COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0118-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAYNA L. LORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Dayna Lord appeals the judgment convicting her of first-degree intentional homicide, contrary to § 940.01(1), STATS., and hiding a corpse, contrary to § 940.11(2), STATS. She contends that: (1) the evidence is insufficient to support the convictions; (2) the prosecutor unconstitutionally commented on her silence in violation of her Fifth Amendment

rights; and (3) the court erroneously excluded learned treatises. We conclude that the evidence sufficiently supports the convictions and that the prosecutor's comments did not violate her Fifth Amendment rights because they were not directed toward her silence. We hold, however, that the court erroneously excluded the learned treatises offered in connection with the homicide charge and that such error was not harmless. Accordingly, we reverse and remand for a new trial on the first-degree homicide charge.[1]

On April 17, 1995, a solid waste station employee operating a front end loader observed an object fall from the elevated bucket into the trash pile from which he was removing refuse. He investigated and discovered that the object was an infant's remains. The pile of trash in which the child was found weighed about 11,000 pounds and was composed of trash bags, thin metal strapping or banding that might be used around pallets and crates, broken bottles, a motor vehicle fender, sharp tin can lids, aluminum strips, and metal cans. The employee was unable to testify whether the front end loader bucket came into contact with the infant before he saw it fall into the pile. The trash pile came from a single garbage truck that brought garbage from fifty-one stops on its route. The contents of the trash collected on the route were continually subjected to compression by the hydraulic packing arm in the truck.

Physical evidence, including DNA testing on the infant's corpse, fingerprints taken from bags assumed to have held the corpse, and handwriting on scraps of paper found in the trash pile, identified Lord as the infant's mother. In

[1] Lord also argues that § 973.014, STATS., is unconstitutional and that the trial court erroneously exercised its discretion when setting Lord's date of parole eligibility. Because we reverse on other grounds, we do not reach these issues.

her opening statement, defense counsel acknowledged that Lord gave birth to the infant boy, but asserted he was stillborn, and that she wrapped his corpse in plastic bags and placed them in the trash for pickup.

Several experts testified at trial. The State's pathologist, Dr. Susan Roe, performed the autopsy. The autopsy disclosed that the body was in a moderate to severe general state of decomposition; a lot of skin had slipped away and was discolored; the tissues were softened; biochemical changes associated with decomposition had occurred; and X-ray findings were consistent with decomposition. Roe further testified that when she washed the infant as part of the autopsy, most of the skin was gone and that some remaining skin came off. The facial structures and skull and associated bones were collapsed from decomposition and from being crushed in the garbage truck. The infant's skull, ribs and jaw were fractured from crushing in the truck.

Roe testified about a wound she discovered on the baby's neck. She described it as

> an incised wound that goes through multiple structures, and it's somewhat irregular through some of those structures. So it appears that it wasn't just one cut but sort of a series of cuts, and it's so isolated that I don't have an explanation for it, from the garbage truck.

When asked whether she could give an opinion to a reasonable degree of medical certainty as to whether someone cut the baby's throat, she responded, "Yes. … In the absence of another explanation, I feel that this infant's throat was–that the sharp injury was done by another person." She went on to state that there was evidence of more than one cut to the baby's neck, and that "there was some movement either of what was used to cut the baby's throat or movement of the

baby." She also testified about a variety of injuries to the infant, including lacerations to the foot, right shoulder, back, and right buttock. With respect to these wounds, she testified that it would not surprise her if these injuries occurred within the garbage truck.

In attempting to determine whether the baby was born alive, Roe analyzed the lung tissue by X-ray, by a flotation test, and by microscope to determine whether air remained in the lungs. She was unable to determine whether the air found present in the lungs was from breathing or from decomposition. She also testified that the baby's umbilical cord and placenta contained no signs of stillbirth, that his nasal structure was capable of admitting breath, and that there were no abnormalities in his heart, thymus, gastrointestinal tract, liver or pancreas. Ultimately, she testified that she was unable to give a medical opinion as to whether the baby was born alive.

