COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0718-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LELAND JARVEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Leland Jarvey appeals from a judgment entered on a jury verdict convicting him of first-degree murder, contrary to WIS. STAT. § 940.01 (1971-72).[1] Jarvey seeks a new trial on grounds that the trial court

[1] All statutory references are to the 1999-2000 version unless otherwise indicated.

erroneously exercised its discretion when it admitted other acts evidence that Jarvey allegedly sexually assaulted a woman and denied Jarvey's request to impeach the woman's credibility with prior crimes evidence. First, we conclude that the court did not erroneously exercise its discretion when it refused to admit evidence of the witness's criminal history. Second, without deciding whether the other acts evidence was improperly admitted, we conclude that the error, if any, was harmless. We affirm the judgment.

STATEMENT OF FACTS

¶2 Jarvey was convicted of killing sixteen-year-old Diane Cartier, whose body was found in a secluded outdoor area near a large sand pit on Tuesday, April 20, 1971. According to Cartier's friend, Colleen Monske, the two friends had gone out together on Saturday, April 17, and were planning on spending the night at Cartier's house. Cartier and Monske "hung out," ate french fries and drank soda at a restaurant and then went to Western Lanes, a bowling alley, at approximately 10:30 p.m. There, the two young women struck up a conversation with Richard Shaut, who Cartier knew from high school, and Shaut's friend Jarvey.

¶3 Cartier, Monske, Shaut and Jarvey went to Shaut's house. Monske testified that at approximately 11:15 or 11:30, they split up. Monske and Shaut left in Shaut's car and Cartier and Jarvey left in Jarvey's car. Monske said that she expected to see Cartier later because Monske was planning to sleep at Cartier's house.

¶4 Later in the evening, Monske and Shaut returned to Western Lanes to meet Cartier, but she and Jarvey were not there. Monske and Shaut waited awhile and then drove around looking for Cartier. Shaut dropped Monske at the

Cartier home at 1:30 a.m. Monske said she told Cartier's mother that the two young women had separated and that Cartier had failed to meet Monske.

¶5 Mrs. Cartier and Monske drove around looking for Cartier. At approximately 3 a.m., Mrs. Cartier contacted law enforcement and persuaded them to begin looking for her daughter. Mrs. Cartier continued to search for her daughter and also contacted Cartier's friends to inquire whether they knew where Cartier was.

¶6 On Sunday morning, the police contacted Jarvey and asked him to come to the police station. Officer Milton Steeno, now retired, testified Jarvey told him that after he and Cartier left the Shaut residence, Cartier told Jarvey she wanted a ride downtown. At approximately 11:40 p.m., as Jarvey and Cartier were driving, Cartier said, "let me out." When Jarvey stopped the car, Cartier exited. Jarvey drove away and went to his parent's trailer in Little Suamico, Wisconsin.

¶7 On Monday, Steeno conducted another interview with Jarvey. Steeno testified that Jarvey told the same story, adding only that he had suggested that the two couples split up because Shaut and Monske had been "making out" in the backseat of the car. Jarvey also consented to a search of his vehicle.

¶8 On Monday night, a woman out walking saw what appeared to be a body at a sand pit. She became frightened and ran home. On Tuesday morning, she and her husband went to the pit to confirm what she had seen. They discovered Cartier's body and contacted the police.

¶9 Steeno went to the crime scene and observed that Cartier was lying on the ground. Her blouse, jacket and brassiere were pushed up around her neck.

Cartier's pants with the underwear still inside were located near the body. There was blood on both Cartier's clothing and her body. A bloody knife, a pack of cigarettes and a beer can were also found near the body.

¶10 The subsequent autopsy revealed that Cartier had died of stab wounds to her chest.[2] She also had a fractured cheekbone, scratches on her legs, and what the State's expert opined were bite marks on her breasts. The pathologist also conducted a sexual assault examination, which revealed sperm in Cartier's vagina.

¶11 Steeno interviewed Jarvey a third time on Tuesday morning. Steeno testified that Jarvey told the same story as before, adding only that there were some "hippie types" in the area where Jarvey dropped Cartier off. Steeno also said that he never asked Jarvey whether Jarvey had sexual intercourse with Cartier and Jarvey never indicated whether he had.

