COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1955-CR **Cir. Ct. No. 2004CF15**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN L. WAKEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Susan Wakeman appeals a judgment of conviction, entered upon a jury's verdict, on one count of first-degree intentional homicide. Wakeman asserts multiple trial court errors and further contends the jury erred when it concluded that, although she suffered a mental disease or defect, she was

able to appreciate the wrongfulness of her conduct or conform her behavior to the law. We reject Wakeman's arguments and affirm the judgment.

Background

¶2 On February 22, 2004, following a night of drinking, Wakeman and others ended up at Louis Shepard's home. While at the house, Shepard allegedly attempted to sexually molest Wakeman. Further, a fight of some sort erupted and Wakeman was physically assaulted by Shepard and others. Wakeman was able to call 911, then break away from the crowd and flee to her home less than one-quarter of a mile away.

¶3 At her home, Wakeman retrieved two knives. She also woke her grandson who, armed with a loaded gun, returned with her to Shepard's house. There, Wakeman fatally stabbed Shepard twice. She was arrested almost immediately and confessed multiple times. The jury convicted her of first-degree intentional homicide.[1]

¶4 Wakeman, however, had asserted she was not guilty by reason of mental disease or defect, and her trial thus proceeded to the mental responsibility phase. Wakeman contended that a history of depression and mood-altering medication, some of which she had ingested on the 22nd, coupled with her night of heavy drinking and the toll of the assault caused her to "snap."

¶5 The jury concluded that Wakeman did, in fact, have a mental disease or defect. However, it also determined that she did not lack the capacity to

[1] The information had charged five offenses. Just before trial, the State dismissed all but the homicide charge.

appreciate the wrongfulness of her actions or conform herself to the requirements of the law. Wakeman was sentenced to life in prison with the possibility of extended supervision after twenty-four years. She appeals, alleging multiple errors. Additional facts will be included as necessary in the discussion.

Discussion

I. Evidence in the Mental Responsibility Phase

¶6 Wakeman argues that she "proved by the great weight of the evidence that she was not criminally responsible for her conduct" and, therefore, the jury erred when it found her culpable. Under WIS. STAT. § 971.15(1)[2], a defendant

> is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

The defendant must establish this affirmative defense "to a reasonable certainty by the greater weight of the credible evidence." WIS. STAT. § 971.15(3). Whether the defendant has met this burden of proof is a question of fact for the jury. ***State v. Leach***, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985). We therefore will not upset the jury's determination if it is supported by sufficient credible evidence. ***State v. Sarinske***, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979).

¶7 Here, although the jury concluded Wakeman had a mental disease or defect, it also found she did not lack the "substantial capacity either to appreciate

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

the wrongfulness of [her] conduct or conform [her] conduct to the requirements of law." WIS. STAT. § 971.15(1); WIS JI—CRIMINAL 605. But Wakeman argues the jury should have found otherwise—that she lacked the ability to appreciate the error of her ways—because she presented two experts to support her position, whereas the State presented testimony from a single expert who applied an incorrect legal standard.

¶8 "Greater weight" of the evidence is not the same as a greater quantity of evidence. The jury is the sole arbiter of credibility and weight to be assigned to testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Therefore, even uncontradicted expert opinion need not be accepted by the jury. ***Sarinske***, 91 Wis. 2d at 48. Here, it is evident that the jury rejected the experts' opinion in favor of Wakeman's own explanation for her behavior: she testified she was angry and drunk. It was therefore within the jury's province to conclude that, although Wakeman may in fact suffer from a mental disease or defect, the illness was not a factor in the homicide.

II. Required Testimony

¶9 Wakeman next argues the trial court erred by requiring her to testify, contrary to her Fifth Amendment rights. While a pretrial order states Wakeman "must testify in order to raise the issue of self-defense[,]" a review of the record indicates that the written document is overly broad and does not accurately reflect the trial court's intent. *See* ***Cashin v. Cashin***, 2004 WI App 92, ¶22, 273 Wis. 2d 754, 681 N.W.2d 255 (resolving conflicts between oral and written pronouncements hinges on the court's intent).

