COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP3167-CR **Cir. Ct. No. 2006CF442**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN M. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 BROWN, C.J. Kevin Moore appeals his conviction for intentionally murdering his wife. He makes four separate arguments as to why his conviction should be overturned: 1) there was insufficient evidence to convict him, 2) the trial court erred in admitting evidence of his spending habits at a

gentlemen's club, 3) the trial court erred in admitting the victim's statements to a coworker about their marriage, and 4) the trial court erred in refusing to admit evidence of a neighbor's refusal to talk to defense investigators about the crime. We reject all of his arguments and affirm.

¶2 Dawn Moore[1] was brutally murdered during the early morning hours of November 13, 2006. Between 5:30 a.m. and 5:40 a.m. that day, several people in the area surrounding Dawn and Kevin Moore's house heard screams. One neighbor believed she heard the words "killing me" as part of the screams. Emergency responders were first called to the scene by Kevin around 7:30 a.m. After they arrived, Dawn was transported to the hospital by rescue workers, where she was pronounced dead.

¶3 Kevin told police that the night before the incident, he had gone to bed around midnight and gotten up around 2:00 a.m. At that point, he said he went down to the basement and worked to clean up and put away Halloween decorations. He said that around 6:00 a.m., he decided to go to a nearby gas station to get some chocolate milk. When he returned home, he returned to the basement. Later that morning, he told police he came back upstairs, saw muddy footprints on the stairs to the second story and went to see if his wife had left for work. He said he was upset because he had just recently cleaned the carpets. When he went to see if his wife had left, he found her body outside.

¶4 After Kevin called 911, Dawn was found by emergency responders lying face down on the ground just outside of her garage, in a pool of her own

[1] Because both victim and defendant in this case share a last name, we will refer to Dawn Moore and Kevin Moore by their first names throughout this opinion.

blood. The scene was messy in part because there was so much blood and in part because the ground was wet with fresh snow, rain, and water. There was blood not only around the body, but spattered on the outside wall of the garage and inside the garage. Drops of blood were also found inside the house. The first thing Kevin said to officers who arrived at the scene was that he had moved a cinder block from on top of his wife's head before calling 911.

¶5 Several aspects of Kevin's account of his morning troubled the officer who interviewed him. First, a receipt from the nearby gas station showed that Kevin had bought milk at 6:31 a.m., one hour after screams were heard and thirty minutes after he claimed he had been at the store. That would mean that Kevin had gone to his car (parked in the garage), backed out of his driveway, and returned the car to the garage without noticing any blood or his wife's body lying nearby. Second, Kevin told officers that he had run up to his wife's body and knelt beside her when he saw her—but his clothes were clean when they got to the scene. When police asked if he had changed clothes at all that morning, he said that he had been wearing the same clothes since he got up at 2:00 a.m. This concerned officers in part because rescue workers who had come near Dawn's body had mud and/or blood on them.

¶6 During Kevin's fourteen-day trial, the medical examiner who performed an autopsy on Dawn testified. He said that he had found that she had died from blunt force trauma to "all surfaces of her head." He testified that her injuries were the result of a minimum of thirteen separate impacts. In addition to the autopsy evidence, DNA tests were performed on the drops of blood inside the house—all came from Dawn. No DNA evidence pointed conclusively to Kevin or anyone else as the perpetrator.

¶7 A forensic scientist also testified for the State. Although most of the blood was located in the garage and outside, he testified that the drops of Dawn's blood inside the house led him to believe that the attack began indoors. Specifically, he testified that because the drops of blood were fairly uniform in size and round, they likely came from a replenishing source (such as an injured person), which would indicate that Dawn was hurt before she ever went to the garage.

¶8 The State's theory during trial was that Kevin had killed his wife as a result of ongoing conflict between them over money and his spending habits. Two of Dawn's nieces testified that they knew Kevin participated in gambling and frequented a local gentlemen's club. There was testimony from an employee and a regular at the gentlemen's club that Kevin was there several nights a week, spending hundreds of dollars a night. Evidence was also introduced that in the days prior to Dawn's death, the couple had received notice that a substantial tax levy had been placed on two of their accounts.

¶9 One witness was Dawn's coworker, who had seen Dawn at a meeting in Louisville, KY the August before she died. She testified that while at a restaurant with other coworkers one evening, she had confided in Dawn that she was going through a messy divorce and was afraid of her then-husband. In particular, she told Dawn that if anything ever happened to her, she hoped the police would look at her husband first. She said that Dawn had empathized with her, stating that she could understand those feelings and that she, too, would want the police to look at her husband if anything happened to her. She also testified that in the same conversation, Dawn told her that Kevin was also unemployed, which caused strain on their marriage.