¶12 Although it was undisputed that Cartier had been murdered, the police did not charge anyone with the crime. In the 1990s, detective Joseph Kaminski reviewed the Cartier file. He ascertained that it might be possible to perform DNA testing on the semen found on vaginal swabs gathered during the autopsy.

¶13 At Kaminski's request, two different labs conducted testing using the swabs and a blood sample from Jarvey. Both concluded that they could not exclude Jarvey as the donor of the DNA. One lab indicated that one of 12,000

[2] At trial, evidence concerning the autopsy was elicited from Dr. Jeffrey Jentzen, Milwaukee County medical examiner, because the pathologist who conducted the autopsy in 1971 was deceased.

Caucasians would have the same genetic profile as the donor. The second lab, using more advanced techniques, determined that only one in 468 million would have the same genetic traits.

¶14 On June 14, 1999, Jarvey was charged with first-degree murder. A jury convicted him, and this appeal followed. Jarvey's challenge to his conviction involves the testimony of Debra W., who gave other acts evidence over Jarvey's objection. Jarvey argues that the trial court erroneously exercised its discretion when it (1) denied Jarvey's request to impeach Debra's credibility by asking her if she had previously been convicted of any crimes; and (2) admitted evidence that Jarvey allegedly sexually assaulted Debra approximately five months after Cartier's death. We reject Jarvey's arguments and affirm the judgment.

DISCUSSION

I. Impeachment of Debra with prior crime testimony

¶15 Prior to Debra's testimony, the defense, outside the presence of the jury, sought permission to impeach Debra with her nine prior criminal convictions.[3] The State took the position that none of the convictions should be used for impeachment, while the defense argued that all nine convictions should be used. Exercising its discretion, the trial court concluded that none of the convictions could be used. Jarvey argues that the trial court erroneously exercised

[3] If Jarvey's request had been granted, he would have been allowed to ask Debra whether she had been convicted of a crime and, if so, how many times. *See* ***State v. Smith***, 203 Wis. 2d 288, 297, 553 N.W.2d 824 (Ct. App. 1996) (Wisconsin law is clear that if evidence of prior convictions is admitted, witnesses may be asked if they have been convicted of a crime, and if the answer is yes, the number of convictions.).

its discretion because it failed to articulate how the State would be unduly prejudiced by the admission of Debra's criminal history. We disagree.

¶16 Evidence that a witness has been convicted of a crime is admissible for the purpose of attacking the witness's credibility. *See* ***State v. Kruzycki***, 192 Wis. 2d 509, 524, 531 N.W.2d 429 (Ct. App. 1995) (a prior conviction of any crime is relevant to the witness's credibility); WIS. STAT. § 906.09.[4] Section 906.09 reflects the longstanding view in Wisconsin that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted. ***State v. Kuntz***, 160 Wis. 2d 722, 752, 467 N.W.2d 531 (1991).

¶17 Whether to admit prior conviction evidence for impeachment purposes under WIS. STAT. § 906.09 is a matter within the trial court's discretion. ***Kruzycki***, 192 Wis. 2d at 525. When we review a discretionary decision, we consider only whether the trial court properly exercised its discretion, not whether we would have made the same ruling. *See* ***State v. Smith***, 203 Wis. 2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996). A court properly exercises its discretion when it

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[4] WISCONSIN STAT. § 906.09 provides in relevant part:

> **Impeachment by evidence of conviction of crime or adjudication of delinquency. (1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
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> **(2)** EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

correctly applies accepted legal standards to the facts of record and uses a rational process to reach a reasonable conclusion. *See* ***id.***

¶18 A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. ***Id.*** at 295-96. These factors are weighed in a balancing test to determine whether the probative value of the prior conviction evidence "is substantially outweighed by the danger of unfair prejudice." WIS. STAT. § 906.09(2); *see also* ***Smith***, 203 Wis. 2d at 295-96.

¶19 Our review of the record convinces us that the trial court did not erroneously exercise its discretion. At issue were nine misdemeanor convictions dating from 1991 to 1996. Seven of the convictions were for issuing worthless checks valued at less than $100. One conviction was for operating while intoxicated. The ninth conviction was for driving without a valid driver's license. The court stated:

> Well, I begin with the analysis that none of the proffered convictions are felonies, and all of these convictions are misdemeanors. All of these convictions were at a point in time that any sentence of probation, any jail sentence or any punishment or rehabilitation has concluded. That's one of the factors that I'm supposed to look at.
>
> I look then at the gravity of the crime, and I make a record that with regard to the offense of worthless checks, a misdemeanor, I'm satisfied that … the nature of that charge is not the charge so peculiar by its character or the conduct involved would not of necessity suggest that a person who committed such an offense would be a person whose credibility, believability for a story would necessarily be impacted, and – and again recognizing that they were misdemeanors.

