COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2338-CR **Cir. Ct. No. 2003CF286**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEREK N. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Derek Anderson, formerly known as Andrew Krnak, appeals a judgment, entered upon a jury's verdict, convicting him of first-degree intentional homicide. Anderson also appeals the order denying his motion for postconviction relief. Anderson argues: (1) the admission of hearsay evidence violated his right to confrontation; (2) the trial court violated his due process rights

by allowing the jury to consider whether the police altered evidence; and (3) the trial court erred by admitting expert testimony regarding mass murderers. Anderson also claims he is entitled to a new trial in the interest of justice. We reject Anderson's arguments and affirm the judgment and order.

BACKGROUND

¶2 Anderson's immediate family, including Allen Krnak (his father), Donna Krnak (his mother), and Thomas Krnak (his brother), disappeared with the family dog on or around July 2, 1998. Anderson claimed he last saw them as they were preparing to leave their home in Jefferson County for their cabin in Waushara County over the Fourth of July holiday. In December 1999, Allen's skeletal remains were found in a remote, wooded area less than ten miles from Western Carolina University, in North Carolina. Anderson had previously attended the university and hiked where Allen's remains were found. Allen died as a result of blunt force trauma to the head and face, inflicted by a club or other similar instrument.

¶3 The State charged Anderson with first-degree intentional homicide for the murder of his father. Anderson's pretrial motion to exclude certain evidence was denied. After a jury trial, Anderson was found guilty of the crime charged and sentenced to life in prison. His motion for postconviction relief was denied, and this appeal follows.

DISCUSSION

I. Admission Of Hearsay Testimony

¶4 Anderson argues that the trial court violated his right to confrontation by admitting hearsay evidence. "In all criminal prosecutions, the

accused shall enjoy the right ... to be confronted with the witnesses against him [or her] ...." U.S. CONST. amend. VI. Whether the admission of evidence violates an accused's right to confrontation is a question of law that this court reviews independently. ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919. The first step in analyzing a confrontation violation claim is to determine whether the challenged statement is testimonial or non-testimonial. *See* ***Crawford v. Washington***, 541 U.S. 36, 68 (2004).

¶5 The Confrontation Clause bars admission of an out-of-court *testimonial* statement unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant with respect to the statement. ***Id.*** at 68-69; ***State v. Jensen***, 2007 WI 26, ¶15, 299 Wis. 2d 267, 727 N.W.2d 518. The ***Crawford*** Court set forth three formulations for determining whether a statement is testimonial. ***Crawford***, 541 U.S. at 51-52. Relevant to this appeal, hearsay is testimonial if the statement was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" ***Id.*** at 52 (citation omitted).

A. Donna Krnak's Statements To Karen Anderson

¶6 Anderson challenges the admission of statements his mother, Donna, made to Karen Anderson (no relation). At the pretrial hearing on Anderson's motion to exclude evidence, Karen testified that she befriended Donna while staying at the same campground. Karen further testified that, after knowing each other for approximately one year, Donna came to her campsite and said: "Karen, I have to be honest with you. I told you I only had one son, but I have two sons." Karen testified that Donna then proceeded to read her a letter from Anderson that included language to the effect of: "If I ever get the money to come back to

Wisconsin, I'll do away with you all." Karen testified that, after reading the letter, Donna expressed fear for her life and that of her family, and further made Karen swear she would not tell anybody about the letter.

¶7 We conclude that these statements were non-testimonial as they were not made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *See* ***id.*** Statements made to loved ones or acquaintances, like Karen, are not the memorialized type of statements that ***Crawford*** addressed. *See* ***Jensen***, 299 Wis. 2d 267, ¶32 (citing ***State v. Manuel***, 2005 WI 75, ¶53, 281 Wis. 2d 554, 697 N.W.2d 811). Additionally, Karen was not a governmental agent, and there was no reason to believe that Donna expected Karen to report her statements to the police. *See* ***Jensen***, 299 Wis. 2d 267, ¶32. On the contrary, Donna pled with Karen not to tell anybody. Donna was simply confiding in Karen about her concerns regarding Anderson. "By all indications, the conversation was confidential and not made with an eye towards litigation." ***Manuel***, 281 Wis. 2d 554, ¶53.

