COURT OF APPEALS
DECISION
DATED AND RELEASED

October 18, 1995

No. 94-2686-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANNE M. EGGLESTON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Anne M. Eggleston appeals from a judgment convicting her of first-degree reckless homicide in the death of her three-year-old son.[1] We reject Eggleston's claims that the prosecutor engaged in

[1] Eggleston's notice of appeal states that she appeals only from the judgment of conviction. Eggleston filed a postconviction motion which was heard and denied by the trial court, and on appeal she raises issues determined on postconviction motion. Eggleston's failure to designate the postconviction order in her notice of appeal does not deprive this court of jurisdiction to review issues raised on postconviction motion. *See* ***Northridge Bank v. Community Eye Care Ctr.***, 94 Wis.2d 201, 203, 287 N.W.2d 810, 811

misconduct, that the evidence was insufficient to support the conviction and that the trial court erred in admitting other acts evidence. We affirm the judgment of conviction.

SUFFICIENCY OF THE EVIDENCE

The jury found Eggleston guilty of first-degree reckless homicide[2] of her son, Joshua, contrary to § 940.02(1), STATS.[3] Eggleston argues that the evidence was insufficient to support this verdict.

Upon a challenge to the sufficiency of the evidence to support a jury's verdict, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757. If more than one inference can be drawn from the evidence, the inference which supports the jury's finding must be followed unless the testimony was incredible as a matter of law. ***State v. Witkowski,*** 143 Wis.2d 216, 223, 420 N.W.2d 420, 423 (Ct. App. 1988).

Eggleston claims that there was insufficient medical evidence that Joshua died due to asphyxiation. We disagree. Dr. Jeffrey Jentzen, medical

(..continued)
(1980).

[2] Eggleston had been charged with first-degree intentional homicide contrary to § 940.01(1), STATS.

[3] Section 940.02(1), STATS., states:

> Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony.

examiner for Milwaukee County and a forensic pathologist, testified that the autopsy revealed external trauma including scratches on Joshua's cheek, a tear on the underside of his upper lip and bruising on the inner side of his lower lip. An internal examination revealed hemorrhaging on the larynx. Jentzen further testified that the injuries to Joshua's mouth and larynx, which had occurred recently, were typical of asphyxiation victims. Jentzen opined that Joshua died of asphyxia by suffocation or strangulation, and ruled out other causes of death.[4] He opined that Joshua would have died four to six minutes after his oxygen was cut off.

Eggleston claims Jentzen's opinion regarding cause of death is undermined because he did not know that Joshua's lip injuries occurred while he was playing with his sister. Social worker Kim Steen testified that just prior to his death, Joshua received a blunt trauma to his mouth and lips when his sister threw a book at him. Steen saw that Joshua had a scratch across his nose the day before he died, but she did not recall seeing that he had an injured lip. The extent to which Steen's testimony undermined Jentzen's opinions was for the jury to decide. A reasonable jury might not agree that Steen's testimony explained all or even some of Joshua's injuries.

Eggleston also argues that her conduct could not have caused Joshua's death. At trial, Eggleston admitted holding Joshua's head against a pillow for fifteen seconds to muffle his crying so he would not wake a baby sleeping nearby. Dr. Garry Peterson testified that fifteen seconds against a pillow would not have asphyxiated Joshua.

The jury was not required to accept Eggleston's testimony that she held Joshua's face to the pillow for only fifteen seconds. Eggleston's mother-in-law, Ida McDermott, testified that Eggleston told her that she held Joshua's face to the pillow for "a few minutes until he quit breathing and crying." In a taped interview on March 18, 1993, Eggleston told Captain Richard Meinel of the Lake Geneva Police Department that she held Joshua's face to the pillow for between one and five minutes.

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[4] Jentzen specifically rejected the suggestion that Joshua died from sudden infant death syndrome (SIDS) because he was not in the age group for that type of death and the autopsy results were not consistent with that type of death.

Jentzen testified regarding the cause of Joshua's death and Eggleston admitted to McDermott that she held Joshua's face to the pillow for a few minutes until he stopped breathing and crying. Viewing the evidence most favorably to the State and the conviction, we cannot conclude that the evidence is so lacking in probative value that no reasonable jury could have convicted Eggleston of first-degree reckless homicide. To the extent that there were conflicts in the testimony, it was the jury's province to assess the credibility of the witnesses, weigh the evidence and draw reasonable inferences from it. *See* ***Poellinger,*** 153 Wis.2d at 506-07, 451 N.W.2d at 757-58. We defer to the jury's inference that Eggleston committed this crime.

