COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3677-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BETH LABATTE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge

CANE, C.J. Beth LaBatte appeals from a judgment of conviction for two counts of first-degree intentional homicide and two counts of armed robbery, contrary to §§ 940.01(1) and 943.32(2), STATS. LaBatte additionally appeals from an order denying her motion for postconviction relief. LaBatte argues that the trial court erroneously exercised its discretion by: (1) admitting

evidence of other crimes committed by LaBatte to prove identity; and (2) admitting out-of-court statements that LaBatte made to investigators regarding the charged crimes. Because the trial court properly exercised its discretion in admitting this evidence, we affirm the judgment and order.

BACKGROUND

After a nine-day jury trial, LaBatte was convicted of two counts each of first-degree intentional homicide and armed robbery for the deaths of eighty-five-year-old Cecelia and ninety-year-old Ann Cadigan and sentenced to two consecutive terms of life imprisonment. During the afternoon of November 16, 1991, the Cadigan sisters were stabbed and beaten to death in their home, just outside of Casco in Kewaunee County. Sometime during the late afternoon hours of November 16, a large light-colored older model four-door sedan with a lone white male driver was seen parked outside the Cadigan residence. Shortly after 6 p.m., a neighbor discovered the bodies of the Cadigan sisters.

The investigation of the crime scene revealed that there was no forced entry into the Cadigan home, and the downstairs phone line cord had been disconnected. Additionally, although the Cadigan sisters were known to keep their purses on a small table in their living room, the police could not locate their purses or wallets.

Police investigation of the Cadigan murders lead to the filing of a criminal complaint against Beth LaBatte on December 23, 1996, charging two counts of armed robbery and two counts of first-degree intentional homicide for the deaths of Cecelia and Ann Cadigan.[1] The complaint was based, in part, on

[1] An amended complaint, including statements given by an additional witness, was filed in January 1997.

numerous statements LaBatte made to various friends and acquaintances regarding her involvement in the murders.

LaBatte filed pretrial motions to exclude evidence of other crimes she had committed, and to suppress out-of-court statements she had made to investigators regarding the charged crimes. The trial court denied LaBatte's motion to suppress her out-of-court statements. With regard to the other acts evidence, the trial court excluded all but LaBatte's attempted robbery of Ervin Neinas and LaBatte's theft of Dorothy Charles's checkbook. The trial court found that the Neinas and Charles offenses could be introduced at trial to establish LaBatte's identity, specifically her methodology of committing such crimes.

After LaBatte was convicted, she filed a motion for postconviction relief alleging that: (1) the trial court erroneously exercised its discretion by admitting evidence of the Neinas and Charles incidents; (2) the trial court erroneously exercised its discretion by admitting LaBatte's out-of-court statements; and (3) LaBatte was denied effective assistance of counsel arising from counsel's alleged failure to challenge LaBatte's out-of-court statements as either irrelevant or excludable as more prejudicial than probative.[2] The trial court denied LaBatte's motion for postconviction relief and this appeal followed.

OTHER ACTS EVIDENCE

Dorothy Charles testified that on January 21, 1991, ten months before the Cadigan murders, LaBatte knocked on Charles's door looking for a

[2] Although LaBatte appeals from the denial of her postconviction motion, she fails to brief her allegation of ineffective assistance of counsel. We therefore decline to address this issue because it "has not been adequately briefed, and the facts have not been adequately developed to allow us to make a reasoned determination." ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25, 31 (1989).

friend in the neighborhood. LaBatte and Charles thereafter engaged in friendly conversation, and LaBatte asked if she could use the bathroom and have a drink of water. LaBatte then brought her son into Charles's home for some Kool-Aid and eventually departed with her son. Later the same day, Charles received a phone call from K-Mart, notifying her that someone had attempted to cash one of her checks. Charles then realized that her checkbook was missing from her purse, which had been located in the living room on a table next to the couch. LaBatte was arrested for trying to cash one of Charles's checks and ultimately admitted to taking the checks from Charles's apartment. At the time of this incident, Charles was seventy-two years old.

