COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1072-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LATOSHA R. ARMSTEAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Latosha R. Armstead appeals from a judgment entered after a jury found her guilty of one count of first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.05

(1995-96).[1] Armstead claims that: (1) the trial court erred when it refused to instruct the jury on the lesser-included offense of felony murder; (2) WIS. STAT. §§ 939.183 and 970.032 violated her right to equal protection; (3) the trial court erroneously exercised its discretion when it refused to instruct the jury on Armstead's requested "theory of defense" instructions; (4) the trial court violated her right to present a defense and fully confront her accusers when it prohibited defense counsel from cross-examining the medical examiner on line-drawing exhibits and when the trial court precluded cross-examination of the police detective relative to a discrepancy between Armstead's handwritten and typewritten statements; (5) the trial court erroneously exercised its discretion when it excluded proffered social history evidence; (6) the trial court erred in allowing into evidence the prior testimony of Armstead's mother, Renee; (7) sentencing a thirteen-year-old to life in prison, under these facts, constitutes cruel and unusual punishment; and (8) the trial court's combined errors precluded Armstead from presenting her theory of defense.

¶2 Because the trial court's refusal to give the felony murder jury instruction was harmless; because Armstead's equal protection argument is moot; because the trial court did not erroneously exercise its discretion when it refused to give Armstead's theory of defense jury instruction; because the exclusion of the line-drawing exhibits was harmless, and the jury was informed about the discrepancy in Armstead's statements; because the trial court did not erroneously exercise its discretion when it excluded the proffered social history evidence; because admitting Renee Armstead's prior testimony was not an erroneous

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

exercise of discretion; because the sentence here did not constitute cruel and unusual punishment; and because the trial court did not preclude Armstead from presenting a defense, we affirm.

I. BACKGROUND

¶3 On March 9, 1997, thirteen-year-old Armstead and her seventeen-year-old boyfriend, James Williams, began talking about stealing Charlotte Brown's car. Brown was a home health aide, who visited Armstead's grandmother. Armstead and Williams lived with Armstead's grandmother. Armstead and Williams devised a plan to strangle Brown so that they could have her car. On March 10, 1997, Brown arrived for the home health visit. Armstead and Williams asked Brown to give them a ride to visit a sick relative. Brown agreed.

¶4 Brown was instructed to pull into an alley and stop. At that point, Williams, who was in the backseat, placed a telephone cord around Brown's neck and strangled her. During that time, Armstead, who was in the front seat, pulled out a knife and cut Brown's hand and neck. At trial, Armstead argued that she was trying to cut the telephone cord off of Brown's neck in an attempt to save Brown's life. After the strangulation was complete, Williams and Armstead drove to another area and, with the assistance of a third person, dumped Brown's body behind a home at 2916 West Wright Street. The body was discovered later that day.

¶5 Meanwhile, Armstead and Williams drove Brown's car home. Armstead later gave the car to her mother, indicating that her father had given her the car. Renee Armstead was pulled over on March 13, 1997, while driving the car. After she advised police that her daughter had given her the car, the police

questioned Armstead and Williams. Both gave statements to the police. Both were charged with the crime, but the cases were tried separately. Armstead was charged as an adult, pursuant to WIS. STAT. §§ 939.183 and 970.032. Following the court's denial of her request to be waived to juvenile court, Armstead was tried as an adult.

¶6 The jury found her guilty of first-degree intentional homicide, party to a crime, despite her "abandonment of intent" defense. She was sentenced to life in prison. She now appeals.

II. DISCUSSION

A. Felony Murder Jury Instruction.

¶7 Armstead's first complaint is that the trial court should have instructed the jury on the lesser-included felony murder jury instruction. She admits that she was guilty of felony murder, but contends that because she "abandoned her intent" to murder Brown, she should not have been found guilty of first-degree intentional homicide, party to a crime. We disagree.

¶8 A lesser-included offense instruction should be given when there are "reasonable grounds in the evidence to acquit on the greater charge and convict on the lesser." ***State v. Jones***, 228 Wis. 2d 593, 598, 598 N.W.2d 259 (Ct. App. 1999). Whether the evidence supports the submission of a lesser-included offense instruction is a question of law. ***State v. Kramar***, 149 Wis. 2d 767, 791, 440 N.W.2d 317 (1989). We apply a two-step test: (1) is the lesser offense a lesser-included offense of the crime charged; and (2) is there a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. ***Id.*** Moreover, failure to give an appropriate lesser-included offense instruction may

constitute harmless error. ***State v. Truax***, 151 Wis. 2d 354, 364, 444 N.W.2d 432 (Ct. App. 1989).

