

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 2, 1995

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, STATS.

NOTICE

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

No. 94-3139-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH WHITE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

DYKMAN, J. Joseph White appeals from a judgment convicting him of first-degree intentional homicide as a party to the crime, contrary to §§ 940.01(1), 939.05 and 939.63(1)(a)(2), STATS., and first-degree sexual assault, contrary to § 940.225(1)(b) and (7), STATS. White raises the following issues on appeal: (1) whether the trial court erred in concluding that Dane County, the place where the deceased's body was found, was the proper venue; (2) whether the trial court erroneously exercised its discretion: (a) when it admitted

testimony as to White's alleged gang activity; (b) when it permitted a witness to testify that White owned guns and a knife; and (c) when it permitted the State to display photographs of the deceased's body; and (3) whether the trial court erred when it gave a party to the crime jury instruction. We resolve these issues against White, and therefore affirm.

BACKGROUND

In February 1991, a women's body was discovered lying in a field in the Town of Deerfield in Dane County. The victim's hands had been severed from the body. Five days later, two hunters found two hands lying near railroad tracks on the border of Racine and Walworth Counties. Subsequent testing revealed the identity of the victim and that she had been sexually assaulted after her death. The autopsy report concluded that her death occurred on or about February 23, 1991.

The police charged Joseph White two-and-one-half years later with first-degree intentional homicide and first-degree sexual assault. After a six-day jury trial in which White represented himself, the jury found him guilty of both charges. White appeals.

VENUE

White argues that the trial court erred in concluding that venue was proper in Dane County, the place where the victim's body was discovered, and instead argues that the trial should have been held in Milwaukee County. Section 971.19(5), STATS., controls venue in murder trials and provides: "If the act causing death is in one county and the death ensues in another, the defendant may be tried in either county. If neither location can be determined, the defendant may be tried in the county where the body is found." White contends that the criminal complaint establishes that the death occurred in Milwaukee County. We disagree.

The complaint alleges that White's son stated that the victim was living in White's house in Milwaukee County and that "the monster hurt her in

the basement" and the "monster cut her fingers." The complaint further alleges that White told a friend that he "killed [the victim], cut off her hands in his basement, and dumped her body by Madison ... [and that] he had murdered the girl, had taken her body and dumped it up by Madison and that her hands were dumped in another county." It also alleges that White told this same friend "something to the effect of, 'The only thing that may ... me up is my son being at the house when she was in the basement.'"

The complaint also describes the cause of death. It alleges that Dr. Billy J. Baumann found that:

the ante-mortem homicidal trauma inflicted to the head, neck, trunk, and extremities of this body included slash and stab wound of the right anterolateral aspect cutting and severing major blood vessels with consequent massive hemorrhaging. He found this to be a fatal wound.... Dr. Baumann [also] found the post-mortem trauma to include stab wounds and cuts of the anterior chest and upper abdomen, amputation of the distal left forearm and hand and amputation of the right hand

From a fair reading of these allegations, we cannot determine where the act causing the death or the death itself occurred. White's son's and friend's statements indicate only that the hands were severed at White's home in Milwaukee County. Dr. Baumann concluded that the acts causing the death were trauma and a slash and stab wound which severed major blood vessels but that the severing of the victim's hands and fingers occurred after the victim was killed. The complaint does not establish where the act causing death or the death itself occurred, but only where postmortem trauma was inflicted. Since the victim's body was found in Dane County, that was the proper venue.

EVIDENCE OF GANG ACTIVITY

White argues that the trial court erroneously exercised its discretion when it admitted evidence showing that White was a gang member. White contends that this evidence was not relevant for the purposes of showing

his relationship with the victim because he readily admitted knowing her. He argues that the evidence was unfairly prejudicial and not probative for the purposes of showing motive or intent. The State disagrees, contending that the evidence was relevant to describe the character of White's relationship with the victim and to show motive and intent for committing the crime. The State contends that part of White's gang activity included forcing the victim to prostitute herself and to give the money to White and that the victim's failure to turn over enough money led to her death.

The decision to admit evidence rests within the sound discretion of the trial court. *State v. Clark*, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We will sustain an evidentiary ruling if the court has exercised its discretion in accordance with accepted legal standards and the facts of record. *Id.*

Generally, evidence of prior acts will not be admitted because of the danger that the jury will infer that the defendant has a propensity to commit crimes and has, in fact, committed the crime at issue. *State v. Plymesser*, 172 Wis.2d 583, 592, 493 N.W.2d 367, 371 (1992). First, the trial court must determine that the proffered evidence is relevant to the case. *State v. Fishnick*, 127 Wis.2d 247, 254, 378 N.W.2d 272, 276 (1985). Second, the court must determine whether the evidence is admissible under § 904.04(2), STATS., which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Third, the court must determine whether the proffered evidence's probative value is substantially outweighed by the danger of unfair prejudice under § 904.03, STATS.¹ *Clark*, 179 Wis.2d at 491, 507 N.W.2d at 174.

