COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2602-CR **Cir. Ct. No. 01-CF-4**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID BECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. David Beck appeals from a judgment of conviction of first-degree intentional homicide and intentionally pointing a firearm at a person. He seeks a new trial arguing that pretrial publicity required a change in venue, the jury view was improper, a witness's statement to police should not have been admitted because the tape recording of the statement was destroyed, and it

was error to permit a witness to testify about a conversation with Beck but not permit cross-examination about the witness's relationship with or her opinion of Beck and his brother. We reject his claims of error and affirm the judgment.

¶2 On January 6, 2001, Beck shot and killed his former girlfriend, Kim Paswaters. Beck, Kim, and Harry Beck, Beck's brother, were all volunteer firefighters and emergency medical technicians (EMT) in the small community of Campbellsport. Beck asked Harry to speak with Kim about why she wanted to end her relationship with Beck. Harry arranged to meet Kim at the firehouse in Campbellsport. While Harry and Kim were conversing, Beck ran downstairs from a mezzanine area of the firehouse and started shooting Kim. He then pointed the gun at Harry.

¶3 Beck was arrested later that night and the murder weapon was found in his truck. Beck confessed to shooting Kim. About a month before his trial started, Beck filed an affidavit withdrawing his confession. He described how Harry had shot Kim and that he took the blame because he felt bad about involving Harry and because Harry had a family to take care of and Beck did not.

¶4 The trial commenced on March 18, 2002. Beck's pretrial motion for a change of venue was denied. In his motion Beck argued that seven articles appearing in Fond du Lac's THE REPORTER in January and February 2001, one article appearing January 6, 2002 in THE REPORTER, six news items appearing in the CAMPBELLSPORT NEWS in January and February 2001, and an article from a

Milwaukee newspaper dated January 8, 2001, constituted prejudicial pretrial publicity.[1]

¶5 We review the trial court's decision on a motion to change venue for an erroneous exercise of discretion. *See* ***Hoppe v. State***, 74 Wis. 2d 107, 110, 246 N.W.2d 122 (1976). The factors to be considered are:

> The inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire*. In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned.

Id. (quoting ***McKissick v. State***, 49 Wis. 2d 537, 545-46, 182 N.W.2d 282 (1971)). On review we look not only at whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial but also at whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or impaneled jurors. ***Hoppe***, 74 Wis. 2d at 111.

¶6 We first observe that the newspaper articles reporting about the crime, Beck's confession, the charges filed, the court appearances, and Kim's funeral were not inflammatory but objective, informational, and non-editorial. Such reporting is not prejudicial. *See* ***id.*** at 112. The reports were based on

[1] Articles appearing in Fond du Lac's THE REPORTER on March 10 and 17, 2002, and reproduced in Beck's appendix were not offered into evidence and are not part of the record. While we reject Beck's request that we take judicial notice of the articles, even if we did so, our analysis is unchanged.

information released by police and court documents, including Beck's own pretrial affidavit setting forth the theory of defense.[2] There is no suggestion that news reports contained information not admissible at trial. Letters to the editor mentioned the crime only for the purpose of opening a dialogue about gun control. The majority of articles appeared more than one year before trial. Circulation records and findings made by the trial court with respect to the county's population reflect that less than 20% of the county population received the newspaper on a regular basis. While undoubtedly the nature of the crime was of great interest to the small community, an informed jury is not necessarily a biased jury. ***Id.***

¶7 The jury selection was not unnecessarily difficult and did not suggest any extreme prejudice created by news accounts of the crime and approaching trial. Individual voir dire was conducted after nearly all the jurors indicated that they had read or heard something about the case. The entire selection process took only the first morning of trial. While potential jurors indicated knowledge about the case, those seated for duty assured the court that they would make a decision based only on the evidence at trial. Beck speculates that potential jurors were not being honest in their appraisal of how they were influenced by news reports. However, it was for the trial court judge to assess the credibility of the jurors' assurances of impartiality. *See* ***State v. Czarnecki***, 2000 WI App 155, ¶19, 237 Wis. 2d 794, 615 N.W.2d 672. Beck does not argue that

[2] The one possible exception is the January 10, 2001 article appearing in THE REPORTER based on impressions from Kim's divorce attorney and making reference to questioning Kim about whether she feared Beck. The article reported that Kim was not afraid of Beck. Although the article also included the attorney's praise of Kim's devotion to her children and parenting skills, it was not inflammatory as to Beck's potential guilt.

the trial court's refusal to grant requests for dismissal of certain jurors for cause was error or that he was unfairly forced to use peremptory strikes to remove biased jurors. Again, an informed juror is not a biased juror. The trial court's denial of the motion to change venue was a proper exercise of discretion.

