COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1544-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN S. KORTBEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Judgment and order affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Brian S. Kortbein appeals from a judgment convicting him of first-degree intentional homicide and from an order denying his motion for postconviction relief. He claims: (1) he was denied due process when he was prohibited from cross-examining a State's witness about disciplinary action

taken against the witness in connection to the case; (2) his right against self-incrimination was infringed when an investigating agent testified that he had become quiet when informed that his shoe print was found at the scene; (3) he was prejudiced by the erroneous admission of other crimes evidence; (4) he was prejudiced by the erroneous exclusion of evidence that the victim had a black eye a few weeks before the murder; (5) he was denied due process when his request for a continuance to investigate a potentially exculpatory witness was denied; (6) he was prejudiced by the trial court's sua sponte interruption of an exculpatory defense witness's testimony and release of that witness's psychological records to the State; (7) he was denied due process by the State's misleading characterization of evidence within its possession; (8) he was prejudiced by the trial court's erroneous refusal to instruct the jury that the defense had only learned about the witness whose testimony was interrupted, and then stricken, on the last day of trial; and (9) the trial court erred by refusing to declare a mistrial. For the reasons discussed below, we reject each of these contentions and affirm the judgment and order of the trial court.

BACKGROUND

Raymond Golembiewski was a seventy-seven-year-old veteran who used to stop in at a gas station near where he lived every morning to read the paper. When he failed to appear several days in a row, a gas station employee contacted his landlord to check on him, and Golembiewski was found bludgeoned to death in his apartment on August 2, 1990.

The pathologist concluded that the murder weapon was a blunt instrument such as a crowbar, tire iron, hammer or numbchucks. He placed the time of death as no later than dawn on August 1, but thought it could have been

much earlier than that. It appeared to him that Golembiewski had been struck two or three times in the face, and then at least eight more times on the back of the head after he fell down. The amount of force required to depress the skull suggested to the pathologist that the murderer had been highly agitated.

Investigators noted that one of Golembiewski's pant pockets had been turned inside out, and no wallet was found in the apartment. Golembiewski's wallet eventually turned up in the police lost and found box, but its appearance could not be traced. There were blood-spattered patterns on boxes near Golembiewski's body that indicated that the boxes may have been moved and possibly searched after the murder. No fingerprints or murder weapon were found at the scene; however, there were several partial footprints recovered from newspapers that had been scattered on the floor near the body. The prints appeared to have been made in blood by British Knight tennis shoes. Although Golembiewski had apparently not smoked, there were ashes in the bathroom toilet and a package of Vantage cigarettes under the couch.

About four months after the murder, police received a tip that they should talk with Kortbein. Kortbein had worked for a time at the VA hospital where Golembiewski was an outpatient. The two had discussed sports together on a number of occasions. Kortbein had also brought cans for recycling over to Golembiewski's apartment. The investigating officer observed a pair of British Knight tennis shoes and Vantage cigarettes in Kortbein's apartment. Kortbein agreed to turn his shoes over to the police for analysis. A forensic serologist at the state crime laboratory found no evidence of blood on the shoes, although it appeared that the laces were newer than the shoes themselves. The serologist then turned the shoes over to shoe print analyst, Steve Harrington, for comparison with the imprints made at the crime scene. Harrison waited three-and-a-half years

before examining the shoes, for which he was later disciplined. Upon analysis, he concluded that Kortbein's left tennis shoe positively matched one of the footwear impressions from the crime scene. He also opined that the shoes were consistent with four other impressions recovered from the scene but did not make the two other patterns observed in the photographs from the scene.

Based upon the shoe match, Kortbein was charged with Golembiewski's murder. The State's theory was that Kortbein had been desperate for money, and that he believed rumors that Golembiewski kept a stash of hoarded money in his apartment. Prosecutors claimed that Kortbein killed Golembiewski, then had a cigarette or two in the bathroom to try to calm down before searching the apartment. The defense theory was that another man, Guy Dunwald, had committed the murder, as he had told several people. Kortbein was convicted after an eleven-day jury trial. He now raises a number of evidentiary and due process issues on appeal. The facts relevant to each of these issues will be discussed below.

