

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2008

David R. Schanker
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. 2007AP2628-CR

Cir. Ct. No. 2006CF29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN R. WILK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Susan Wilk appeals a judgment convicting her of first-degree reckless homicide in the death of three-year-old Mercedes Caflisch. Wilk argues that she was denied a fair trial because of four evidentiary rulings: (1) the court allowed the State to present other acts evidence regarding four

injuries Mercedes suffered while under Wilk's supervision; (2) the court allowed evidence of Wilk's inconsistent statements to police through her former attorney, Stephen Eisenberg; (3) the court prohibited Wilk from presenting evidence of injuries Mercedes suffered while in her parents' care; and (4) the court admitted into evidence postmortem photographs depicting cuts and bruises and a severed intestine. Wilk also requests a new trial in the interest of justice. Because we conclude that the trial court properly exercised its discretion regarding the evidentiary issues and because the errors, if any, are harmless, we affirm the judgment.

BACKGROUND

¶2 Wilk provided child care at her residence for Mercedes and other children. Mercedes had been in Wilk's care for nineteen hours preceding her death. When her mother picked her up at Wilk's residence, she noticed that Mercedes' face was bruised, her nose was purple, and her lip was red. Mercedes exhibited signs of extreme thirst and was having trouble breathing. When asked about Mercedes' injuries, Wilk told Mercedes' mother that she thought Mercedes fell out of bed. Wilk commented that she did not know why Mercedes was acting strangely and that she was not acting that way before her mother arrived.

¶3 On the way home from Wilk's residence, Mercedes' mother noticed that Mercedes had become unresponsive and drove her to the hospital. Resuscitation efforts failed, and Mercedes was pronounced dead twelve minutes after arriving at the hospital. The autopsy concluded that Mercedes died as a result of a severed small intestine caused by a concentrated force to her abdomen. The fatal blow to Mercedes' abdomen caused her spinal column to sever her small intestine. Mercedes also had bruises all over her body.

¶4 The State presented evidence that Mercedes was not injured or sick when she arrived at Wilk's residence. Both of Mercedes' parents testified that Mercedes was not sick or injured and did not have any bruises other than a laceration under her chin, a bug bite on her leg, and one scratch on her back. Various witnesses testified that Mercedes appeared happy and energetic when they observed her the day before her death and at Wilk's residence.

¶5 Three medical doctors testified for the State that Mercedes' fatal injury occurred within twenty-four hours of her death and that it was highly unlikely that Mercedes' injury was self-inflicted. Two doctors testified that they believed Mercedes' fatal injury occurred four to six hours before her death. The force required to produce the fatal injury was comparable to the force that would occur from falling out of a second- or third-story window onto a protruding object. All of the medical experts agreed that Mercedes would not have appeared happy and energetic within hours of suffering the abdominal injury. Rather, Mercedes would have showed symptoms and probably would have become listless and complained of thirst. She would have cried and clearly would have been in distress.

¶6 The State also presented evidence that the bruises on Mercedes' body at the time of her death were not caused by accidents and that most of the injuries occurred less than twenty-four hours before her death. According to the evidence, Mercedes had over forty injuries on her body at the time of death, and they were caused by child abuse. Most of the injuries occurred within a few hours of her death.

¶7 The State and Wilk stipulated that, if called upon to testify, a toxicologist would have testified that he examined blood taken from Mercedes

during her autopsy. The blood samples showed that Mercedes had 1.3 milligrams per liter of Ephedrine and 13 milligrams per liter of Guaifenesin in her blood, ten times the therapeutic levels for adults. These drugs are found in Ephedrine Plus, an over-the-counter stimulant that Wilk routinely used. An expert in toxicology testified that Mercedes was given Ephedrine and Guaifenesin during the time frame when Mercedes was at Wilk's house.

¶8 Two detectives and a social worker testified that they went to Wilk's residence to interview Wilk after Mercedes' death. When asked if she was Susan Wilk, Wilk responded that she was Susan's sister, Michelle. When informed that the detectives knew who she was, Susan admitted that she lied about her identity.

¶9 Wilk's defense was that Mercedes' injury was accidental and self-inflicted. Mercedes' grandfather testified that Mercedes' father told him Mercedes had run into a tire changer and got "knocked [] on her fanny," then got back up and continued what she was doing. A detective also testified that Mercedes' grandfather told him Mercedes ran into a tire changer. A defense expert testified that Mercedes suffered a fatal blow six to twenty-four hours before her death. He opined that Mercedes' fatal injury might have been caused when she ran into a tire changer the day before her death. He agreed that Mercedes was an abused child.

