the knife was purchased in 1982 and was not in existence in 1976.

¶14 Crull further testified that in 1986 Niesen told her they were soul mates and that it was strange that they had met at the Other Place because he had not been to the Other Place in a long time. She asked him why he had not been there in a long time, and she said his "exact words" were, "I met somebody there and it went horribly wrong." She asked him what he meant by "horribly wrong" and he said "she ended up dead. And a weapon went off a bridge." She testified that this scared her and she did not ask him any more questions.

¶15 Crull testified that when she was first interviewed by Fond du Lac detectives she did not tell them what Niesen had told her about someone ending up

dead. But that after the interview, she discussed Niesen's admissions with her husband, Buddy Brock, who encouraged her to tell the police. Crull then called Detective Steve Kaufman and provided the information she had withheld during the live interview three days earlier.

¶16 Kaufman testified at trial and confirmed that Crull first told him about Niesen's admissions three days after the live interview. Thereafter, Kaufman interviewed Niesen three times in early 2009 and excerpts from these recorded interviews were introduced into evidence during Kaufman's testimony.

¶17 Initially Niesen told Kaufman he could not recall ever being at the Other Place in Fond du Lac. He then said he had been there but "everything was a drug haze back then." Niesen confirmed that he was living in Appleton in 1976, he was a heavy drug user and later married Crull. Niesen recalled that he met Crull at a strip club, but then he could not remember where. However, twenty minutes into the interview, Niesen asked where the officers were from. When they told him Fond du Lac police department, there was a long pause and Niesen "turned white" according to Kaufman. When the officers mentioned the Other Place, there was another long pause and then Niesen volunteered that his former wife Crull "worked there a couple times."

¶18 Kaufman then told Niesen they were investigating a cold case from 1976; another long pause occurred before Niesen said he could not remember that far back. Kaufman asked him whether "something happened back then" and Niesen answered,"[I]t's possible but I'm not a killer." Kaufman testified that at no point had he accused Niesen of anything, nor had he mentioned anything about a killing, nor had he said that he was investigating Niesen as a suspect. In reference

to something happening back in 1976, Niesen also said both "I don't recall" and "it could have."

¶19 As the interview progressed, Niesen clearly recalled the Other Place, that Crull had worked there and that it was halfway to Milwaukee. When he was asked "what happened," there were long pauses and Niesen just stared. He said only that he "can't remember." He never asked who was killed or how. When Niesen was confronted with the fact that the police recovered his DNA, Niesen did not ask what type of DNA or where his DNA was found. When questioned at the jail two days later, Niesen told police, "I had to have been there. You got my DNA. That doesn't mean shit." Police had not yet told Niesen what type of DNA evidence they had.

¶20 Leichtman's purse containing her identification was found in a dump among construction materials which came from another dumpster near a motel and apartment complex construction site on Spencer Road six-tenths of a mile from Niesen's Spencer Road home at the time.

¶21 From the record, we conclude that there was sufficient evidence on which a rational jury could rely to find Niesen guilty. The evidence presented at trial in support of the jury's verdict is not so lacking in probative value and force that no reasonable trier of fact could have found Niesen guilty beyond a reasonable doubt. Niesen's sufficiency of the evidence argument fails.

The Trial Court Properly Exercised its Discretion with Respect to Each of the Challenged Evidentiary Rulings.

¶22 Niesen also challenges several evidentiary rulings by the trial court. The trial court's decision to admit or exclude evidence is discretionary and will not be overturned by this court if there is a reasonable basis for it and the trial

court relied on accepted legal standards and relevant facts of record. *See* ***State v. Ringer***, 2010 WI 69, ¶24, 326 Wis. 2d 351, 785 N.W.2d 448. Evidence is not admissible unless it is relevant. WIS. STAT. § 904.02 (2009-10).[2]

¶23 First, Niesen claims the trial court erred in admitting into evidence and publishing to the jury the knife which Niesen owned at the time of his arrest in 2009. We disagree. At trial, the State introduced the unobjected-to testimony of Shuck that in 1976 Niesen carried, at different times, a couple different types of knives and sometimes would carry one to the bars they frequented. The State further introduced the unobjected-to testimony of Crull that Niesen was in the habit of carrying a knife around with him in 1985-86, including at clubs. Crull testified that the knife provided in 2009 looked similar to the knife she saw Niesen carry in 1985-86. The evidence was relevant to prove that Niesen was known to carry a knife at the time of the murder and known to always carry one ten years later when he was with Crull. *See* WIS. STAT. § 904.06(1) ("evidence of the habit of a person … whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person … on a particular occasion was in conformity with the habit or routine practice").

¶24 Second, Niesen claims that the trial court erred when it failed to suppress the identification by Lyon and Cichocki of Niesen's 1976 photo. Niesen also takes issue with the State refreshing the witnesses' recollections before trial by showing these witnesses a 1976 composite of the suspected killer and then showing them the 1976 photo of Niesen. Niesen's claim of error again fails.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶25 The trial court did not allow the composite to be shown to the jury. And, as the trial court pointed out, where is the violation when the two witnesses were already shown the same composite "way back in 1976?" It is not a violation "for the State in talking to their potential witnesses to show them [the composite] to see if it refreshes their recollection." We agree.

¶26 Further, Niesen's trial counsel basically conceded that the trial court properly exercised its discretion when it ruled that the State could ask the two witnesses whether Niesen's 1976 photo resembled the man they saw leave with Leichtman, since the court was not allowing them to testify that the photo *was* the man they saw leave with Leichtman. In response to the trial court's ruling, the following exchange occurred:

> [Defense Counsel]: Because I think in a way the Court is granting part of the relief that I'm requesting.
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> [The Court]: Okay.
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> [Defense Counsel]: Because there's not going to be the identification. That's a good bit of what I'm requesting. That no one look at the photo and say …. [t]he person in the photograph is the person that I remember. It's my understanding from the Court's ruling that that's not going to occur.
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> [The Court]: That's correct.

We agree that the trial court's admission of this evidence was not in error. Given that the events occurred thirty-three years before trial, the court did not err in concluding that the witnesses could testify as to whether the photo taken of Niesen in 1976 resembled the man they saw leave with the victim.

¶27 Third, Niesen contends that the trial court erred in precluding evidence that Leichtman was a prostitute because it denied Niesen his opportunity to present his defense and forced Niesen to elect between his Fifth Amendment

right to present a defense and his Sixth Amendment right not to testify. Specifically, Niesen claims that the court's decision precluding reference to Leichtman as a prostitute "denied Niesen his defense he had consensual sexual intercourse with the victim wholly independent of her assault and murder."

¶28 Niesen's final argument also fails. We agree with the State that regardless of whether or not Leichtman was a prostitute, Niesen could have argued that he had sex earlier in the day, that the sex was consensual and that he had no part in the murder later on—all without having to label Leichtman a prostitute. The trial court properly exercised its discretion in concluding that the marginal probative value of labeling the victim a prostitute would be substantially outweighed by the danger of unfair prejudice.

¶29 We conclude that there was sufficient evidence to uphold the judgment of conviction. The trial court properly exercised its discretion with respect to each of the evidentiary decisions.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.