Ervin Neinas's preliminary hearing testimony,[3] read at trial, described how on May 16, 1992, exactly six months after the Cadigan murders, LaBatte came to Neinas's home and asked to use his phone because her car was out of gas. Neinas allowed LaBatte into his home, and she proceeded to use the bathroom and further claimed that she attempted to phone someone for help.[4] After escorting LaBatte to the kitchen for a glass of water, Neinas returned to his living room followed shortly thereafter by LaBatte, holding a knife. LaBatte told Neinas, "I don't want to use this knife … Give me all your money or I got to use it." Neinas refused and dared LaBatte, saying "[j]ust try it." LaBatte ultimately left the Neinas home, putting the knife in the waistband of her trousers. At the time of this attempted robbery, Neinas was seventy-seven years old.

[3] The preliminary hearing testimony referred to was given prior to the trial convicting LaBatte of the Neinas crime.

[4] Although not testified to at trial, at the hearing on the motion in limine, the State introduced evidence that someone had cut the phone line to the Neinas residence.

Further evidence regarding the Neinas incident was introduced via LaBatte's own testimony on behalf of the State at the preliminary hearing of Charles Benoit, who was separately charged as an accomplice to LaBatte in the Neinas case. LaBatte described how, on May 16, 1992, she and Benoit had been riding around in Benoit's "beige, four-door" when she suggested to Benoit that they rob someone. LaBatte suggested a place she knew to be "quiet and secluded," where she was "somewhat" familiar with the people.

A trial court's evidentiary findings will be upheld where "the court exercised its discretion according to accepted legal standards and in accordance with the facts of record." ***State v. Speer***, 176 Wis.2d 1101, 1116, 501 N.W.2d 429, 434 (1993). Further, we will not hold that the trial court erroneously exercised its discretion "where a reasonable basis exists for the trial court's determination." ***Id***. However, "the record must reflect that discretion was exercised, including evidence that the trial judge undertook a reasonable inquiry and examination of the facts as the basis for his decision[.] " ***Id***. Where a trial court "fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the … court's exercise of discretion." ***State v. Gray***, 225 Wis.2d 39, 51, 590 N.W.2d 918, 926 (1999).

LaBatte contends that the trial court erroneously exercised its discretion when it admitted evidence of the Neinas and Charles crimes. In general, "evidence of other acts is not admissible because of the 'fear that an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged.'" ***Id***. at 49, 590 N.W.2d at 925 (quoting ***State v. Sullivan***, 216 Wis.2d 768, 783, 576 N.W.2d 30, 37 (1998)). Consistent with this fear, the courts of this state have held that "[o]ther acts evidence may not be introduced to show

that the defendant has a certain character trait and, in the present charge, acted in conformity with that trait." ***Gray***, 225 Wis.2d at 49, 590 N.W.2d at 925; *see also* ***Sullivan***, 216 Wis.2d at 781-82, 576 N.W.2d at 36.

Sections 904.04(2)[5] and 904.03, STATS.,[6] govern the admissibility of other acts evidence. Exceptions to the general rule against admitting other acts evidence are found in § 904.04(2), STATS.; however, "[e]ven if the other acts evidence is being offered for one of these acceptable purposes, it must be relevant, and its probative value must outweigh its unfair prejudicial effect." ***Gray***, 225 Wis.2d at 49, 590 N.W.2d at 925 (citations omitted). The ***Sullivan*** court propounded a three-step analysis for determining the admissibility of other acts evidence:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more

[5] Under § 904.04(2), STATS., "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[6] Section 904.03, STATS., states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

> probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Sullivan, 216 Wis.2d at 772-73, 576 N.W.2d at 32-33.

Here, the first part of the three-step analysis is satisfied because the other acts evidence was offered to establish LaBatte's identity, an acceptable purpose under § 904.04(2), STATS. The ***Gray*** court recognized that other acts evidence is admissible to show identity if the other acts evidence has "such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute *the imprint of the defendant*.'" ***Gray***, 225 Wis.2d at 51, 590 N.W.2d at 926 (emphasis added). Further, "[t]he threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. Whether there is a concurrence of common features is generally left to the sound discretion of the trial courts." ***Id***. (quoting ***State v. Kuntz***, 160 Wis.2d 722, 746-47, 467 N.W.2d 531, 540 (1991)).

