COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2155-CR **Cir. Ct. No. 00 CM 1710**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHELE M. RATHKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded for a new trial*.

¶1 SCHUDSON, J.[1] Michelle M. Rathke appeals from the judgment of conviction for obstructing an officer in violation of WIS. STAT. § 946.41(1),[2]

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

following a jury trial, and from the order denying her motion for postconviction relief. She argues that the trial court: (1) denied her the constitutional right to confrontation, by excluding the photographs of her injuries; (2) erroneously exercised discretion, by excluding the photographs under WIS. STAT. § 904.03; and (3) erred in denying her request for a mistrial. This court, concluding that the trial court erroneously exercised discretion by excluding the photographs, reverses and remands for a new trial.[3]

I. BACKGROUND

¶2 Rathke was charged with obstructing City of Wauwatosa Police Officer Gary Raymond on February 27, 2000, by "step[ping] in front of him and push[ing] him away as he attempted to assist another officer who was engaged in a struggle with another individual." The other individual was Rathke's boyfriend, Alexander Schultz, who, the police said, had interfered with them when they were trying to locate a missing juvenile.

¶3 After the jurors were selected, but outside their presence and before they were sworn in, the State moved *in limine* to exclude four photographs: two of Schultz and two of Rathke, showing what the defense maintained were the injuries they received in their encounter with the police. In support of the State's motion, the prosecutor maintained:

---

[2] The judgment of conviction refers to "Resisting or Obstructing an Officer." The complaint, however, charged Rathke with "Obstructing an Officer," and that is the offense for which the jury found her guilty.

[3] Resolving the appeal on this basis obviates the need to address Rathke's other arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

> Your Honor, if you look at the picture [sic], the first thing people think is police brutality. This case is about destruction [sic] the officer. It's not a civil suit against the police force. This is [sic] picture is irrelevant to this case.[4]

(Footnote added.) Responding to the State's motion, defense counsel explained why he wanted to introduce the photos and, specifically regarding the photos of Rathke, he argued:

> I intend to show the police officer was behind Ms. Rathke[,] as the bruise indicates on the back of her arm[,] … [in order t]o show Ms. Rathke had her back to the officers. She was facing Mr. Schultz and … she had nothing to do with the trying to obstruct or resisting with the officer.

Without explanation, but apparently accepting this argument as well as defense counsel's argument with respect to the Schultz photos, the trial court denied the State's motion; all four photos were to be allowed.

¶4 During the prosecutor's opening statement, however, the trial court changed its decision regarding the Rathke photos. When the prosecutor began describing the altercation between Schultz and the police, the trial court interrupted the proceedings, excused the jury, and had the following discussion with counsel:

> THE COURT: Counsel, I'm going to be very clear. This is in my view. Maybe [Rathke] can't control it. Maybe you think I'm not sensitive, but I can't allow her putting on an emotional display in front of the jury while making opening statements in front of the jury.
>
> [DEFENSE COUNSEL]: Can I speak with her a moment?

[4] This passage is one of many in which the record is frustratingly unclear. Frequently, the prosecutor, defense counsel, and the trial court refer to the photograph(s), alternating between singular and plural references, without specifying whether they are indicating one or more photos, or whether they are indicating the Schultz or Rathke photo(s). Both appellate counsel, in their briefs to this court, sometimes make the same mistakes. In this opinion, this court has attempted to sort out the factual background, based on the contexts in which the references were made.

THE COURT: You get her under control. I'll have to sanction her or have a mistrial. This is not appropriate. I'll not allow her to make this kind of display in front of the jury. It's highly prejudicial in front of the State's case. She has to get control. Now we're going off the record.

(Off-the-record discussion had by all parties.)

THE COURT: Back on the record. I want to note for the record that we are outside the presence of the jury, and now the Court will revisit the previous State's motion in limine regarding the picture. If I can see the picture.

[DEFENSE COUNSEL]: The picture. Before –

THE COURT: Yes. Now previously the Court ruled in two parts on the State's motion in limine, one regarding the picture of the other party. His name was Alexander Schultz.

Second, showing the picture. Showing the picture, the defendant shows a bruise on the arm. The State agreed there's probative value, her physical position at the time of the arrest. The incident was outweighed by their prejudicial value, that they are appealing to emotion and sympathy, that the jurors should be sympathetic to the defendant as someone who's been handled physically and suffered physical injuries in the hands of a police officer.