¶9 We are persuaded by the State's analysis that failure to give the felony murder instruction here constitutes harmless error. In ***Truax***, we concluded that if a jury convicts a defendant on the charged crime despite instruction on the next immediate lesser-included offense, then failure to instruct on a lower lesser-included offense is harmless. ***Id.*** at 364. In Armstead's case, she was charged with first-degree intentional homicide, party to a crime. The trial court agreed to also instruct the jury on the lesser-included offense of first-degree reckless homicide. Armstead argues that the proper pecking order of the instructions should have been first-degree intentional homicide, then felony murder, and then, first-degree reckless homicide. Not so in this case.

¶10 In ***State v. Morgan***, 195 Wis. 2d 388, 433-41, 536 N.W.2d 425 (Ct. App. 1995), we held that first-degree reckless homicide and felony murder were not lesser-included offenses of each other because "a conviction for felony murder has the same potential maximum penalty as a conviction for first-degree reckless homicide and a conviction on the separate predicate felony." ***Id.*** at 439; *see also* ***State v. Davis***, 144 Wis. 2d 852, 425 N.W.2d 411 (1988) (reviewing courts may compare maximum penalties to decide whether one homicide offense is less serious than another). The facts in the instant case, however, involve a situation where the circuit court could not impose the criminal penalty for committing felony murder because felony murder is under the jurisdiction of the juvenile court. WIS. STAT. §§ 938.183(1m)(c)1. and 938.34.

¶11 Thus, the penalties available to the sentencing court here were life in prison if convicted of first-degree intentional homicide, forty years in prison if

convicted of first-degree reckless homicide, and a delinquency disposition, not extending beyond the juvenile's twenty-fifth birthday, if convicted of felony murder. WIS. STAT. §§ 939.50(3)(a), 939.50(3)(b); ***State v. Hezzie R.***, 219 Wis. 2d 849, 871-90, 580 N.W.2d 660 (1998). Consequently, the proper order of the jury instructions would have been first-degree intentional homicide, followed by first-degree reckless homicide, followed by felony murder. Because the jury convicted Armstead of first-degree intentional homicide, despite the opportunity to convict her of first-degree reckless homicide, Armstead was not prejudiced by the failure to give the felony murder instruction. ***Truax***, 151 Wis. 2d at 363-64. If the jury had believed Armstead abandoned her intent to kill, it could have convicted her of reckless homicide. The jury did not. It found she had the requisite intent. Accordingly, any error in giving the felony murder instruction was harmless.

B. WIS. STAT. §§ 939.183 and 970.032.

¶12 Armstead next claims that WIS. STAT. §§ 939.183 and 970.032 violate her right to equal protection and due process. She suggests that these statutes cause children of different ages to be treated differently than their adult counterparts. She argues that if she had been an adult or over the age of fifteen, she would have been given the felony murder jury instruction. This claim, however, is moot because, as discussed above, the failure to give the felony murder jury instruction was harmless error. The jury found Armstead guilty of first-degree intentional homicide, despite instruction on the lesser-included offense of reckless homicide. Accordingly, we need not address her claims of equal protection and due process.

C. Theory of Defense Jury Instruction.

¶13 Next, Armstead argues that the trial court erroneously exercised its discretion when it refused to give either of her two "theory of defense" jury instructions. We disagree.

¶14 A trial court has broad discretion in choosing the language of jury instructions, and must fully and fairly inform the jury of the law applicable to the case. ***State v. Holt***, 128 Wis. 2d 110, 127 n.3, 382 N.W.2d 679 (Ct. App. 1985). Having reviewed the proffered instructions and the trial court's reasoned decision, we cannot conclude that the trial court erroneously exercised its discretion.