Although the State pursued admission of a number of LaBatte's other acts, the two ultimately admitted for the purpose of establishing identity were the Neinas and Charles incidents. The trial court, in its decision denying LaBatte's motion to exclude other acts, found: "The crimes involving the Charles and Neinas matters are similar to the known facts in this case and the State's theory of commission. Both involve gaining entry to the home of an elderly person for the purpose of locating and stealing drugs and/or money." The trial

court recognized that "there was no evidence of forced entry observed at the Cadigan house," and "items were arguably missing from the Cadigan residence." The trial court also cited witness testimony relating a conversation with LaBatte in which LaBatte stated that she would gain entry to a house by asking to use the bathroom or telephone. Finding that the other acts evidence was suggestive of identity, the trial court stated:

> Albeit others may engage in similar activities, the manner in which these crimes are alleged to have been committed have a certain signature value. Such a mode of robbery is sufficiently unique so that it may assist a jury in determining who committed the offenses; i.e., a person who uses knives to rob elderly persons in their homes after gaining entry by subterfuge and by engaging in certain stratagems once admitted, including the taking of prescription drugs, money or checks.
>
> The court is satisfied that *the State has met the level of relevance as to the Charles and Neinas incidents*. There is a sufficient concurrence of common features and similarities between these respective incidents that the jury may be able to conclude that the other acts and the present act reflect imprint of the defendant. (Emphasis added.)

Having established the relevance of the Charles and Neinas incidents, the trial court considered "whether the risk of unfair prejudice resulting from the use of this evidence substantially outweighs its probative value," consistent with the third part of the ***Sullivan*** court's three-step analysis. Recognizing that "all the evidence sought by the State operates to the prejudice of LaBatte," the trial court considered "whether the evidence would be unfairly prejudicial in its effect by influencing the jury by improper means, appealing to its sympathy, arousing its sense of horror, promoting its desire to punish or otherwise causing the jury to base its decision on extraneous considerations." Given these considerations, the trial court found that "[t]he relevance of the Charles and Neinas incidents and statements by LaBatte as to her methodology outweigh the

prejudicial effect of that evidence, especially when cautionary instructions will accompany their admission."

Here, the trial court cautioned the jury that evidence of the Charles and Neinas incidents was being introduced "for [the] very limited purpose … [of] determining the identity of the person who is alleged to have committed offenses in this case." In addition to explaining what it meant to consider the prior acts for the sole purpose of establishing identity, the trial court stressed to the jury that it was "not to conclude from this evidence … that Miss LaBatte has a certain character or character trait or [that] she acted in conformity with that character or character trait on the offenses in this case."[7] Because the trial court undertook a reasonable inquiry and examination of the facts and set forth its reasoning thereto, in compliance with the ***Sullivan*** court's three-step analysis, we hold that the trial court reasonably exercised its discretion by admitting evidence of LaBatte's involvement in the Neinas and Charles incidents for the purpose of establishing LaBatte's identity.

LABATTE'S OUT-OF-COURT STATEMENTS

LaBatte additionally contends that the trial court erroneously exercised its discretion when it admitted out-of-court statements LaBatte had made to investigators on July 25, 1995, regarding the charged offenses. During this interview, LaBatte denied involvement in the Cadigan homicides, insisting that

[7] Although LaBatte concedes that the trial court gave a limiting instruction on both the Neinas and Charles incidents, she argues that the limiting instruction was flawed by certain statements that the trial court made prior to its instructions on the Charles incident. However, LaBatte failed to object to these statements at trial. "An objection to instructions at a time when they cannot be corrected is untimely," and "an untimely objection to instructions is a waiver of an alleged defect in those instructions." ***Lampkins v. State***, 51 Wis.2d 564, 573, 187 N.W.2d 164, 169 (1971).

she "could never do anything like that," and that she had "changed." Despite her denials, LaBatte revealed an alter ego, who she referred to as "bad Beth"—that is, LaBatte when she would drink. When asked if "bad Beth" may have been involved in the Cadigan homicides, LaBatte responded, "I think bad Beth would have known what happened to the old ladies in Casco." When further questioned about whether she was involved in the homicides, LaBatte stated: "Yes, it [sic] could have been. I might have blacked out."