Now, I ruled at that time the facts that were in existence were prejudicial. Clearly, they were prejudicial not outweighing their probative value. I'm now going to reverse that ruling.

We have now seen a display of emotion by the defendant in front of the jury, a display of weeping openly when the physical incident was being described. Now this is whether intentional or unintentional would be some indication that it's intentional, Counsel. Nevertheless, displays of emotion and frustration appeal to the sympathy on the part of the jury.

Now having said that, we caution the defendant not to do it again in front of the jury. In addition, we've seen that appeal when it functions as an appeal to their sympathy. Now coupled with that appeal, it's ruled improper. It has that infraction as being intended or not intended. I'm not going to allow the picture of, the two pictures now, I believe for the jury to see the pictures after seeing the display of the defendant behind the prosecutor's back. That prejudicial value outweighs the probative value. I see questions as to where she was stationed. Now that prejudicial effect outweighs the probative value. The two pictures are not admitted.

[DEFENSE COUNSEL]: I want to make a motion for mistrial. I believe it's wholly inappropriate for the Court to rule that picture is not admissible. Due to the fact that defendant bec[a]me emotional during the opening statements, the Court ruled based on the law not on –

THE COURT: Yes. Prejudicial effect outweighs their probative value.

[DEFENSE COUNSEL]: These pictures have nothing to do with her crying here on the witness stand. I'm sorry. In the defendant's area, she's an 18 year old. She's very –

THE COURT: They're compounded. They now function more as an appeal to sympathy as they did previously.

[DEFENSE COUNSEL]: The picture is going to be used to show position, not sympathy. Maybe the Court can have a cautionary instruction.

THE COURT: The purpose I believe is you may very well believe on your part is to show position. Their effect perhaps intends to appeal to the sympathy. The weeping in front of the jury may not have been intended as an appeal to sympathy, but it functions as an appeal to sympathy whatever its intention was. And I can't appear in the defendant's mind to know what her intentions were at this point. However, it's a compounding effect.

Before that display, I could see perhaps unintended appeal to sympathy by showing bruises. It would have more probative value on the position of where she was positioned than probative effect on the State as it appeals to sympathy. But now as we've seen in a display, the situation is reversed. Do you understand the argument?

[DEFENSE COUNSEL]: No, I don't. I think that's completely inappropriate. That's absolutely absurd that the Court would reverse its prior ruling based on the fact that it's the defendant's emotions.

THE COURT: It['s] not a little emotion. It's a weeping display behind the prosecutor's back when he was making his argument.

[DEFENSE COUNSEL]: She is 18 and upset by the prosecutor. He says nothing to do –

THE COURT: Counsel, that does not allow her to stand up in front of the jury and scream at the officer they brutalized me. It's not allowed just because she's 18.

[DEFENSE COUNSEL]: But she's not doing that. She is not on the stand saying the officer brutalized her. The picture is used to show position.

THE COURT: She was openly weeping behind the prosecutor's back while there was opening statements.

[DEFENSE COUNSEL]: That's based on the fact where she was sitting. If she was sitting over there, it would have been in front of the prosecutor's face and not intended.

THE COURT: The question of intention or unintention is irrelevant to the question of what impact does it have upon the jury.

[DEFENSE COUNSEL]: If you're upset on her crying, focus on the jury.

THE COURT: I'm not interested in punishing the jury. I want the jury to decide this case based upon fact and not emotion.

[DEFENSE COUNSEL]: That's exactly what you're doing. You're punishing her because she cried. Judge, answer me; this would have reversed your ruling if she sat crying?

THE COURT: No.

[DEFENSE COUNSEL]: You're basing it on because she was crying. I move for mistrial.

THE COURT: No, not mistrial, initial action obstructing. The effect is only upon the jury. I can see in their faces regarding intention, her action has that effect.

….

… Clearly the picture of the bruise has prejudicial effect. It now compounds it and makes it more likely there's prejudicial effect outweighing their probative value.

….

[PROSECUTOR]: Just for the record, the defendant was in court yesterday; and today not once did she show emotion. She teared when the prosecution put on their case.

