COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP947-CR **Cir. Ct. No. 2008CF123**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES CLIFFORD KOEPP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: R. A. BATES, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. James Koepp appeals a judgment convicting him of three counts of first-degree intentional homicide. The sole issue on appeal is an evidentiary ruling barring Koepp from presenting evidence that someone else may

have committed the homicides. We conclude the evidence was properly excluded and affirm the conviction.

BACKGROUND

¶2 Koepp was charged with killing Danyetta Lentz and her teenaged children, Nicole and Scott Lentz, in their mobile home on or about January 11, 2007. The coroner determined that the causes of death were strangulation and sharp force injuries, and opined that three separate weapons had been employed: a ligature found around Danyetta's neck, a knife found protruding from Scott's chest, and another knife that had been used on Nicole.

¶3 The State's theory was that Koepp had killed Danyetta to keep her from exposing an affair and had killed the children because they witnessed the murder of their mother. Nicole's boyfriend, James Warner, placed Koepp in the mobile home on the night of the homicides based upon a series of telephone conversations; the police recovered clothing from Koepp with blood stains from all three victims; and several witnesses related incriminating statements Koepp had made after the fact. However, there was also unknown male DNA found on the ligature and the handles of the two knives found at the scene, and Warner further testified that Nicole mentioned during one of the telephone conversations on the night of the homicides that Koepp had told her "someone had seen someone fleeing from her house."

¶4 At three different points during the trial, the defense attempted to put in evidence that an unknown man may have committed the homicides. The circuit court excluded the proffered evidence, but permitted Koepp to make offers of proof.

¶5 The offers of proof consisted of the following. First, Warner would have testified that the weekend before the homicides, Nicole woke him up about 1:00 a.m., upset that Danyetta had either gone out or was going out. Nicole subsequently related to Warner that "some guy" had given her mother a ride home and had argued with her when she refused to have sex with him.

¶6 Second, a classmate of Scott's, Reba W., would have testified that, two or three days before the homicides, Scott told Reba and others that his mother was being bothered by a guy she used to date, who "didn't get the hint" when she broke it off. Scott said the guy kept calling, and Danyetta would make Scott or Nicole answer the phone and say that she was not there.

¶7 Third, Danyetta's sister, Kim Lucht, who suffered from a seizure disorder and some mental health problems, would have testified that the week before the homicides, Lucht was staying over at the mobile home and was awoken by Danyetta and a man shouting outside. Danyetta then ran inside crying and went to bed. Lucht had previously told police that the argument was about whether Danyetta would have sex with the man and that the man had come inside briefly, may have been bowlegged, and may have been someone who worked on Danyetta's car. However, by the time of trial Lucht did not remember what the argument was about and did not remember seeing the man's face.

STANDARD OF REVIEW

¶8 Trial courts have broad discretion to admit or exclude evidence and to control the order and presentation of evidence at trial. ***State v. James***, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727. Generally speaking, we will set aside such discretionary determinations only if the trial court has failed to apply the correct law, failed to consider relevant facts of record, or has failed to arrive at

a reasonable result. ***Id.***; ***Duffy v. Duffy***, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). However, we independently determine whether an evidentiary decision deprives a defendant of the constitutional right to present a defense. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

DISCUSSION

¶9 The right to present a defense through the testimony of favorable witnesses and the effective cross-examination of adverse witnesses is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). A defendant's right to present a defense may in some cases require the admission of testimony which would otherwise be excluded under applicable evidentiary rules. *See* ***id.*** at 648; *see also* ***State v. Jackson***, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998). The right to present a defense is not absolute; rather, it is limited to the presentation of relevant evidence whose probative value is not substantially outweighed by its potential prejudicial effect. *See* ***Pulizzano***, 155 Wis. 2d at 646. Additionally, in order to warrant a new trial, a defendant must show that a violation of the confrontation clause or compulsory due process clause "completely" prohibited him from exposing a witness's bias or motive for testifying falsely, or deprived him of material evidence so favorable to his defense as to "necessarily" prevent him from having a fair trial. ***United States v. Manske***, 186 F.3d 770, 778-79 (7th Cir. 1999); ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 872 (1982).

