COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0935-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DIANE M. MIKIC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Diane M. Mikic appeals from a judgment convicting her of first-degree reckless homicide and aggravated battery both while armed with a dangerous weapon in the death of her husband, Frank Mikic, and from an order denying her postconviction motion. We affirm.

It is undisputed that Mikic stabbed her husband to death. She challenges the trial court's refusal to suppress statements she gave to the police after the incident, the admission of evidence that she had tried to stab Frank on a previous occasion, trial counsel's failure to object to the prosecutor's remarks during closing argument, the sufficiency of the evidence and the sentence.

SUPPRESSION OF STATEMENTS TO POLICE

Prior to trial, Mikic moved to suppress statements she gave in her bedroom after police arrived and later at the police station on the grounds that she was in custody, had invoked her right to counsel and did not give voluntary statements.

Upon review of an order declining to suppress evidence, we will not disturb the trial court's findings of fact unless they are contrary to the great weight and clear preponderance of the evidence. *See* ***State v. Clappes,*** 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). However, we independently apply federal constitutional principles to the facts found by the trial court. *See* ***id.***

Mikic first argues that she was in custody when she gave one statement to the police at her home and another at the police department. ***Miranda***[1] warnings are necessary when a defendant is subject to custodial interrogation. *See* ***State v. Leprich,*** 160 Wis.2d 472, 476, 465 N.W.2d 844, 845 (Ct. App. 1991). Custodial interrogation occurs when a defendant has been formally arrested or his or her freedom of movement has been restrained to a degree associated with formal arrest. *See* ***id.*** at 477, 465 N.W.2d at 846. A court considers the totality of the circumstances attendant upon the giving of a statement

[1] ***Miranda v. Arizona,*** 384 U.S. 436 (1966).

to determine whether the defendant was in custody, i.e., the defendant's freedom to leave, and the purpose, place and length of the interrogation. *See* ***id***. The in-custody determination is an objective one: whether a reasonable person in the defendant's situation would have considered himself or herself to be in custody. *See* ***State v. Koput,*** 142 Wis.2d 370, 379, 418 N.W.2d 804, 808 (1988). "Not every on-the-scene questioning by a police officer need be preceded by a ***Miranda*** warning." *See* ***Leprich,*** 160 Wis.2d at 477, 465 N.W.2d at 845. The ***Miranda*** rule does not apply when general on-the-scene questions are investigatory rather than accusatory in nature. *See* ***id.***

Here, the trial court determined that Mikic was not in custody when she gave the statements. The officer who took the first statement in the bedroom of her home testified that he did not tell Mikic she was under arrest, did not restrain her, and had moved her to the bedroom to shield her from the events relating to investigation of Frank's death. Mikic did not testify at the suppression hearing. These facts support the trial court's conclusion that Mikic was not in custody when she gave her first statement to the police in her bedroom.

As to the second statement made at the police station, the police officer testified that Mikic was not advised that she was under arrest prior to giving the statement, she was interviewed in an office, she was not handcuffed and her freedom of movement was not restrained. There was no evidence that she did not voluntarily accompany officers to the police station. In the absence of other factors indicating that Mikic was in custody, the police station statement was not an in-custody occurrence. *See* ***Koput,*** 142 Wis.2d at 380-82, 418 N.W.2d at 808-09.

In the absence of facts indicating an in-custody interrogation, ***Miranda*** warnings were not necessary. Nevertheless, officers did give Mikic her ***Miranda*** warnings, which Mikic concedes, before questioning her at her home and officers reminded her of those rights before questioning her at the police station.[2] The transcript of the taped interview at her home shows that after Mikic received her ***Miranda*** rights and was asked whether she understood them, she responded, "I mean we have a lawyer… Why, do I need one. I, I do. I need one." Mikic then proceeded to answer the officer's questions.

Mikic argues that she requested counsel in response to being given her ***Miranda*** rights. Once a suspect invokes the Fifth Amendment right to counsel under ***Miranda,*** police may not interrogate further unless the suspect's counsel is present. *See* ***State v. Coerper,*** 199 Wis.2d 216, 222-23, 544 N.W.2d 423, 426 (1996). "The invocation of the right to counsel must be unambiguous: The suspect 'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" ***Id.*** at 223, 544 N.W.2d at 426 (quoted source omitted). A request for counsel "is equivocal when, in light of the circumstances, a reasonable police officer understands only that the suspect might be invoking the right to have counsel present." ***State v. Long***, 190 Wis.2d 386, 397, 526 N.W.2d 826, 830 (Ct. App. 1994).

