COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2542-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. SMOTHERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Robert J. Smothers appeals from a judgment of conviction of second-degree intentional homicide, by use of a dangerous weapon. He claims that items seized as a result of a warrantless entry to his apartment should have been suppressed and that his right to present a defense was violated by the exclusion of evidence suggesting that the victim was abusive to his wife.

We conclude that suppression was not required under the doctrine of inevitable discovery and that exclusion of the evidence suggesting spousal abuse was not error and, even if error, it was harmless error. We affirm the judgment.

Smothers stabbed and killed his friend, Jay Meyer, during a fight. The two men had been together drinking beer for several hours. The fight occurred outside of Smothers' residence. After Smothers stabbed Meyer in the chest, he went to the door of his apartment building and summoned someone to call the police. Smothers went into his apartment. When he returned to the door of the apartment building, he dropped the knife in the back hallway of the building.

In checking the entire apartment building for possible victims or suspects, the police went into Smothers' apartment. A bloody jacket was observed in the apartment. The observation of the bloody jacket was included in the application for a search warrant for Smothers' apartment. When the warrant was executed, the police seized the jacket, a pellet gun, and an additional knife.

The trial court upheld the warrantless entry into Smothers' apartment under the emergency doctrine. *See* ***State v. Kraimer***, 99 Wis.2d 306, 314, 298 N.W.2d 568, 572 (1980). In reviewing an order regarding the suppression of evidence, this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Richardson***, 156 Wis.2d 128, 137, 456 N.W.2d 830, 833 (1990). Whether a search or seizure passes constitutional muster, however, is a question of law subject to de novo review. *See* ***id.*** at 137-38, 456 N.W.2d at 833. We may sustain the trial court's determination on different grounds. *See* ***State v. Sharp***, 180 Wis.2d 640, 650, 511 N.W.2d 316, 321 (Ct. App. 1993).

We conclude that the dispositive issue is whether, assuming entry to Smothers' apartment was not justified under the emergency doctrine, the items later seized were admissible because they inevitably would have been discovered.

> The State must establish: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

State v. Lopez, 207 Wis.2d 413, 427-28, 559 N.W.2d 264, 269 (Ct. App. 1996).

We have little difficulty concluding that the police would have applied for and obtained the warrant to search Smothers' apartment even without having seen the bloody jacket during their warrantless entry to the apartment. The crime occurred outside of Smothers' apartment and Smothers himself was discovered just a few steps from his apartment door. Smothers had a set of keys in his hand. Officers observed blood on the floor in the hallway outside of Smothers' apartment. Although the bloody knife was in plain view in the apartment hallway and had been pointed out by Smothers, the police did not know whether other weapons were involved in the fight. These were sufficient leads to justify the application for a search warrant.

Smothers argues that the police had no information that he had gone into his apartment. But the converse is also true—the police did not have information that he had not gone into the apartment. The police were actively pursuing a murder investigation with little information about what had occurred. Smothers refused to give the officers consent to search the apartment and had not given any statement about the circumstances of the crime. Every avenue to discover and preserve possible evidence would be used. A search of the apartment

belonging to the person who admitted stabbing Meyer and located only a short distance away from where the victim was found was a logical extension of the investigation.

Moreover, police would eventually discover that Smothers was seen wearing a jacket when he was with Meyer that day. An attempt to find the jacket would be made. The first place to look would have been Smothers' apartment as he was just a few feet away from there when he was arrested. There is little possibility that the items seized would have no longer been at the apartment had the issuance of the warrant awaited further investigation. *Cf.* ***United States v. Cabassa***, 62 F.3d 470, 473 (2nd Cir. 1995) ("inevitability of discovery is lessened by the probability, under all the circumstances of the case, that the evidence in question would no longer have been at the location of the illegal search when the warrant actually issued"). Smothers lived alone and was under arrest. He could not have prevented discovery of the items.

