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. 94-1057-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON K. CLAYBROOK,

Defendant-Appellant.

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

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Aaron K. Claybrook appeals from a judgment convicting him of first-degree intentional homicide while using a dangerous weapon as party to the crime, contrary to §§ 940.01(1) and 939.05, STATS., and from an order denying his postconviction motion. 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 Reynaldo's wife, Debbie Ramos, were charged in the crime. Ward and

Claybrook were tried and convicted together; Debbie was tried and convicted separately.[1]

Several of the issues Claybrook raises on appeal were also raised by Ward in his appeal, ***State v. Ward,*** No. 93-2383-CR, unpublished slip op. (Wis. Ct. App. Nov. 15, 1995). To the extent that Claybrook raises an issue which we have decided as part of Ward's appeal, we will incorporate our analysis in ***Ward***.

Claybrook argues that he was denied a fair trial because gruesome photographs and videotapes were admitted into evidence. As we held in ***Ward,*** the trial court did not misuse its discretion in admitting this evidence.

Claybrook contends that he was denied a fair trial because he was shackled at the ankles throughout trial. As we held in ***Ward,*** the trial court did not erroneously exercise its discretion when it required the defendants to be shackled at trial.

A few additional observations are required to dispose of Claybrook's argument. We noted that Ward did not point to any evidence that the jury saw him shackled. In contrast, Claybrook's postconviction motion included the affidavit of trial counsel which stated that the jury had the opportunity to see Claybrook in shackles and on occasion had a plain view of him in shackles. No evidentiary hearing was held on this motion.

A record relating to the jury's ability to view a defendant in shackles should be made before or during trial, not after trial, so that the trial court has an opportunity to assess the situation and determine what steps need to be taken to restrict the jury's view of the shackles. *Cf.* ***State v. Grinder,*** 190 Wis.2d 541, 551, 527 N.W.2d 326, 329 (1995). For this reason, we will not consider trial counsel's affidavit.

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

Claybrook argues that the trial court should have drawn the jury from another county due to pretrial publicity. We rejected this argument in ***Ward*** and do so here for the same reasons.

Claybrook contends that he was prejudiced by being tried jointly with Ward, particularly in light of evidence that Ward and Debbie were romantically involved. Claybrook contends that this evidence applied only to Ward, was unduly prejudicial to him and would have been inadmissible had he been tried separately. As to the latter point, we disagree. The relationship between Ward and Debbie was a fact which was necessary to the State's theory of why the murder occurred and to place the murder in context. Therefore, evidence of the Ward-Ramos relationship would have been admissible had Claybrook been tried separately. Claybrook's argument does not persuade us that severance was warranted. *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) (severance is warranted when a line of evidence is relevant and admissible as to only one defendant).

Claybrook challenges the trial court's evidentiary rulings regarding Sherney Johnson, LaShonda Mayhall and Anthony Parker. We rejected similar challenges in ***Ward.*** In addition to our analysis in ***Ward,*** we note that Claybrook did not object to this testimony on confrontation grounds. A confrontation objection must be made with sufficient particularity or it is waived. ***State v. Gove,*** 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989).

Claybrook challenges an evidentiary ruling regarding James Ward. The trial court permitted James, Robert Ward's brother, to testify that one day before the murder, he heard Debbie say to Claybrook that she wished she could find someone to "bump her husband off." Claybrook argues that the admission of this evidence violated his confrontation right. We disagree.

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).

The trial court admitted the statement as a statement by a coconspirator under § 908.01(4)(b)5, STATS. To be admissible under this section, the co-conspirator's statement must be made "during the course of and in furtherance of the conspiracy." ***Id.*** "A defendant's right to confrontation is not violated by admission of a co-conspirator's statement that passes muster under Rule 908.01(4)(b)5, Stats." ***State v. Whitaker,*** 167 Wis.2d 247, 264 n.10, 481 N.W.2d 649, 656 (Ct. App. 1992).[2]

Claybrook does not persuasively argue that the trial court erroneously admitted Debbie's statement through James's testimony. The trial court found that a conspiracy was suggested by the evidence. Claybrook does not suggest this finding is unsupported by the record.