Two defense experts also testified at trial. Dr. Gregory Schmunk, chief medical examiner for Brown County, testified that the infant's injuries could have occurred within the garbage truck, including "a large almost decapitating tear to the head." He also testified that based upon a large amount of skin cells present deep within the lungs, he believed the baby experienced significant distress inside the womb and that it looked like the infant died inside the uterus. He stated that there was no evidence to demonstrate it was alive outside the womb. In addition, Dr. Roger Riepe, a pathologist and head of surgical pathology at Marshfield Clinic, testified that the amount of squames (skin cells shed by the body) and debris found in the infant's lung tissue was consistent with the infant having died in utero.

Lord contends that the evidence is insufficient to support the convictions. She argues that because Roe "did not know" and "could form no opinion" as to whether the infant was born alive, a reasonable jury could not have inferred this fact. We disagree.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). This court must search for inferences most favorable to the jury verdict. ***State v. Stark***, 162 Wis.2d 537, 549, 470 N.W.2d 317, 322 (Ct. App. 1991). If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, this court may not overturn the verdict. ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 758.

We conclude that the evidence sufficiently supports the convictions. Roe testified to a reasonable degree of medical certainty that a person caused the injury to the infant's throat. From that testimony, a jury could reasonably infer that the child was born alive because it logically follows that a person would only cut a child's throat to kill a living child. This is a permissible inference, despite Roe's inability to conclude the child was born alive based upon medical testing. Further, the jury's inference of a live birth is consistent with Roe's testimony that the baby's umbilical cord and placenta contained no signs of stillbirth, that his nasal structure was capable of admitting breath, and that there were no abnormalities in his heart, thymus, gastrointestinal tract, liver, or pancreas. In sum, the jury was entitled to weigh the testimony of the experts, and Roe provides a sufficient basis upon which to reasonably infer live birth. Roe's inability to opine whether the baby was born alive is consistent with the circumstance that it is

for the jury ultimately to draw reasonable inferences from the evidence. Evidently finding Roe credible, the jury could reasonably infer that the child's throat would not be cut unless it was born alive.

We turn now to Lord's assertion that the prosecutor unconstitutionally commented on her silence during trial. Lord contends that the prosecutor made five explicit references to her silence.[2] This issue involves the application of law to undisputed facts. It therefore presents a question of law reviewed de novo. ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W2d 389, 394 (1984).

It is a violation of an accused's privilege against self-incrimination for a prosecutor to comment to the jury on that person's post-arrest silence. ***State v. Sorenson***, 143 Wis.2d 226, 256, 421 N.W.2d 77, 89 (1988). We must decide whether the prosecutor's remarks were directed at the defendant's silence. ***Lofton v.***

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[2] Four of the five statements are as follows: (1) From the State's opening statement, "Well, who tells us that this is Dayna Lord's baby? The baby and the bags. Certainly not Dayna Lord. The bags, the three bags where the baby had been." (2) From the State's redirect of Dr. Roe:

> Q. Where did you come into the – you were asked during the cross examination to assume that the infant was not born into a toilet. How would you go about finding out whether it was or not?
> A. Only one person knows.
> Q. Who's that?
> A. The mother.
> Q. Is the mother's story on these kinds of cases important?
> A. Yes.

(3) From the cross-examination of a defense pathologist: "You didn't talk to [Dayna Lord] and find out whether she had ever had any fetal movement." (4) From the State's closing argument: "But when you're doing the autopsy, you're supposed to be searching for the truth, and in his search for the truth [Schmunk] made no effort to talk to Dayna Lord. Sloppy or else he didn't care about the truth."