OTHER ACTS EVIDENCE

Eggleston challenges the trial court's decision to admit evidence that she abused Joshua and made derogatory comments about his resemblance to his father. Eggleston also argues that the trial court did not give a curative instruction at the time such evidence came in.[5]

In a motion in limine, the State moved the trial court to permit evidence that Eggleston had reported to the Walworth County Department of Human Services that when Joshua was a month old, she picked him up and shook him roughly because he would not stop crying. The State also sought to introduce evidence that in January 1990, Eggleston told the Department that she had been kicked out of her home by her husband, Scott Eggleston, because she handled the children roughly. The State also wanted to present Scott's testimony that in April 1990, he took Joshua to the emergency room because the defendant had bruised his back and forehead. Finally, the State sought to present testimony from relatives that the defendant had tripped, shoved and demeaned Joshua and demonstrated a dislike for him.

The trial court applied § 904.04(2), STATS., and concluded that the evidence was relevant to show motive and intent to kill, the latter being an element of the first-degree intentional homicide charge against Eggleston. The trial court also found that the other acts evidence was not so remote as to be devoid of probative value. The trial court also considered the danger of unfair prejudice to Eggleston and excluded as unduly prejudicial one prior act involving the placement of rat poison where a child could reach it. The rest of the State's other acts evidence was admitted.

We will affirm the trial court's decision to admit evidence if the court properly exercised its discretion. ***State v. Webster,*** 156 Wis.2d 510, 514, 458 N.W.2d 373, 374-75 (Ct. App. 1990). In exercising its discretion, the trial

[5] The appellant's brief makes these allegations without citation to the record on appeal.

court must apply accepted legal standards to the facts of record and, demonstrating a rational process, it must reach a reasonable conclusion. ***Id.*** at 515, 458 N.W.2d at 375.

Section 904.04(2), STATS., specifically excludes evidence of other crimes or acts when such evidence is offered "to prove the character of a person in order to show that the person acted in conformity therewith." *See* ***State v. Shillcutt,*** 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). However, the statute does not bar evidence which is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Section 904.04(2). We need only determine that the other acts evidence was relevant to one of the purposes enumerated in § 904.04(2) in order to uphold the trial court's discretionary decision to admit the evidence. *See* ***State v. Speer,*** 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993).

We agree with the trial court that evidence of Eggleston's previous conduct toward Joshua and her other children was relevant to her motive[6] and intent to kill Joshua, tended to rebut the common perception of a loving mother-child relationship and was not unfairly prejudicial. Evidence that Eggleston had behaved inappropriately with Joshua also tended to rebut her contention that she was only trying to calm Joshua when she held his face to the pillow.

The trial court properly exercised its discretion in admitting this evidence. It determined that the evidence fell within one of the exceptions enumerated in § 904.04(2), STATS., and then assessed whether it was more probative than prejudicial. *See* ***Shillcutt***, 116 Wis.2d at 235, 341 N.W.2d at 719.

Eggleston complains that the trial court did not give a cautionary instruction after testimony regarding each item of other acts evidence. Eggleston's theory that an instruction was required in the middle of a witness's testimony is not supported by citation to legal authority. The record indicates

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[6] Although motive is not an element of any crime, *see* ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988), "[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent," ***State v. Johnson***, 121 Wis.2d 237, 253, 358 N.W.2d 824, 832 (Ct. App. 1984).

that at the conclusion of testimony by each witness who provided other acts evidence, the trial court instructed the jury that the evidence could be considered only with regard to motive and intent and could not be used to conclude that Eggleston was a bad person and therefore guilty of the charged crime. The court's use of a cautionary instruction ameliorated any prejudicial effect of the other acts evidence. *See* ***id.*** at 238, 341 N.W.2d at 721.

PROSECUTORIAL MISCONDUCT

Finally, Eggleston alleges numerous incidents of prosecutorial misconduct which she claims interfered with her right to a fair trial. She cites the following instances: (1) the prosecutor's statement in the jury's presence that he would waive the State's peremptory strikes, (2) the proximity of the prosecutor's table to the jury, (3) the prosecutor's pretrial release of information to a defense witness, and (4) the prosecutor's alleged enjoyment of defense counsel's frustration in being unable to locate a witness. We conclude that none of these instances, either separately or together, operated to deprive Eggleston of a fair trial.

