COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 29, 1996

No. 95-1856-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE D. JARDINE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Jamie Jardine appeals a judgment of conviction following a jury trial and an order denying a motion for a new trial, following convictions on one count of attempted first-degree homicide and four counts of first-degree sexual assault. Jardine contends the trial court erred when it excluded testimony from a defense psychologist offered to interpret Jardine's conduct in light of his mental or emotional state at the time of the event. Jardine also contends that the trial court erroneously exercised its discretion when it denied a new trial based upon newly discovered evidence. We reject Jardine's contentions and affirm.

TRIAL TESTIMONY

To place the issues in context, a review of relevant trial evidence is necessary. A City of Superior police officer, at about 9:30 on the evening of November 7, 1993, encountered a young woman, later identified as Laurie Grandhagen, battered and bloodied beyond recognition and unable to speak, suffering from a gunshot wound to the thigh. An emergency room physician assessed Grandhagen's head injuries as clearly life-threatening with major skull damage penetrating deep into Grandhagen's brain from a marked blunt force trauma. Grandhagen was aphasic, that is, could not speak due to her head injury. She also incurred a limb-threatening gunshot wound to the upper leg. Grandhagen's skull injuries were consistent with blows from the butt of the pistol later tied to Jardine.

Grandhagen had no memory of the moment when she was shot and her skull crushed. She described events immediately up to that point. She was a masseuse at Kady's Sauna and Massage Parlor, and knew Jardine as a customer from prior visits. He arrived at seven or eight in the evening of November 7 and purchased a massage. After the massage, Grandhagen reached for a towel to wipe her hands. Jardine reached over and grabbed the towel, pulled out a pistol and handcuffs from his clothing, and raised and pointed the gun at her. He had her turn around and place her hands behind her, and he handcuffed her. He removed her shorts and "kind of ripped my top off. ... just tore it apart." He told her to get on the floor, and while the gun was within arms reach, he engaged in various acts of sexual intercourse and sexual contact. She denied that the sex was consensual. Jardine stopped and got dressed, led her out of the room and down the hall, gun in hand. He asked her "where the money was." She pointed to the rug in a front room where the receipts from the business were hidden. He then guided her down a hallway with the gun against the back of her head. He took her into a small room, ordered her to her knees, and placed the gun in his pants to allow him to remove the handcuffs. She pleaded with him not to hurt her, reminding him that she had a little boy. He returned the keys and handcuffs to his pocket and pulled out the gun. Thinking he was going to shoot her, she grabbed hold of the gunbarrel and a struggle over the gun ensued. They each fell to their knees on the floor and that is her last memory of events.

Jardine also testified. He was employed at the time of arrest as a loss prevention officer at a grocery chain in a three-state area, and therefore routinely carried handcuffs on his person. He had a number of years of law enforcement training and owned a pistol. He admitted initially lying to police when questioned several days after the event about his presence at Kady's on November 7.

Jardine testified that he had experienced recurring depression, and on the evening of November 7, 1993, he became depressed over a problem with his girlfriend and contemplated suicide. He drove to a bridge in Duluth with his semiautomatic pistol but changed his mind. He decided to go to Kady's where he had been seven or eight times previously, the last time about a year earlier. He had prior massages from Grandhagen on two occasions, but they had never engaged in sexual conduct. He had previously paid Denise McKay, another masseuse and the business manager, for sexual activities including masturbation.

While alone undressing, Jardine realized he was still carrying his pistol in the waistband of his trousers so he concealed it in his jean jacket lying on the floor. Later, when Grandhagen reached for a towel on top of the jacket, "I overreacted and jumped off the table and grabbed the towel," and "my gun was then exposed." Jardine testified "I kind of panicked. I got more upset. ... I grabbed my handgun and I tried to hide it from her ...." The gun was loaded with eighteen rounds in the magazine and one in the chamber. When Grandhagen asked him what he had behind his back, he brought the gun to his side. She said: "[W]e could have sex ...." He had not asked her to have sex with him, and he became confused about her statement. He denied forcibly removing Grandhagen's clothing, indicating that she did so on her own.

He began massaging her vaginal area but was unable to obtain an erection so he then brought out his handcuffs because it "helps to turn me on some." He showed Grandhagen the handcuffs and she said "yes, we can use those." He made no verbal or physical threats, and they engaged in various sorts of sexual contact and intercourse. She asked if he was going to hurt her, and he told her he would not, but eventually her references to her two-year-old son caused him to stop because it reminded him of his own young son. His head was spinning, and he was confused.

