COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 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. 94-2460-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK ANDREW REA,

Defendant-Appellant.

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

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

PER CURIAM. Mark Rea appeals from the judgment of conviction for first-degree intentional homicide and second-degree sexual assault, both as party to a crime. Rea argues that the admission of other acts evidence deprived him of his constitutional right to a fair trial; that exclusion of the co-defendant's composition deprived him of his right to present a defense;

and that admission of his (Rea's) confession was improper because it was secured in violation of his constitutional rights. We affirm.

Rea and his co-defendant, David Newbury, were charged and tried jointly for the brutal sexual assault and murder of their classmate, Charlene Dvorak, whose badly beaten body was found near Pulaski High School on May 14, 1993. Rea first contends that the trial court erred in allowing the State to introduce what he considers inadmissible "other acts" evidence: a composition he wrote approximately forty-five days before the assault; sexually suggestive comments he made to Dvorak the day before the assault; and statements he made after the assault claiming to have killed Dvorak.

A challenge to the admissibility of evidence is reviewed under the erroneous exercise of discretion standard. ***Badger Produce Co. v. Prelude Foods Int'l Inc.***, 130 Wis.2d 230, 235, 387 N.W.2d 98, 101 (1986). If there is a reasonable basis for the trial court's decision, it will be upheld. See ***State v. Plymesser***, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992).

In assessing the admissibility of other acts evidence, the trial court must apply a two-part test. ***State v. Danforth***, 129 Wis.2d 187, 202, 385 N.W.2d 125, 131 (1986). First, the evidence must fit within the exceptions of § 904.04(2), STATS. ***Danforth***, 129 Wis.2d at 202, 385 N.W.2d at 131. Second, the trial court must determine whether any unfair prejudice resulting from the admission of the evidence would substantially outweigh its probative value. *See* § 904.03, STATS., and ***Danforth***, 129 Wis.2d at 202, 385 N.W.2d at 131. "Implicit with our two-prong analysis is the requirement that other crimes evidence be relevant to an issue in the case" as required by § 904.01, STATS. ***State v. Alsteen***, 108 Wis.2d 723, 729, 324 N.W.2d 426, 429 (1982).

Rea challenges the admission of a composition he wrote approximately 45 days prior to Dvorak's murder. In response to a school assignment in which he was asked to describe his "favorite place," Rea wrote:

> My favorite place I would like to be is Hell Because I like Death and Killing And theires No Rule except yours And thats How this hole world should Be! Meny years

> White men were in control Now The Blacks are trying to take over, Blood And Death Excites me. To watch a man Blead and Die right in frunt of you must meny Powers witch If you follow satan You shal have. Just like me!! If Everyone could see the world The way I Do Every thing would Be much mor exciting. I would explain but I would be to hard.

The trial court admitted the composition concluding that it provided "a reasonable basis for proving [Rea's] motive, intent and state of mind and identity."

While conceding that this evidence of "a professed fascination with death and violence...would, at first blush, appear to be relevant on motive, intent and identity," Rea argues that "[t]he composition is simply not fact-specific enough to be deemed relevant to any issue in the case." On appeal, the State agrees but argues harmless error.

We agree with the trial court. Section 904.04(2), STATS., allows other acts evidence to prove, *inter alia*, motive, intent, and identity. In this brutal, unprovoked attack, Rea's composition was relevant to the most obvious questions: Who would have done such a thing, and why? Arguably, the composition offered responses to those questions by identifying Rea, his completely crazed view of life, and his willingness to kill.

We also conclude that the composition's probative value was not outweighed by any unfair prejudicial effect. The probative value of other acts evidence depends on its nearness in time, place and circumstance to the alleged crime or element sought to be proved. ***State v. Speer***, 176 Wis.2d 1101, 1117, 501 N.W.2d 429, 434 (1993). Under the circumstances of this case, the trial court reasonably found that the evidence "provided a reasonable basis" for determining Rea's motive and intent.

Rea next argues that his sexually aggressive remarks should not have been admitted. Rea's classmates testified that the day before the assault, Rea told Dvorak "that he could take [her] behind a dumpster and ... fuck her," that "he could drag her by the hair to the dumpster and make her suck his penis," and that he "bet he could make her scream." The trial court ruled that the statements were relevant and admissible under § 904.04(2), STATS., as to intent, motive and identity, and that the probative value of this evidence was not outweighed by any unfair prejudice to Rea.

Once again, we agree with the trial court. Rea's remarks indicated his aggressive sexual intentions against Dvorak the day before the attack. The trial court used reasonable discretion in admitting the testimony relating Rea's statements.

Rea also challenges the admissibility of statements he made after the assault. A classmate testified that Rea stated, "yeah, I did it, and I'd do it again," and "yeah, I killed her." Another classmate testified that Rea said that "he hit her with a brick and used a claw hammer." Again, Rea concedes that "at first blush" this evidence appears to be admissible, but he argues that, under § 904.02, STATS., it was "so fundamentally unreliable that it was utterly lacking in probative value." Clearly, however, as the trial court concluded, this testimony was admissible as Rea's admissions under § 908.01(4)(b)1, STATS.[1]

Rea next argues that the trial court's exclusion of co-defendant Newbury's composition deprived him of his right to present a defense. Whether an evidentiary determination deprived an individual of his/her constitutional right to present a defense is subject to our *de novo* review. ***In Interest of Michael R. B.***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993).