¶8 Having concluded that these statements were non-testimonial, we must nevertheless assess them under ***Ohio v. Roberts***, 448 U.S. 56 (1980). ***Manuel***, 281 Wis. 2d 554, ¶¶3, 60.[1] To determine admissibility of non-testimonial statements: (1) the declarant must be unavailable at trial; and (2) the declarant's statements must "bear[ ] adequate 'indicia of reliability' [, which] could be

[1] As the State points out: "Our supreme court's decision to use the analysis in ***Ohio v. Roberts***[, 448 U.S. 56 (1980),] to determine the admissibility of nontestimonial hearsay under the Sixth Amendment has been undercut by the United States Supreme Court's subsequent determination that nontestimonial hearsay does not implicate the Sixth Amendment. *See* ***Davis v. Washington***, 547 U.S. 813, 823-24 (2006)."

inferred without more in a case where the evidence fell within a firmly rooted hearsay exception or upon a showing of 'particularized guarantees of trustworthiness.'" ***Id.***, ¶61 (quoting ***State v. Hale***, 2005 WI 7, ¶45, 277 Wis. 2d 593, 691 N.W.2d 637, in turn citing ***Roberts***, 448 U.S. at 66). Because Donna was unavailable for trial—having disappeared in July 1998—we turn to the second inquiry.

¶9 To evaluate whether statements contain particularized guarantees of trustworthiness, this court considers the "'totality of the circumstances, but ... the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.'" ***Id.***, ¶68 (quoting ***State v. Weed***, 2003 WI 85, ¶25, 263 Wis. 2d 434, 666 N.W.2d 485, in turn quoting ***Idaho v. Wright***, 497 U.S. 805, 819 (1990)). "'Some factors that have been considered in assessing the reliability of a statement include spontaneity, consistency, mental state, and a lack of motive to fabricate.'" ***Id.*** (citation omitted). Further, "we examine whether the statement is so trustworthy that adversarial testing would add little to its reliability." ***Id.*** (internal quotations and citations omitted).

¶10 Here, the record reveals no apparent motive for Donna to falsely accuse Anderson of sending her a threatening letter. As the State aptly points out, the admission that one's own son threatened to "do away" with his family could be a source of embarrassment and is not the type of thing one would usually fabricate. The record supports a conclusion that Donna volunteered these statements to Karen in confidence. Moreover, Donna's admission of having initially lied to Karen about Anderson's existence is another indicator of reliability. In light of the totality of the circumstances, we conclude that Donna's statements contain sufficient particularized guarantees of trustworthiness.

¶11 To the extent Anderson contends that Donna's statement to Karen on a later occasion rendered all of Donna's statements inadmissible, we are not persuaded. Karen testified that, several months after the conversation in which Donna read her the letter from Anderson, Donna told Karen to remember the letter if something happened to her. When Donna initially read the letter, however, she made Karen swear she would not tell anybody about the letter. The fact that Donna, months later, told Karen to remember the letter if something happened to her cannot retroactively transform Donna's earlier statements from non-testimonial to testimonial.

¶12 Although Donna's subsequent request for Karen to remember the letter if something happened to her is arguably testimonial, we conclude that any error in admitting the statement was harmless because the statement itself says nothing about the letter's contents or the identity of its sender. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 684 (1986) (Confrontation Clause errors subject to harmless-error analysis). Moreover, any error was inconsequential to the evidence of Anderson's guilt, *see* ***id.*** at 684, and does not undermine our confidence in the conviction, *see* ***Williams***, 253 Wis. 2d 99, ¶50.

