COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3199-CR **Cir. Ct. No. 2002CF3911**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. MERENESS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 BRIDGE, J. William J. Mereness appeals the judgment of conviction for first-degree intentional homicide. He makes three arguments on appeal. First, he argues that testimony regarding statements he made to his mother prior to her death in which he confessed to the homicide was admitted in violation

of ***Crawford v. Washington***, 541 U.S. 36 (2004). In ***Crawford***, the Supreme Court ruled that the testimonial statement of a person absent from trial may only be admitted if the person is unavailable and the defendant has had a prior opportunity to cross-examine the declarant about the statement. ***Id.*** at 67-68. Mereness had no such opportunity to cross-examine his mother prior to her death. He argues that the court's error in admitting this evidence entitles him to a new trial. Second, he argues that the circuit court erred in ruling that evidence of his prior conviction for false swearing in an earlier divorce proceeding could be admitted for purposes of impeaching him pursuant to WIS. STAT. § 906.08(2) (2005-06).[1] Third, he argues that the circuit court erred in denying his motions to change venue.

¶2 We conclude that the admission of testimony regarding Mereness's confession to his mother constituted a ***Crawford*** violation and was therefore an erroneous exercise of discretion. However, we conclude that the error was harmless. For the reasons we explain below, we also conclude that the circuit court did not erroneously exercise its discretion when it permitted the State to impeach Mereness regarding his prior false swearing and when it denied his motion for a change of venue. Accordingly, we modify and affirm.

BACKGROUND

¶3 Mereness was charged with intentional homicide for the murder of his estranged wife, Jennifer Mereness, on November 22, 2002. Mereness twice moved for a change of venue. Both motions were denied after hearings.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Prior to trial, the State filed two motions in limine. In the first, the State sought a ruling on the admissibility of testimony of Officer Peter Helein of the City of Appleton Police Department regarding his conversation with Mereness's mother, LaBelle Mereness, in which she described statements Mereness made to her regarding the homicide. Following a hearing, the circuit court granted the motion and permitted the testimony.

¶5 At trial, Officer Helein testified that he spoke to LaBelle while she was in the hospital prior to her death and that she described two conversations she had with Mereness shortly after his wife's murder. He testified that LaBelle told him that on November 27, 2002, five days after the homicide, her son was at her residence and was extremely upset. At that time he told her that he did not want to go to prison for seventy years for killing Jennifer. The officer also testified that LaBelle described a series of events that occurred two days later on November 28, 2002. At that time, according to the officer, LaBelle observed Mereness enter her kitchen and remove a carving knife and a box of saran wrap, and she followed him as he went into the home's bathroom and laid down in the bathtub while still holding these items. The officer testified that LaBelle asked Mereness what he was doing and he responded that he wanted to die. According to the officer, she then asked Mereness, "Did you kill Jennifer," to which he responded by saying "yes, I'm really sorry."

¶6 In the second motion in limine, the State sought a ruling pursuant to WIS. STAT. § 906.08(2) that Mereness's prior conviction for false swearing in an earlier divorce proceeding would be admissible to impeach his credibility should he exercise his right to testify at trial. After a hearing on this issue, the circuit court granted the motion. Mereness chose not to testify at the trial. He was

convicted by a jury following a seven-day trial. We reference additional facts as needed below.

DISCUSSION

Admission of Testimony Regarding Mereness's Conversation With His Mother

¶7 Mereness first argues that the circuit court erred when it denied his motion for a new trial based on the court's admission of the testimony of Officer Helein regarding his conversation with Mereness's mother prior to her death during which she recounted Mereness's confession. He contends that the admission of his mother's statement constituted a violation of his Sixth Amendment confrontation right under ***Crawford,*** 541 U.S. 36. In ***Crawford***, the Supreme Court held that the testimonial statement of a person absent from trial may only be admitted in conformity with the Confrontation Clause of the Sixth Amendment if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant regarding the statement. ***Id.*** at 67-68. The determination of a violation of the Confrontation Clause "does not result in automatic reversal, but rather is subject to harmless error analysis." ***State v. Weed,*** 2003 WI 85, ¶28***,*** 263 Wis. 2d 434, 666 N.W.2d 485 (citation omitted). The State concedes a ***Crawford*** violation, but argues that the error was harmless.[2]

