COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-2383-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT L. WARD,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Robert L. Ward appeals from a judgment convicting him of being party to the crime of first-degree intentional homicide contrary to §§ 939.05 and 940.01(1), STATS. Ward raises numerous issues on appeal which involve the trial court's exercise of its discretion. Because we conclude that the trial court did not erroneously exercise its discretion, we affirm.

Reynaldo Ramos was bludgeoned and stabbed to death in his bedroom late in the evening of June 1, 1992. Robert Ward, Aaron Claybrook and Ramos's wife, Debbie Ramos, were charged in the crime. Ward and Claybrook were tried and convicted together; Debbie was tried and convicted separately.[1] Further facts will be stated as we address the appellate issues.

SHACKLES

Ward challenges the trial court's refusal to remove his shackles in the courtroom. Ward argued in the trial court that shackles implied guilt, and security in the courtroom could be assured by other means. The State contended that Ward was a flight risk given the severity of the charge against him and the lengthy sentence Debbie had already received. The State also had security concerns because the courtroom would be crowded. The State observed that because Ward would be seated at counsel table, the shackles would not be particularly noticeable to the jury, and precautions could be taken to minimize the jury's opportunity to see the shackles.

The trial court required Ward to remain in shackles because he had been accused of a "very violent criminal act," and in the absence of restraints the jurors would be distracted by concerns for their safety in the crowded courtroom. The trial court did not want to risk the possibility of disruptive behavior. The trial court also considered that the jurors would know Ward was in custody and would not be surprised to see him in shackles.

Ward argues that the trial court's refusal to remove his shackles violates ***State v. Grinder***, 190 Wis.2d 541, 527 N.W.2d 326 (1995).[2] In ***Grinder***, defense counsel claimed on the first day of trial that Grinder's appearance in shackles compromised his right to a fair trial because shackles would lead the jurors to believe that Grinder was dangerous and undermine the presumption of innocence. ***Id***. at 548, 527 N.W.2d at 329. The trial court declined to interfere

[1] We reversed Debbie's conviction in ***State v. Ramos***, No. 93-2448-CR, unpublished slip op. (Wis. Ct. App. Aug. 10, 1994).

[2] We ordered supplemental briefs from the parties addressing ***State v. Grinder***, 190 Wis.2d 541, 527 N.W.2d 326 (1995), which was decided after briefing concluded in this appeal.

with the sheriff's procedures regarding shackles and ruled that shackles were appropriate because Grinder was charged with extremely violent crimes. The court gave counsel the option of having counsel table draped in brown paper to shield the jurors from the shackles. ***Id***. at 548-49, 527 N.W.2d at 329.

The supreme court held that the trial court erroneously exercised its discretion because it relied primarily upon the sheriff's procedures rather than considering whether Grinder actually posed a risk of violence or escape. ***Id***. at 551, 527 N.W.2d at 330. Notwithstanding this conclusion, the ***Grinder*** court held that even if the trial court failed to weigh the specific need to restrain Grinder, he was not prejudiced because "there [was] no evidence to indicate that the jury either was aware of or actually saw him in shackles at any point." ***Id***.

Ward's shackles challenge fails for the same reason because Ward points to no evidence that the jury saw him shackled.[3] Also, Ward has not shown that he was prejudiced by being shackled in the courtroom. Further, while Ward complains in his supplemental brief that the trial court completely discounted the impact on jurors of seeing a defendant in shackles, he goes too far in suggesting that this was the only factor considered by the trial court. The trial court considered several appropriate factors, including the nature of the charges against Ward, his background and possible security risks in the courtroom. These are legitimate concerns under ***Grinder***. *See* ***id***. at 552, 527 N.W.2d at 330. It is within the trial court's discretion to decide whether a defendant should be shackled during trial as long as the trial court sets forth its reasons justifying restraints. ***Id***. at 550-52, 527 N.W.2d at 329-30. The trial court did so here.

[3] Ward argues that the record does not demonstrate that the trial court took steps to prevent the jurors from viewing the shackles. However, it is Ward's burden to demonstrate that the jury "was aware of or actually saw him in shackles at any point." *See* ***Grinder***, 190 Wis.2d at 551, 527 N.W.2d at 330. Therefore, we do not address this argument.