B. Allen Krnak's Statements To Patricia Ellifson

¶13 Next, Anderson challenges the admission of statements his father, Allen, made to a co-worker, Patricia Ellifson. Although Anderson concedes the statements are non-testimonial, he claims they lack particularized guarantees of trustworthiness. We are not persuaded. Ellifson testified that she met Allen when she began working at the same company as him in May 1991. According to Ellifson, she knew Allen had a son named Thomas, but never knew he had a second son until a conversation that occurred in January or February of 1998. At

that time, Ellifson was complaining to Allen about the moody behavior of her son when Allen remarked, "Makes you want to kill your kid before he kills you." Ellifson also testified that, in April 1998, she again mentioned her son's moodiness, and Allen asked whether her son had ever threatened her. When Ellifson responded, "No. Why?," Allen stated that his son had tried to kill him by clubbing him with something when he came home from work one night. When Ellifson inquired whether Allen had told anyone and asked what he was going to do, Allen "just kind of shrugged his shoulders and said, 'At least you know how you are going out of this world, how you are going to die.'" When Ellifson asked if Allen was referring to his son, Thomas, Allen clarified that he was talking about Anderson.

¶14 Like Donna's initial conversation with Karen about the letter, Allen's statements to Ellifson were volunteered in confidence. The statements were made spontaneously to a friend who was experiencing problems with her adult son, and nothing suggests that Allen expected Ellifson to share his comments with anyone. On the contrary, when Ellifson questioned what Allen was going to do about it, his response indicated he was resigned to his fate. Anderson nevertheless challenges the trustworthiness of Allen's statements on the ground that Allen's recollection regarding important details may have faded by the time he relayed information about the attack to Ellifson. Anderson further intimates that Allen may have misperceived the event. We are not persuaded. That Allen did not specify what Anderson tried to club him with does not render Allen's statement ambiguous, and we fail to see how Allen could have misperceived Anderson's attack. As with Donna's decision to share the letter, we conclude that Allen's admission that his own son tried to kill him was potentially a source of shame and not the type of thing one would typically fabricate. Therefore, under

the totality of the circumstances, we conclude that Allen's statements to Ellifson contain sufficient particularized guarantees of trustworthiness to satisfy Anderson's right to confrontation.

II. Claimed Due Process Violation

¶15 Next, Anderson argues that the trial court violated his due process rights by allowing the jury, rather than the court, to determine whether police altered evidence. Three weeks after the Krnaks disappeared, police seized the mileage logbook for a family truck. The Krnaks kept logbooks containing mileage information for each of their vehicles. When the logbook was seized, the truck's odometer read 127,452 miles. According to the State, the truck's last mileage log, dated approximately one week before the family disappeared, read 124,834 miles—a difference of approximately 2,600 miles. The round-trip distance from the Krnak home in Wisconsin to the site of Allen's remains in North Carolina is approximately 1,623 miles.

¶16 Anderson moved to exclude the mileage log on the ground that the State had tampered with it. Specifically, Anderson argued that various documents generated before he was charged with the killing indicated that the subject entry in the mileage log had a number missing from the thousandth column. In other words, the last mileage entry in the log "says 12 and there is a space and there is 834." An officer testified, however, that the apparent omission of the "4" in copies of the log was due to poor photocopying of the original book. The officer testified that his copy and the original log showed the mileage to be "124,834."

¶17 Anderson argues the trial court violated his due process right by allowing the jury to determine whether the mileage log had been altered. According to Anderson, the log should not have been admitted unless the court

first found that the entry had not been altered. As the party challenging admission of the log on due process grounds, Anderson had the burden of proving that the log had been altered. *Cf.* ***State v. Drew***, 2007 WI App 213, ¶12, 305 Wis. 2d 641, 740 N.W.2d 404. Here, the trial court found that Anderson had not met his burden of proving that the State tampered with the logbook. Therefore, the logbook's credibility and weight were matters properly submitted to the jury. *See* ***State v. Bowden***, 2007 WI App 234, ¶14, 306 Wis. 2d 393, 742 N.W.2d 332.

III. Admission Of Expert Testimony Regarding Family Annihilators

¶18 Anderson also challenges the admission of expert testimony by Dr. Thomas O'Connor, an associate professor of Justice Studies and Applied Criminology at North Carolina Wesleyan College. O'Connor testified about different types of mass murderers, including a category described as the "family annihilator." O'Connor opined that the motivation for the family annihilator "is usually expressive rather than instrumental" and that "[t]he family annihilator usually kills all of the members of the family and even the family pet." When asked which member of a family is typically the family annihilator, O'Connor replied that "there's some profiling literature to suggest that the eldest son in a family is more likely to display those kinds of motivation characteristics." O'Connor further explained that the family annihilator may not view the family members as family but, rather, may distance himself from the victims, viewing them as strangers. O'Connor additionally testified that the killing of a family pet "represents another expressive act in … an internal last act of defiance or last act of rage by the offender."