> In addition, it's now been recited on the record that the dispositions were a fine, very minimal jail time and probation, and so by the sentences imposed, I'm satisfied that the sentences would reflect the character that I described of the conduct, that is to say the sanctions were well within the general character of those offenses. They do not involve any false statements, and I would be satisfied.
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> And turning now to the OWIs[5] again, the operating while intoxicated are offenses that are – they have no *mens rea* meaning they are not intentional offenses. They are conduct people get into by going – by drinking, but they are offenses that are found within a community. They go across all social economic and educational barriers, and they do not I think contribute to a characterization that such a person would be falsifying or should be placed in a position where because of that offense alone that they should be – their testimony should have less probative value.
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> And, therefore, on the sum total of the analysis and because of the record that's been made here today, I am … going to not permit this witness to be asked … whether she's been convicted of a crime and the number of crimes.
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> I also want to indicate on the record that even if [I had] allowed that, I would have then permitted the State to … explore … these issues that I have now set forth on the record, and I do not think that that is a good use of … trial time here, nor do I think that it would contribute to the ultimate resolution of this matter, nor do I believe that putting all of that in front of this jury is going to in one way or the other assist them in the conclusions they have to make with regard to this case or the evaluation of this witness's testimony.
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> So for all of those reasons, … pursuant to 906.09, I am excluding evidence of the conviction of prior crime[s] on the grounds that such evidence in this case as I understand it, … that its probative value is far outweighed by the

[5] The trial referred to the eighth and ninth convictions as OWIs. This reflects the fact that there was confusion over the precise nature of the ninth conviction because a statute number from Michigan was listed, rather than the name of a specific crime. However, as indicated, the ninth conviction was for operating without a valid driver's license.

> danger of unfair prejudice that such testimony would have with regard to this witness's testimony.

¶20 The trial court considered the proper factors and concluded that the probative value of the evidence was outweighed by the danger of unfair prejudice. Jarvey's primary complaint is that the court failed to articulate how the State would be unfairly prejudiced. Although the court may have not have been explicit, we may infer that the court made that finding. *See* ***Englewood Apts. P'ship v. Grant & Co.***, 119 Wis. 2d 34, 39 n.3, 349 N.W.2d 716 (Ct. App. 1984). First, the court concluded that the nature of the crimes and the punishments were minimal and, therefore, less probative of the witness's credibility.

¶21 Next, the court implicitly concluded that the State would be unfairly prejudiced by having its witness indicate she had been convicted nine times when those convictions were not serious in nature. That is why the court indicated that if the witness was required to disclose the number of convictions, the court would have allowed the State to introduce evidence about the specific nature of the convictions which the court said would not be an efficient use of judicial time. Based on the record, we conclude that the court did not erroneously exercise its discretion because it correctly applied accepted legal standards to the facts of record and used a rational process to reach a reasonable conclusion.[6] *See* ***Smith***, 203 Wis. 2d at 295.

[6] Even if we were to conclude that the trial court erroneously exercised its discretion, we would nonetheless sustain Jarvey's conviction on harmless error grounds. For the reasons articulated later in this opinion, we are likewise convinced that Jarvey's inability to ask Debra about her prior convictions did not result in Jarvey's conviction.

II. Other acts evidence

¶22 Prior to trial, the State moved to introduce other acts evidence of Jarvey's alleged assault on Debra. The court granted the State's motion, and ultimately admitted Debra's testimony for the purpose of proving motive and opportunity. *See* WIS. STAT. § 904.04(2). Debra testified that she was at the Stardust bar one night in September 1971. Jarvey, who Debra knew from junior high, said he would give her a ride home. However, instead of going to Debra's home, they left the Stardust, went to another bar and had a few drinks.

¶23 Debra testified that when they left the second bar, she said she wanted to go home. Nevertheless, Jarvey drove her to a quarry, where young people often hung out. Jarvey parked the car and exited so that he could go to the bathroom. He returned to the car and said, "Let's go for a walk." Although Debra refused, Jarvey opened her door, pulled her from the car and took her for a walk.