JURY SELECTION

Ward challenges the trial court's refusal to draw a jury from another county and contends that the jury drawn from Kenosha County was not impartial because it was exposed to pretrial publicity about the crime in the form of newspaper articles and television reports. While the trial court acknowledged that there had been "a good deal of publicity in the case," it found that the reports regarding the case were "news-based," did not editorialize regarding guilt or innocence and were not devised to influence public opinion against Ward and Claybrook. The court also found that the State did not generate publicity in the case and that none of the information appearing in news reports had been suppressed.

Whether to change venue is within the trial court's discretion. ***Hoppe v. State***, 74 Wis.2d 107, 110, 246 N.W.2d 122, 125 (1976).[4] The trial court should order a change of venue if the defendant presents sufficient evidence that it is reasonably likely a fair trial cannot be had. ***Id***. In analyzing whether the trial court properly exercised its discretion, we consider the proof offered of community prejudice and whether that prejudice manifested itself in the jury selection and the verdict. *See* ***id***. at 111, 246 N.W.2d at 125-26.

With regard to community prejudice, Ward points to the fact that Debbie's trial, which was held several weeks before the Ward/Claybrook joint trial, was covered in newspaper and television reports, some of which identified Ward as Debbie's "married boyfriend." Ward contends that other reports evoked sympathy and concern for Debbie's daughter, Charika Parker, a key witness for the State, and that a prosecutor's reference during Debbie's trial to Ward's involvement in the murder was reported in a newspaper with a sizeable circulation in Kenosha County.

Media coverage of shocking crimes is likely to make prospective jurors aware of the general nature of the crimes. *See* ***id***. at 112, 246 N.W.2d at

[4] The trial court and the parties treated Ward's motion for a change of venire as a motion for a change of venue. Ward takes the same approach on appeal. Therefore, we apply the principles applicable to motions for change of venue.

126. "However, it has been repeatedly held that an informed jury is not necessarily to be equated with a partial or biased jury and that mere familiarity with specific facts will not, in itself, disqualify jurors." ***Id***. "[O]bjective, informational, and noneditorial [reporting] ... is not to be considered prejudicial." ***Id***.

We agree with the trial court that the information available pretrial was information which ultimately came into evidence at trial or would have been admissible. The newspaper articles offered by Ward to support his claim of community prejudice were objective, informational and noneditorial. Finally, although Debbie's trial was held several weeks before the Ward/Claybrook trial, we do not agree that the proximity of the two trials, in and of itself, required a change of venue for Ward and Claybrook.

We further conclude that community prejudice did not taint the jury selection process or the verdict. Ward argues that sixteen of the original twenty-nine jurors admitted that they had heard or read something about his case. Ward further argues that four of those jurors deliberated on the case (a fifth juror was dismissed as an alternate). In particular, jurors Johnson, Nielson and Burns recalled that: (1) Reynaldo was beaten and stabbed in his home; (2) his stepdaughter (Charika Parker) hid in the closet during the incident and recognized an attacker's voice; (3) Debbie was convicted in Reynaldo's death; and (4) a boyfriend was involved. Ward argues that he was unable to remove from the jury all those jurors who had knowledge or opinions regarding the crime, or who lived or once lived in the neighborhood of the murder.

An individual can qualify as an impartial juror if he or she "can lay aside his or her opinion and render a verdict based on the evidence presented in court." ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733-34 (1979). "The mere expression of a predetermined opinion as to guilt during the voir dire does not disqualify a juror *per se*." ***Id***. at 33, 280 N.W.2d at 733. Of the specific jurors identified by Ward as having been exposed to pretrial publicity, each juror denied having formed an opinion about the case and agreed to put aside information gleaned from the media in favor of evidence adduced at trial. Ward has not demonstrated that the jury was other than impartial.

Although Ward contends that prejudice was likely to result if he was tried by jurors who lived in the neighborhood of the murder and felt personally threatened by his conduct, Ward did not ask those jurors whether they would be more likely to convict because the crime occurred in their neighborhood. Because this issue is not preserved for appellate review, we do not address it further. *See* ***State v. Kaster,*** 148 Wis.2d 789, 804-05, 436 N.W.2d 891, 897-98 (Ct. App. 1989) (we will not consider an issue where the record does not provide a factual underpinning for the argument).

We conclude that the trial court properly exercised its discretion in declining to draw a jury from another county.

SEVERANCE

Ward seeks review of the trial court's refusal to sever his trial from Claybrook's. Although Ward sought severance on the ground that he and Claybrook would present antagonistic defenses, he declined to disclose his possible defenses so the trial court could evaluate this claim. Instead, Ward argued that evidence relating solely to Claybrook would prejudice him. The State argued that Ward's refusal to reveal his defense precluded the trial court from concluding that Ward's defense was antagonistic to Claybrook's. The trial court declined to sever the trials because "mere finger pointing is absolutely not sufficient to call for separate trials."