He dressed, placed the gun back in his waistband, helped Grandhagen dress and started to leave. He denied leading Grandhagen down the hall at gunpoint or demanding to know where the money was hidden. She asked him to remove the handcuffs, and he agreed. He remained confused and upset when they entered a small room where he asked her to kneel down for "no real reason ...." He removed the handcuffs and assured her he was not going to hurt her. She was cold, so he wrapped her in a blanket sitting nearby. He wanted to show her he was not going to hurt her, so he removed his pistol, a single action 9-millimeter semiautomatic. He placed his left hand over the ejector port and pulled back the slide to lock it in place when Grandhagen grabbed it. During the struggle, Grandhagen placed her fingers inside the trigger well with her feet pushing against his stomach and the gun went off. Grandhagen fell, and he saw that she had some blood on the left side of her head. He thought she had been shot in the head and did not know what to do. Jardine felt helpless and left. He denied making a phone call to friends in North Dakota at 10 p.m. to establish an alibi.

The jury found Jardine guilty on all counts.

EXCLUSION OF PSYCHOLOGIST'S TESTIMONY

Jardine challenges the exclusion of testimony from a psychologist, Dr. John Laney, in reference to the defendant's state of mind, and offered as relevant to each of the five charges. Whether expert testimony is relevant and whether it will assist the fact finder is committed to the sound discretion of the trial court. ***State v. Pittman***, 174 Wis.2d 255, 267-68, 496 N.W.2d 74, 79 (1993).

The offered testimony was irrelevant to the four charges of sexual assault. Jardine offered the testimony on the issue of Grandhagen's consent.[1] While each of the four counts of sexual assault require the State to prove lack of consent, the accused's mental state is not relevant to that question.

[1] Counsel's offer spoke of the issue of "Jamie's awareness of lack of consent." As noted by the trial court, if the psychologist's testimony were offered to show that Jardine's mental disease or defect prevented him either appreciating the wrongfulness of his conduct or to conform his conduct to the requirements of law, that would require an NGI plea. *See* § 971.15, STATS.

Consent is defined in § 940.225(4), STATS., as follows:

> "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

The element of consent in the sexual assault statutes deals with the conduct of the victim and not the state of mind of the accused. The comment to the pattern jury instruction, WIS J I— CRIMINAL 1200 n.6 concurs:

> If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. This is the case because Wis. Stat. § 940.225 uses none of the "intent words" which indicate that the defendant's knowledge of no consent is an element of the crime, see Wis. Stat. § 939.23.

The observation that the defendant's belief is not relevant should not be misunderstood. Evidence of the victim's acts or words may coincidentally tend to establish the defendant's state of mind, but that does not elevate state of mind to a required element of the crime. Evidence of words or acts is not admissible to prove the defendant's state of mind, it is admissible because it bears upon whether the victim consented in fact.

Jardine also offered Laney's testimony as relevant to the attempted first-degree intentional homicide charge. Sections 940.01(1) and § 939.32(1)(a), STATS. Intent to kill is, obviously, an element of this crime. However, the offer to provide an "interpretation" of Jardine's conduct was far too vague to establish that the testimony had any probative value on the issue of intent to kill. Counsel advised the trial court:

> As we've indicated, there has been a psychiatric diagnosis of severe depression characterized by Dr. Clyde Olson as rising to the level of mental illness; that while

> there is concurrence that that does not raise the issue of an insanity issue, it does raise the issue regarding Jamie's mental and emotional state and functioning at the time of this incident. ...
>
> There is also issue regarding a count of attempted first degree intentional homicide, which does specifically require intent. And while ... addressing ... that issue regarding Dr. Laney does not go or would not go toward an inability on Jamie's part to form the intent to kill, it is our position that the only basis upon which the state alleges there was an intent to kill is the defendant's conduct, and it is that conduct, in addressing that conduct, which then becomes significant, and *it's an interpretation of that conduct* which becomes significant. *And we believe that Dr. Laney's testimony would be pertinent and assist the trier of fact with respect to a determination or interpretation of the conduct that Jamie engaged in*, and that as such, its germane to the defense that Dr. Laney be allowed to testify to address Jamie's mental state, his emotional state and those issues in the context that I have described. (Emphasis added.)

When the State objected to the evidence on grounds of relevancy, defense counsel stated:

> I'd indicated initially that our assessment was that it related predominantly to the issues of sexual assault, but upon review and review of some case law and so forth, I'm satisfied that it is also pertains to the other conduct engaged in.

The party proffering psychiatric testimony must demonstrate the legal significance of the clinical facts sought to be introduced. ***State v. Flattum***, 122 Wis.2d 282, 305, 361 N.W.2d 705, 717 (1985). ***Flattum*** emphasizes the trial courts' authority to exclude even properly qualified psychiatric testimony if they find it irrelevant under 904.02, STATS. ***Id.*** at 306, 361 N.W.2d at 717. Even if relevant, trial courts may also exclude it pursuant to § 904.03, STATS., if its

probative value is outweighed by the countervailing factors. ***Id.*** Trial courts may also exclude evidence disguised as expert testimony if it is no more than a statement of behaviors that jurors understand as a matter of common knowledge. ***Id.*** at 306, 361 N.W.2d at 717-18, citing ***State v. Dalton***, 98 Wis.2d 725, 298 N.W.2d 398 (Ct. App. 1980).