¶15 Armstead requested that the following two instructions be given to the jury:

> … [1] It is Lat[o]sha's position that before Charlotte Brown dies, Lat[o]sha attempted to cut the cord around her neck and thereby save her life.
>
> If the evidence you have heard in support of Lat[o]sha's position creates in your mind that before Charlotte Brown was killed, Lat[o]sha had abandoned her intent to kill, then you must find her not guilty of first degree intentional homicide and should consider whether it has been proven that she committed a felony murder.
>
> … [2] It is Lat[o]sha's theory of offense that, immediately prior to the victim's death, she abandoned her intent to have the victim killed, and attempted to prevent the death by cutting the cord which was being used to strangle the victim. If the evidence you have heard in support of the defendant's theory creates in your mind a reasonable doubt whether she had the intent to cause the victim's death at the time the victim was killed, then you may not find her guilty of first degree intentional homicide.

The trial court ruled that the first instruction could not be given because of the reference to felony murder. The trial court refused to give the second jury

instruction because Armstead failed to provide the trial court with any legal authority to do so. Instead, the trial court instructed the jury:

> It is the defendant's theory of defense that she did not intentionally aid or conspire in the homicide of Charlotte Brown.
>
> If the evidence you have heard in support of defendant's theory creates in your minds a reasonable doubt as to her guilt, you may not find her guilty of first degree intentional homicide, party to a crime.

The trial court's decision was not erroneous. As noted, the first defense instruction contained the reference to felony murder; the second was incorrect as a matter of law. Armstead's theory was that she abandoned her intent to kill, as evidenced by her attempt to cut the strangulation cord, while Williams was holding it around Brown's neck. Under circumstances such as these, a withdrawal that occurs immediately before or during the commission of the crime is not legally sufficient. *See* ***Zelenka v. State***, 83 Wis. 2d 601, 621, 266 N.W.2d 279 (1978).

D. Exclusion of Evidence.

¶16 Armstead next claims that the trial court erroneously exercised its discretion when it limited defense counsel's cross-examination of two witnesses: (1) the medical examiner; and (2) the police detective. She suggests that the trial court's rulings prevented her from presenting a defense and from confronting adverse witnesses.

¶17 A trial court's evidentiary rulings are discretionary, and will not be upset on appeal if they have a reasonable basis and are consistent with the facts of record. ***State v. Johnson***, 181 Wis. 2d 470, 484, 510 N.W.2d 811 (Ct. App. 1993).

Moreover, an evidentiary error may be harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶18 Here, Armstead complains that the trial court precluded her from cross-examining the medical examiner with the use of diagrams, which depicted possible positioning of the knife and the wounds to the victim's neck. Armstead wanted to introduce the diagrams and question the medical examiner with respect to the diagrams to show that the cuts on the neck and hand of the victim could have been made in an attempt to cut the cord and prevent the strangulation. The trial court allowed defense counsel to question the medical examiner about the theory, but would not allow the admission of the diagrams. The trial court reasoned that the diagrams would not assist the jury, and were not the best evidence available. The trial court stated that the actual photographs of the injuries were available, and defense counsel could question the medical examiner using the actual photos, rather than the diagrams, which were not authenticated or drawn to scale. We cannot conclude that the trial court erroneously exercised its discretion when it so ruled. Moreover, any error in excluding the diagrams was harmless, because defense counsel elicited testimony from the medical examiner that the neck injuries could have been inflicted by someone trying to cut the telephone cord off the woman's throat. Thus, the jury heard this evidence, and defense counsel emphasized this testimony during closing argument to support Armstead's theory of defense.

¶19 Armstead also claims the trial court limited the cross-examination of the police detective. Specifically, she refers to the police detective's testimony regarding the discrepancy between Armstead's handwritten and typewritten

statements, and defense counsel's attempt to recreate how the wrist wound occurred. We have reviewed the transcript and reject Armstead's claim.

¶20 In Armstead's handwritten statement, she indicated that "she then put the knife to Charlotte's neck and cut her." In the typewritten statement, however, it indicates that "she didn't put the knife to Charlotte's neck and cut her." When the police detective testified on direct examination, he was asked to read Armstead's statement. When he reached the discrepancy, he stated: "States she didn't put the knife to Charlotte's neck -- she did put the knife to Charlotte's neck and cut her." In other words, he read both versions. During cross-examination, defense counsel questioned the detective about the discrepancy, suggesting that the police inaccurately recorded the statements.

¶21 There were only three objections during this part of the cross-examination. The State objected twice to argumentative questions and once because the question had already been asked and answered. The trial court sustained all three objections. The trial court did not erroneously exercise its discretion here, nor did it limit the cross-examination of the detective about the discrepancy in the statements. It simply sustained objections when defense counsel became argumentative and when defense counsel was repeating the same question that had already been answered.