Our review of the record shows that the trial court concluded that the evidence was relevant for the purposes of showing the relationship between White and the victim and White's role in the gang. The court concluded that the evidence was prejudicial but nonetheless admissible. We agree.

The State presented evidence that White was a gang member and supported the victim's initiation into the gang. The evidence further showed that part of the victim's initiation included pledging \$1,000 to the gang which she would make through prostitution. The State also presented testimony that the victim's failure to give this money to the gang or White could result in a punishment. Another witness testified that White had several women working for him and that one of them was not making enough money.

We agree that the evidence was relevant to show that not only did White know the victim, but the nature of that relationship. We also conclude that the evidence provided a reason why White might have killed the victim. We agree that the evidence's prejudicial effect was not sufficient to overcome its probative value. We conclude that the trial court's decision to admit this evidence was the product of a reasoned decision and, therefore, it was not an erroneous exercise of discretion.

WEAPONS

White argues that the trial court erroneously exercised its discretion in permitting a witness to testify that White owned guns and a knife. Before the trial began, the court ordered that no evidence regarding White's gun ownership be admitted. When a witness testified that White owned "[a] Rambo knife and a few guns," White objected and the court instructed the jury to

¹ Section 904.03, STATS., provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

disregard the portion of the statement regarding the guns. White contends that this testimony was inadmissible, highly prejudicial and warranted a mistrial.

White's argument is without merit. In the first instance, the trial court's order did not preclude the State from offering evidence that White owned a knife. This evidence was relevant to show that White owned a weapon which could have been used to kill the victim and sever her hands and fingers. Second, while the statement about White's gun ownership violated the pretrial order, the court immediately instructed the jury to disregard that specific evidence. Further, before deliberations, the court told the jury to "[d]isregard all stricken testimony." We must presume that the jury will follow an adequate curative instruction and disregard improper statements. See *State v. Kennedy*, 105 Wis.2d 625, 641, 314 N.W.2d 884, 891 (Ct. App. 1981) (quoted source omitted) (possible prejudice to a defendant is presumptively erased from the jury's mind when the court gives admonitory instructions). White has not given us any reason to believe that the jury did not follow this admonishment. Therefore, we conclude that the trial court did not erroneously exercise its discretion by allowing the jury to hear evidence of White's ownership of a knife.

JURY INSTRUCTION

White argues that the trial court erroneously exercised its discretion by giving the jury a party to the crime instruction. He contends that the State's case suggested that only White committed the crime. He also argues that the instruction only served to confuse the jury. We disagree.

A trial court has wide discretion in instructing a jury. *State v. Lenarchick*, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). Jury instructions are intended to reflect theories of law pertinent to the evidence, which a jury is required to follow in reaching a verdict. *Harrison v. State*, 78 Wis.2d 189, 209-10, 254 N.W.2d 220, 228-29 (1977). The theory of law appropriate to a particular case turns on the facts of record. *Id.* at 210, 254 N.W.2d at 229.

The trial court instructed the jury that a person concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it. See § 939.05, STATS. In *Harrison*, 78 Wis.2d at 209, 254 N.W.2d at 228, the defendant

had been charged as a principal, but the evidence he presented could have exonerated him as a principal and left him with responsibility as a party to the crime. The court concluded that the party to the crime instruction was appropriate under the facts, and the jury could properly have found him guilty as a principal under any or all of the alternatives. *Id.*

The same situation is present in the instant case. White offered evidence showing that there may have been more than one set of footprints at the place where the victim's body was found. The State also offered evidence of White's gang membership which, with the footprint evidence, supports a conclusion that others may have been involved in the murder. Therefore, a jury may have reasonably concluded that White was assisted by another person when he committed the crime or, alternatively, that White was an accomplice to another person's murderous acts. Accordingly, we conclude that a factual basis supporting the instruction existed and, therefore, the trial court's use of the instruction was not an erroneous exercise of discretion.

PHOTOGRAPHS OF THE DECEASED

Finally, White argues that the trial court erroneously exercised its discretion when it permitted the State to display photographs of the victim's body after it was discovered, including pictures of her severed hands and forearms. White contends that these photographs were not relevant to the issue of who murdered the victim and any probative value they might have had was substantially outweighed by their prejudicial value. We disagree.

Whether photographs should be viewed by the jury is left within the sound discretion of the trial court. *State v. Hagen*, 181 Wis.2d 934, 946, 512 N.W.2d 180, 184 (Ct. App. 1994). We will not disturb the court's decision unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury. *Id.*

We have viewed the photographs, and while we agree that they are unpleasant, we do not find them to be so offensive that their being displayed was unduly prejudicial. The trial court concluded that the jury was entitled to see how the body was actually found, what it was that White was alleged to have done, and what he was charged with doing. White argues that the photographs were only relevant to show that the victim was deceased, a fact

not in dispute. He contends that the real issue was who perpetrated the crime and not how it was committed. But the photographs were relevant to show how the murder was committed, to show that the death was an intentional act, and the lengths to which White went to avoid victim identification. Accordingly, the court did not erroneously exercise its discretion when it permitted the State to display the photographs.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.