State, 83 Wis.2d 472, 486-87, 266 N.W.2d 576, 582 (1978). It is not a constitutional violation if a prosecutor's comment is not directed specifically to the defendant's silence. ***Id.*** at 487, 266 N.W.2d at 582. If the prosecutor's language was manifestly intended as comment on the defendant's silence, or if the language was such that the jury naturally and necessarily would take it to be comment on the defendant's silence, then the prosecutor's remarks were improper. ***State v. Johnson***, 121 Wis.2d 237, 246, 358 N.W.2d 824, 828 (Ct. App. 1984).

We initially address the first through fourth statements. We conclude that these statements are not comments upon Lord's post-arrest silence. Each statement is directly related to the evidence and not to the fact that Lord exercised her constitutional right to not testify. Further, the language of the statements is not such that the jury would naturally take it to be a comment upon Lord's silence. Rather, each statement was both brief and couched in a discussion of the evidence. Further, the third and fourth statements were, respectively, a direct attempt to impeach a defense witness regarding the scope of this investigation and as closing argument regarding the scope of investigation. Both statements were made in an attempt to affect the weight the jury would give defense witness opinions. We see nothing in the statements that indicates an intention to comment upon Lord's silence, nor anything which naturally draws attention to it.

We wish to note, however, our disapproval of the fifth statement in question. In the State's rebuttal closing argument, it stated:

> You heard Dr. Roe testify about her experiences with these kinds of cases, and she used the term by history. By history. What that means is by history she was able to determine what happened, and that's from talking to the mom. Dr. Schmunk again was sloppy because he didn't do that--or else he didn't care--about the truth …. [B]ut

> [defense witness, Dr. Orser] didn't talk to the Defendant either to try and find out the truth, find out if these fetal movements stopped, find out how long the labor was, find out what was happening inside of her. It was never done.
>
> *The Defense says that they worked real hard to try and show you the truth. They didn't try to show you the truth. They tried to hide the truth in this case*. (Emphasis added.)

Although the State began the statement by discussing defense experts, a jury could reasonably construe the final three sentences to be a comment on Lord's silence, rather than an attempt to discredit the defense experts. While we do not reverse specifically on these grounds, we note that this comment comes dangerously close to being improper and reversible error.

We next turn to Lord's argument that the trial court improperly exercised its discretion by refusing to admit learned treatises. She argues that by excluding the treatises, the court infringed upon her constitutional right to present a defense. Lord provided the State with copies of five learned treatises, including copies of the portions of the articles sought to be introduced along with copies of title pages from the works in which the articles appeared. The title pages showed the name of the work, the author, the publisher and, with respect to two treatises, the year of publication. Each of the treatises concerned the issue whether the infant was born alive. After the State rested its case, it brought a motion in limine to exclude three of the learned treatises.

The three treatises in question discussed the following information. One article discussed Developmental Pathology of Embryo and Fetus. It detailed a study of stillbirths and how often certain causes of stillbirths appear. It also stated that aspiration of squames were considered indicative of asphyxia. A second article discussed Fetal and Perionatal Pathology. It surveyed several

studies that discussed the effects of certain factors on whether there was going to be a stillbirth, including maternal factors, fetal factors, the influence of labor, and fetal response to hypoxia. It also discussed the pathology of birth asphyxia and its effects upon various body organs. Finally, another article discussed Human Osteology. It described the number and appearance of vertebrae in human beings and the possibility that there may be variations between humans regarding the number of vertebrae that exist.

The State sought to exclude the treatises, claiming that notice was insufficient under § 908.03(18), STATS.,[3] because the defense did not include the treatises' publication dates. The prosecutor admitted the State was not prejudiced by the omission. The trial court nonetheless excluded the treatises, concluding that "the Rules of Evidence are precisely drafted and must be meticulously followed in this instance. The statute was not followed, and it's clear that the statute was not followed, and for that reason the motion in limine will be granted."