LaBatte now challenges the relevancy of these statements and further asserts that despite any marginal relevance, the statements were excludable as more prejudicial than probative. LaBatte, however, failed to raise her relevancy objections at trial. Rather, she filed a pretrial motion to suppress, asserting that the statements were involuntary. In the decision denying LaBatte's motion to suppress her statements, the trial court noted that LaBatte limited her argument to whether her statements were "voluntary." Not until filing her postconviction motions did LaBatte challenge the relevancy of her out-of-court statements to investigators.

The rules of evidence dictate "that an objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony." ***Holmes v. State***, 76 Wis.2d 259, 272, 251 N.W.2d 56, 62 (1977); *see also* § 901.03(1)(a), STATS. Additionally, an objection to evidence:

> should be made in terms which *apprise the court of the exact grounds upon which the objection is based* and … general objections which do not indicate the grounds of inadmissibility will not be sufficient to entitle the objector to raise the question on appeal if, where the error might have been corrected if properly objected to, the evidence is competent for any purpose.

Holmes, 76 Wis.2d at 271, 251 N.W.2d at 62 (emphasis added). A failure to object "results in a waiver of any contest to that evidence … [and] where the objection was not properly raised in the trial court, this court will not review the asserted error on appeal." ***Id***. at 272, 251 N.W.2d at 62-63. However, despite a party's failure to properly raise a timely objection at trial, this court may address unpreserved claims: (1) where there is plain error under § 901.03(4), STATS.; or (2) in order to "accomplish the ends of justice … 'regardless of whether the proper motion or objection appears in the record.'" ***State v. Romero***, 147 Wis.2d 264, 275, 432 N.W.2d 899, 903 (1988) (quoting § 751.06, STATS.).

Although LaBatte objected to the admission of the out-of-court statements, her objection was based on voluntariness grounds, not relevancy. Therefore, her failure to timely object, on the basis of relevancy, resulted in waiver of the objection. Even, however, were we to address LaBatte's relevancy objection, it would fail on its merits.

The test for relevancy is "whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ***State v. Dodson***, 219 Wis.2d 65, 79, 580 N.W.2d 181, 189 (1998); *see also* § 904.01, STATS. However, although evidence may be deemed relevant, its probative value must not be "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …." Section 904.03, STATS.

LaBatte's out-of-court statements related directly to the main fact of consequence at issue—whether LaBatte committed the charged crimes. Although LaBatte's statements were not explicit admissions, they tended to inculpate LaBatte in the crimes' commission. Further, given the implicatory nature of her

statements, that she "could have" committed the crimes and that "bad Beth" would have known what happened in Casco, we conclude that any prejudice is not unfair and does not substantially outweigh the evidence's significant probative value.

In addition to our independent review of the record, the trial court, in the hearing on LaBatte's postconviction motion, stated: "I believe under the circumstances that Miss LaBatte saying that she could have or might have done it or that bad Beth might have done it, but that she doesn't think she could have … [done] something that bad under drugs, were equivocal acknowledgments on her part or could be construed by the jurors as such." The trial court further recognized that "[e]very confession … in some measure, has some aspect of prejudice above and beyond the admission itself, and clearly there were prejudicial aspects of the conversation and statements made by Miss LaBatte to Officers Vendola and Servais, but that prejudice in and of itself hasn't precluded it from being admissible." The trial court additionally noted that although the pretrial suppression hearing addressed the voluntariness of LaBatte's statements, it did, at that time, implicitly consider the issues of relevance. The trial court stated:

> So it is this Court's opinion that I gather based upon the record as it has been reconstructed, that I did consider the relevance of [the statements], found [them] to be relevant, and implicitly found whatever prejudicial impact there was, did not outweigh that relevance, but if the record is incomplete in that respect, then I am today determining that these, indeed, are true, and the Court would have expressly stated that more concisely for the record if it had been brought to my attention at the time of trial.

Upon our review of the record and the trial court's rationale, we conclude that LaBatte's statements are relevant, any prejudice resulting from their admission is not unfair and does not substantially outweigh the evidence's significant probative

value. We therefore hold that the trial court reasonably exercised its discretion by admitting LaBatte's out-of-court statements to investigators.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.