[2] ***Crawford v. Washington***, 541 U.S. 36 (2004), was decided subsequent to Mereness's trial. During postconviction proceedings, Mereness argued that ***Crawford*** should be applied retroactively, and the State conceded that it should. The retroactivity of ***Crawford*** was resolved in ***Whorton v. Bockting***, 127 S. Ct. 1173 (2007). In ***Whorton***, the Supreme Court held that ***Crawford*** is not retroactive as to cases that are already final on direct appeal, but is retroactive as to cases that are still on direct review. ***Whorton***, 127 S. Ct. at 1180. Because the present case falls into the latter category, we agree that ***Crawford*** applies. Although the State conceded that ***Crawford*** applied to this case, it argued during postconviction proceedings that the mother's statement was non-testimonial. However, it does not make that argument on appeal. When an (continued)

¶8 Whether a constitutional error is harmless is subject to de novo review. *See* ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382. We are to focus on the effect of the error on the jury's verdict. ***Weed,*** 263 Wis. 2d 434, ¶29 The test is whether it is clear beyond a reasonable doubt that the error complained of contributed to the verdict obtained. ***Id.*** Stated differently, if it is clear beyond a reasonable doubt that a rational jury would have convicted absent the error, then the error did not "contribute to the verdict" and is therefore harmless. ***Id.*** The factors to be considered in determining whether an error is harmless include:

> the frequency of the error, the nature of the State's case, the nature of the defense, the importance of the erroneously included or excluded evidence to the prosecution's or defense's case, the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence, whether erroneously admitted evidence merely duplicates untainted evidence, and the overall strength of the [State's] case.

State v. Norman, 2003 WI 72, ¶48, 262 Wis. 2d 506, 664 N.W.2d 97.

¶9 Mereness argues, and the State agrees, that the case against him was circumstantial. There were no eyewitnesses to the murder. No one identified Mereness in the vicinity of the crime, and no physical evidence was introduced at trial tying him to the crime or the crime scene. Against this backdrop, Mereness describes the mother's statements as "[p]robably the most damning evidence of guilt…." He asserts that absent evidence of estrangement, a defendant's confession to his own mother makes evidence of a confession that much stronger. In response, the State first contends that Mereness's statement to his mother was

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issue has not been briefed or argued on appeal, we deem it abandoned. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

duplicative of a statement he made in the presence of his father two days later, which was admitted without objection. Mereness's father testified at Mereness's trial that on November 29, 2002, he and his wife LaBelle had a conversation with Mereness while Mereness was lying in the bathtub at their home:

> Q. We're clarified on the time and date. You and your wife find William in the bathtub with his clothes on or some clothes on with a knife and saran wrap. You, your wife and your son are in the bathroom. Okay?
>
> A. Yeah.
>
> Q. You stated there was a question asked, "What are you doing?" And you stated that your son did not reply to that?
>
> A. Right.
>
> Q. Do you recall that? Is that all correct?
>
> A. Yes.
>
> Q. What happened next?
>
> A. Then my wife asked him the question, "Did you do it?"
>
> Q. And what did William say?
>
> A. He replied, "Yeah, I did it." "I done it." "Yeah, I done it."

When Mereness stated in the bathroom that he "did it," his father "interrupted at that point and said [he] didn't want to hear any more.... [b]ecause [he] didn't want to have to testify against him." Then, the three went into the kitchen and talked about his options:

> A. We talked about his three options that he had. He stated he didn't want to go to prison. And —
>
> Q. I'm sorry, sir. Go ahead.
>
> A. And we talked about three options.
>
> Q. What were the three options you talked about?

> A. They were go to trial or confess or take your life.
>
> Q. And you stated he stated he didn't want to go to jail, was it?
>
> A. Jail and or prison, yes.
>
> Q. Was that when you discussed about going to trial or when you, I'm sorry, when you discussed about confessing?
>
> A. Yes. He had mentioned that.

Mereness argues that without his mother's corroborative statements, there was reasonable doubt as to what Mereness was referring to when his father testified that he said "I done it." We disagree.