¶10 Wilk points to evidence that Mercedes was already sick when she arrived at Wilk's residence. Another mother testified that she saw Mercedes get dropped off at Wilk's residence the day before her death and she looked like something was wrong. Wilk told her that Mercedes had a stomach ache. Wilk's sister testified that Mercedes did not appear well when she was being dropped off at Wilk's residence the day before she died. And Wilk's boyfriend testified that Mercedes complained of a stomach ache on that day. Wilk's boyfriend conceded

that he saw Mercedes wearing only a diaper the day before her death and her chest, face, neck, and legs all looked normal. Mercedes was not having trouble breathing and did not appear thirsty at that time.

DISCUSSION

Standard of Review

¶11 When reviewing the trial court's evidentiary rulings, the applicable standard is whether the court appropriately exercised its discretion. *See State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). An appellate court will sustain an evidentiary ruling if the record shows that the trial court examined relevant facts, applied a proper legal standard, and reached a reasonable conclusion. *Id.* at 780-81.

Other Acts Evidence Presented by the State

¶12 The trial court appropriately exercised its discretion when it admitted other acts evidence consisting of four discrete incidents in which Mercedes suffered injuries while in Wilk's care. To be admissible, other acts evidence must pass a three-part test: first, the acts must be offered for an admissible purpose under WIS. STAT. § 904.04(2);¹ second, the acts must be relevant, meaning they have a tendency to make a consequential fact more or less probable than it would be without the evidence; and third, the probative value of the other acts evidence must not be substantially outweighed by their prejudicial effect. *Id.* at 771.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶13 The four previous injuries Mercedes suffered while in Wilk's care were admissible to establish the absence of mistake or accident. The injuries—a broken arm, a facial injury, a burn, and a lacerated chin—arose under circumstances that tend to disprove Wilk's claim of accidental self-inflicted injury. In these other incidents, Wilk did not tell Mercedes' parents about the injury until she was asked. Regarding Mercedes' broken arm, Wilk gave inconsistent versions of an accident. A doctor testified that, in a clinical study, only two out of four hundred children who fell down stairs suffered an injury similar to Mercedes' broken arm. Wilk also gave conflicting versions of a facial injury Mercedes suffered, telling Mercedes' mother that Mercedes must have fallen out of bed, but telling a detective that Mercedes was running around and fell against a coffee table. Wilk also gave inconsistent versions of how Mercedes burned her hand. Finally, Wilk and her sister gave inconsistent statements regarding who was bathing Mercedes when Mercedes fell and cut her chin. The common features of not notifying Mercedes' parents of the injuries until asked, giving inconsistent statements about the manner in which the injury was inflicted, and claiming accidental self-inflicted injury tend to discredit Wilk's defense in this case.

¶14 The probative value of the other acts evidence was not substantially outweighed by any prejudicial effect. The court gave a limiting instruction telling the jury that they should not consider the other acts evidence to conclude that Wilk was a bad person or that she acted in conformity with the other acts. The limiting instruction ameliorates the adverse effect of admitting the other acts evidence. *See State v. Fishnick*, 127 Wis. 2d 247, 262, 378 N.W.2d 272 (1985).

¶15 In addition, any error in admitting the other acts evidence was harmless. In light of the overwhelming evidence that Mercedes' fatal injury could not have been self-inflicted, there is no reasonable possibility that the error

contributed to Wilk's conviction. *See State v. Tucker*, 2003 WI 12, ¶26, 259 Wis. 2d 484, 657 N.W.2d 374. In light of the testimony regarding the symptoms Mercedes would have displayed within hours of receiving the injury, it is highly improbable that Mercedes' injury was caused when she ran into a fixed object the day before her death. It is also highly unlikely that the drugs found in Mercedes' blood were administered by anyone other than Wilk. And Wilk's lying about her identity during the investigation shows consciousness of guilt. We are confident that the verdict would have been the same even had the other acts evidence not been admitted.