On appeal, Ward argues that he should have been tried separately because the physical evidence was heavily weighted against Claybrook. He argues that the evidence against him was "largely circumstantial," while the evidence against Claybrook was "largely physical." Severance is within the trial court's discretion. ***State v. Jennaro***, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977). We review whether the trial court properly exercised its discretion at the time it was asked to do so. *See* ***id.*** at 505-06, 251 N.W.2d at 803.

At the time Ward brought the severance motion, he did not provide the trial court with sufficient information such that it could determine whether a body of evidence was relevant only to Claybrook's guilt. *See* ***State v. Patricia A.M.***, 168 Wis.2d 724, 732, 484 N.W.2d 380, 383 (Ct. App. 1992), *rev'd on*

other grounds, 176 Wis.2d 542, 500 N.W.2d 289 (1993). Therefore, the trial court did not err in declining to sever based on the showing Ward made pretrial.

The trial court's reluctance to grant severance based upon an assertion that the defendants' defenses would be antagonistic was born out at trial. Ward and Claybrook did not employ antagonistic defenses or engage in finger pointing. In fact, during closing argument, Ward's counsel pointedly told the jury that his comments would be restricted to Ward. Each defendant blamed Debbie for the murder, not his codefendant. Ward does not point us to those portions of the record which substantiate that the concerns which motivated him to seek severance manifested themselves at trial.[5] Based upon this record, we conclude that the trial court properly exercised its discretion in denying Ward's motion to sever his trial from Claybrook's.

EVIDENTIARY RULINGS

1. Photographs and Videotape

Reynaldo suffered multiple, gruesome injuries. Ward contends that he did not receive a fair trial because photographs depicting Reynaldo's body and photographs and videotapes of the autopsy and crime scene were admitted into evidence.

Ward objected to several enlarged photographs and claimed that they were cumulative to a previously shown videotape of the crime scene. The State responded that certain photographs were enlarged by the medical examiner to assist him in cataloging Reynaldo's injuries for the autopsy report because the wounds were so numerous he could not count them during the autopsy. The medical examiner selected those photographs which would assist him in testifying about the victim's injuries and cause of death. The State also contended that: (1) the jury needed to see how Reynaldo was injured; (2) evidence of the extent of Reynaldo's injuries supported the State's theory that at

[5] Ward also does not argue that his defense strategy changed as a result of the trial court's refusal to sever his trial from Claybrook's.

least two people beat him; (3) Reynaldo's injuries reflected a struggle and Claybrook had a black eye the day after the murder; and (4) Reynaldo's bedroom was wrecked, and photographs of this supported the testimony of Debbie's daughter, Charika, that she heard a commotion the night of the murder.

In ruling on Ward's objections, the trial court noted that the State needed to reconstruct the murder for the jury. While agreeing that the photographs were gruesome, the trial court discounted Ward's argument that they would make the jury more likely to convict. The trial court found that the probative value of the photographs outweighed the danger of unfair prejudice. The photographs were displayed to the jury and sent into the jury room during deliberation.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* ***State v. Lindh***, 161 Wis.2d 324, 346-47, 468 N.W.2d 168, 175 (1991).[6] Whether to admit evidence is within the trial court's discretion and we will uphold such rulings if they have a reasonable basis. *See* ***id***. at 348-49, 468 N.W.2d at 176. It is also discretionary with the trial court whether to display photographs to the jury and allow the photographs to be sent to the jury room. ***State v. Thompson***, 142 Wis.2d 821, 841, 419 N.W.2d 564, 571 (Ct. App. 1987). We will uphold the trial court's decision unless it was "wholly unreasonable or the only purpose of the photographs [was] to inflame and prejudice the jury." ***Id***.

We conclude that the trial court properly exercised its discretion. It considered the probative value of the evidence, the danger of unfair prejudice and gave its reasons for its decision. The trial court correctly determined that the photographs would permit the State to recreate the crime as accurately as possible and support its theory that Reynaldo's injuries were caused by more than one person who intended to kill him. The trial court's rulings were reasonable.[7]

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[6] Ward does not argue that the photographs were irrelevant.

[7] While the trial court apparently rejected the premise that gruesome pictures can be unfairly

For the same reasons, we reject Ward's challenge to the trial court's discretionary decision to admit a videotape of the crime scene. Ward argues that the videotape was cumulative. The trial court ruled that the videotape would reconstruct the crime for the jury and assist it in determining who committed it.