¶10 Mereness's argument—that it was uncertain what he was admitting to if we look only to his father's testimony—ignores the context surrounding the conversation. Jennifer Mereness was murdered on November 22. The conversation with Mereness's mother occurred on November 27, and the conversation involving his father occurred on November 29. The statement Mereness made in his father's presence occurred while Mereness was lying in the bathtub at his parents' home holding saran wrap and a knife, just as he had been at the time he confessed to his mother. Taken in context, it is readily apparent that the subject of the conversation was the death of Mereness's wife and Mereness's options as they related to that subject, which included confessing, going to prison or committing suicide. Mereness does not offer any plausible alternative topic that might have been the subject of the conversation. The postconviction court found that "[t]he jury must have found the father credible. I find him credible. The testimony of James Mereness, Sr., is untainted and, although disjointed, stands on its own. Any statements from LaBelle duplicates this evidence."

¶11 The State argues further that the postconviction court specifically determined that the State had presented a strong case. The court stated:

> The State presented many witnesses. Much of the evidence was circumstantial but the enormity of that evidence tied up loose ends and made a tight case. Further, the defendant did attempt to take his life after the conversation he had with his father about his options.
>
> The State's case, although circumstantial, was strong. The State presented evidence that answered or provided strong inferences to answer questions and address gaps in the evidence. The State's Reply Brief sets forth examples of this evidence.
>
> In reviewing the factors I ask the question: Where would the case be without LaBelle's statements? The father's testimony would have been admitted. It is just as damaging, if not more so, as LaBelle's statements. It was credible. The defendant's statements would still come into evidence. The defendant's attempted suicide shows consciousness of guilt. It strengthens the father's testimony as it shows that the defendant acted upon the conversation with his father and serves as an admission. The jury was instructed that it could consider circumstantial evidence. That circumstantial evidence can prove a fact and that a jury may logically find other facts therefrom according to common knowledge and experience. Without LaBelle's statements the State presented credible evidence beyond a reasonable doubt sufficient to sustain the verdict. The totality of the evidence is sufficient to sustain the verdict.
>
> I conclude that the admission of LaBelle's statements through Captain Helein was harmless error.

¶12 We conclude that the admitted testimony merely duplicated the untainted evidence offered by Mereness's father. Accordingly, we conclude that admission of the officer's testimony was harmless error and that, as a result, Mereness was not entitled to a new trial.

Cross-Examination Regarding Mereness's Prior Conviction for False Swearing

¶13 Mereness next argues that the circuit court erroneously exercised its discretion by allowing the State to cross-examine him regarding his prior conviction for false swearing in the context of a prior divorce proceeding.[3] A trial court possesses wide discretion in determining whether to admit or exclude evidence, and we will reverse these determinations only upon an erroneous exercise of that discretion. ***State v. Sveum***, 220 Wis. 2d 396, 405, 584 N.W.2d 137 (Ct. App. 1998). The trial court properly exercises its discretion if its determination is made according to accepted legal standards and in accordance with the facts of record. ***Id.*** If the court bases its determination on an erroneous view of the law, it has exceeded its discretion. ***Id.***

¶14 As a general rule, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime …, may not be proved by extrinsic evidence." WIS. STAT. § 906.08(2). However, if they are probative of truthfulness or untruthfulness and not remote in time, specific instances of conduct may be inquired into on cross-examination of the witness. ***Id.*** Mereness does not challenge whether the false swearing evidence was admissible under § 906.08(2). Further, he does not assert that the evidence was without probative value. Instead, he argues that the probative value of the false swearing was outweighed by the danger of unfair prejudice and therefore the circuit court erred in permitting the State to raise the

[3] The specific incident involved Mereness creating a false check which he presented to the court in his divorce proceeding in an attempt to mislead the court into believing that he had loaned a sum of money to his father.

issue on cross-examination.[4] Mereness contends that the false swearing incident had nothing to do with the crime for which he was before the jury. He also contends that the prejudicial impact would be overwhelming because it would have "branded him as a convicted liar" in the presence of the jury.

¶15 The State argues that the circuit court's ruling was consistent with the holding in ***State v. Boehm,*** 127 Wis. 2d 351, 379 N.W.2d 874 (Ct. App. 1985). In ***Boehm,*** the defendant was being tried for first-degree intentional homicide. The circuit court permitted the State to cross-examine Boehm under WIS. STAT. § 906.08(2) regarding her prior acts of welfare fraud. We upheld this ruling, concluding that Boehm put her credibility at issue by taking the stand, and the State was permitted to refer to her prior conduct on cross-examination for impeachment purposes as it related to her credibility. ***Boehm,*** 127 Wis. 2d at 358.