¶10 Kevin's theory of defense was that he did not murder his wife—it was someone else, most likely an intruder to their home. He testified that he had an extensive gun collection and large amounts of cash in the house. He also called an expert who testified that the drops of Dawn's blood found inside the home were consistent with what blood dripping from a weapon might look like. He used that evidence to argue that the footprints going up the stairs and down the hall were from an intruder looking around the house for cash and/or guns.

¶11 Kevin's testimony as to what happened the day Dawn died was fairly consistent with what he had told police: he woke up at 2:00 a.m., went down to the basement, left to buy some chocolate milk, went back to the basement, and came up again to find muddy footprints on the steps. Once he saw the muddy footprints, he went to look for his wife and eventually found her body outside.

¶12 Before trial, Kevin filed a motion in limine asking to present evidence at trial that a neighbor (who admitted to being in the vicinity of the Moore house when Dawn was killed) had refused to talk to defense investigators. He argued that the refusal implied that the neighbor might have something to hide. He was not allowed to present that evidence or make that argument, but he was able to call that neighbor as a witness and ask about where he was that morning and what he did or did not see from his house across from the Moore residence.

¶13 After listening to all of the testimony, the jury convicted Kevin and he appeals.

DISCUSSION

¶14 Three of Kevin's four issues concern evidentiary rulings by the trial court; the fourth is a sufficiency of evidence argument. First, he complains that evidence of his visits to a gentlemen's club was inadmissible "other acts" evidence under WIS. STAT. § 904.04 (2007-08).[2] Second, he contends that Dawn's coworker's statements regarding Dawn's feelings about her marriage were inadmissible hearsay. Third, he argues that he had a right to present evidence that his neighbor had the opportunity to commit the crime and that ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), should be interpreted to allow him to do that. Finally, he claims that the evidence in this case was insufficient, as a matter of law, to convict him of this crime.

Standards of Review

¶15 All three admissibility of evidence issues are subject to the same standard of review. A trial court may admit or exclude evidence within its discretion. ***State v. Bauer***, 2000 WI App 206, ¶5, 238 Wis. 2d 687, 617 N.W.2d 902. We will uphold a trial court's evidentiary ruling if we find that it "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. If the trial court fails to develop its reasoning or misapplies the law, we will search the record to see if there is a proper legal analysis that supports the trial court's conclusion. *See* ***Bauer***, 238 Wis. 2d 687, ¶5; ***Hunt***, 263 Wis. 2d 1, ¶34.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶16 When reviewing a challenge to a jury verdict based on sufficiency of the evidence, our standard of review is extremely deferential to the jury verdict. An appellate court may not reverse a jury verdict "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient … that it can be said as a matter of law that *no* trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) (emphasis added).

Other Acts Evidence

¶17 Before trial, Kevin filed a motion in limine to preclude admission of evidence that he frequented and spent money at the Mansion on Main, which he described in his brief as a "gentlemen's club." He claims that the evidence was "other acts" evidence covered by WIS. STAT. § 904.04 and ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). He complains that the trial court "did not evaluate the evidence using the 'other acts' analysis," a three-part test described in ***Sullivan***. *See* ***id.***

¶18 WISCONSIN STAT. § 904.04(2)(a) states that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person *in order to show that the person acted in conformity therewith*." (Emphasis added.) In ***Bauer***, we noted that "simply because an act can be factually classified as 'different'—in time, place, and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." ***Bauer***, 238 Wis. 2d 687, ¶7 n.2. We went on to explain that "the first question the lawyers and the trial court should ask is 'what is the purpose of the State's intention to admit the evidence?' If it is not to show a similarity between the other

act and the alleged act, then perhaps the parties should [ask] whether it is 'other acts' evidence at all." ***Id.***

¶19 The State argues that under ***Bauer***, the Mansion on Main evidence was not "other acts" evidence that required a ***Sullivan*** analysis. We agree. This is not "other acts" evidence because, as we implied in the ***Bauer*** footnote, it was not used to show a similarity between those acts and the crime Kevin was accused of committing. *See* ***Bauer***, 238 Wis. 2d 687, ¶7 n.2. Instead, the proper analysis is the one used by the trial court—whether, if the evidence is relevant, "its probative value is substantially outweighed by the danger of unfair prejudice." WIS. STAT. § 904.03.