STANDARDS OF REVIEW

Evidentiary decisions lie within the sound discretion of the trial court. *See* ***State v. Morgan***, 195 Wis.2d 388, 416, 536 N.W.2d 425, 435 (Ct. App. 1995). The trial court also has discretion whether to grant a continuance; give a requested jury instruction; or order a new trial. *See* ***State v. Anastas***, 107 Wis.2d 270, 272, 320 N.W.2d 15, 16 (Ct. App. 1982); ***Strait v. Crary***, 173 Wis.2d 377, 382, 496 N.W.2d 634, 636 (Ct. App. 1992); ***State v. Bembenek***, 111 Wis.2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983). We will sustain discretionary acts so long as the trial court "examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a

conclusion that a reasonable judge could reach." ***Modica v. Verhulst***, 195 Wis.2d 633, 650, 536 N.W.2d 466, 474 (Ct. App. 1995). We will independently determine, however, whether any trial court errors deprived the defendant of due process or other constitutionally protected rights. *See* ***State v. Evans***, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994).

ANALYSIS

Harrington's Cross-Examination

The trial court prohibited the defense from questioning Harrington about the disciplinary action taken against him for his delay in examining the shoes. Kortbein claims that the trial court's ruling deprived him of his due process right to examine a witness against him. *See* ***Davis v. Alaska***, 415 U.S. 308, 328 (1974); U.S. CONST. amend. XIV. He believes he should have been allowed to attempt to impeach Harrington on the theory that the disciplinary action could have motivated the analyst to make up for the delay he caused by overstating his conclusions.

The State first argues that Kortbein waived this issue by discussing it during an unrecorded sidebar. *See* ***State v. Tarantino***, 157 Wis.2d 199, 206-07, 458 N.W.2d 582, 585 (Ct. App. 1990) (appellant has responsibility of providing an adequate record for review). However, we conclude the trial court's responses to Kortbein's motion in limine and postconviction motion were sufficient to preserve the issue for appellate review.

A defendant's right to confront the witnesses against him is not absolute, but rather limited to the presentation of relevant, non-cumulative evidence that is not substantially outweighed by its potentially prejudicial effect.

See ***State v. Pulizzano***, 155 Wis.2d 633, 646, 456 N.W.2d 325, 330 (1990). We agree with the trial court that the testimony that Kortbein sought to elicit from Harrington was not relevant.

Harrington testified that he knew his delayed report would be scrutinized. Logically, the scrutiny would be greater if the report linked Kortbein's shoes to the murder, leading to trial. Therefore, at the time Harrington issued his report, the possibility of future discipline would weigh towards excluding the shoes from having made the crime scene impressions, not matching them. Furthermore, the disciplinary action had been completed nearly a year before trial, and Kortbein made no offer of proof that there was any possibility of further repercussions from the disciplinary action that might affect the integrity of Harrington's testimony. We see no misuse of discretion or constitutional error in the trial court's decision to exclude the evidence.

Reference to Kortbein's Silence

Dennis Miller, a special agent for the criminal investigation unit of the Wisconsin Department of Justice, assisted the Tomah Police Department in investigating the murder. During the investigation, he interviewed Kortbein. At trial, Miller testified that he had asked Kortbein a series of questions about his prior contacts with the victim. The prosecutor elicited the following testimony:

> A: I asked the defendant again if he had ever been inside of the residence.
>
> Q: And what did the defendant indicate?
>
> A: That in his contacts he had not been inside of the residence, only met the victim outside when he had delivered cans.
>
> Q: And what was the purpose of that questioning?

A: To see if in fact he would admit to being in the residence and possibly leaving the footwear impression that was found.

Q: Any other information that you asked him?

A: I then specifically asked Mr. Kortbein—Or told him that we had physical evidence that could put him in the scene. And he at that time then related that he had not been in the residence.

Q: Did you ask him anything else regarding shoes or clothing?

A: Yes, I did. I then mentioned to him or advised him that we had the footwear impressions of his tennis shoes that were matched that had put him in the scene along with other physical evidence. And at that time Mr. Kortbein just became real quiet.

Kortbein's defense attorney objected to Miller's testimony at a sidebar, but did not ask to have the statement stricken because he did not want to draw more attention to it.