We agree with the attorney general's challenge to the adequacy of the offer. At no time did defense counsel reveal the substance of the psychologist's testimony, not even a summary. There was no attempt to connect a psychiatrist's opinion with the proposed psychologist's opinions. There was no attempt to show how the testimony would explain how Jardine's severe depression could have caused him to crush Grandhagen's skull without intending to do so. Counsel did not indicate whether the testimony would be based upon interviews and tests or mental health history. Counsel spoke only of "valuable insight" providing "an interpretation of the conduct that Jamie engaged in ...." Error cannot be predicated upon a ruling that excludes evidence if the substance of the evidence is not made known to the judge by offer or is apparent from the context of questions asked the witness. Section 901.03(1)(b), STATS. The trial court acted within its discretion when it refused to allow the testimony.

MOTION FOR NEW TRIAL

Jardine's motion for a new trial was based primarily though not exclusively upon a letter from Kay Richards, the owner of Kady's Sauna and Massage Parlor, written after Jardine was sentenced. Apart from many matters irrelevant to the issue of a new trial, the twelve-page handwritten letter alleged that before trial Grandhagen had given Richards a description of the events of November 7, 1993, in direct conflict with much of Grandhagen's later trial testimony.[2] Essentially, Richards' letter alleged that before trial Grandhagen told Richards a version of events of November 7 that showed the sexual activities with Jardine was consensual. The trial court eventually rejected Jardine's contention that this hearsay was admissible as a statement against Richards' penal interest. The court also ruled that even if the letter were admitted at a new trial, no reasonable jury could find the relevant contents

[2] The record includes a typewritten copy of the letter. Jardine relied upon the "against penal interest" provision of the statute.

credible.[3] Thus, the court ruled, the letter together with other new evidence only marginally relevant and discussed later herein, presented no reasonable probability of a different result. The record strongly supports the trial court's finding that the letter was not credible.

Motions for a new trial based on newly discovered evidence are entertained with great caution. ***Erickson v. Clifton***, 265 Wis. 236, 240, 61 N.W.2d 329, 331 (1953). The motion is submitted to the sound discretion of the trial court. ***State v. Kaster***, 148 Wis.2d 789, 801, 436 N.W.2d 891, 896 (Ct. App. 1989). We will affirm the trial court's exercise of discretion if it has a reasonable basis and is made in accord with accepted legal standards and the facts of record. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App. 1992). The trial court may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) The evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached on a new trial. ***Kaster***, 148 Wis.2d at 801, 436 N.W.2d at 896.

When resolving whether it is reasonably probable that a different result would occur, it is not proper to choose between the allegations made at trial and the new evidence and to determine which is true; rather, the question is whether a reasonable jury could believe the newly discovered evidence. *See* ***State v. McCallum***, 198 Wis.2d 149, 158-59, 542 N.W.2d 184, 187-88 (Ct. App. 1995).

We will assume without deciding that the relevant portions of the letter were admissible after she pled her Fifth Amendment privilege against self-incrimination several times.[4] The following evidence, especially when viewed cumulatively, supports the trial court's ruling.

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[3] Section 908.045(4), STATS., does not modify the common law rule found in ***Meyer v. Mutual Serv. Cas. Ins. Co.***, 13 Wis.2d 156, 164-65, 108 N.W.2d 278, 282 (1961). ***Meyer*** allows only that part of a hearsay statement that is a declaration against interest or is so closely connected with it as to be trustworthy. *See Judicial Council Committee Note—1974.*

[4] We disagree with Jardine's contention that Richards' invocation of the Fifth Amendment

A.

Richards admitted that she was engaged as a go-between for Jardine's mother in a plan to pay Grandhagen money. Grandhagen testified that Richards had approached her before trial and said: "I've talked to Jamie's mother, and she wanted me to tell you that if you changed your story, that you will get $200 for the rest of your life. ... Every month."

Richards described the incident as follows:

Q. Is it true that the nature of that conversation involved asking you to approach Laurie Grandhagen to change her testimony?

A. Yes.

(..continued)
privilege resolves whether the statement was against her penal interest.