¶20 The trial court correctly applied a WIS. STAT. § 904.03 analysis to the Mansion on Main evidence. It acknowledged that there is some prejudice inherent in presenting this type of evidence, stating that "I'm sensitive to that. Everybody has their own walk in life, and sometimes it's perceived by others maybe in different manners." It went on to state:

> So what we have here today is … a theory by the State that there [are] financial issues involving this couple. Does that mean there was such hostile discord in this family that … [Kevin's] own life-style behavior provided the nexus or motive for what in fact happened? I don't know. And I think what's important though is that the jury not be denied the opportunity of giving the appropriate weight and credibility to those statements.

Since the trial court applied the proper standard of law and came to a rational conclusion, our inquiry goes no further. *See* ***Hunt***, 263 Wis. 2d 1, ¶34.

Dawn's Statements to Her Coworker

¶21 At trial, Kevin objected to the testimony of Dawn's coworker, who testified that when she told Dawn of her hope that if anything ever happened to her, they would look to her husband first, Dawn said she felt the same way. Before the testimony was given, outside the presence of the jury, there was an offer of proof and argument on both sides as to the admissibility of the evidence. Ultimately, the trial court found that the statements were not testimonial, so a hearsay analysis was appropriate. Then, after finding the statements "trustworthy," it admitted the evidence.

¶22 Kevin complains that the trial court did not go into a proper analysis of the WIS. STAT. § 908.045(6) residual hearsay exception as outlined in ***State v. Anderson***, 2005 WI 54, ¶59, 280 Wis. 2d 104, 695 N.W.2d 731. Section 908.045(6) applies to statements that are "not specifically covered by any of the foregoing exceptions but hav[e] comparable circumstantial guarantees of trustworthiness." In ***Anderson***, our supreme court outlined the three "guarantees of trustworthiness" that are found in the enumerated hearsay exceptions, including "[w]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed." ***Anderson***, 280 Wis. 2d 104, ¶59. The State submits that this case falls into that category and we agree.[3]

¶23 Here, it is clear that the trial court examined Dawn's statements to her coworker for trustworthiness and concluded that they were trustworthy enough

[3] The State also points out that Kevin refers to the guarantees outlined in ***State v. Anderson***, 2005 WI 54, ¶59, 280 Wis. 2d 104, 695 N.W.2d 731, as a "three-prong[]" analysis. We assume Kevin only meant to emphasize that the coworker's statements did not meet any of the three enumerated guarantees of trustworthiness, but we also note that only one is necessary. *See* ***id.***, ¶60-63.

to be admitted. While it is true that the trial court spent much of its analysis discussing whether the statements were testimonial under ***Crawford***,[4] it also stated, "Is there any reason why Ms. Moore would articulate the things she stated if they … in fact were not certainly presented in a manner that would be trustworthy?… I think it would be very trustworthy and should be perceived as such." So, while the trial court may not have cited to the proper case and standard, it did make some useful findings—namely that the statement was made under circumstances that tend to produce trustworthy statements. However, since the trial court did not explicitly state why it found the statements to be trustworthy, we look to the record to support that finding. *See* ***Hunt***, 263 Wis. 2d 1, ¶34.

¶24 Dawn made the admitted statements to her coworker[5] at a restaurant after a meeting in Lousiville, KY. She was talking about a sensitive and potentially embarrassing subject—her own marital problems. Her coworker testified that she only saw Dawn have one drink. She also testified that she herself was not under the influence at the time of the conversation and had not taken Dawn's statement as a joke. All of these circumstances are "such that a sincere and accurate statement would naturally be uttered." *See* ***Anderson***, 280 Wis. 2d 104, ¶59. In addition, it is relevant that the conversation was initiated by the co-worker, not Dawn, which goes to the fact that Dawn was unlikely to have planned in advance to make untrue statements. *See* ***id.*** Another testament to the sincerity and solemnity of the conversation—Dawn's coworker called the police to report

[4] ***Crawford v. Washington***, 541 U.S. 36 (2004).

[5] In his brief, Kevin twice mentions that this conversation was between Dawn and a person who was her superior at work. Kevin does not cite to the record for this proposition, and we note that Dawn's coworker actually testified that they were working the same position.

the conversation the very same day that she learned Dawn had died. When asked about her reason for doing that, she said that she knew there was a child involved and wanted to do what was necessary to protect Dawn's son since Dawn could not do that anymore.