¶10 During a jury instruction conference held the day before Wakeman ultimately testified, the court had opined that Wakeman's statement to police

appeared to support a theory of self-defense, whether she testified or not. Further, the court concluded both the perfect and imperfect self-defense instructions were warranted.

¶11 It appears that the reason a discussion about Wakeman testifying occurred because she was contemplating offering evidence under ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). ***McMorris*** evidence is evidence "of prior specific acts of violent behavior of the victim of an assault or homicide where self-defense is in issue" and which is within [the defendant's] knowledge at the time of the incident. ***McAllister v. State***, 74 Wis. 2d 246, 250, 246 N.W.2d 511 (1976) (quoting ***McMorris***, 58 Wis. 2d at 152).

¶12 Because "only evidence as to specific acts of which the defendant had knowledge is admissible[,]" ***McAllister***, 74 Wis. 2d at 250, a defendant will frequently have to testify about how he or she came by the knowledge. Here, the court indicated that before it would permit corroborating evidence of Shepard's prior violence, Wakeman would first have to testify to establish how she came to know of these incidents.

¶13 It is therefore evident that the trial court meant to indicate Wakeman had to testify to lay the foundation for ***McMorris*** evidence, not to warrant a self-defense jury instruction. Even if that were not the case, the record reveals that the court had already decided to instruct the jury on self-defense before Wakeman testified. Wakeman does not challenge the court's analysis of the admissibility of the ***McMorris*** evidence, and the court did not actually require Wakeman to testify to receive a self-defense instruction.

III. Erroneous Jury Instructions

¶14 The jury was given WIS JI—CRIMINAL 810 on a duty to retreat. Wakeman contends the instruction was erroneous because there is no such duty in Wisconsin and the instruction therefore confused the jury.

¶15 So long as a jury instruction fully and fairly informs the jury of the law applicable to the case, determining which instructions to give is a matter of discretion for the trial court. *See* ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App.1995).

¶16 WISCONSIN JI—CRIMINAL 810 states:

> There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

This instruction is proper when there is evidence the defendant had an opportunity to retreat, because such a chance reflects on the reasonableness of the defendant's use of force. ***State v. Wenger***, 225 Wis. 2d 495, 503-04, 593 N.W.2d 467 (Ct. App. 1999). Here, there was evidence Wakeman could and did retreat to the safety of her own home before choosing to return to the victim's house. The jury instruction was therefore proper. It is not confusing—it adequately and accurately states the law, specifically acknowledging there is no duty to retreat. ***Id.*** at 502.

¶17 Wakeman also asked the court to give WIS JI—CRIMINAL 1012 on adequate provocation, arguing she "was provoked to the point, considering her intoxication and her state of mind, that provocation was a legitimate defense…."

She claims she "is entitled to any instruction she requests, provided it is supported by some evidence at trial."

¶18 This jury instruction indentifies two elements of the adequate provocation defense: "that the defendant actually believed that there was provocation and that the defendant's belief was reasonable." WIS JI—CRIMINAL 1012. The first element is subjective; the second is objective. Assuming Wakeman fulfills the subjective test, there is no evidence to support the objective prong here. This is because the objective test "looks at a reasonable *sober* person under similar provocation." ***State v. Heisler***, 116 Wis. 2d 657, 662, 344 N.W.2d 190 (Ct. App. 1983) (emphasis added). A reasonable sober person assaulted by drunken party revelers would not be provoked to flee the scene, go home, obtain a weapon and potential accomplice, return to the scene of the attack, and repeatedly and fatally stab one of her alleged assailants. The court therefore properly refused the adequate provocation instruction.