Claybrook argues that the trial court erred when it required him to appear before the jury wearing a pair of cut-off blue jean shorts and a pair of Fila tennis shoes allegedly worn by one of Reynaldo's assailants because the demonstration prejudicially undermined the presumption of innocence.[3] The trial court ruled that the jury should have an opportunity to observe Claybrook in the shorts and shoes to see if they fit. While Claybrook's counsel questioned the probative value of the demonstration, he focused his comments on the logistics of the demonstration.

As an initial matter, we conclude that this appellate argument is waived because Claybrook did not object to the demonstration at trial. *See* ***State v. Copening***, 103 Wis.2d 564, 571, 309 N.W.2d 850, 853 (Ct. App. 1981). Even if the issue were not waived, we would conclude that the trial court properly exercised its discretion in permitting this relevant presentation to the jury. *See* ***State v. Lindh***, 161 Wis.2d 324, 348, 468 N.W.2d 168, 176 (1991) (the admission of evidence is within the trial court's discretion). There was testimony that

[2] The coconspirator exclusion from hearsay is firmly rooted. ***Bourjaily v. United States,*** 483 U.S. 171, 183 (1987).

[3] The trial court removed the shackles from Claybrook's feet during this demonstration.

Claybrook wore the shoes and shorts on the night of the murder and that they were bloody when found. Claybrook's appearance before the jury in the shoes and the shorts was probative on the question of whether they fit him. We see no unfair prejudice because the demonstration did not have "a tendency to influence the outcome [of Claybrook's trial] by *improper* means." *See* ***State v. Mordica***, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992).

Claybrook argues that he did not personally waive his right to testify. In so arguing, Claybrook claims that ***State v. Albright***, 96 Wis.2d 122, 291 N.W.2d 487, *cert. denied,* 449 U.S. 957 (1980), should be abandoned. The ***Albright*** court recognized that while a defendant has a due process right to testify at trial, that right does not fall within a category of fundamental rights "which can only be waived in open court on the record by the defendant." ***Id***. at 130, 291 N.W.2d at 490-91. Although Claybrook argues that ***Albright*** should no longer control, we recently stated that ***Albright*** still governs in this area.

In ***State v. Wilson***, 179 Wis.2d 660, 508 N.W.2d 44 (Ct. App. 1993), *cert. denied,* 513 U.S. ___, 115 S. Ct. 100 (1994), we refused to require trial courts "to undertake an on-the-record colloquy with the defendant at the close of the defense's case-in-chief concerning his or her right to testify." ***Id***. at 672 n.3, 508 N.W.2d at 48; *see also* ***State v. Simpson***, 185 Wis.2d 772, 779, 519 N.W.2d 662, 664 (Ct. App. 1994).

Under ***Albright***, "in the absence of the express disapproval of the defendant on the record during the pretrial or trial proceedings, [counsel] may waive the defendant's right to testify." ***Albright***, 96 Wis.2d at 133, 291 N.W.2d at 492. The record must reveal a knowing and voluntary waiver of the defendant's right to testify. ***Wilson***, 179 Wis.2d at 671-72, 508 N.W.2d at 48. These requirements are met here.

After codefendant Ward rested his case, the trial court asked Claybrook's counsel whether he had any other evidence to present. He replied he did not. Claybrook did not indicate any objection or disagreement with counsel's statement. Claybrook's silence "is presumptive evidence of a valid waiver, by his counsel, of his right to testify." *See* ***id***. at 673, 508 N.W.2d at 49.

Claybrook argues that the trial court erroneously circumscribed his cross-examination of a state crime lab technician, Elaine Canales-Wilson, regarding fingernail scrapings. Canales-Wilson testified that fingernail scrapings were collected from the victim, but she did not examine them. Counsel asked: "What can be found from fingernail scrapings or samples?" The State objected on relevancy grounds and because the answer required speculation. Claybrook's counsel argued that an answer to the question would be relevant to show why the scrapings were not analyzed. The trial court stated that Claybrook could have pursued his own analysis of the fingernail scrapings with the crime lab. After sustaining the State's objection, the trial court instructed the jury at the State's request "that both the Constitution and the Law provides that both the State and the defense have identical rights to have evidence examined."

