COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2752-CR **Cir. Ct. No. 2003CF427**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACQUELYN A. LOPICCOLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Jacquelyn LoPiccolo appeals a judgment convicting her of being party to the crime of first-degree intentional homicide. The sole issue on appeal is whether the trial court erred in disallowing testimony from a psychologist that LoPiccolo's personality was such that she made verbal

threats that she had no intention of carrying out. We conclude the trial court did not erroneously exercise its discretion in excluding the testimony, and, further, that the exclusion did not deprive LoPiccolo of her constitutional right to present a defense. Accordingly, we affirm the appealed judgment of conviction.

BACKGROUND

¶2 LoPiccolo's husband shot and killed their son-in-law, Irvin Johnson. The State charged LoPiccolo as party to the crime on the theory that she goaded her husband into killing Johnson. The State's theory derives in part from the history of bad blood between the LoPiccolos and their son-in-law, which we briefly describe in the paragraphs which follow.

¶3 Johnson began dating the LoPiccolos' daughter, Vanessa, when Vanessa was sixteen and Johnson was twenty. Although they disapproved of the relationship virtually from its start, the LoPiccolos eventually consented to their daughter's marrying Johnson when she was seventeen. Soon after the marriage, however, LoPiccolo started urging Vanessa to divorce Johnson for a number of reasons, including a concern that Johnson was unemployed and would be unable to provide for Vanessa and the baby Vanessa was then expecting. In addition, LoPiccolo told a number of people over the months preceding the shooting that she was going to kill Johnson or wanted him dead, and she once asked a family friend to kill Johnson for her.

¶4 The day before the shooting, LoPiccolo and Johnson had an argument over the phone that culminated in Johnson calling LoPiccolo several vulgar names and threatening to get a restraining order to bar her from seeing Vanessa or her future grandchild. When LoPiccolo spoke with another daughter, Janeen, later that day, she told Janeen that she was going to make Johnson pay and

that she was going to kill him. When Janeen pointed out that LoPiccolo would go to prison if she killed Johnson, LoPiccolo said she would kill herself before that happened. LoPiccolo told Janeen that she would regret for the rest of her life that she had allowed Vanessa to marry Johnson, and that she felt the only way to rectify that decision was to kill Johnson. LoPiccolo also said she was going to rip into her husband when he came home from work and question whether he was a real Sicilian who would defend her honor. Janeen took her mother's statement to mean that LoPiccolo meant to have her husband kill Johnson to demonstrate his Sicilian blood.

¶5 LoPiccolo spoke to Janeen again later that evening, asking her to speak to her father because he "wasn't going to do anything," which Janeen took to mean that her father was not going to kill Johnson. When Janeen spoke to her father, he criticized her for not taking her mother's side in the argument and said somebody was going to die that weekend. He subsequently called Johnson and Vanessa to request that Johnson apologize for the things he had said to LoPiccolo, which Johnson refused to do.

¶6 The next morning, LoPiccolo told Janeen over the phone that she wanted to come over to Janeen's apartment, where LoPiccolo had learned Vanessa and Johnson were staying, to pick up some Avon supplies. Janeen told her mother that if she wanted to come over, she would need to bring the police to supervise the exchange. In a separate phone conversation that morning, LoPiccolo told Vanessa that she wanted an apology from Johnson "or else," which Vanessa believed meant that her mother would kill Johnson.

¶7 When LoPiccolo and her husband arrived at Janeen's apartment, Janeen noted that her parents did not have the police with them and locked her

door. After Janeen refused to open the door for her mother, LoPiccolo smashed one of the window panes on the door and reached through to unlock the door herself. After breaking into the apartment, LoPiccolo hit Janeen to get her out of the way, then grabbed Johnson by the arm and started hitting him and screaming at him. LoPiccolo's husband then entered the apartment with a gun, kicked Vanessa out of the way when she tried to grab his gun, and shot Johnson three times in the chest, twice after he had already fallen to the ground. Janeen told her parents to take whatever they wanted, and LoPiccolo responded, "[W]e got what we want." LoPiccolo's husband left the apartment without saying anything. LoPiccolo followed him, telling Vanessa on the way out, "[Y]ou happy? He's dead now. My job is done." At the police station after the shooting, LoPiccolo wrote her husband a note stating, "Charles, I'll never doubt you again. Thank you. I love you, Jackie."