¶16 In granting the State's motion to permit cross-examination regarding Mereness's false swearing, the court determined that the false swearing occurred approximately seven to eight years earlier, which the court found not to be too remote in time. It also noted that Mereness's action involved conduct with a spouse. The court acknowledged that the evidence would likely cause some concern for Mereness, but observed that "[c]redibility is the key to the case."

[4] Mereness bases his claim on ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), which sets out the test for admitting other acts evidence under WIS. STAT. § 904.04(2). One part of the ***Sullivan*** test requires the court to weigh whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, among other factors. *See* ***id.*** at 772-73. As discussed above, the statute at issue is WIS. STAT. § 906.08(2) rather than § 904.04(2), which Mereness acknowledges. As a general proposition, evidence that is otherwise admissible may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03. Accordingly, the issue of unfair prejudice is appropriate for analysis regardless of the underlying statutory basis for its admissibility.

¶17 We conclude that the circuit court's reasoning is consistent with our ruling in ***Boehm,*** and that the court applied the proper legal standard to the facts before it. It was reasonable for the court to determine that Mereness's willingness to lie in a divorce proceeding would suggest that he would be even more likely to lie when more was at stake and his very freedom was at issue. Mereness complains that the court did not "carefully explain" why the probative value of the false swearing evidence outweighed the danger of unfair prejudice, but cites no authority suggesting that the circuit court was required to articulate its reasons in more detail than it did. We conclude that the circuit court sufficiently articulated the reason for its ruling and that court's decision to admit the evidence was a proper exercise of its discretion.

Change of Venue

¶18 Finally, Mereness contends that the circuit court erred in denying his motion for a change of venue. We review a ruling on a motion for a change of venue under an erroneous exercise of discretion standard. ***State v. Messelt***, 178 Wis. 2d 320, 327, 504 N.W.2d 362 (Ct. App. 1993). Although our review is deferential to the circuit court's ruling, we are to undertake an independent evaluation of the circumstances. ***Id.***

¶19 A defendant's constitutional right to a fair trial requires a trial court to change the trial's venue where prejudicial pretrial publicity would make a fair trial impossible. ***Briggs v. State***, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977). In order to obtain a change of venue, the requesting party must present sufficient evidence to show there is a reasonable likelihood of community prejudice so pervasive as to preclude the possibility of a fair trial in that community. ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994).

¶20 To determine whether the defendant presented evidence sufficient to meet this standard, the trial court is to consider the following factors:

> (1) the inflammatory nature of the publicity; (2) the timing and specificity of the publicity; (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id. at 306. The court is to evaluate those factors to "determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or impaneled jurors." ***Messelt***, 178 Wis. 2d at 327-28. Consequently, the court's "evaluation requires both an examination of the evidence supporting the motion to change venue and the jury impaneling process." ***Id***. at 328.

¶21 Focusing on the first factor, Mereness contends that articles in a local newspaper contained "highly prejudicial and inadmissible information," including that Mereness had previously tried to kill the victim, that he had tried to poison an ex-wife, and that he had a prior criminal history. We note that news reports that are objective, informational and non-editorial are not prejudicial merely because they may inform prospective jurors about the crime or the defendant. ***Holland v. State***, 87 Wis. 2d 567, 577, 275 N.W.2d 162 (Ct. App. 1979), *rev'd on other grounds,* 91 Wis. 2d 134, 280 N.W.2d 288 (1979). Instead:

> A court looking to the inflammatory nature of the publicity should be primarily concerned with the manner in which the information was presented. Uneditorialized news of an informational nature may inform possible members of a jury, but this does not necessarily make the information

> objectionable. News reports become objectionable when they editorialize, amount to 'rabble rousing' or attempt to influence public opinion against a defendant.

State v. Fonte, 2005 WI 77, ¶32, 281 Wis. 2d 654, 698 N.W.2d 594.

¶22 At the motion hearing, Judge Daley discussed the content of the articles, the "inflammatory nature," the pervasive nature of the publicity, and the familiarity of the jury with the publicity, the timing and specificity, the State's participation, and the availability of less drastic measures than change of venue, including sequestration of the jury and individual *voir dire*. The court noted that after an initial period beginning in late November 2002, immediately after the murder, and ending around January 2003, a significant number of newspaper articles were published on the subject. It found further that in the subsequent six months up until the time of the hearing on the motion for change of venue, the articles had become more infrequent. The court noted that there were no editorials, and that the reporting was objective, other than a few articles dealing with extraneous material from Mereness's co-workers, his ex-wife and son. It determined that only one article contained information which would be inadmissible. It concluded that the adverse publicity which occurred shortly after the murder could not be considered to have permeated the jury pool.