Kortbein maintains that Miller's statement that he "just became real quiet" violated his Fifth Amendment right against self-incrimination and warrants a new trial. We have previously construed the Fifth Amendment to protect a defendant's silence during the early stages of a criminal investigation. *See* ***State v. Fencl***, 109 Wis.2d 224, 236, 325 N.W.2d 703, 710 (1982). However, even assuming that Miller's remark could be construed as a comment on Kortbein's election to remain silent, we are satisfied that that reference was harmless. An improper reference to a defendant's silence is harmless when there is no reasonable possibility that the reference might have contributed to the conviction, taking into account the frequency of the error, the State's evidence, and the theory of the defense. *See* ***id.*** at 238, 325 N.W.2d at 711. Here, the challenged statement was but one remark in an eleven-day jury trial. The prosecutor did not make any reference to the statement, but rather focused on evidence that linked Kortbein to

the victim and showed that he needed money. The defense focused on the theory that another man had committed the crime. There is no reasonable possibility that Miller's isolated comment affected the outcome of the trial.

Other Crimes Evidence

In support of its contention that Kortbein was having financial difficulties around the time of the murder, the State presented evidence that Kortbein had three convictions for issuing worthless checks shortly after the murder. Kortbein maintains that the admission of this evidence over his objection was an erroneous exercise of discretion.

Under § 904.04(2), STATS., evidence of other crimes or acts may be admissible when offered for the purpose of establishing motive. However, the evidence still must be relevant under §§ 904.01 and 904.02, STATS., in that it relates to a fact or proposition of consequence to the determination of the action. Furthermore, its probative value must substantially outweigh the danger of unfair prejudice or confusion of issues under § 904.03, STATS. *See* ***State v. Sullivan***, 216 Wis.2d 768, 785-89, 576 N.W.2d 30, 32-33 (1998).

Kortbein contends that his convictions for issuing worthless checks were not relevant to show motive because they were entered one to four months after the murder occurred. However, as the trial court noted, the dates of the convictions were necessarily some time later than the dates on which the worthless checks were actually issued. This would tend to place the other crimes evidence within the same time frame as the murder. Moreover, there is no requirement that other crimes evidence must precede the date of the crime charged. The trial court's conclusion that this evidence was highly relevant to whether Kortbein had a financial motive to kill the victim, and that its probative value outweighed any

prejudicial effect, represented a rational application of the proper law to the facts of the case.

Evidence of Victim's Black Eye

The defense attempted to introduce testimony that the victim had a black eye a few weeks before the murder. The evidence was offered to show that someone other than Kortbein may have had a hostile relationship with Golembiewski and, thus, a motive to kill him. The trial court excluded the evidence on relevancy grounds, however, because the witness who observed Golembiewski's black eye did not know how the injury had occurred. He simply had a "feeling" that it had been caused by another person rather than from some sort of accident. Again, the trial court's ruling represented a rational application of the proper law to the facts of the case. Absent any first-hand knowledge that a person other than Kortbein had intentionally injured Golembiewski, the black eye evidence was not relevant.

Defense Motion for Continuance

At about 9:00 p.m. on December 19, 1995, in the middle of the trial, an informant contacted someone on the prosecution team and told him to ask Teresa Fulton about her observation of "bloody shoes" that may have belonged to Dunwald's girlfriend, Rita Harris, at some point around the time of the murder. The State was unable to locate Fulton that evening, but disclosed the information it had received to the defense the following morning. The defense then moved to reopen its case-in-chief and obtain a continuance to locate Fulton and evaluate her claim.

The trial court accepted evidence and argument on whether to grant a continuance. The State presented the testimony of Lieutenant Wesley Revels, who had observed blood on a tennis shoe that may have belonged to Harris while investigating a property damage incident in September 1990. Revels stated that the spot of blood he had observed on a woman's tennis shoe outside of Dunwald's apartment was still wet, but that he did not take the shoes into custody. Based on this information, the trial court ruled that Fulton's testimony would not be relevant and denied the continuance.

While, as Kortbein points out, there was no way for the trial court to know at the time of its ruling whether the incident about which Revels testified was the same one Fulton had described to the informant, there was, at that time, no reason to believe that there were two such incidents. Because blood that was still fresh on a tennis shoe in September would not make it any more likely that someone other than Kortbein had left shoe imprints at the murder scene in July or August, we conclude that the trial court's determination was a reasonable exercise of its discretion. *See* ***Bowie v. State***, 85 Wis.2d 549, 556-57, 271 N.W.2d 110, 113 (1978) (factors that the trial court should consider before deciding a motion for a continuance include the materiality of an absent witness's anticipated testimony). In other words, the trial court made a rational decision based upon the evidence before it at that time.