The Fifth Amendment right to refuse to testify is manifestly broader than the standard by which a statement is determined to be "against penal interest." A judge must allow a witness to refuse to testify unless it is "perfectly clear, from a careful consideration of all the circumstances in the case ... that the answer[s] cannot possibly have such tendency to incriminate." ***Hoffman v. United States***, 341 U.S. 479, 486-87 (1951) (emphasis omitted). On the other hand, the use of a hearsay statement against penal interest is admissible only if it "at the time of its making ... so far tended to subject the declarant to ... criminal liability ... that a reasonable person ... would not have made the statement unless the person believed it be true." Section 908.045(4), STATS. This statute adopts a "reasonable person" test in evaluating the question of admissibility. *Judicial Council Committee's Note—1974.*

There is reason to believe that the relevant portions of the letter were not against Richards' penal interest when made. She initially wrote the letter for Judge Lucci but readdressed it "To whom it may concern" when she was told he may not preside over post-trial matters. Prior to writing the letter, Richards had not told authorities a different version of what she knew which could have subjected her to obstructing an officer.

Finally, because the State did not argue waiver, we need not address whether Richards waived her right to invoke the Fifth Amendment. She answered a number of questions surrounding the letter writing and only selectively invoked her privilege.

Q. Is it true that Mrs. Jardine approached you to offer Laurie Grandhagen money to change her testimony?

A. No, that is not right.

Q. What was the nature of the conversation, then?

A. She said that all she wanted, she wanted me to ask Laurie to tell the truth. All she wanted was the truth. And she said that she would see that Laurie and her boy would get money every month, you know, to help her till she was back on her feet. But she never ever offered me money or anything like that, never.

Q. And do you recall Ms. Grandhagen's response to that offer?

A. I don't even know if I told Laurie. Yes, I did too tell her. No, I don't.

Because Mrs. Jardine and Richards spoke of paying Grandhagen after Jardine was charged, Grandhagen would have had to "change her story" to accomplish Mrs. Jardine's goal. The concept of paying a witness to change her story is highly suspect to say the least. The fact finder could also view Richards' vacillation regarding whether she ever communicated such a remarkable offer to Grandhagen as convincing evidence that her letter was not believable.

B.

A critical allegation that Richards made to Walter Gayan, an investigator with the public defender's office, that she saw Grandhagen and Jardine engaged in consensual sexual activities prior to November 7, was in direct conflict with Jardine's own testimony.

Richards telephoned Gayan after Jardine's sentence in July 1994. Richards expressed an interest in helping Jardine obtain a reduced sentence. She initially told Gayan that she had seen Grandhagen fondling Jardine's pubic area at the massage parlor approximately two weeks before the events of November 7, 1993. While this allegation conflicts with Grandhagen's testimony,

it is also conflicts with Jardine's testimony. He testified that he and Grandhagen had never engaged in any sexual activities together prior to November 7.

Some statements to Gayan were also not consistent with Richards' statements in the letter. When Gayan told Richards that her statement may not necessarily be meaningful because it preceded the events of November 7, Richards made no mention of her presence at the parlor on November 7. Richards, however, called Gayan back to say that she was present about 5:15 p.m. on November 7, and she saw Grandhagen naked and engaged in consensual sexual activity with another man.

Further, Richards' letter says she fired Grandhagen on November 7 for engaging in sex with a customer. In contrast, she told Gayan that she had fired another employee and would not tolerate sexual activities between her employees and customers. When Gayan asked why she had not fired Grandhagen, Richards told him that she had not gotten around to it.

Finally, Richards inexplicably failed to tell Gayan the single most helpful allegation later made in the letter, Grandhagen's detailed admissions to Richards that the sexual intercourse with Jardine was consensual.

C.

Richards was in regular contact prior to trial with the Douglas County victim/witness specialist, Darlene Olson, and was very cooperative and on friendly terms. She expressed great concern that rumors and publicity about sexual activities at Kady's would cause problems for her business. She furnished Olson a list of employees she had fired for engaging in sex at the parlor, but said nothing of firing Grandhagen nor revealed any of the matters set forth in the letter.

D.

Richards admitted she had told a Superior police detective who contacted her to discuss the letter that she had gotten herself "in a real bind."

When asked at the hearing what she had meant, she refused to answer on grounds her answer might incriminate her.

In addition to finding that a reasonable jury would not find the letter credible, the trial court found the remaining new evidence only marginally relevant at best. This evidence showed that McKay had told a friend that she had committed perjury at trial. McKay's trial testimony, however, was inconsequential. She was not on the premises on November 7. While she denied at trial that she had ever engaged in sexual conduct with Jardine, McKay's sexual activities were of questionable relevance, especially in light of Jardine's acknowledgement that he had never engaged in sexual activities with Grandhagen before November 7.

In conclusion, the trial court's exclusion of the expert's opinion testimony offered as an interpretation of Jardine's conduct and the court's denial of a motion for a new trial based upon newly discovered evidence was well within the court's discretion.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.