Ward also claimed that he had an alibi which rendered the graphic photographs unnecessary. An alibi defense does not relieve the State of its obligation to prove all the elements of a crime beyond a reasonable doubt. *See* ***State v. Plymesser***, 172 Wis.2d 583, 594, 493 N.W.2d 367, 372 (1992). The photographs were admissible to support an inference that the person or persons who severely beat Reynaldo intended to kill him. *See* ***Sage v. State***, 87 Wis.2d 783, 787-90, 275 N.W.2d 705, 707-09 (1979).[8]

2. Sherney Johnson and LaShonda Mayhall

The trial court permitted Sherney Johnson and LaShonda Mayhall to testify regarding statements Debbie made to them in the Kenosha County jail. In essence, Debbie admitted to Johnson and Mayhall that she killed Reynaldo. Ward objected on the ground that Mayhall's and Johnson's testimony would violate his Sixth Amendment confrontation rights.

The trial court found that Debbie was unavailable because she "[p]ersist[ed] in refusing to testify concerning the subject matter of [her] statement despite an order of the judge to do so." *See* § 908.04(1)(b), STATS.[9] The

(..continued)
prejudicial, it went on to exercise its discretion in ruling that the pictures' probative value outweighed their prejudicial effect.

[8] Intent was an element of the crime with which Ward was charged. *See* § 940.01(1), STATS.

[9] Debbie invoked her Fifth Amendment right not to testify at the Ward/Claybrook trial. Despite being granted immunity, she declined to testify. The trial court found her in contempt and ordered her jailed pending further contempt proceedings. Debbie never testified.

trial court then admitted Debbie's statements to Johnson and Mayhall as exceptions to hearsay under § 908.045, STATS.[10]

A two-pronged approach applies to determining whether hearsay evidence satisfies the Confrontation Clause: "(1) the declarant must be unavailable, and (2) the evidence must bear some indicia of reliability." ***State v. Patino***, 177 Wis.2d 348, 372, 502 N.W.2d 601, 610-11 (Ct. App. 1993). If the evidence "has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." ***Id***. (quoted source omitted).

Statements against interest under § 908.045(4), STATS., are firmly rooted exceptions to the hearsay rule. ***State v. Denny***, 163 Wis.2d 352, 358, 471 N.W.2d 606, 609 (Ct. App. 1991). Debbie's statements to Johnson and Mayhall were statements against interest because they tended to subject her to criminal liability. Section 908.045(4). Once Debbie was unavailable to testify, the trial court need not have conducted an independent inquiry into reliability because the evidence fell within a firmly rooted hearsay exception. *See* ***Patino***, 177 Wis.2d at 372-73, 502 N.W.2d at 611.

Ward argues that Johnson and Mayhall were not trustworthy because they were inmates. Johnson and Mayhall gave essentially the same testimony: Debbie admitted to them on separate occasions that she was involved in the murder of her husband. Johnson's and Mayhall's criminal convictions do not render their testimony inadmissible; rather, their criminal histories were a factor the jury could consider in evaluating their credibility.

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[10] Section 908.045(4), STATS., does not exclude as hearsay:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

Finally, Debbie's statements to Johnson and Mayhall were relevant. Ward told the police that he rode around in Racine with Debbie on the night of the murder. Debbie told Johnson and Mayhall that she killed her husband on that night. This tends to undermine Ward's contention that he was uninvolved in the murder.

3. Anthony Parker

Ward challenges the trial court's decision to permit Anthony Parker, the father of Debbie's children, to testify that one year before the murder Debbie told him during a telephone conversation that she wanted to kill Reynaldo because he had beaten her, causing a miscarriage. Debbie also allegedly told Anthony that she intended to kill Reynaldo to obtain insurance proceeds and their house.

The trial court admitted Anthony's testimony under § 908.03(3), STATS., as a statement of the declarant's then-existing state of mind or emotion, that is, Debbie's desire or intent to kill her husband. The trial court also found that Debbie's statement to Anthony was admissible under § 908.045(4), STATS., as a statement against interest. We agree with the trial court's rulings on this question and conclude that Ward's confrontation rights were not violated because §§ 908.03(3) and 908.045(4) are firmly rooted hearsay exceptions. *See* ***State v. Jackson***, 187 Wis.2d 431, 435-37, 523 N.W.2d 126, 128-29 (Ct. App. 1994) (§908.03(3)); ***Denny***, 163 Wis.2d at 358, 471 N.W.2d at 609 (§908.045(4)); ***Patino***, 177 Wis.2d at 372-73, 502 N.W.2d at 611.