THE COURT: I think doing the display in front of the jury when she didn't do it other times would be some indication it may have been contrived or uncontrived or unintended. I don't know. That's all I know. It has an obstructive effect on the jurors, and that effect now compounds the prejudicial purpose or prejudicial effect of the mixture to the point where their prejudicial value

> outweighs the probative value. This is excluded. It does not apply the pictures to the other party….
>
> ….
>
> I'm not excluding the [defendant's] picture as sanctions to her. I'm excluding them because of her obstructing behavior has influenced the jury, now making their prejudicial effect outweighs their probative value which is not the case. That's not meant as a sanction to her but just because of their obstructive nature of their prejudicial value has increased because of what the jury saw.
>
> ….
>
> The Court will now clarify the record on which two pictures are proposed to be introduced by the defense will be included because of their prejudicial value did not outweigh the probative value. Now the basis of action would in my view outweigh probative value. The probative value is fairly small because it deals with the position the defendant was proven up by other evidence. It was not as graphic as other injuries that show injury; and because on her body while defense proved up evidence by others, this particular area addresses the passion of the defendant's situation to injury by passion. It's no longer permitted because there's greater effect that way.[5]

(Footnote added.)

---

[5] This court has quoted the proceedings, including countless ambiguous and confusing statements, as reflected in the transcribed record. The complete record clarifies that the photos of Schultz were allowed, but the photos of Rathke were excluded.

This court also clarifies that, notwithstanding the trial court's comment that "the position [of] the defendant was proven up by other evidence," all the above-quoted comments came during the proceedings immediately following the interruption of the prosecutor's opening statement.

Obviously, this court has quoted these proceedings because of their relevance to the issues on appeal. Additionally, this court offers this lengthy excerpt from the record in a hopefully constructive attempt to enable the trial court to consider the difficulties faced by this court in reviewing a decision on appeal when the decision consistently misstates the legal standard, frequently fails to clarify the facts, and sometimes issues internally inconsistent pronouncements by confusing critical words such as "included" and "excluded," and "probative" and "prejudicial."

II. DISCUSSION

¶5 On direct examination at trial, Rathke testified, "After I was talking to Alex for a couple of seconds, all of a sudden I got pushed from the back of me, in a very aggressive force." On cross-examination, she testified: "I approached Alex and the police officer or two. I couldn't see. It was behind my back, came from behind and pushed me, so then I had contact with the police officer because they pushed me." Clearly, the photos, by showing the location of her injuries, could have supported Rathke's account and were therefore relevant evidence. *See* WIS. STAT. § 904.01 ("'Relevant evidence' means evidence having 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.").

¶6 WISCONSIN STAT. § 904.03, however, in relevant part, provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …." "[U]nfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies … or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***State v. Mordica***, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992).

¶7 "Whether photographs are to be allowed is a matter of discretion with the trial judge." ***State v. Sarinske***, 91 Wis. 2d 14, 41, 280 N.W.2d 725 (1979). When reviewing a trial court's discretionary decision to exclude evidence, this court considers whether the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d

400, 414-15, 320 N.W.2d 175 (1982). Here, this court concludes that the trial court failed to apply a proper standard of law, failed to use a demonstrated rational process, and failed to reach a conclusion that a reasonable judge could reach.

¶8 Some factual uncertainty remains. Appellate counsel submits that "[t]he extent of Ms. Rathke's crying is unknown as it was not fully described on the record," and that "there is no reason to believe that the jury focused on it or even noticed Ms. Rathke crying." The trial court referred to it as "weeping." The prosecutor said that Rathke "teared." Still, the trial court commented that it had observed that Rathke's weeping had had an effect on the jurors. This court accepts the trial court's account.[6] Still, the trial court's exclusion of the Rathke photos was erroneous for two reasons.

¶9 First, the trial court applied incorrect legal standards. It repeatedly articulated that it was measuring the relative probative value and prejudicial effect. The proper discretionary scales, however, must weigh whether the "probative value is *substantially* outweighed by the danger of *unfair* prejudice." *See* WIS. STAT. § 904.03 (emphasis added).

¶10 At the hearing on the motion for postconviction relief, the trial court acknowledged that it "may have misspoke" in failing to refer to the "*substantially* outweighed" standard. The court commented, however, that "that's more of a technical choice of terms" and that, in fact, it had applied the correct standard. This court is not convinced. The difference, as a matter of law, is not merely

[6] In light of the trial court's immediate and drastic response to Rathke's weeping, however, this court would caution the trial court to consider that, in many circumstances, the emotional displays of parties and witnesses may, in and of themselves, have probative value. Courts should not be too quick to cut off a jury's opportunity to observe such expressions and determine whether they are genuine or contrived.