We conclude that the trial court misused its discretion in precluding cross-examination with regard to fingernail scrapings. *See* ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638, *cert. denied*, 510 U.S. ___, 114 S. Ct. 246 (1993). Cross-examination may be limited by considerations of relevance and materiality. ***Id***. at 679, 499 N.W.2d at 639. Here, the trial court erroneously limited Claybrook's cross-examination on a relevant matter, that is, whether the murder investigation took into account all of the physical evidence and what information can be gleaned from different kinds of evidence. Furthermore, counsel's inquiry regarding the information to be gleaned from fingernail scrapings did not require the technician to speculate. Rather, she could have testified regarding the type of findings usually made from fingernail scrapings, even though such findings were not made in this case.

We also conclude that the trial court misused its discretion in instructing the jury because the instruction impermissibly suggested that Claybrook had the burden to have the evidence examined to prove his innocence. *See* ***State v. McCoy***, 139 Wis.2d 291, 297, 407 N.W.2d 319, 322 (Ct. App. 1987), *aff'd*, 143 Wis.2d 274, 421 N.W.2d 107 (1988). The test for a jury instruction is whether the overall meaning communicated by the instruction was a correct statement of the law. *See* ***Betchkal v. Willis***, 127 Wis.2d 177, 188,

378 N.W.2d 684, 689 (1985). Here, the trial court's instruction impermissibly shifted the burden of proof.[4]

Although we conclude that the trial court erroneously precluded Claybrook from cross-examining the state crime lab technician regarding fingernail scrapings and erroneously left the jury with the impression that it was Claybrook's burden to prove his innocence by having the physical evidence examined, we conclude that the errors are harmless. An error is harmless if there is no "reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The State has to meet this burden, ***id.***, at 543, 370 N.W.2d at 232, and we look to the totality of the record to determine whether it is reasonably possible that the errors contributed to the conviction. *See* ***id***. at 547, 370 N.W.2d at 233.

James testified that on the evening of the murder, Claybrook told him that at midnight he would be starting a new life because he was taking somebody out. James identified a pair of Fila shoes as those worn by Claybrook that night. James also stated that Claybrook was wearing a pair of blue jean shorts that night. The next day, James noticed that Claybrook had a black eye. Earnest Ward testified that on the night of the murder, Claybrook told him that at midnight he was going to Kenosha to kill someone. He also testified that Claybrook was wearing shorts and Fila shoes. The next day, Claybrook was not wearing the Fila shoes and had a black eye. A son of Debbie's testified that on the day of the murder, he was in a car with his mother, Robert Ward and Claybrook, and Claybrook stated he was going to kill someone that night.

A police detective testified that he found the blood-covered Fila shoes in Debbie's car. Other police officers testified that they found a bag with bloody blue jean material in it outside Janice Claybrook's apartment.

A state crime lab technician testified that the blood on the Fila shoes and the shorts was consistent with Reynaldo's and not consistent with the

[4] The trial court's instruction could have been more precisely worded to reflect that the defense may submit evidence to the crime lab, §§ 971.23(4), (5) and 165.79(1), STATS., but is not required to do so.

blood of either Debbie, Robert Ward or Claybrook. Another expert testified that it was his opinion that impressions found at the crime scene were made by the Fila shoes or shoes of the same size and tread characteristics.

The totality of the record indicates that the State presented sufficient evidence that Claybrook was involved in Reynaldo's murder. The shoes and shorts Claybrook was wearing on the night of the murder were found with blood on them which was consistent with the victim's. The impressions of shoes like the ones he owned were consistent with those found in the room where the murder occurred. Finally, Claybrook told several people on the night of the murder that he was going to kill someone later that night and he had an injury the next day which was consistent with a struggle. Based upon this evidence, we conclude that there is no reasonable possibility that the trial court's missteps regarding the fingernail scrapings contributed to Claybrook's conviction.

Having found no reversible error, we reject Claybrook's request for a new trial.

By the Court.—Judgment and order affirmed.

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