Ward also argues that Debbie's statement to Anthony was uncorroborated and that parts of it were untrue. However, Ward does not provide any citation to the record for the latter claim. With regard to Ward's claim that the statement was uncorroborated, Ward does not cite any authority for the proposition that the statement must be corroborated in order to be trustworthy. Rather, its trustworthiness emanates from the fact that it fits within a firmly rooted hearsay exception. *See* ***Jackson***, 187 Wis.2d at 435-37, 523 N.W.2d at 128-29.

Finally, Ward argues that Debbie's statement to Anthony was a year old, had little or no probative value and was unfairly prejudicial. We disagree. Ward told police that he was with Debbie on the night of the murder. Debbie had previously expressed a desire to kill her husband. In this context, Debbie's statement had probative value and was not unfairly prejudicial to Ward.

4. Earnest Ward/Karen Golden

Ward challenges the trial court's decision to permit Earnest Ward, his brother,[11] to testify that in the early evening hours of June 1, 1992, the night before the murder, an intoxicated Claybrook told him that he was going to kill someone that night[12] and invited Earnest to join him. Earnest declined. Shortly thereafter, Earnest went to the home of Karen Golden, Claybrook's sister, to tell her what Claybrook said to him. Golden testified that Earnest told her that Claybrook and Ward were going to kill Reynaldo.

Ward focuses his appellate argument on Golden's testimony about what Earnest told her. Golden testified that Earnest told her that Ward and Claybrook were going to Kenosha "to knock off Debbie's husband." However, Earnest did not tell the jury he identified Reynaldo as the intended victim when he spoke with Golden. The State argued that Golden was offering a prior inconsistent statement of Earnest's when she said he told her Reynaldo was the intended victim. The trial court agreed.

Prior inconsistent statements are not hearsay. *See* § 908.01(4)(a)1, STATS. Here, Claybrook told Earnest that he was going to kill someone and Earnest relayed that information to Golden. Golden then testified that Earnest made a more specific statement to her of Claybrook's and Ward's intentions.

[11] Earnest is also Claybrook's first cousin.

[12] Earnest testified that he and Ward were also intoxicated.

Golden's testimony was inconsistent with Earnest's testimony as to what Earnest told her. Therefore, it was admissible.[13]

5. Officer Anderson

Finally, Ward argues that the trial court improperly limited his ability to present a defense when it refused to permit Kenosha police officer Dennis Anderson to testify that he observed three individuals in the area the morning after the murder. The evidence was offered to counter the testimony of a neighbor, Roland Loney, that he heard a commotion next door around the time of the murder and saw two black men and one black woman in the area of the victim's house between 11:30 p.m. and 12:35 a.m.

Ward stated that Anderson would testify that he saw a similarly configured trio in the area at about 7:15 or 7:30 a.m. the following morning. The individuals were not Debbie, Ward or Claybrook. The trial court excluded Anderson's testimony as irrelevant because it was unlikely that seven hours after the murder Loney and Anderson saw the same people near the victim's home.

Ward makes much of the fact that Anderson saw two black men and a black woman near the murder scene seven hours after the murder. However, in this case, the passage of time between the two sightings supports the trial court's discretionary decision to exclude Anderson's testimony as irrelevant. *See* ***Lindh***, 161 Wis.2d at 348-49, 468 N.W.2d at 176.

"Evidence is irrelevant on remoteness grounds if `the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in the proof thereof.'" ***State v. Oberlander***, 149 Wis.2d 132, 143, 438 N.W.2d 580, 584 (1989) (quoted

[13] Earnest returned to testify as part of Ward's case. He stated that he never told Golden that Ward was going to be involved in the murder Claybrook mentioned or that Reynaldo was the intended victim. It was for the jury to resolve the conflicts in the testimony of Earnest and Golden. *See* ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980).

source omitted). Loney's testimony pertained to the approximate time of the murder. Anderson's testimony pertained to a time period approximately seven hours later. The latter testimony had no rational or logical connection to the circumstances of the murder.

Because irrelevant evidence was excluded, Ward was not deprived of his right to confrontation or his right to present a defense. *See* ***State v. Walker***, 154 Wis.2d 158, 192, 453 N.W.2d 127, 141, *cert. denied*, 498 U.S. 962 (1990).

By the Court.—Judgment affirmed.

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