¶22 Similarly, there was no erroneous exercise of discretion when the trial court sustained an objection to defense counsel's attempt to recreate how the wrist injury occurred. During the cross-examination of the detective, defense counsel wanted to play the role of Armstead and have the detective play the role of Brown to recreate that part of Armstead's statement where "she grabbed Charlotte Brown's wrist with her left hand." Defense counsel then reached toward the

detective and asked the detective to put his hand in the location "that makes sense … from the words in the report." At this point, the State objected to the demonstration as speculative. The trial court sustained the objection, ruling that the detective could not interpret the statement because he was not present when the incident occurred. The detective can only relate what the statement was.

¶23 Armstead suggests that when the trial court limited this demonstration, it prevented her from demonstrating that the wrist wound could not possibly have occurred as described in the statement. The trial court's ruling was reasonable and, therefore, not an erroneous exercise of discretion. If Armstead wanted to argue to the jury that the wrist injury could not have occurred as stated, she was free to do so. However, the police detective who took the statement could not be compelled to offer speculative testimony.

E. Social History.

¶24 Next, Armstead asserts that the trial court erroneously exercised its discretion when it prohibited her from testifying during her direct examination about her background. Defense counsel wanted to present evidence about Armstead's life, including that both her mother and father were not present in her life, her mother was a drug addict, and her father was in prison. The defense wanted to introduce evidence that Armstead had lived with her grandmother from a very young age, but that her grandmother became disabled, which forced Armstead to assume a caregiver role at a very young age. They wanted to show that Armstead had been sexually assaulted or abused repeatedly throughout her life, and had been sexually assaulted by Williams. Defense counsel claimed that this evidence demonstrated Armstead's inability to act on her own will, and interfered with her ability to form intent. The trial court ruled that Armstead could

introduce the facts and circumstances surrounding the incident, how far she got in school, her educational investment, any learning disability, and anything that might go to her ability to comprehend things around her. The trial court found, however, that the remainder of the proffered evidence was inadmissible because Armstead failed to show how it was relevant:

> To all of a sudden try and litigate at this point in the trial her entire life, her social history, it is collateral, it is irrelevant, it is misleading, it is confusing, and it would take up unnecessary time in this case.
>
> We are dealing with the offenses that have been charged, here. If you want to talk about her capacity and information relevant to her capacity to form intent at that time, and I would allow you to go as far as to say that, you know, she didn't have a mother and father with her [in] her life, she's been raised mostly by her grandmother, that she has lived with her grandmother for however long you can establish she's lived with the grandmother, it's already said that the mother in the transcript said she doesn't reside with her daughter.
>
> ….
>
> … I'm not going two years back, I'm not going to birth, and I'm not going to go into what you alleged to be a rape. I don't see any connection between that and this case whatsoever. I'm not going into the father and whether he's been nice to her or not. There's no connection.…

The trial court's decision was reasonable. Social history evidence may be admitted if it is relevant to "cast doubt upon or to prove the defendant's intent to commit the crime charged." ***Morgan***, 195 Wis. 2d at 430. Here, the trial court determined that Armstead failed to demonstrate the relevance of the proffered evidence. She did not show how multiple rapes, which occurred in her past, would have interfered with her ability to form the requisite intent associated with the homicide in this case. Similarly, there was no connection provided between her parents' abandonment of her as a child and her ability to form intent.

¶25 Moreover, the trial court's decision did not exclude all evidence, but carefully delineated what evidence would be relevant and what evidence would not be relevant. The trial court indicated that certain evidence about Armstead's immediate history could be admitted, including her relationship with Williams. The trial court's decision does not constitute an erroneous exercise of discretion.

F. Admission of Renee Armstead's Prior Testimony.

¶26 Armstead next claims the trial court erroneously exercised its discretion when it allowed the prior testimony of Renee to be presented to the jury. Renee had testified during Williams's trial, but was unavailable to testify during Armstead's trial. Armstead asserts that Renee's testimony should not have been admitted because Williams's defense was antagonistic to her defense, and attempted to make Armstead look more culpable than Williams. The trial court reviewed the transcript, and concluded that the State could introduce the testimony if the defense was unable to locate Renee. The defense could not locate Renee and, therefore, the prior testimony was admitted.