Interruption of Fulton's Testimony & Release of Her Psychological Records

Notwithstanding the denial of its continuance motion, the defense directed its private investigator, James Brieske, to speak with Fulton while the trial proceeded. Brieske contacted Fulton on the evening of December 20, 1995, after the evidentiary portion of the trial had closed, and brought her to court the next

morning. In a voir dire proceeding, Fulton testified she had seen tennis shoes caked in blood sometime during the hot summer months of 1990, shortly before she heard about Golembiewski's murder; that the sight of the shoes disturbed her and made a lasting impression on her; that she had previously seen Rita Harris wearing the shoes, but noted that Rita was going around without shoes afterwards, until she stole some new shoes; that she did not know the brand of the bloody shoes, but they had a circle on the ball of the foot; that she believed the shoes had been turned over to the police in a brown paper bag; and that she had dyslexia and difficulty with time and dates. Fulton's testimony was somewhat confused and at times contradictory. In chambers, she informed the parties and the court that she had been hospitalized for anorexia, depression and a possible bipolar disorder in 1989. Following voir dire, the trial court allowed the defense to reopen the case to present Fulton's testimony before closing arguments.

Fulton testified before the jury that on one occasion when she was in a neighboring apartment, which also was frequented by Dunwald and Harris, she observed a pair of tennis shoes that had a blood-like reddish-brown substance on one of the soles from the toe to the arch area. When asked whether she had ever seen anyone wearing those tennis shoes before, Fulton stated she had seen "those types of shoes" on Dunwald and Harris. Then, the following exchange occurred:

> Q: As we sit here in this court room today, do you know for certain the brand of that shoe?
>
> A: No, but I do know they're sitting over there. I do not know the ID. I did not know the brand for positively certain on the day that I saw them.

Immediately following Fulton's answer, the trial court requested a sidebar conference and sent the jury out sua sponte. The trial court was concerned that Fulton had not mentioned in her voir dire testimony that she had seen

Dunwald wearing the bloody shoes or that the shoes were the same brand as those sitting on the exhibit table. Defense counsel pointed out that no one had asked her either question earlier.

While the jury was out, the State moved for a continuance to obtain Fulton's psychological records and to have the voir dire proceeding transcribed for impeachment purposes. Over the objection of the defense, the trial court agreed to continue the case until the following morning and made arrangements to have the court reporter transcribe the voir dire proceeding. The court issued an order releasing Fulton's psychological and psychiatric records, and noted that "whatever the State gets will be given to the defense."

Kortbein contends that the trial court erred by interrupting the testimony of a key defense witness when no objection had been raised. He claims that the interruption represented an impermissible judgment as to the witness's competence, which is an issue for the jury. However, we disagree with Kortbein's characterization of the trial court's action. The record shows that the trial court called the sidebar to deal with the issue of surprise testimony, not the witness's competence. Kortbein cites no authority that would bar the trial court from interrupting the proceedings to get counsel's reaction to surprise testimony or from granting a continuance to deal with the unexpected situation. Nor has Kortbein made any offer of proof as to what testimony Fulton would have given had her direct examination continued uninterrupted. We see no prejudicial error.

Kortbein also claims the trial court erred by allowing disclosure of Fulton's confidential records, in violation of § 905.04(2), STATS. The first problem with this theory is that the State also obtained Fulton's own authorization to release the records. Furthermore, even assuming that Fulton's release was not

fully voluntary, under ***State v. Echols***, 152 Wis.2d 725, 736-38, 449 N.W.2d 320, 324 (Ct. App. 1989), a criminal defendant lacks standing to raise a privilege issue with regard to anyone's confidential records but his or her own.

Reference to Length of Psychological Record

After the continuance was granted, the State made arrangements to obtain Fulton's medical records, including her psychological and psychiatric records. Altogether, there were over 300 pages of records, about twenty-five pages of which Kortbein claims pertained to psychological or psychiatric issues. When District Attorney John Matousek and Defense Attorney John Brinkman discussed over the telephone how and when the State would make the records available to the defense, Matousek either mistakenly told Brinkman that there were over 300 pages of psychological records or Brinkman mistakenly inferred that fact based upon his understanding of the scope of the trial court's discovery order. Matousek also told Brinkman that if the defense continued with Fulton's testimony, the State would present several doctors to destroy her credibility.