DISCUSSION

¶8 In order to rebut the State's theory that LoPiccolo had urged her husband to kill Johnson, LoPiccolo sought to introduce testimony from her long-time psychologist. Although LoPiccolo did not submit any report or statement from the psychologist, counsel explained that the psychologist's testimony would be that LoPiccolo's frequent use of the word "kill" was a type of venting consistent with her personality but which did not indicate true threats. Counsel argued that the psychologist's testimony was necessary to support lay testimony that LoPiccolo was never taken seriously when she used the word "kill." The trial court barred the psychologist's testimony.

Admissibility of Character Evidence.

¶9 The admissibility of evidence lies within the trial court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises its discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶10 The standard for admitting character evidence is set forth in WIS. STAT. § 904.04 (2003-04),[1] which provides in relevant part:

> **(1) Character evidence generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same ….

Character evidence may be presented "by testimony as to reputation or by testimony in the form of an opinion," including expert opinion testimony. WIS. STAT. § 904.05(1); ***King v. State***, 75 Wis. 2d 26, 38, 248 N.W.2d 458 (1977).

¶11 The trial court acknowledged that character evidence such as LoPiccolo sought to introduce through her psychologist was generally admissible, although it was not entirely persuaded that it was analogous to the profile evidence found admissible in ***State v. Richard A.P.***, 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998). The court correctly noted, however, that (1) otherwise admissible evidence still must be relevant under WIS. STAT. §§ 904.01 and 904.02, in that it

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

must relate to a fact or proposition of consequence to the determination of the action; and (2) its probative value must substantially outweigh the danger of unfair prejudice or confusion of issues under WIS. STAT. § 904.03. ***State v. Sullivan***, 216 Wis. 2d 768, 785-89, 576 N.W.2d 30 (1998). The court then reasoned that the psychologist's testimony would be of limited probative value because the fact that some people are given to saying things that they do not mean to be taken literally was within the common knowledge of jurors, and other lay witnesses would already be providing similar testimony. Additionally, the trial court was persuaded that the proffered testimony could be confusing to the jury, to the extent that it might appear that the psychologist was offering an opinion as to LoPiccolo's actual intent at the time she made her statements about Johnson (which would be barred under other case law), as opposed to more general profile evidence.

¶12 We are satisfied that the trial court applied the proper legal standards in determining that the danger of confusion of the jury outweighed the limited probative value of the proffered evidence. It's conclusion was not unreasonable and did not constitute an erroneous exercise of discretion.

Right to Present a Defense.

¶13 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).

¶14 The right to present a defense is not absolute, however. The right 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 process clause "completely" prohibited the defendant from exposing a witness's bias or motive for testifying falsely, or deprived the defendant of material evidence so favorable to the defense as to "necessarily" prevent the defendant from having a fair trial. ***United States v. Manske***, 186 F.3d 770, 778 (7th Cir. 1999); ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 859 (1982). Whether an evidentiary decision deprives a defendant of the right to present a defense is a constitutional question which we decide de novo. *See* ***State v. Heft***, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994).

¶15 We have concluded that the trial court reasonably determined that the probative value of the proffered testimony was substantially outweighed by its potential to mislead the jury. LoPiccolo testified that her various comments to the effect that she wanted Johnson dead were only a figure of speech, and that she tended to "get mouthy when [she was] mad." Her testimony that she frequently made hollow threats was supported by a number of other witnesses. Thus, LoPiccolo was not "completely" prohibited from presenting her defense. In any event, the evidence against her included not only her prior threats, but also her note to her husband after the shooting, thanking him for his action. Taking into account all of the evidence, we are not persuaded that the absence of the psychologist's testimony deprived LoPiccolo of a fair trial. Accordingly, we

conclude that the exclusion of the psychologist's testimony did not violate LoPiccolo's right to present a defense.

By the Court.—Judgment affirmed.

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