

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1773-CR

Cir. Ct. No. 00CF1073

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEROME L. DANCER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jerome Dancer appeals a judgment, entered after a jury trial, convicting him of two counts of first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1)(a) (1999-2000).¹ He argues that the trial court

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

erroneously exercised its discretion in permitting the State to introduce three autopsy pictures of the victims' wounds and in allowing the prosecutor to elicit testimony on cross-examination of a lay witness's opinion that she thought Dancer was both the father of the murdered child and the person who threatened to harm the other victim, Jennifer Collins, if she revealed his identity as the child's father. We affirm.

I. BACKGROUND.

¶2 February 22, 2000, was the last time anyone saw Jennifer Collins alive. Several days later, when she failed to report for work, her friend, Jennifer Conrad, Collins's sister, Lori Dancer, and her husband, Jerome, went to Collins's apartment to check on her welfare as well as that of her four-month-old baby, Kaylee Collins. The three opened an unlocked door and found Collins's body on the bedroom floor. After police were summoned, officers found the body of Kaylee under some clothes in a laundry basket. It was determined that both victims had been dead for some time.

¶3 In examining the apartment, the police discovered that the door to the apartment was not forced, very few items were disturbed in the apartment, and blood could only be found in the bedroom and bathroom sink. These facts suggested that Collins may have let the assailant into her apartment and that neither burglary nor robbery were likely motives for the murders. The police also found a diary and a W-2 form containing the following language:

I will help to legally name and/or locate the other parent of my child, children. If I fail to cooperate three times, I will no longer be eligible for W-2, employment positions, or child care until I do so [or] for six months, whichever is longer.

The initials “J.C.” appeared next to this section.

¶4 Autopsies on the bodies confirmed that both victims had bled to death as a result of deep knife wounds to their necks. Also discovered during the autopsy was Collins’s pregnancy of approximately 12-14 weeks’ duration and that Collins’s panties worn at the time of her murder contained semen stains. Later, scientific tests performed on these stains, as well as DNA samples obtained from Dancer, Collins, the fetus, and Kaylee, established that Dancer was the father of both Kaylee and the fetus Collins was carrying, and it was his semen found on Collins’s panties.

¶5 Further investigation led the police to discover that Collins’s case manager at the supervising W-2 agency had instructed Collins that in order to remain eligible for welfare payments, Collins had to name the father of her child. Collins had complied, naming two men as possible fathers, but the first man was excluded because of his race, and the second unknown man was a person Collins claimed had raped her. Testifying at trial, the case manager informed the jury that the regulations allowed Collins to obtain a “good cause” exemption relieving her from the requirement that she name the father of Kaylee if she became pregnant as the result of a rape.

¶6 When pressed by the police, Dancer initially admitted to having a sexual relationship with Collins, but not until later did he give an inculpatory statement to police. In this subsequent statement, Dancer described how he argued with Collins over her desire to name him as Kaylee’s father. He confessed that he then left the apartment and went to his car where he obtained a knife that he had brought from home and came back and slit Collins’s throat. He explained that he was hesitant to kill the baby, but the fear that his wife would find out that Kaylee

was his child drove him to slit her throat too. He then took the knife home, washed it and placed it back in the butcher block in the kitchen.

¶7 Dancer was charged with two counts of first-degree intentional homicide and a jury trial was held. During the State's case, the trial court allowed the prosecutor to introduce three close-up autopsy pictures taken of the victims' wounds into evidence. The State also introduced evidence that a knife found in Dancer's home had blood on it that matched the victim's.

¶8 Dancer took the stand in his defense and admitted to killing Collins and Kaylee. However, unlike his earlier version of the events, he now claimed he was coerced into killing them. Dancer testified that Collins invited him over the night of the murders and he accepted her invitation. When he arrived the two engaged in sexual intercourse. Later they heard a knock on the window and Dancer said he ran into the bedroom because he thought it might be his wife. When he heard a man's voice, he alleged that he came out of the bedroom and saw two men. After a discussion with the men, one of the unknown men pulled out a knife and the other a gun. Dancer testified that the man with the gun pointed it at him and ordered Dancer to cut Collins's throat. According to Dancer, because he was afraid for his life, he took the knife and did as directed. Afterwards, Kaylee began making noise and one of the men told him to cut her throat. He stated that because the gun was still pointed at him, he slit Kaylee's throat too. Dancer explained that after the killings, the men threatened him and told him to leave. He claimed that upon leaving he noticed a black four-door vehicle with tinted windows parked in front of the apartment house.