Matousek offered Brinkman the option of driving over to the hospital and picking up Fulton's records and bringing them to the district attorney's office, where he could copy all of them that night, or just having Matousek fax to the defense the documents that the records custodian had faxed to the prosecution. Erroneously believing that there were over 300 pages of psychological and psychiatric records to go through, and simultaneously needing to prepare for the possibility of closing arguments the following day, Brinkman declined to pick up Fulton's records that evening. Also based in part upon his misimpression as to the extent of Fulton's documented mental problems,

Brinkman agreed not to put Fulton back on the stand and to strike the testimony that she had already given.

Kortbein argues that the State's misrepresentation rose to the level of prosecutorial misconduct. It is well established that the Fourteenth Amendment protects a criminal defendant from any misconduct by state authorities that would deprive him of due process of law. *See* ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). The suppression or withholding of material evidence favorable to the defendant by any part of the prosecution team may constitute a due process violation, regardless of whether the prosecution acted in good faith. *See* ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Arguably, a prosecutor's misleading statement as to the existence or non-existence of impeachment material for a defense witness could fall within this category, even if unintentionally made.

However, the justification for a new trial based upon prosecutorial misconduct varies depending on whether the misconduct was intentional or unintentional. While granting a new trial may serve as a deterrent for intentional conduct, it can have no effect on future unintentional conduct. Thus, the less egregious the conduct of the State, the more prejudice the defendant must show to warrant a reversal. *See* ***Simos v. Gray***, 356 F. Supp. 265, 268 (E.D. Wis. 1973).

Here, there is nothing in the record to show that the misrepresentation, if it even occurred, was intentional. Therefore, Kortbein needed to show that the misrepresentation affected the outcome of the trial. However, the fact that Fulton had substantial physical as well as mental problems did not change the fact that the State had powerful ammunition with which to impeach her the following day. Kortbein has not shown that counsel's decision to

strike Fulton's testimony was based more on the quantity of evidence within the State's possession than the quality of that evidence. The fact that the defense might have been able to obtain expert testimony to minimize the damage from the State's experts if it had more time was not the State's fault. Both sides were under the same time pressure from the approaching Christmas holiday.

Fulton Instruction

When informed of the parties' agreement to strike Fulton's testimony and proceed to closing arguments, the trial court invited suggestions from counsel as to what to tell the jury. Counsel agreed that the trial court could instruct the jury as follows:

> Members of the jury, yesterday morning the Court received information that Teresa Fulton may have evidence in this case that you have a right to have, that is, to consider. However, after listening to the beginning of her testimony before you, it became apparent that further investigation should be undertaken.
>
> The attorneys have discovered and so informed the Court that Ms. Fulton does suffer from severe mental health issues that were not immediately apparent. This has led them to agree that her testimony should be stricken.
>
> And that, I should instruct you not to consider anything she may have said in court. Accordingly, Ms. Fulton's testimony is stricken and you should not consider anything that she may have said.
>
> Furthermore, you may make no inference from the fact that she did testify briefly or that her testimony has been stricken.
>
> Now, is there anybody on the jury that does not feel that they would be able to abide by this instruction? Thank you.

The trial court refused, however, to additionally instruct the jury that the defense had not learned of Fulton until the last day of trial. Kortbein claims

this omission prejudiced him by leaving the jury with the impression that the defense was desperate enough to call an obviously crazy witness to testify at the last minute.

Regardless of whether Kortbein waived his right to request the additional instruction by agreeing to the instruction given, we conclude that the trial court properly exercised its discretion by limiting itself to the language used. *See* ***State v. Foster***, 191 Wis.2d 14, 26, 528 N.W.2d 22, 27 (Ct. App. 1995) (trial court has wide latitude to develop specific language of the instruction). The trial court informed the jury that Fulton's problems were not immediately apparent, and that it should not draw any inferences from her brief testimony. Giving the additional instruction requested by the defense might have led the jury to conclude that the State had withheld the information from the defense.

Postconviction Motion

After the jury returned its guilty verdict, the defense moved for a new trial on numerous grounds, including each of those raised on appeal, which we have already concluded did not warrant relief. In addition, Kortbein claimed that the State had failed to timely notify him about Fulton in accordance with § 971.23(7), STATS. However, we agree with the trial court that notifying Kortbein of Fulton's information the following morning was reasonably prompt.

By the Court.—Judgment and order affirmed.

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