IV. Restrictions on Voir Dire

¶19 Wakeman contends the trial court impermissibly restricted voir dire. The court did, on more than one occasion, ask defense counsel to speed up or end the process. However, no contemporaneous objection was raised to the court's comments, and the matter is therefore not properly preserved for appeal. ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

¶20 Even on the merits, however, Wakeman's complaint fails. Subject to fundamental fairness, the court has broad discretion regarding the form, scope, and number of voir dire questions. *See* ***State v. Migliorino***, 150 Wis. 2d 513, 537, 442 N.W.2d 36 (1989). Wakeman has not shown a violation of fundamental fairness or an erroneous exercise of discretion because, despite the court's

comments on speeding up voir dire, the court never actually terminated the questioning until defense counsel stated, "I am done, Judge. I guess I am done. I do feel that way." Counsel did not indicate there were more questions to ask and, on appeal, Wakeman does not identify any topic about which she would have liked to question the panel further.

V. Use of Handcuffs and Due Process

¶21 Wakeman was not shackled during the guilt or mental responsibility phases of her trial. She was, however, shackled for transport between the jail and the courtroom in accordance with the sheriff's policies, which Wakeman does not challenge. But one of the jurors inadvertently observed Wakeman in handcuffs while the jury was in the hallway, waiting to enter the courtroom to deliver its verdict on her guilt. That juror told another juror. Wakeman conceded the guilt phase of her trial could not have been tainted, but moved for a mistrial of the mental responsibility phase. The court denied the motion and instead issued a cautionary instruction to the jury.

¶22 Whether to grant a mistrial is left to the trial court's discretion. ***State v. Knighten***, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997). The law forbids routine use of visible shackles during both the guilt and penalty phases of a trial, subject to special need. ***Deck v. Missouri***, 544 U.S. 622, 624-26 (2005). We therefore think it logical that such a prohibition also extends to the mental responsibility phase of a trial, when such a phase is necessary. However,

> a juror's observation of a restrained defendant outside a courtroom is not likely to arouse a juror's prejudice because people expect to see prisoners in restraint when they are in a position where they could escape. … "Courts have generally found brief and inadvertent confrontations

> between a shackled accused and one or more members of the jury insufficient to show prejudice."

Knighten, 212 Wis. 2d at 844 (citations omitted).

¶23 Further, the court instructed the jury that shackling was merely the sheriff's policy and the jury was not to make any inference from Wakeman's handcuffs. We presume juries follow the court's instructions. ***Id.*** at 845. The jury had already determined Wakeman's guilt; only the question of her mental responsibility remained. Wakeman offers no explanation for how viewing her in handcuffs would influence the jury's verdict regarding her capacity to understand her actions.[3] Thus, to the extent that Wakeman's mistrial motion was based on the juror's observation of her while shackled outside the courtroom, her motion was properly denied. *See* ***id.***

VI. Excluded Evidence

¶24 Wakeman complains the trial court improperly excluded from the guilt phase certain answers on her jail inmate medical screening form, filled out when she was booked into the jail shortly after she was arrested. On the form, there were questions about mental health and psychiatric treatment. Wakeman, or possibly the intake officer filling in the form with Wakeman's answers, indicated she had suffered from depression and had received counseling.

[3] Wakeman broadly argues, "Common sense and human nature tell us the juror who saw [Wakeman] shackled was no doubt prejudiced" and the jury "now saw her shackled, ergo, dangerous, possibly a flight risk." However, beyond the fact that this assertion is mere speculation, Wakeman does not demonstrate a causal connection between this possible perception and an altered verdict.

¶25 A court's decision to admit or exclude evidence is discretionary. ***State v. Leighton***, 2000 WI App 156, ¶46, 237 Wis. 2d 709, 616 N.W.2d 126. Only relevant evidence is admissible. WIS. STAT. § 904.02. Evidence is relevant if it has the "tendency to make the existence of any fact that is of consequence … more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. But even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice … or misleading the jury … or needless presentation of cumulative evidence." WIS. STAT. § 904.03. When admission of evidence is challenged, the burden is on the proponent to show why the evidence is admissible. ***Leighton***, 237 Wis. 2d 709, ¶47.

¶26 The trial court declined to admit the answers on the screen form related to Wakeman's mental health history because they were "too ambiguous" and required clarification. Wakeman argues the answers were probative of her "mental state at the time of the incident" and were important for the jury to understand what was going on at the time.