¶25 The residual hearsay exception outlined in WIS. STAT. § 908.045(6) is "a compromise between concerns that reliable evidence might be unreasonably excluded by static rules and the law's obsessive fear of hearsay." ***Anderson***, 280 Wis. 2d 104, ¶56. The trial court found that Dawn's statements to her coworker were trustworthy, and the facts support a conclusion that they exhibited the level of trustworthiness required under ***Anderson*** to be admissible. We will not disturb the trial court's decision. *See* ***Hunt***, 263 Wis. 2d 1, ¶34.

Evidence Inculpating a Third Party

¶26 Kevin sought to present evidence that a neighbor, who admitted to being in the vicinity of his own home (and therefore near Kevin and Dawn's home) on the morning of Dawn's death, refused to speak with defense investigators. Kevin wanted to use that evidence to show (and argue) that the neighbor might have had something to do with the crime. On appeal, Kevin acknowledges that ***State v. Denny***, 120 Wis. 2d 614, 625, 357 N.W.2d 12 (Ct. App. 1984), outlines a three-prong test for introducing evidence inculpating a third party. To do so, defendants must establish a "legitimate tendency" that the third person could have committed the crime charged by showing that the person had: 1) motive, 2) opportunity, and 3) a direct connection to the crime charged which is "not remote in time, place, or circumstances." ***Id.*** at 624. Kevin admits that he cannot show motive, but argues that because he can make "a strong showing that

the third party was connected to the scene," that evidence "ought to outweigh any deficiency in the motive."

¶27 We are unpersuaded by Kevin's argument for many reasons. First, we hardly think it remarkable or compelling that a person who lives near a crime scene was nearby when it occurred in the early hours of the morning. Second, we outlined the test in ***Denny*** as a three-prong test, where all three prongs must be met, and we have neither the ability nor the desire to change that holding in this case. *See* ***City of Sheboygan v. Nytsch***, 2008 WI 64, ¶5, 310 Wis. 2d 337, 750 N.W.2d 475 ("It is well settled that the court of appeals may not overrule, modify, or withdraw language from a previously published decision of the court of appeals."). Arguably, our inquiry ends there; however, Kevin accurately points out that ***Denny*** was decided in the context of a defendant who sought to introduce evidence of motive where no connection was present, and here, the opposite is true. Kevin can connect his neighbor to the area of the crime, but has no evidence of motive.

¶28 Kevin appears to ask us to limit our holding in ***Denny*** to its particular fact situation. But our reasoning in ***Denny*** applies here, as well:

> [E]vidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased—degenerating the proceedings into a trial of collateral issues.

Denny, 120 Wis. 2d at 623-24. If we were we to distinguish Kevin's case from ***Denny*** based on the particular type of inculpatory evidence he seeks to present, we would open the door to defendants pointing the finger at any and every individual who can be placed near the crime scene at the time a crime is committed. No

doubt Kevin himself could find several other neighbors who were in the area at the time and therefore had the "opportunity" to kill Dawn. We adhere to our decision in ***Denny*** and hold that the trial court correctly analyzed and excluded evidence inculpating a third party based on Kevin's inability to show any possible motive. We see no "legitimate tendency" here.

Sufficiency of the Evidence

¶29 As stated above, the standard of review for Kevin's claim that there was insufficient evidence to convict him is extremely deferential to the jury verdict. Therefore, we limit our discussion of this claim to a brief recitation of the facts presented in the light most favorable to the jury verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶30 Dawn was brutally beaten and murdered between 5:30 and 5:40 in the morning on November 13, 2006. Multiple people in the area heard screams around that time. Though Kevin claims not to have been aware that anything was wrong until around 7:30 a.m., his own testimony places him awake and in the house when the murder occurred. Approximately an hour later, he went to buy chocolate milk. To do that, he had to go into the garage where part of the bloody struggle took place and drive out of his driveway, past his wife's body. Although he told investigators he knelt by his wife's body and shook her to see if she was all right, his clean appearance when the police arrived did not match those statements, particularly since he explicitly stated that he had not changed his clothing since 2:00 a.m. There were no signs of forced entry or ransacking, and there *was* expert testimony that the struggle between Dawn and her assailant began *inside* the home, rather than in the garage.

¶31 There is no question that Kevin has a different version of the facts, supported by other testimony, that he wishes the jury had accepted. But that is not the question we have to answer. Instead, we have to answer whether the record supports the jury verdict when viewed in the light most favorable to the State. *See* ***Poellinger***, 153 Wis. 2d at 501. We believe that it does. Because we find against Kevin on all of his claims, we affirm his conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.