¶8 Over Beck's objection, a jury view at the Campbellsport firehouse was conducted during trial. From the firehouse parking lot, the trial court pointed out Beck's, Harry's, and another witness's home. Beck moved for a mistrial on the ground that the jury view was tainted because Beck's house had a "For Sale" sign out front while Harry's did not. Beck also argued that he was prejudiced by the jury seeing him in handcuffs as he was leaving the squad car after the jury view.

¶9 The trial court denied the motion for mistrial concluding that no negative inference could be drawn from the "For Sale" sign in front of Beck's home. It determined there was no prejudice from seeing Beck in handcuffs at the end of the jury view because the jury had already been discharged for the day and had been instructed that observation of matters outside the courthouse was not to be construed as evidence.

> The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.

State v. Bunch, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995) (citations omitted). Where, as here, the defendant seeks a mistrial on grounds not

related to conduct by the prosecution, we give the trial court's ruling great deference. *See* ***id.*** at 507.

¶10 We conclude the trial court properly exercised its discretion in denying a mistrial. Beck agreed that his house should be pointed out and could have alerted the trial court to the existence of the sign that he subsequently claimed to be prejudicial. Further, Beck only speculates that observation of the "For Sale" sign would "subtly influence" the jurors to believe Beck was guilty and less open to considering his defense that he was not the shooter. The jury was given a cautionary instruction about the view and is presumed to have followed it. *See* ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

¶11 ***State v. Knighten***, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997), explains how the brief observation of a defendant in restraints does not require declaration of a mistrial.

> [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."

Id. (citation and quoted source omitted). Thus, there was not sufficient prejudice to justify a mistrial.

¶12 At trial Beck's sister, Connie Meyer, testified about the phone conversation she had with Beck shortly after the shooting. In the conversation Beck had said, "I did it, but I don't know why I did it." Meyer's interview with police was recorded and a transcript of the interview prepared. Meyer reviewed the transcript and signed it. The statement was admitted at trial. Beck argues that

it was error to admit Meyer's statement and testimony since the prosecution was unable to produce the original audiotape of the interview.[3] He claims that the evidence should have been excluded as a discovery sanction under WIS. STAT. § 971.23(7m)(a) (2001-02).[4] Whether the prosecution has met its burden of showing good cause for a failure to produce discovery is a question of law that we review de novo. ***State v. Long***, 2002 WI App 114, ¶33, 255 Wis. 2d 729, 647 N.W.2d 884, *review denied*, 2002 WI 121, 257 Wis. 2d 117, 653 N.W.2d 889 (Wis. Sept. 26, 2002) (No. 01-1147-CR).

¶13 Good cause existed for not producing the original audiotape because it no longer existed. Even though negligence or lack of bad faith will not be good cause in all cases, *see* ***State v. Martinez***, 166 Wis. 2d 250, 259, 479 N.W.2d 224 (Ct. App. 1991), the facts here permit the inference that the tape was not purposefully destroyed. The officer explained that he reused the tape after the transcript was made and Meyer had signed the statement. Moreover, even if a discovery violation occurred, prejudice must exist before a new trial is warranted.[5] ***State v. DeLao***, 2002 WI 49, ¶60, 252 Wis. 2d 289, 643 N.W.2d 480; *see also* ***State v. Nielsen***, 2001 WI App 192, ¶19, 247 Wis. 2d 466, 634 N.W.2d 325,

[3] The original audiotape had been recorded over after the transcript was made.