The evidence adduced at the suppression hearing supports a conclusion that Mikic did not unequivocally ask for counsel; Mikic concedes as

[2] We reject Mikic's claim that the officers were required to administer the full ***Miranda*** rights at the police station before taking a second statement. *See* ***State v. Jones,*** 192 Wis.2d 78, 99, 532 N.W.2d 79, 87 (1995).

much. The officer construed Mikic's statement as a question, rather than the required unequivocal invocation of the right to counsel. Moreover, Mikic then answered the officer's questions. Her conduct was inconsistent with her claim that she invoked the right to counsel. The trial court found that Mikic did not invoke her right to counsel. This is necessarily premised on fact-finding deriving from the officer's testimony at the suppression hearing. Because this assessment of the officer's credibility is intertwined with the trial court's findings and conclusion, we affirm the conclusion. *See* ***Wassenaar v. Panos,*** 111 Wis.2d 518, 525, 331 N.W.2d 357, 361 (1983).

Finally, Mikic argues that her statements were not voluntary due to her highly emotional and agitated state at the time she gave them. However, the essential inquiry is whether the statement was procured by coercive means or whether it was the product of improper police pressure. *See* ***Clappes,*** 136 Wis.2d at 236, 401 N.W.2d at 765. The court examines the facts and the totality of the circumstances surrounding the giving of the statement and balances the personal characteristics of the defendant against the pressure exerted by the police to induce a response to questions. *See* ***id.*** at 236, 401 N.W.2d at 765-66. A statement given at home does not occur in a setting that is inherently coercive. *See* ***Leprich*****,** 160 Wis.2d at 478, 465 N.W.2d at 846. Mikic does not allege coercion or police pressure, merely her agitated state. This allegation does not amount to coercion or improper police pressure. The totality of the facts and circumstances do not indicate that the police exerted any pressure or used any coercive tactics on Mikic. Therefore, the trial court did not err in declining to suppress statements given at home and at the police station on the grounds that they were involuntarily given.

OTHER ACTS EVIDENCE

Mikic argues that the trial court erroneously admitted evidence that eight years before her 1996 trial for Frank's 1995 death, she told Frank's mother that a mark on a cupboard door of Frank's former residence was caused when she thrust a knife at Frank and missed. The State offered the testimony of Frank's mother and the door as other acts evidence on the issues of intent, motive, opportunity and absence of mistake or accident. After a hearing, the trial court ruled that the evidence was relevant to intent and absence of mistake or accident and was not unduly prejudicial because it was extremely probative on the question of whether Mikic acted in 1995 with intent to cause either substantial or great bodily harm, an element of the battery charged in Count 2 of the information.[3] The trial court specifically considered that the cupboard door incident occurred eight years before and noted that the remoteness in time did not eliminate its probative value.

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 he acted in conformity therewith." *See also* ***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). Evidence of other acts committed by a defendant is admissible to place the charged crime in context or to provide background to the case. *See* ***State v. Hereford,*** 195

[3] Count 1 of the information charged first-degree reckless homicide under § 940.02(1), STATS.

Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995), *cert. denied*, 116 S. Ct. 1286 (1996). The trial court must decide if there is a logical or rational connection between the other acts evidence and any fact that is of consequence to the determination of the action being tried. *See* ***State v. Alsteen,*** 108 Wis.2d 723, 729-30, 324 N.W.2d 426, 429 (1982).

Mikic argues that this evidence was extremely prejudicial. However, nearly all evidence operates to the prejudice of the party against whom it is offered. *See* ***State v. Johnson,*** 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). The test is whether the resulting prejudice of relevant evidence is fair or unfair. *See* ***id.*** Evidence is unfairly prejudicial if it has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case. *See* ***State v. Gulrud***, 140 Wis.2d 721, 736, 412 N.W.2d 139, 145 (Ct. App. 1987). For other acts evidence to be excluded, the danger of unfair prejudice must substantially outweigh the probative value. *See* ***State v. Plymesser***, 172 Wis.2d 583, 592, 493 N.W.2d 367, 372 (1992). When a jury is instructed that other acts evidence may be used only to show a permissible purpose and not to show that the defendant had a bad character and acted in conformity with it, any danger of unfair prejudice or of misleading the jury is cured. *See* ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286-87 (Ct. App. 1992). Juries are presumed to follow all the instructions given. *See* ***id.*** at 436, 485 N.W.2d at 286.

Here, the trial court performed the requisite analysis and properly exercised its discretion in admitting the evidence as relevant to intent and absence of mistake or accident. Additionally, evidence of previous violence and the stormy relationship between Mikic and her husband was properly admitted to place the

crime in context and to permit the jury to assess Mikic's claims of self-defense and long-term abuse by Frank. In addition, the trial court delivered the cautionary instruction.