"technical." And the trial court's repeated reference to the wrong standard suggests that, in fact, it applied an improper standard in carrying out the balancing test as required under WIS. STAT. § 904.03.

¶11 Moreover, in its ultimate postconviction pronouncements, the trial court not only reverted to its incorrect deletion of the "*substantially* outweighed" standard, it also repeated its incorrect reference to "prejudice" rather than "*unfair* prejudice."

> Is it just the prejudicial effect of that particular piece of evidence, or is it the prejudicial effect of that piece of evidence coupled with … the behavior of the defendant that now changes the Court's view of whether the prejudicial effect outweighs its probative value, and I do believe that because the defendant began to weep at the time the prosecutor … refers to the conduct of the police that the pictures would have—
>
> The pictures, which were the defense's way of describing the conduct of the police, would have—would be connected in the minds of the jurors with the defendant weeping, in other words.
>
> Now, the prosecutor describes what the police were doing. The defense has this evidence which they contend shows what the … police were actually doing, creating bruises on her body, and they're going to link her weeping with that evidence ….
>
> Now, it did have probative value. That's not disputed. I don't think a whole lot, but it had some, and I think cumulatively a weeping defendant and pictures showing bruises from the police has a tendency to inflame the jury, so they're not deciding the case as to whether she was resisting or obstructing but rather deciding—deciding the case on what the police did in terms of using physical force and making an arrest, and that was not an issue for the jury to decide, so at that point I felt the evidence had to be excluded.
>
> ….
>
> … [T]he Court of Appeals … will question case law as to whether the items of evidence has [sic] to be seen alone, or whether action of other pieces of evidence introduced might change the prejudicial effect and all of it but might greatly increase the prejudicial effect of that

> challenged piece of evidence such that that motion to exclude it should be granted.

Thus, throughout its postconviction decision, the trial court, in two substantial ways, continued to misstate the legal standard.

¶12 Second, the trial court's decision failed to explain how a "demonstrated rational process" would lead to the exclusion of the Rathke photos. *See* ***Loy***, 107 Wis. 2d at 415. The photos were relevant. They became no less relevant by virtue of Rathke's weeping. If, somehow, the photos also presented the potential "danger of unfair prejudice," *see* WIS. STAT. § 904.03, how did that danger increase simply because of Rathke's weeping? The trial court's references to the "compounding" effect are unconvincing.

¶13 Rathke also argues that the trial court's error was not harmless. She contends: "Had the jury seen the photographs, it [sic] would have substantiated [her] testimony and drawn the testimony and credibility of the officers into question. By ruling the photographs were inadmissible, the [c]ourt limited the defense's ability to confront and impeach the [S]tate's witnesses, and to put forth a proper defense." The State's response is somewhat curious:

> Rathke did have the opportunity to cross-examine all three police officers, and to elicit testimony from her own witnesses regarding Rathke's position relative to the police and her friend, and as to any bruises she may have suffered….
>
> In fact, Rathke did not cross[-]examine any of the three State witnesses as to how bruises could have been raised on the back of her arm. Rathke did not question her own witnesses about whether they noticed any bruises on the back of her arm, or whether they had seen pictures of such injuries, or whether she had mentioned pain or bruises on her arm later that day or during the next few days. Rathke did not mention bruises on the back of her arm, or anywhere else on her body, during her own testimony.

(Record references omitted.) Thus, ironically, the State faults Rathke for her failure to elicit or give trial testimony that could have been substantiated by the excluded photos.

¶14 The State does not dispute that Rathke suffered bruises. The State does not dispute that the excluded photos showed the bruises Rathke suffered. And, on appeal, the State does not dispute the relevance of the photos to Rathke's defense that she was pushed by the police, from behind. Essentially, therefore, the State has offered nothing to counter Rathke's argument that the trial court error in excluding the photos was not harmless. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶15 Accordingly, this court concludes that the trial court erroneously exercised discretion in excluding the Rathke photos and, therefore, that Rathke is entitled to a new trial.

By the Court.—Judgment and order reversed and cause remanded for a new trial.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.