¶24 Debra said that after they walked about twenty yards, Jarvey threw her to the ground and started to choke her. He told her to take her clothes off and then he had sexual intercourse with her. Afterward, Jarvey asked her what she would do if he threw her in the water. She said she did not know. Then the two walked back to Jarvey's car.

¶25 As Debra neared the car, she ran ahead and locked herself inside. She opened the car only after Jarvey pounded hard on the windows. Jarvey got in the car and asked Debra not to tell the police what had happened. Debra testified Jarvey then said if Debra called the cops, "they would connect him for Diane's murder." She told him she would not call the police. Jarvey dropped Debra off at the Stardust bar. The next day, Debra told two friends about the incident. Ultimately, she contacted the police to report the incident.

¶26 The jury was instructed that if it determined Jarvey had assaulted Debra, it could consider the evidence as it related to motive and opportunity. Consistent with the pattern jury instruction, the jury was instructed that it could not consider the evidence to conclude that Jarvey acted in conformity with a certain character trait.

¶27 Jarvey argues that the other acts evidence was improperly admitted as evidence of motive and opportunity. The State disagrees, arguing that the evidence supported the State's theory that Jarvey had a motive to use force and violence to obtain sexual gratification from young women who he picked up and drove to isolated areas. The State argues the evidence is also relevant to show that Jarvey had the opportunity to drive women who rode in his vehicle to isolated locations where he could have sex with them by whatever means necessary. In the alternative, the State argues that if the trial court erred by admitting the other acts evidence, that error was harmless.

¶28 Without deciding whether the other acts evidence was improperly admitted, we conclude that the error, if any, was harmless. Error in admitting other acts evidence is subject to harmless error analysis. ***State v. Thoms***, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***Id.*** The beneficiary of the error, here the State, has the burden to establish that the test has been met. ***Id.*** The conviction must be reversed unless the court is certain that the error did not influence the jury "or had such slight effect as to be de minimus." ***Id.*** In determining if harmless error exists, we focus on whether the error undermines our confidence in the case's outcome. ***Id.*** We consider the error in the context of the entire trial and consider the strength of

untainted evidence. ***Id.*** Based on this standard of review and our careful review of the record, we conclude that the State has met its burden.

¶29 There is overwhelming evidence of Jarvey's guilt. Two independent laboratories concluded that Jarvey could not be excluded as the donor of the DNA found in Cartier's vagina. There was also undisputed testimony that no sperm was found in Cartier's underwear or pants, which led one expert to conclude that Cartier did not dress after sexual intercourse. Thus, there was substantial evidence contradicting any suggestion that Jarvey had consensual sexual intercourse with Cartier and that she later met another individual who killed her.[7]

¶30 Jarvey's own statement to Steeno also contradicts any suggestion that he had consensual intercourse with Cartier. Not only did Jarvey not mention any sexual intercourse, he told Steeno that he dropped Cartier downtown at 11:40 p.m. Given Monske's uncontroverted testimony that the two couples split up at 11:15 or 11:30, it would have been difficult under the circumstances for Jarvey to have sexual intercourse with Cartier before dropping her downtown.

¶31 Second, numerous witnesses testified about admissions Jarvey made in the months and years following Cartier's death. Patrick Ruby, Jarvey's friend, testified that in summer or fall of 1971, he helped rescue Jarvey from a bar fight. Ruby testified that after the fight, Jarvey said, "You're a good friend. You know I killed the Cartier girl."

[7] Jarvey, who did not testify at trial, did not specifically argue that he had consensual sexual intercourse with Cartier. Instead, Jarvey's counsel suggested that if Jarvey and Cartier did have sexual relations, it does not automatically follow that Jarvey killed Cartier.

¶32 Debra testified that Jarvey told her if she called the police "they would connect him for Diane's murder."[8] Another woman, Lottie St. Andre, said she knew Cartier from high school. She said that approximately fourteen months after Cartier's death, Jarvey asked her out. When she refused to go out with him, he told her, "Don't piss me off or you're going to end up out in the woods like your friend."