CLOSING ARGUMENT

Mikic argues that her trial counsel was ineffective for failing to object to improper closing argument by the prosecutor. After outlining the elements of first-degree reckless homicide, the prosecutor remarked:

> Now, let me, again, put in a framework of what we are not charging. This is not a first-degree intentional homicide case. This is not a case where you have to believe she wanted him dead, she planned to have him dead, she was glad he was dead. None of that is in here. We understood that when we charged that.
>
> If you believe she didn't want him dead, she can still be convicted of this. If you believe she is sad that he is dead, you can still convict her of this. If you believe she didn't plan it or premeditate it, this is the crime that the evidence clearly shows is appropriate. As I said in my opening statements, we'll give her that benefit of a reasonable doubt; that she did not intend to kill him.

Mikic contends that these remarks were prejudicial and could have led the jury to convict her on a lesser charge because she was not charged with a more serious offense. She further contends that the prejudicial impact of this remark is demonstrated by the prosecutor's mention at sentencing of a juror's inquiry as to why Mikic was not charged with first-degree intentional homicide. She contends that trial counsel was ineffective for not objecting to the foregoing remarks.

Ineffectiveness of counsel occurs when counsel performs deficiently and the deficient performance prejudices the defendant. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch,*** 124 Wis.2d 628,

633, 369 N.W.2d 711, 714 (1985). However, we need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). Whether counsel's performance prejudiced the defendant is a question of law which we review de novo. *See* ***id***.

Here, we conclude that Mikic did not meet her burden to show prejudice. First, Mikic did not offer the testimony of trial counsel on this point. In order to pursue an ineffective assistance of trial counsel claim, trial counsel's testimony must be preserved. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Notwithstanding this defect in the record, we conclude that because the trial court stated at the postconviction motion hearing that it would have overruled an objection had one been made, counsel cannot be faulted for not bringing a motion that would have failed.[4] *See* ***State v. Simpson***, 185 Wis.2d 772, 784, 519 N.W.2d 662, 666 (Ct. App. 1994). Therefore, Mikic was not prejudiced by trial counsel's failure to object.

SUFFICIENCY OF THE EVIDENCE

Mikic argues that the evidence established self-defense as a matter of law and was insufficient to convict her of first-degree reckless homicide while armed with a dangerous weapon and aggravated battery while armed with a dangerous weapon.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury

[4] Counsel is allowed considerable latitude in closing arguments and the trial court has discretion to determine the propriety of the argument. *See* ***State v. Draize,*** 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979).

"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, 758 (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***. It is within 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 reasonable inference can be drawn from the evidence, the reviewing court must adopt the inference which supports the conviction. *See* ***State v. Hamilton***, 120 Wis.2d 532, 541, 356 N.W.2d 169, 173-74 (1984).

On appeal, Mikic argues that because she acted in self-defense, the jury should have acquitted her. In response, the State points out the evidence upon which the jury could have relied to reach its guilty verdicts. The jury was entitled to sift and weigh the evidence of self-defense against other evidence upon which it could base a conviction. *See* ***Poellinger,*** 153 Wis.2d at 506, 451 N.W.2d at 757. Because the jury was free to reject Mikic's self-defense claim and accept other evidence that Mikic recklessly caused Frank's death under circumstances which showed utter disregard for human life, *see* § 940.02(1), STATS., we are bound by the jury's findings and inferences. *See* ***Hamilton,*** 120 Wis.2d at 541, 356 N.W.2d at 173-74.

SENTENCING

Mikic argues that the trial court misused its discretion in sentencing her to twenty years for reckless homicide and to a concurrent fifteen-year term for aggravated battery because it did not consider Mikic's self-defense claim. The weight to be given to each sentencing factor is within the trial court's broad

discretion. *See* ***State v. Thompson,*** 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). That discretion is exceeded only where the sentence imposed is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. *See* ***id.***

Mikic's sentence does not fall within the category of sentences which shock public sentiment. Mikic faced a maximum sentence of sixty years for both counts, and the State sought the maximum sentence. Mikic received one-third of the possible maximum sentence. The trial considered the three primary factors which should drive sentencing: the gravity of the offense, the defendant's character and the need to protect the public. *See* ***State v. Paske,*** 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991).

Mikic briefly argues that the trial court erroneously restricted presentation of her self-defense claim at sentencing. However, the trial court adequately expressed its reasons for doing so—it was familiar with the self-defense claim from trial and did not want to retry the case. The court later explained why it did not agree that Mikic was a victim of long-term abuse and rejected her self-defense claim.

By the Court.—Judgment and order affirmed.

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