We conclude that the items seized from the apartment inevitably would have been discovered by means not tainted by the possible unlawful entry to the apartment. Suppression was not required.

The theory of defense was self-defense. Smothers testified that Meyer attacked him after he told Meyer to "go home and beat his wife and kid." Smothers said that Meyer grabbed him by the throat and choked him twice while the fight was in progress.

The defense sought to introduce evidence suggesting that Meyer was physically violent towards his wife and child. In her testimony, Meyer's wife denied that she ever had a physical fight with Meyer. Smothers sought to elicit testimony from a juvenile crisis counselor of the Kenosha County Human

Development Services that almost two months after Meyer's death, Meyer's wife had called the crisis center and made reference to some violent episode involving her son and indicated that she did not want her son to be like her husband. The trial court excluded the evidence for two reasons: it was confidential information under § 48.78(2), STATS., and it was irrelevant. Smothers argues that the trial court's ruling violates his constitutional right to present a defense.

Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court misused its discretion. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *See* ***id.*** at 367, 497 N.W.2d at 149. Whether a defendant's right to present a defense has been improperly denied by the trial court is a question of constitutional fact which we review de novo. *See* ***Michael R.B. v. State***, 175 Wis.2d 713, 720, 499 N.W.2d 641, 644 (1993). A defendant does not have a right to present irrelevant evidence. *See* ***State v. Walker***, 154 Wis.2d 158, 192, 453 N.W.2d 127, 141 (1990).

We need not address whether the juvenile counselor's testimony was confidential. The evidence was properly excluded on relevancy grounds.

Smothers claims that the evidence was relevant to corroborate, through a disinterested witness, Meyer's proclivity to use violence. However, evidence of specific violent conduct by a homicide victim is not admissible to support an inference about the victim's actual conduct during the incident which resulted in death but only to show the accused's state of mind about the danger the victim posed. *See* ***Werner v. State***, 66 Wis.2d 736, 743, 226 N.W.2d 402, 405

(1975). *See also* ***State v. Daniels***, 160 Wis.2d 85, 96, 465 N.W.2d 633, 637 (1991). Thus, only conduct which the accused is aware of at the time of the incident is admissible. *See* ***id.*** at 94, 465 Wis.2d at 636 (quoting ***McMorris v. State***, 58 Wis.2d 144, 152, 205 N.W.2d 559, 563 (1973)). Meyer's wife called the juvenile crisis center sometime after Meyer's death. At the time of the fight, Smothers was not aware of the wife's phone call that confirmed his belief that Meyer could be physically abusive.

We further conclude that if it was error to exclude the evidence, it was harmless error. "The test for whether an error was harmless is whether there is no reasonable possibility that the error contributed to the conviction, a reasonable possibility being one which is sufficient to undermine confidence in the outcome of the proceeding." ***State v. Patricia A.M.***, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). We must look to the totality of the record. *See* ***id.*** at 556-57, 500 N.W.2d at 295.

Smothers had already testified that he observed a "punch mark" in the wall of Meyer's home and that Meyer indicated he had hit the wall rather than hit his wife. Smothers further testified that although Meyer had never said he beat or hit his wife, Meyer had said "he threw her around." Smothers said that within the last year Meyer said that he beat his son. Smothers had seen Meyer spank his son once. The evidence from the juvenile counselor was di minimus and cumulative in light of this evidence that Meyer had acted out against his family. Although the evidence may have served to corroborate Smothers' accounts of Meyer's violence against his family, the evidence from the counselor was vague as to the type of conduct Meyer's wife feared. It lacked probative value. Further, the implication that Meyer abused his wife has no direct connection to Meyer's acts against Smothers. The evidence was that Meyer had his hands around Smothers'

throat. This was far more probative of self-defense than the supposition that Meyer had abused his wife. Our confidence in the outcome is not undermined by the exclusion of the testimony from the juvenile counselor.

By the Court.—Judgment affirmed.

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