Section 908.03(18), STATS., provides for the admissibility of published treatises and periodicals when the offering party serves written notice upon opposing counsel at least forty days before trial. Sections 908.03(18)(a) and (c), STATS., provide in part:

> (a) … The notice shall fully describe the document which the party proposes to offer, giving the name of such document, the name of the author, the date of publication, the name of the publisher, and specifically designating the portion thereof to be offered. The offering party shall deliver with the notice a copy of the document or of the portion thereof to be offered.

[3] From Lord's argument on both appeal and postconviction, it appears all five treatises were excluded. The State's motion in limine, however, only requested the exclusion of three treatises, and it appears from the record that the court ultimately excluded those three treatises.

> ….
>
> (c) The court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice.

The decision to admit or exclude evidence is discretionary, and will not be reversed absent an erroneous exercise of discretion. ***State v. Evans***, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). The term "discretion" contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal standards. *See* ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977).

First, we hold that the trial court erroneously exercised its discretion by failing to consider, the State's concession of no prejudice notwithstanding, the manifest injustice exception set forth in § 908.03(18)(c), STATS., to the foundational requirements in § 908.03(18)(b). Section 908.03(18)(c) provides that "[t]he court may, for cause shown prior to or at the trial, relieve the party from the requirements of this section in order to prevent a manifest injustice." Although the State briefly mentioned the provision and the defense responded by saying it would leave the decision to the court's discretion, the trial court neither addressed nor acknowledged the provision. Its failure to address this exception, combined with its observation that the treatise rule "must be meticulously followed in this instance," indicates that it may not have appreciated its discretion to avoid a strict application of the requirements in § 908.03(18)(c), thereby determining the issue of admissibility under an erroneous view of the law. A mistaken view of the law

results in an erroneous exercise of discretion. ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983).[4]

Alternatively, we conclude that, given the nature of both the evidence and the defense, the learned treatises went to the heart of Lord's defense and their exclusion unconstitutionally infringed upon her right to present a defense.[5] A circuit court may not deprive a defendant of his or her constitutional right to present a defense through rote application of this state's rules of evidence. ***State v. Jackson***, 217 Wis.2d 646, 663, 575 N.W.2d 475, 483 (1998). This trial was essentially a contest of experts, with each side presenting testimony relating to the critical issue of the case—whether the infant was born alive. Any evidence which informed on the weight of that testimony and the witnesses' credibility was therefore crucial to assisting the jury in evaluating and weighing the experts' opinions. This is particularly true given the equivocal nature of the State expert's testimony—that she believed to a reasonable degree of medical certainty that a person cut the infant's throat, but that she was unable to give an opinion as to whether the child was born alive.

We reject the State's argument that the treatises were not critical to the defense. The learned treatises constituted neutral authorities that could enhance the

[4] At the postconviction hearing, the court briefly mentioned, inter alia, that it had made a determination at trial that the treatises' non-admission would not result in a manifest injustice. The record is nonetheless devoid of any consideration of the issue.

[5] The State contends Lord waived any argument that constitutional error occurred by the treatises' exclusion. Waiver is an issue of judicial administration except in certain cases. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). We have discretionary authority under § 752.35, STATS., to consider waived issues. ***Vollmer v. Luety***, 156 Wis.2d 1, 13, 456 N.W.2d 797, 803 (1990), *citing* ***State v. Brooks***, 124 Wis.2d 349, 354, 369 N.W.2d 183, 185-86 (Ct. App.1985). Rather than determining whether it is waived, we think the issue is of sufficient importance that we choose to exercise our prerogative and address the issue.

weight given to the defense experts' opinions by providing corroborative evidence central to the dispositive issue and presumably to Lord's theory of the case. Thus, although Lord was able to present evidence in support of her argument that the infant was stillborn and that the infant's throat was cut during garbage compression, the defense experts' credibility may have been enhanced by the objective support provided by additional learned treatises. In a case where experts alone testify to the critical issue, we cannot see how such treatises are anything less than critical. We thus hold that, given the nature of the facts and evidence in this case, the exclusion of the treatises infringed upon Lord's right to present a defense.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.