¶33 A friend of Jarvey, David Jaegers, testified that after a bar fight in 1972, Jarvey thanked him for helping out in the fight. Jaegers testified:

> Then he said to me, "You know, you're the best friend I got," and I go, "Yeah, yeah, yeah, yeah." You know, the guy's saying he's best friends and stuff. He goes, "I got something to tell you." I said, "Yeah, what?" And he said, "I killed that Cartier girl." I said, "Oh, come on, come on." He said, "Hey, don't worry about it. Don't worry about it. They got nothing on me." And then -- and then I was, you know, kind of a shocking thing … but the look in that man's eyes told me he was telling me the truth.
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> ….
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> [W]e finished our cigarette or something. Like I said, I was a little bit in shock. I went back inside, and as I was going back in, he grabbed me by the back and says, "Don't worry about it. Don't worry about it. Like I said, they got nothing on me."

Jaegers said that he later told his uncle, a police officer, about the conversation, and eventually gave a statement to a detective.

[8] Even if Debra's testimony concerning the sexual assault had not been admitted as other acts evidence, her testimony concerning Jarvey's statement would have been properly admitted as an admission. Furthermore, the State probably would have been permitted to introduce some facts concerning the alleged assault to put Jarvey's statement in context.

¶34 Finally, Patricia Niles, a high school classmate of Jarvey's, testified that she heard Jarvey talking to either himself or the bartender in a bar about three years after Cartier's death. She said she heard him say, "They're never going to find out. I even left a pack of cigarettes there."

¶35 The DNA evidence and Jarvey's various admissions, as well as the other evidence, is overwhelming. Jarvey disagrees, arguing that there is other evidence in the record that casts doubt on his guilt. For example, Jarvey contends that he dropped Cartier downtown approximately one block from where Cartier's former boyfriend worked, suggesting she went to visit her boyfriend. Also, Monske's mother testified that she received two hang-up calls around 12:30 a.m. on Sunday. Jarvey argues, "The obvious inference was that Diane was attempting to contact [Monske], whom she had failed to meet at the bowling alley." Additionally, there was testimony that a man and his boys were at the sand pit on Sunday afternoon and did not see Cartier's body.

¶36 Further, a pizza parlor employee testified that she remembered Cartier and three individuals coming in between 1:30 a.m. and 2 a.m. on Monday. Jarvey also argues that his expert's testimony about the time of death excluded the possibility that Cartier died Saturday night. Additionally, the autopsy revealed that Cartier had eaten potatoes or pizza shortly before her death. Finally, Jarvey contends that there was a pubic hair found at the scene that was analyzed using microscopic analysis in the 1970s, which concluded the hair was not Jarvey's or Cartier's.

¶37 We have read the entire transcript and have examined each of Jarvey's arguments in detail. Although we decline to discuss all of the evidence

that refutes each of Jarvey's contentions, we remain convinced that the evidence of Jarvey's guilt is overwhelming.

¶38 For instance, Jarvey places great emphasis on his theory that Cartier was at the pizza parlor early Monday morning, which contradicts the State's theory that Cartier died late Saturday night or early Sunday morning. Jarvey notes that the autopsy suggested that Cartier had eaten pizza shortly before her death. However, the autopsy results did not conclude that Cartier had eaten pizza. Instead, the test results stated that the food in Cartier's stomach "looked like sausage stems, maybe chunks of potatoes, or maybe pizza crust." Chunks of potatoes is consistent with Monske's testimony that she and Cartier ate French fries on Saturday night.

¶39 Furthermore, the pizza parlor employee testified that she told police in 1971 that she saw Cartier at the pizza parlor early Monday morning, and that Cartier was with another woman and two men named Thomas and Curt Oettinger. On rebuttal, Thomas Oettinger testified that although he does not remember if he was at the pizza parlor on that early Monday morning, he is positive that he never saw Cartier after Cartier's mother called him Sunday morning looking for Cartier. Sherry Westby testified that she remembers going to the pizza parlor with Curt Oettinger and Jim Ness on that early Monday morning, and that the fourth person with them was Patti Costello. Westby explained that at the time, she resembled Cartier, which could explain the employee's belief that she saw Cartier.

¶40 In summary, we conclude that there is no reasonable possibility that the admission of the other acts evidence, if improper, resulted in Jarvey's conviction. The other evidence in the record was more than sufficient to prove beyond a reasonable doubt that Jarvey killed Cartier.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.