Admissibility of Attorney Eisenberg's Statements on Wilk's Behalf to the Police

¶16 The trial court properly exercised its discretion when it admitted statements by Wilk's former attorney, Stephen Eisenberg. Eisenberg told detectives that Wilk told him that Mercedes did not have any injuries when she left Wilk's house on the day she died. Later, he said Wilk indicated Mercedes had some scabs on her nose, a cold sore on her lip, a scratch on her stomach, and some other scratches and bruises. Wilk argues that Eisenberg's statements were hearsay. The statements were not hearsay because they were not offered to prove the truth of the matter asserted. *See* WIS. STAT. § 908.01(3). They were offered to show inconsistency, not Mercedes' condition. In addition, the statements are not hearsay under § 908.01(4)(b)4. because they were statements made by Wilk's attorney, her agent, within the scope of his employment made during the existence of the relationship. An attorney may be considered his client's agent so long as it does not disturb the important policies concerning effective assistance of counsel. *United States v. Brandon*, 50 F.3d 464, 468 (7th Cir. 1995). Eisenberg's statements do not disturb the policy concerns of effective assistance of counsel

because he was no longer Wilk's attorney at the time of trial, and his statements fall squarely within § 908.01(4)(b)4.

¶17 In addition, even if Eisenberg's statements were inadmissible, the error in admitting them was harmless. The statements were a small part of a seven-day trial, and there is no reasonable probability that the statements contributed to Wilk's conviction. Wilk's inconsistent statements about Mercedes' condition were not a substantial factor in the trial.

Preclusion of Evidence of Mercedes' Injuries While in Her Parents' Care

¶18 The trial court properly exercised its discretion when it allowed Wilk to introduce only one incident in which Mercedes was injured while in her parents' care. The court allowed Wilk to introduce evidence that Mercedes' father spanked her approximately two weeks before her death because it might have provided an alternative explanation for bruises at the time of her death. The court prohibited Wilk from introducing evidence that Mercedes' father had a propensity for spanking her, that her mother accidentally scratched Mercedes' eye while administering eye drops, or that her mother and father accidentally burned Mercedes' hand and foot with a cigarette. None of this evidence was relevant because it did not relate to Mercedes' condition at the time of her death. None of the proffered evidence would have supported the defense of accidental self-inflicted injury. To the extent Wilk attempts to blame Mercedes' parents for her fatal injury, the evidence was not admissible because it did nothing more than afford a possible ground of suspicion against another person. *See State v. Denny*, 120 Wis. 2d 614, 622-24, 357 N.W.2d 12 (Ct. App. 1984). To be admissible, the evidence must directly connect the person to the crime. *Id.* The proffered

evidence did not connect Mercedes' parents to Mercedes' fatal injury because the other acts were not consistent with the nature and timing of that injury.

Admission of Postmortem Photographs

¶19 The trial court properly exercised its discretion when it admitted postmortem photographs of Mercedes and a photograph of a severed intestine. The State introduced twelve photographs of Mercedes, showing over forty bruises on her body. The autopsy photographs showed Mercedes' severed small intestine and two photographs of a severed intestine from an unnamed patient. Wilk argues that the photographs were not substantially necessary to show a material fact of the case and that the probative value of the photographs was substantially outweighed by unfair prejudice.

¶20 The admissibility of the photographs into evidence is within the trial court's discretion, and we will not disturb the trial court's decision unless it was entirely unreasonable or the only purpose of the photographs was to inflame or prejudice the jury. *See State v. Pfaff*, 2004 WI App 31, ¶34, 269 Wis. 2d 786, 676 N.W.2d 562. The photographs were necessary to support the expert testimony regarding the cause of Mercedes' death. Whether an intestine could have been severed by a child accidentally running into a fixed object was a substantial issue in the case, and the autopsy photographs supported the expert testimony that cast doubt on the defense explanation. The photographs depicting bruises were relevant to establish substantial child abuse during the hours Mercedes was in Wilk's care. The photographs were not introduced merely to inflame or prejudice the jury.

New Trial in the Interest of Justice

¶21 Finally, Wilk is not entitled to a new trial in the interest of justice. Wilk's argument is based on the same issues discussed above. We conclude that the merits were fully and fairly tried, justice has not miscarried, and there is little likelihood that retrial would result in a different verdict. *See State v. Darcy N.K.*, 218 Wis. 2d 640, 667-68, 581 N.W.2d 567 (Ct. App. 1998).

By the Court.—Judgment affirmed.

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