Eggleston first argues that the prosecutor improperly stated that he would waive the State's peremptory challenges after the parties became aware that an insufficient number of jurors had been seated to allow for seven strikes by each side. After the trial court stated its intention to strike the jury, the prosecutor asked to discuss the matter in chambers. The trial court did not respond, and the parties continued to discuss in front of the potential jurors the fact that if each side exercised all of its strikes there would not be an alternate juror. At that point, the prosecutor offered to dispense with two of the seven strikes available to him. Defense counsel then asked the judge to move the discussion into chambers. Thereafter, the parties went to chambers, and the status of peremptory strikes was discussed further.

On appeal, Eggleston argues that the prosecutor's "public announcement that he would forego his peremptory strikes" cast Eggleston "in a bad light since she would be construed as using her strikes to eliminate jurors." At the postconviction motion hearing, the trial court rejected this claim and questioned whether the jury knew what was going on.

We see no misconduct on the part of the prosecutor. He asked to continue the peremptory strike discussion in chambers. That the trial court did not immediately grant the request cannot be attributed to the prosecutor. Additionally, we do not discern any prejudice to Eggleston. The trial court doubted the potential jurors understood what was happening. This finding is not clearly erroneous.

Next, Eggleston argues that the prosecutor's table was positioned so that he could "blow kisses" to the jury, thereby placing Eggleston at a disadvantage. At the beginning of the second day of trial, defense counsel objected that the prosecutor's table was facing the jury from the middle of the courtroom. Defense counsel inquired why the defense was not also facing the jury. The trial court found that the defense table was actually closer to the jury and that the jurors' ability to see the defense table depended on which way they were looking. At the postconviction motion hearing, the prosecutor testified that he moved his table because the defense table was blocking his view of the jury. Eggleston has not demonstrated on this record that the prosecutor exploited his proximity to the jury.

Eggleston next claims that the prosecutor acted inappropriately when he furnished Judith Saynor, the mother of Eggleston's fiance, Christopher Saynor, with a letter from Eggleston.[7] During trial, the prosecutor advised the court that Eggleston had given him a letter written by Eggleston from the Walworth County jail to an ex-boyfriend. The prosecutor gave the letter to Judith because she had expressed a concern that Eggleston was trying to manipulate her son and the letter seemed relevant to her concern. The prosecutor acknowledged that the letter might make Christopher less sympathetic to Eggleston.

Christopher testified at the mid-trial hearing on this matter that he intended to testify truthfully in the case even though someone had attempted to influence his testimony. The trial court found that the prosecutor did not act improperly when he forwarded the letter to Judith and that the letter itself would not influence Christopher's putative testimony. At the postconviction

[7] The letter is not included in the record on appeal.

motion hearing, the trial court stood upon the record previously made on this controversy.

We assume arguendo that the prosecutor's conduct was improper. However, we conclude the conduct was not prejudicial because Christopher stated that the incident would not influence his testimony, and he later testified in a manner which was favorable to Eggleston.[8]

Finally, Eggleston complains that the prosecutor seemed satisfied when the defense was unable to locate Rachael Eggleston, one of her children, to testify at trial.

At the postconviction motion hearing, the prosecutor testified that Rachael left the building sometime after the trial court signed the defense's subpoena for her. The prosecutor recalled that Scott and/or his mother, McDermott, were concerned that Rachael was being subpoenaed in the middle of the trial and left the courthouse with her. The prosecutor saw them in the hallway before they left. Afterward, the prosecutor spoke with defense counsel, who was having difficulty locating Rachael. Defense counsel testified that when the prosecutor informed him that Rachael had left the courthouse, the prosecutor smiled and apparently thought the situation was funny. The prosecutor did not recall laughing or joking when he spoke with defense counsel about Rachael leaving the courthouse. Notwithstanding the defense's difficulty in serving Rachael with the subpoena, trial counsel testified at the postconviction motion hearing that he subsequently decided not to call her as a witness.[9]

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[8] Christopher testified that Eggleston was a good mother to the children from her marriage to Scott and the daughter from their relationship. He also testified that she seemed to love Joshua, he did not see her abuse the children and she did not say cruel things to or about Joshua. Christopher resisted the prosecutor's attempt on cross-examination to portray Eggleston as less than an ideal mother.

[9] Defense counsel wanted Rachael to testify that she threw a book at Joshua. Her testimony became unnecessary after the social worker testified to that incident.

The entire "Rachael" incident occurred outside of the jury's presence. Eggleston has not shown that this incident had any bearing on the outcome of the trial.

By the Court.—Judgment affirmed.

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