¶10 Evidence offered to cast blame for a charged offense onto a person not on trial is not relevant unless it has a "legitimate tendency" to show that the

other person actually could be guilty. ***State v. Denny***, 120 Wis. 2d 614, 623-25, 357 N.W.2d 12 (Ct. App. 1984). Under the legitimate tendency test, third-party defense evidence may be admissible if the defendant can show that: (1) the third party had a motive to commit the charged offense; (2) the third party had the opportunity to commit the charged offense; and (3) there is some evidence to directly connect the third party to the charged offense that is not remote in time, place, or circumstance. ***Id.*** at 624; *see also* ***State v. Scheidell***, 227 Wis. 2d 285, 295-96, 595 N.W.2d 661 (1999) (approving ***Denny*** test). Evidence directly connecting the third person to the charged offense could include demonstrated proximity to the crime scene or recent acts or threats of violence. ***Denny***, 120 Wis. 2d at 624.

¶11 As a threshold matter, the State contends that the evidence Koepp sought to introduce would have been inadmissible under hearsay rules, even if it was relevant under the legitimate tendency test. However, ***Pulizzano*** could potentially require admission of the evidence notwithstanding statutory evidentiary rules such as hearsay, if it were constitutionally necessary for Koepp's defense. Therefore, we do not address the hearsay issue but instead go directly to the ***Denny*** issue.

¶12 Applying the ***Denny*** test here, we are not persuaded that Koepp's offers of proof establish a legitimate tendency to believe that a third party committed the homicides.

¶13 Regarding motive, we will assume that Warner and Lucht were referring to the same incident allegedly involving a man who argued with Danyetta about whether she would have sex with him after he drove her home in the early morning hours about a week before the homicides. Thus, the testimony

of each corroborates the testimony of the other on the occurrence of this event. However, although there was a verbal altercation, there is no evidence that any violence occurred. Moreover, there was nothing in either Warner's or Lucht's account to suggest that Danyetta had an ongoing romantic relationship with the man. It is not reasonable to infer that a single denial of sex after a night out would have provided motive to brutally kill Danyetta and her children a week later, when the denial of sex did not result in violence at the time, so far as the suggested offers of proof.

¶14 We similarly conclude that the proffered testimony on an ex-boyfriend does not show that he had a motive for the homicides. Reba did not provide any information that the ex-boyfriend had committed or threatened violence against Danyetta, either during the bothersome phone calls or at any other time.

¶15 Even if we were to assume that the man who drove Danyetta home and loudly demanded sex was the same ex-boyfriend who "didn't get the hint" and continued calling after she broke up with him—which, taken together, might conceivably form a pattern of a disgruntled, rejected lover—Koepp did not show that this ex-boyfriend had opportunity to commit the homicides. Because the identity of the ex-boyfriend in question was unknown, there was simply no way to determine whether he had an alibi for the night in question.

¶16 And finally, even if we were to take such a broad view of opportunity as to include anyone without a known alibi who knew Danyetta's address and could have broken into the mobile home, there is not a reasonable basis in the evidence for linking the unknown third party or parties referenced in the offers of proof to the crime scene in close temporal proximity to the

homicides. The jury heard testimony that someone may have been seen "fleeing" the mobile home an undisclosed amount of time *before* the murders, and that Koepp's wife saw an unidentified vehicle near the Lentz trailer around 1:00 a.m. the night of the homicides, which was about four hours *after* Nicole stopped answering Warner's phone calls that night. It would be pure speculation to believe that the fleeing person or the vehicle's owner had anything to do with the demand for sex or bothersome phone calls.

¶17 In sum, we are satisfied that the circuit court properly exercised its discretion in ruling that the proffered evidence was not sufficient under ***Denny***, and we conclude that the evidentiary ruling did not deprive Koepp of a fair trial.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).