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[1] **908.01 Definitions.**

...

(4) STATEMENTS WHICH ARE NOT HEARSAY . A statement is not hearsay if:

...

(b) Admission by party opponent. The statement offered against a party and is:

1. The party's own statement...

Rea explains that his "theory of defense rested in part upon the opportunity to confront and impeach Newbury" because each co-defendant was claiming that the other was the primary actor. Rea argues that the Newbury composition would have supported his (Rea's) version because it depicted "sex as power, sex as brutal, uncaring[,] impersonal, narcissistic gratification."

Newbury's composition, written six months prior to the murder, is, as Rea's brief describes it, "a rambling four-page description of several raunchy sexual encounters taking place in a nudist town with all women." Although temporally more remote than Rea's composition, Newbury's composition was also admissible to establish Newbury's motive, intent, and identity under § 904.04(2), STATS. Thus, we conclude that the trial court erred in excluding Newbury's composition.

The court's error, however, was harmless. An error in the exclusion of evidence is harmless unless "there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

The evidence against Rea was overwhelming. It included Newbury's confession identifying Rea as the primary actor, Rea's own confession, Rea's composition, Rea's statements the day before the assault, and Rea's admissions after the assault. We conclude, therefore, that there is no reasonable possibility that the exclusion of Newbury's composition contributed to Rea's conviction.

Finally, Rea argues that the trial court erred in denying the motion to suppress his confession. Rea does not claim that the ***Miranda*** warnings were deficient or that he did not knowingly waive his rights. Rather, Rea maintains that his waiver was involuntary because of coercive police tactics, his developmental disabilities, and the unavailability of his lawyer and father.

Under the Fifth Amendment of the United States Constitution, no person "shall be compelled in a criminal case to be a witness against himself." If, however, the accused "voluntarily, knowingly and intelligently" waives his right against self-incrimination, then his statements may be used against him. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). Reviewing a trial court's denial of

a motion to suppress a confession presents a mixed question of fact and law. We will not set aside the trial court's factual findings "unless they are contrary to the great weight and clear preponderance of the evidence." ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). We independently review, however, "the application of federal constitutional principles to the facts as found." ***Id.***

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'." ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986). If no coercive tactics were undertaken by the police, there is no basis for finding the confession involuntary. ***Clappes***, 136 Wis.2d at 235-39, 401 N.W.2d at 765-67; ***State v. Owens***, 148 Wis.2d 922, 934, 436 N.W.2d 869, 874 (1989). The voluntary nature of a confession is determined by balancing the personal characteristics of the accused against the pressures exerted by the police. ***Grennier v. State***, 70 Wis.2d 204, 210, 234 N.W.2d 316, 320 (1975). The personal characteristics are not, however, dispositive if the trial court finds that the police did not engage in improper conduct. ***Clappes***, 136 Wis.2d at 239-240, 401 N.W.2d at 767.

Rea argues that the police employed "coercive tactics ... during nearly six hours of questioning." The record, however, belies his claim. According to the testimony at the hearing on his motion to suppress, Rea was arrested at about 5:30 p.m. on May 19, 1993. He was placed in a squad car, advised of his ***Miranda*** rights, and taken to the police station for questioning. Detective Joseph Nowicki advised Rea of his ***Miranda*** rights again and then began questioning Rea at about 6:40 p.m. Between 6:40 p.m. and 10:00 p.m., Rea offered three different alibis and, as a result, the questioning was interrupted several times so that the police could investigate them. When the alibis broke down, Rea eventually admitted that he committed the crimes and his formal statement was taken between approximately 10:40 p.m. and 12:30 a.m.

At the hearing on his motion to suppress, Rea did not testify. No evidence disputed Nowicki's account that Rea never declined to speak and never requested a lawyer or his parents. Rea was provided with sandwiches, soda, coffee, and cigarettes and was given at least four breaks of between ten and thirty minutes. There was no evidence of any threats or other coercion.

Rea argues that "law enforcement personnel undertook inadequate efforts to secure a valid waiver of his constitutional rights" given his age and mental capacity. A psychologist testified that Rea functioned at a third or fourth grade level. Nowicki, however, testified that Rea engaged in a coherent and rational discussion with him. Further, Nowicki testified that Rea acknowledged having been through the interrogation process during a prior arrest for an unrelated crime.

Rea further argues that the absence of his parents and/or his lawyer rendered his confession involuntary. The presence of a parent or an attorney is not required to validate a juvenile's waiver. ***Theriault v. State***, 66 Wis.2d 33, 41, 223 N.W.2d 850, 853 (1974). According to the undisputed testimony, Rea never requested an attorney or his parents. Further, there is no evidence to show that Rea's attorney (in an unrelated juvenile court case) was seeking contact with Rea or even that the questioning detective knew that Rea had such counsel.

We conclude, therefore, under the totality of the circumstances, that Rea voluntarily waived his rights and the trial court properly admitted his confession.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.