¶23 In short, the court deliberately considered each of the relevant factors. It then made the following determination:

> All things considered in the exercise of this Court's discretion, I do believe that in fact on the whole it was factual reporting and is not objectionable. They did report facts which will be evidence at trial no doubt, but that is what occurs in an open society with television and newspapers.
>
> I suspect we'll go through the afternoon and I'm ordering 100 jurors to be brought in for this case, but I do believe that Rock County has a right to have—it's the

> defendant's right to be tried in Rock County by a jury of his peers, together with the county has a right to have it tried here unless a fair trial can be—cannot be had. I cannot conclude a fair trial cannot be had. As a result I deny the motion for a change of venue.

¶24 Mereness renewed his motion, and a second hearing was held approximately a month later. Judge Werner presided over this hearing. He stated:

> I'm going to adopt Judge Daley's findings as my findings without reciting them into the record. I think they still apply. And I'm going to deny the motion at this point in time. The defendant and the state for that matter are not entitled to a jury that's unaware of the case. They're just entitled to a jury that can be fair and impartial, and we will cross that bridge when it comes. The motion is denied. But as happens in all of these cases, if we can't get a jury I will have to revisit the issue, and I will do that on my own motion if it becomes a problem, then we'll have to look at alternatives. But at this point in time the motion is denied.

¶25 We agree with the circuit court's characterization of the publicity. The articles about which Mereness complains contained factual, non-editorial reporting about the murder and about Mereness's criminal history. To the extent the coverage contained possibly inflammatory elements such as a headline, etc., that coverage was offset by other factors we address below, such as the circuit court's effective use of voir dire. In any case, we cannot characterize the publicity as "rabble rousing" or an attempt to influence public opinion against Mereness.

¶26 Mereness next focuses on the third, fourth and fifth of the ***Albrecht*** factors relating to jury selection. The circuit court conducted individual voir dire of prospective jurors who indicated that they had read or heard anything about the case. Mereness concedes that this "limited the risk of a single juror tainting the entire panel." However, he complains that many prospective jurors had to be struck for cause based on their knowledge about the case. He also asserts that

most of his peremptory challenges were used to strike individuals who had heard facts about the case prior to trial. However, neither of these assertions amounts to a claim of prejudice as it relates to the jurors who heard his case. To that issue, he asserts that three of the jurors who remained on the final panel "admitted to having heard things about the case." From this, he speculates that there was an increased likelihood that one or more of these jurors would recall the inadmissible information contained in media accounts, and would impart that information to the remaining jurors. However, Mereness's assertion is at most speculative. In any event, we have concluded that the information in the media accounts did not editorialize nor did they attempt to convince readers of Mereness's guilt.

¶27 Prospective and actual jurors need not be excluded merely because they have formed some opinion or preconceived notion about the guilt or innocence of the accused. Rather, the critical question is whether the individual can set aside that opinion or notion and fairly decide the case based on the evidence presented. The United States Supreme Court explained this concept as follows:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961).

¶28 Certainly the circuit court need not accept a juror's stated willingness to be fair as dispositive in the face of overwhelmingly pervasive and highly prejudicial pretrial publicity. However, as discussed above, here the informational reporting did not rise to the level of prejudice that would so infect the community that it is reasonably likely that a fair trial could not be had. Moreover, the circuit court exercised due care and sensitivity to potential community prejudice by conducting individual voir dire. Further, there was no great difficulty in selecting a jury: the entire voir dire and selection process consumed one day of trial, beginning at 9:28 a.m. and concluding at 4:05 p.m. We are satisfied that voir dire was properly employed by the circuit court to produce an impartial jury in Mereness's trial.

CONCLUSION

¶29 We conclude that the circuit court's admission of Officer Helein's testimony regarding LaBelle's statements was harmless error. We conclude further that the circuit court did not erroneously exercise its discretion when it permitted the State to impeach Mereness regarding his prior false swearing, or when it denied his motion for a change of venue. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.