¶19 Whether to admit proffered expert testimony rests in the trial court's discretion. ***State v. Shomberg***, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370.

Our review of a trial court's exercise of discretion is deferential, and we apply the erroneous exercise of discretion standard. ***Id.***, ¶¶10-11. The trial court's exercise of discretion will not be overturned if the decision had "a reasonable basis," and if the decision was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted). Further, a reviewing court may search the record for reasons to sustain a trial court's exercise of discretion. ***Id.*** at 343.

¶20 Anderson argues that, because he was charged with killing only his father, evidence regarding mass murderers and their motivation was irrelevant. Alternatively, Anderson contends that O'Connor's testimony was of such marginal relevance that its probative value was outweighed by its prejudicial effect. Even if we assume the court erred by admitting O'Connor's testimony, we conclude that its admission was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (test is whether there is a reasonable possibility that the error contributed to the conviction).

¶21 On cross-examination, defense counsel effectively attacked O'Connor's direct testimony, as O'Connor conceded he had never published anything about family annihilators and, before the present trial, had not been qualified to testify as an expert on the family annihilator typology. O'Connor, who was paid $2,000 for his preliminary research and appearance at trial, testified that, after the State initially contacted him, he spent 200 hours reviewing animal cruelty literature in an attempt to determine how killing a family pet "tied in" to the family annihilator typology. O'Connor, however, admitted that, in a 2001 book titled *Mass Murder in the United States*, a chapter devoted to family annihilators did not mention killing the family pet as a hallmark of this type of mass murderer. Similarly, O'Connor conceded that other experts in the field did

not mention anything about the oldest male child when discussing family annihilators.

¶22 O'Connor additionally acknowledged that there was no data to support this mass murderer typology and no theory to explain the causal components. Rather, the typology "lead[s] to a theory eventually." O'Connor's direct testimony was further eroded on cross-examination when he could not recall the details of case studies he claimed to be familiar with. Ultimately, O'Connor indicated: "[T]he content of what I came here to talk about today was mostly theoretical and typological and not necessarily case based." The State made no effort to rehabilitate O'Connor, instead choosing to forgo redirect examination.

¶23 Given defense counsel's effective cross-examination, it is doubtful the jury gave much weight to O'Connor's testimony. Moreover, in light of the properly admitted evidence, including the statements regarding Anderson's threat to the family and a previous attempt to kill his father, we are convinced that there is no reasonable possibility that O'Connor's testimony contributed to Anderson's conviction. *See* ***Dyess***, 124 Wis. 2d at 543.

IV. New Trial In The Interest Of Justice

¶24 Alternatively, Anderson seeks a new trial under WIS. STAT. § 752.35 (2007-08),[2] which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Anderson invokes the first basis for relief, that the real

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

controversy was not fully tried. In order to establish that the real controversy has not been fully tried, Anderson must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶25 Here, Anderson argues that the jury had before it evidence not properly admitted which so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. The crux of Anderson's argument is that the admission of expert testimony and evidence regarding family annihilators clouded the real issue in this case by effectively placing him on trial for the murders of his entire family—not just his father. As discussed above, any error in admitting expert testimony regarding family annihilators was harmless in this case. We have likewise rejected Anderson's challenge to the admission of testimony regarding the letter in which Anderson threatened to kill his entire family. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

¶26 To the extent Anderson challenges the prosecutor's opening and closing remarks accusing Anderson of killing his entire family, Anderson forfeited this argument by failing to object to these statements at trial. *See* ***State v. Seeley***, 212 Wis. 2d 75, 81, 567 N.W.2d 897 (Ct. App. 1997). Moreover, the jury was instructed that the attorneys' arguments, conclusions, and opinions are not evidence. "We presume that the jury follows the instructions given to it." ***State v.***

Truax, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Accordingly, we conclude that there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Anderson a new trial.

By the Court.—Judgment and order affirmed.

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