¶27 Wakeman greatly overstates the significance of her screening form. On its face it simply indicates that at some indefinite time—not necessarily the hours preceding her booking—she suffered from depression and received counseling. Moreover, the information on the form relating to her depression and counseling are self-reported; simply stating those events as facts does not automatically make them true. The answers therefore have no demonstrable relevance to any fact in controversy during the guilt phase.

¶28 In any event, failure to admit the answers would be harmless error. They were quite vague and not likely to be weighed heavily by jurors. More

significantly, the jury heard various references to Wakeman's depression at other points in the trial: she had told police she was frequently depressed, her sister and another witness made references to her depression, and her doctor testified he had prescribed Wakeman anti-anxiety medication that also acts as a depressant. Thus, a rational jury would still have found Wakeman guilty of homicide even if the cumulative answers had been admitted. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

VII. Media in the Courtroom

¶29 Wakeman asserts it was error for the trial court to deny her motion to exclude electronic and photographic media, because "mere presence of cameras in the courtroom is a per se denial of Wakeman's rights to a fair and impartial trial and due process of law." She contends:

> The Wisconsin Supreme Court recognized that, "A judge shall not, **when it will interfere with the judicial process or fair trial**, permit any radio or TV reproduction or taking of pictures in the courtroom … at any time during judicial proceedings." In re Promulgation of a Code of Judicial Ethics: Rule 14, 36 Wis. 2d 252, 262, 153 N.W.2d 873 (Wis. 1967). (Emphasis added [in Wakeman's brief].)

Wakeman's reliance on Rule 14 of the Code of Judicial Ethics is misplaced: the rule was rescinded effective July 1, 1979, and replaced with a new set of rules

governing media coverage. *See* ***In re: Code of Judicial Ethics***, 90 Wis. 2d xix (1979). These rules are presently found in SCR ch. 61.[4]

¶30 We further reject Wakeman's contention that the mere presence of cameras is a per se violation of her rights. The United States Supreme Court has ruled that there is no "constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances." ***Chandler v. Florida***, 449 U.S. 560, 573 (1981). "An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issues of guilt or innocence uninfluenced by extraneous matter." ***Id.*** at 574-75; *see also* ***State v. Jennings***, 2002 WI 44, ¶28, 252 Wis. 2d 228, 647 N.W.2d 142 (we are not free to disregard the Supreme Court's pronouncements of federal constitutional law).

¶31 If it could be shown that "mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required." ***Chandler***, 449 U.S. at 575. Instead, the appropriate safeguard against prejudicial publicity is the defendant's right to show the jury's ability to fairly adjudicate the case was compromised by media coverage. ***Id.***

[4] SUPREME COURT RULE ch. 61 governs the use of electronic media and still photography. The Sixth Amendment to the United States Constitution guarantees a public trial, but this right is not held exclusively by the defendants. ***State v. Wilson***, 149 Wis. 2d 878, 907, 440 N.W.2d 534 (1989). The Wisconsin Constitution, art. I, § 7, guarantees public access to the courts. *See also* WIS. STAT. § 757.14. Broadcasting court proceedings is an extension of this right and has been permitted since 1979. ***Wilson***, 149 Wis. 2d at 907.

¶32 However, an allegation that publicity prevented a defendant from receiving a fair trial must be adequately supported by evidence. ***State v. Wilson***, 149 Wis. 2d 878, 907, 440 N.W.2d 534 (1989). Wakeman points to no evidence her jury was compromised but, rather, fills her briefs with generalizations and hypotheticals about how the media presence could have altered her trial.[5] We do not decide cases based on hypothetical facts. *See* ***Pension Mgmt., Inc. v. DuRose***, 58 Wis. 2d 122, 128, 205 N.W.2d 553 (1973).

VIII. Jury Demographics

¶33 Finally, Wakeman, who is Native American, challenges the ethnic composition of her jury, asserting Native Americans were intentionally excluded from her jury panel. Forest County uses lists provided by the Department of Transportation to compile its list of potential jurors. *See* WIS. STAT. § 756.04(4). In 2004, the county sent 1,500 jury questionnaires to prospective jurors, of which 556 were returned. Wakeman complains that only 5.8% of the returned questionnaires were from Native Americans, even though the county at large is 11% Native American. Thus, she asserts that using the DOT list is both unconstitutional as applied and contrary to WIS. STAT. § 756.001(4).