[4] WISCONSIN STAT. § 971.23(7m)(a) (2001-02), provides: "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance." All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[5] Thus, we need not decide if the prosecution had an obligation to preserve the original audiotape of Meyer's interview. ***State v. DeLao***, 2002 WI 49, 252 Wis. 2d 289, 643 N.W.2d 480, on which Beck relies, does not address the prosecution's duty to preserve raw evidence. That we decline to address the issue should not be deemed an imprimatur on the practice of recording over the statements of potential witnesses.

review denied, 2001 WI 117, 247 Wis. 2d 1036, 635 N.W.2d 784 (Wis. Oct. 23, 2001) (No. 00-3224-CR). Beck was not prejudiced by the destruction of the original audiotape. Meyer was an available witness at trial. She indicated that her signed statement was an accurate reflection of the police interview. Her statement was not exculpatory evidence.

¶14 The final issue surrounds the testimony of Sherry Chappelle, an EMT who worked and trained with both David and Harry Beck. The trial court denied Beck's pretrial motion to admit testimony from Sherry that Harry had been pursuing her for a romantic relationship months before the shooting and was despondent in the weeks before the shooting because Sherry had rejected Harry. The trial court found such evidence to be irrelevant.

¶15 At trial Sherry testified that while on duty with Beck one day in the autumn of 2000, he talked about his problems with Kim. Over Beck's objection, Sherry indicated that Beck told her that during a live burn training exercise he had briefly considered not performing his duty to assure the safety of Kim and her training partner as they entered the burning building. Beck indicated that he was jealous of Kim's relationship with her training partner and knew that they would die if he failed to punch out the windows of the burning building after they went in. Beck reportedly said causing the deaths would have been okay with him. Beck wanted to cross-examine Sherry about her negative opinion of the Beck brothers in order show her bias in the testimony about the live burn exercise. The trial court did not permit such cross-examination. Beck complains about all three rulings.

¶16 Evidentiary rulings are addressed to the trial court's discretion. ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). We will

uphold the trial court's decision absent an erroneous exercise of its discretion. ***Id.*** at 585 n.1.

¶17 We first take up the admission of Sherry's testimony about Beck's thoughts during the live burn exercise. We agree with the State that this testimony is not other acts evidence. Also, it is not hearsay evidence under the admission by a party opponent exception. WIS. STAT. § 908.01(4)(b)1. Beck's statement to Sherry was admissible if otherwise relevant and not outweighed by the risk of unfair prejudice. *See* ***State v. Johnson***, 121 Wis. 2d 237, 256, 358 N.W.2d 824 (Ct. App. 1984). We affirm the trial court's determination that the evidence was relevant on the issue of intent. Beck's citation to ***State v. Borrell***, 167 Wis. 2d 749, 482 N.W.2d 883 (1992), is misplaced. In ***Borrell*** the defendant's tearful postcrime explanation that he did not want to kill his victim was held to be irrelevant on the issue of the defendant's state of mind at the time of the crime. ***Id.*** at 781. In contrast, Beck's statement to Sherry was made before the crime was committed and suggested that he had thought of killing Kim. It was relevant. *See* ***State v. Kuta***, 68 Wis. 2d 641, 642-45, 229 N.W.2d 580 (1975); ***Johnson***, 121 Wis. 2d at 257.

¶18 While the trial court recognized that the evidence would be prejudicial, it did not find unfair prejudice. This comports with the recognition that "[n]early all evidence operates to the prejudice of the party against whom it is offered.… Thus, the standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'" ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citation omitted). Beck does not suggest how Sherry's testimony would influence the jury by improper means.

We conclude it did not and therefore, the trial court properly exercised its discretion in admitting the evidence.

¶19 We also conclude that excluding Sherry's testimony about Harry's pursuit of her and his reaction when she rejected him was a proper exercise of discretion. Such evidence only bore on Harry's feelings about Sherry and did not provide any link to Harry's propensity to shoot Kim. It was not relevant and did not support the theory of defense.

¶20 Finally, we are not persuaded that the trial court improperly limited Sherry's cross-examination to the prejudice of the defense. The defense asked Sherry if she believed Harry and Beck to be controlling men. She admitted that she believed that to be true. Further exploration of her dislike for Harry certainly might have indicated bias against Harry but not Beck himself. Again, the proposed cross-examination was irrelevant.

By the Court.—Judgment affirmed.

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