COURT OF APPEALS
DECISION
DATED AND RELEASED

June 25, 1996

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. 95-2420-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY KIMBER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

WEDEMEYER, P.J. Anthony Terrill Kimber appeals from a judgment entered after a jury convicted him of two counts of first-degree intentional homicide, arson of a building, and three counts of first-degree recklessly endangering safety, as a habitual criminal, contrary to §§ 940.01(1), 943.02(1)(a), 941.30(1), and 939.62, STATS. Kimber claims the trial court erred in excluding lay and expert testimony regarding his mitigating defense of

adequate provocation and loss of self-control.[1] Because the trial court did not erroneously exercise its discretion in excluding this testimony, we affirm.

I. BACKGROUND

Kimber admits killing his girlfriend, Jerline Yarborough, and her daughter, Dorothy, and he admits setting their home on fire afterwards to try to cover up his crimes. His defense, however, is that he was provoked to the point that he lost control. He argued that the adequate provocation defense applied, which would reduce the first-degree intentional homicide charge to second-degree. Section 939.44, STATS., defines adequate provocation:

> **(1)** In this section:
>
> > (a) "Adequate" means sufficient to cause complete lack of self-control in an ordinarily constituted person.
> >
> > (b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.
>
> **(2)** Adequate provocation is an affirmative defense only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide.

In order to support his defense, Kimber moved *in limine* to offer testimony from police officers, a psychologist, and an anger management

[1] Kimber also makes a brief and an inadequately developed argument that his constitutional right of due process and his constitutional right to present a defense were violated by excluding this testimony. Because we conclude that the trial court did not err in concluding that this testimony was irrelevant, however, it is not necessary to address his constitutional arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); ***State v. Droste***, 115 Wis.2d 48, 339 N.W.2d 578 (1983) (defendant does not have a constitutional right to present irrelevant evidence).

specialist. He contended that the police officers would testify that they had been trained to maintain self-control while under attack and still had been provoked to kill in situations where the killings were ruled justifiable. He contended that the psychologist would testify that Kimber was not "quick to temper," and the anger management specialist would testify about the dynamics of domestic violence and how African-American men are trained not to control their temper as they learn to establish "manhood."

The State opposed the motion, arguing that this testimony was irrelevant. The trial court agreed with the State. Kimber proceeded to trial and was convicted. He now appeals.

II. DISCUSSION

The decision whether to admit or exclude proffered expert testimony is a matter of trial court discretion. ***State v. Friedrich***, 135 Wis.2d 1, 15, 398 N.W.2d 763, 769 (1987). Similarly, exclusion of evidence is addressed to the discretion of the trial court. ***Prill v. Hampton***, 154 Wis.2d 667, 678, 453 N.W.2d 909, 913 (Ct. App. 1990). Our review of the trial court's evidentiary decisions is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Pittman***, 174 Wis.2d 255, 268, 496 N.W.2d 74, 79-80, *cert. denied,* 114 S. Ct. 137 (1993). We will not find an erroneous exercise of discretion if the trial court examined the relevant facts, applied a proper legal standard, and used a rational process to reach a reasonable decision. ***Id.***

Kimber complains about three evidentiary rulings: (1) excluding proffered testimony from police officers; (2) excluding proffered testimony from a psychologist; and (3) excluding proffered testimony from an anger management specialist.

Kimber claims the police officers would have testified regarding their extensive training in how to maintain self-control while under attack. The intent in calling these witnesses would be to show that such training is available, but that Kimber did not have such training.

Kimber claims the psychologist would testify that he evaluated Kimber, administered psychological tests, and concluded that Kimber is not "quick to temper."

Kimber claims the anger management specialist would testify about the dynamics of domestic violence and how men are trained not to control their temper in our society and that under the concept of manhood in the African-American culture, men are not taught self-control.

Kimber argues that these witnesses' testimony was relevant to his defense of adequate provocation. The trial court disagreed, concluding that none of the testimony was relevant. Regarding the police officers, the trial court reasoned:

> "[T]he fact that police officers have received training in how to maintain self-control under attack in their official capacity, which training apparently is not available to the general public 'cause nobody would seek that out obviously, Court doesn't believe it's relevant to the reasonableness of the defendant's actions in this case and the Court doesn't believe it's relevant. Pursuant to 904.01 and 904.02 of the Wisconsin State Statutes, court doesn't believe it to be admissible."

Regarding the psychologist and the anger management specialist, the trial court again concluded that their testimony should be excluded. The trial court again relied on relevancy law in its decision to exclude this testimony.[2]

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[2] The trial court also makes some reference to prior case law addressing the "heat of passion defense," which was the predecessor to the adequate provocation defense. *See, e.g.,* ***State v. Klimas***, 94 Wis.2d 288, 288 N.W.2d 157 (Ct. App. 1979), *cert. denied*, 449 U.S. 1016 (1980), *overruled by* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Because we have concluded that it was not erroneous to exclude this testimony on relevancy grounds, we need not address the case law referred to by the trial court.

In reviewing the trial court's determination, we note that the record does not contain any testimonial offer of proof. Kimber did not produce any of these witnesses for questioning. His offer of proof was limited to his recitation of what he expected these witnesses to say in general. No specific details regarding their testimony was ever presented. Based on this limited offer of proof, we cannot say that the trial court erroneously exercise its discretion in excluding this testimony. The trial court reviewed the limited facts presented by Kimber regarding the testimony proffered by each witness, applied relevant statutory law, and reached a reasonable conclusion—that none of the testimony was relevant to the issue of adequate provocation.

We conclude that the trial court did not erroneously exercise its discretion in excluding the proffered testimony. Its conclusion—that the fact that police officers have special training and Kimber does not is irrelevant to Kimber's defense—is perfectly reasonable. Because of such special training, a police officer is not an ordinarily constituted person, and, therefore, how a police officer acts is not relevant to how Kimber acted.

Further, the trial court's conclusion that the psychologist's and anger management specialist's testimony were irrelevant is also a reasonable conclusion. According to the offers of proof, the psychologist's testimony was limited to the psychologist's opinion that Kimber was not "quick to temper," and the anger management specialist's testimony was apparently limited to the general dynamics of domestic violence and African-American male cultural influences. Kimber did not allege that either witness could offer testimony that an ordinarily constituted person in Kimber's position would have acted as Kimber did, or could testify regarding what circumstances would cause an ordinarily constituted person to completely lose self-control.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring*). Although I concur in the result, I do not join in the majority's writing or reasoning. In my view, § 939.44, STATS., has no application to this case. The statute addresses whether provocation would "cause complete lack of self-control in an ordinarily constituted person." On what basis, therefore, would it apply to a person who is not "ordinarily constituted?"

There is no dispute that Kimber and his girlfriend, as stated in Kimber's confession, were smoking "chronics,"—marijuana cigarettes laced with cocaine—just before the argument leading to the murders. Thus, when Kimber committed these crimes, he was not "ordinarily constituted" and, therefore, he may not invoke the defense of provocation.