¶34 There is "no requirement that petit juries actually chosen must mirror the community and reflect the variously distinctive groups in the population. … but the jury wheels, pools or names, panels, or venires from which

[5] For example, Wakeman asserts in a footnote, "We will never know if Elaine Shepard's refusal to come to Court – despite a validly served subpoena – was the result of fear of media exposure." At this stage, it is irrelevant to this court why Elaine Shepard refused to respond to her subpoena. If Wakeman wanted to use her absence to show damage from the media coverage, it was her burden to demonstrate the connection. As a casual aside in the footnotes, this commentary is insufficient.

juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." ***Taylor v. Louisiana***, 419 U.S. 522, 538 (1975). To establish a prima facie violation of the right to a representative jury, a defendant must show: (1) the group allegedly excluded is a "distinctive" group in the community; (2) representation of the group in jury pools is not fair and reasonable in relation to the number of such persons in the community; and (3) the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." ***Duren v. Missouri***, 439 U.S. 357, 364 (1979).

¶35 Assuming Wakeman fulfills the first two ***Duren*** elements, she fails on the third. The only suggestion she has that Native Americans were systematically excluded is an unsupported assertion that Native Americans are less likely than other groups to have State-issued driver's licenses or identification cards. Moreover, her sample is too small to make a prima facie case for exclusion. "Disproportionate representation of a group in one array is insufficient to establish a systematic exclusion." ***State v. Pruitt***, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980). Wakeman offers statistics relevant to her particular case, but she must be able to show systematic exclusion of Native Americans from jury panels *over time.*

¶36 We also reject Wakeman's contention that WIS. STAT. § 756.04 is unconstitutional or contradicts WIS. STAT. § 756.001(4). Section 756.001 states that trial by jury is a cherished constitutional right; jury service is a civic duty; individuals qualified to serve as jurors may not be excluded on the basis of various characteristics like race, age, or gender; and jurors should be selected at random. Wakeman contends § 756.04 is at odds with § 756.001 because in counties where only the DOT list is used, otherwise qualified individuals who are not on the

DOT's list will never have a chance to be on the panel.[6] However, § 756.001 is really a policy statement, the objectives of which are achieved by implementing the subsequent sections.

¶37 Wakeman also complains the jury clerk intentionally added Native Americans to the jury panel. The clerk initially picked a panel containing forty potential jurors, one of whom was Native American. The clerk testified she generated the list by asking a computer program for forty names; the computer then randomly selected the names from the DOT list. Counsel then advised the clerk that the panel might need as many as sixty names. Rather than start over and have the computer pick sixty new names, the clerk told the computer to add twenty names to the existing forty. These twenty names included four Native Americans. Then, the court told the clerk that the pool should be expanded to eighty names, and she repeated her addition, adding twenty more names instead of making a new list of eighty. Wakeman appears to believe the clerk hand-selected Native American jurors to add to the possible panel.

¶38 Although Wakeman expresses incredulity over the various percentages of Native Americans in each of the three lists,[7] she has not contradicted the clerk's testimony or otherwise shown their inclusion was intentional or performed manually by the clerk. "[F]ortuity can account for any disproportion that may appear on a particular venire." ***Pruitt***, 95 Wis. 2d at 78 n.3.

[6] The clerk of the circuit court must use the DOT list to compile potential jurors, but WIS. STAT. § 756.04(5)(a) permits that list to be supplemented with voter registration lists; telephone and municipal directories; utility company lists; tax rolls; high school graduation lists; and lists of people receiving certain government aid.

[7] Meanwhile, of course, these proportions are also not identical to the County's Native American composition.

Wakeman may find the statistics she cites improbable, but they are certainly not impossible. There is no evidence of systematic exclusion, or intentionally disproportionate inclusion, of Native Americans in the jury selection process.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.