¶27 Under WIS. STAT. § 908.045(1), an unavailable declarant's former testimony taken against a party with motive and interest similar to that of the party against whom the testimony is offered is admissible as an exception to the hearsay rule. The trial court's decision to admit this testimony is discretionary and will not be overturned unless the trial court erroneously exercised its discretion. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982).

¶28 Having reviewed Renee's testimony, we agree with the trial court that it could be admitted. Renee's testimony was limited to how she came to be in possession of Brown's car. Renee's questioning was limited to chronology-of-the-case facts. Accordingly, despite the allegation of antagonistic defenses, the motive

and interest were similar. Because Renee was a chronology witness in both Williams's and Armstead's trials, Armstead had the same motive and interest as Williams—to test the accuracy of Renee's recollections and to provide a basis to impeach her credibility.

¶29 Moreover, Armstead fails to indicate what questions, or even what areas of questioning, she would have delved into had Renee been available to testify at her trial. Thus, her claims that she was unable to adequately confront this witness are unpersuasive.

G. Cruel and Unusual Punishment.

¶30 Next, Armstead argues that imposing a life sentence on a thirteen-year-old who participated in the homicide, not as the direct actor, but as a party to the crime and who, at the last minute, tried to prevent the homicide, constitutes cruel and unusual punishment. She claims that WIS. STAT. §§ 938.183 and 970.032, which subject thirteen-year-olds to life in prison for first-degree intentional homicides are unconstitutional. We are not persuaded.

¶31 The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court has declared that the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are grossly disproportionate to the severity of the crime. ***Rummel v. Estelle***, 445 U.S. 263, 271 (1980).

¶32 Armstead contends that because she was only thirteen years old, not the direct actor—the one who tightened the telephone cord around the victim's neck, and because she attempted to save the victim's life, a life sentence is

disproportional. A claim similar to Armstead's was considered and rejected in ***Rodriguez v. Peters***, 63 F.3d 546, 566-68 (7th Cir. 1995): "[W]e live in a world where juvenile offenders are committing violent crimes with increasing frequency. It has often been said that a bullet fired from a gun of a juvenile, at the head of another, is just as fatal as one fired from a weapon of an adult." The Seventh Circuit reasoned in ***Rodriguez*** that the Illinois legislature enacted legislation which imposed a life sentence on juvenile offenders who are tried as adults for certain crimes in an attempt to deter violent juvenile offenders. ***Id.*** The penalty was based on sufficiently objective criteria and "can be rationally applied to juvenile offenders without offending the Eighth Amendment's prohibition against cruel and unusual punishment." ***Id.*** at 568. We agree with the Seventh Circuit's analysis.

¶33 The Wisconsin legislature has enacted legislation mandating a life sentence with deferred parole eligibility for thirteen-year-old defendants convicted of first-degree intentional homicide. The legislature enacted WIS. STAT. §§ 938.183 and 970.032 because "young people were capable of committing extremely violent acts and the existing set of juvenile laws in Wisconsin was inadequate to deal with it." Dennis J. Barry & Bonnie Ladwig, *Time Ripe for Change*, April WIS. LAW. 10, 12 (1996). There is a rational basis, *see* ***Hilber v. State***, 89 Wis. 2d 49, 54, 277 N.W.2d 839 (1979), for the enactment of this legislation. The law serves to deter juvenile offenders who may conclude that they will not receive tough punishment for committing homicides. This is constitutionally permissible.

¶34 Moreover, under WIS. STAT. § 939.05, a direct actor and a party to the crime are equally liable for the conduct. Thus, Armstead's argument that she was not the direct actor does not alter our analysis. In addition, the jury was not

persuaded by Armstead's defense that she was trying to save Brown's life by putting the knife to Brown's neck.

H. Right to Present a Defense.

¶35 Armstead's last claim is that the combination of the trial court's refusal to give her theory of defense instruction, exclusion of the line drawings and certain cross-examination of the medical examiner and police detective, and preclusion of her testimony during direct examination as to her social history constituted a wholesale bar of her theory of defense, her right to present a defense, and her right to due process. We have rejected each of these three claimed errors in turn earlier in the opinion. Lumping the three together in combination does not somehow create error. ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("zero plus zero equals zero").

By the Court.—Judgment affirmed.

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