¶9 In support of this defense, Dancer called two neighbors who testified to seeing two black men in a black car with tinted windows parked in front of the

building approximately one week before the bodies were discovered. One neighbor testified that she witnessed Collins approach the car and talk to the men and then rush back to her apartment. The other neighbor stated she saw Collins looking out the window at the two men in the black car and she observed the two men looking at Collins. She noticed that Collins quickly closed the blinds and turned off the light.

¶10 Dancer also called a friend of Collins, Andrea Bell, who testified on direct-examination that Collins had told her that she had become pregnant as a result of a rape in Green Bay, but later told her that she knew who Kaylee's father was and that this man was threatening to harm her if she revealed his identity. On cross-examination, over the objection of defense counsel, Bell was permitted to state that she thought Dancer was the baby's father's and the man who was threatening Collins.

II. ANALYSIS.

¶11 Dancer claims that the trial court erroneously exercised its discretion when it admitted several autopsy photos of the victims over his objection. Dancer contends that the colored photos, consisting of close-ups of the wounds of the victims, are "extremely graphic and gruesome." He observes that our supreme court has cautioned: "Photographs should be admitted if they will help the jury gain a better understanding of material facts; they should be excluded if they are not 'substantially necessary' to show material facts and will tend to create sympathy or indignation or direct the jury's attention to improper considerations." *Sage v. State*, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979). Dancer argues the pictures inflamed the jury and had little relevance to the purpose advanced by the State for their admission. We disagree.

¶12 The admission of photographs into evidence at trial is within the discretion of the trial court. See *State v. Lindvig*, 205 Wis.2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). We will not overturn the trial court's decision unless "it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." *State v. Hagen*, 181 Wis.2d 934, 946, 512 N.W.2d 180 (Ct. App. 1994).

¶13 Originally, the State sought to introduce fifteen pictures of the victims. The trial court permitted only three to be admitted into evidence and shown to the jury. As the trial court correctly reasoned:

Now quite clearly if the defendant testifies in his own defense that this was an intentional homicide but it was coerced, the State – if the State had the defendant's statement as proffered by the defense for use, I think the intent issue would be close to a nonissue in this case. But the defendant can't be called by the State, and the statement that the defendant proffers, the coercion defense is not something that the State has access to. So it appears to me that based on the defendant's statement, which is basically all the State has, the intent to kill issue is at issue. And clearly when I look at photographs of the child's neck, when I look at a photograph of Miss Collins' neck, that would seem to establish potentially intent.

¶14 Additionally, the trial court gave the following cautionary instruction to the jury before the pictures were shown:

Photographs will now be shown to you for the purpose of aiding you in resolving the issues of fact that you must decide in this case, if it so aids you. This evidence is not being shown to you to evoke or arouse any sympathy, prejudice, or passion, and you must not let it have such an influence on you.

¶15 We have reviewed the photographs and conclude that the trial court properly exercised its discretion in allowing the photographs into evidence. The trial court determined that the photographs were evidence of an element of the

crime of first-degree intentional homicide; i.e., intent to kill. The photos of Collins were shown to prove the cuts were not done accidentally or in self-defense, and the photo of Kaylee calls into question Dancer’s explanation that he simply “put the knife blade to the sleeping baby’s throat and cut once” and “didn’t physically touch the baby to do so.”

¶16 Dancer argues “there was adequate independent evidence of intent to kill making the pictures cumulative, unnecessary and unduly prejudicial.” However, as we observed in *Lindvig*, “[e]vidence is always admissible to prove an element of the charged crime even if the defendant does not dispute it at trial.” *Lindvig*, 205 Wis. 2d at 108 (brackets in *Lindvig*; quoted source omitted). Here, the State was required to prove that Dancer intended to kill his victims. The photos showing the severity of the victims’ wounds assisted the State in proving that element. Thus, the trial court properly exercised its discretion.

¶17 Next, Dancer submits that the trial court erroneously exercised its discretion when it permitted a defense witness, Andrea Bell, to answer an improper question on cross-examination. The disputed question and Bell’s answer follow:

[STATE]: And from the context of those conversations, isn’t it true that you believed that she was talking about the defendant, Jerome Dancer, threatening her?

[DEFENSE COUNSEL]: Objection. Speculation.

THE COURT: Overruled. Witness may answer.

THE WITNESS: Yes, I did.

¶18 As noted, Bell was called by Dancer to corroborate his coercion defense that the men who made him kill Collins and Kaylee were probably two of the four unknown black men who had raped Collins in Green Bay. On direct, Bell

testified that Collins had told her four black men in Green Bay raped her, and that later, Collins confided in Bell that she knew who the baby's father was and that this person was threatening to harm her if she named him in a paternity suit. We agree with Dancer that the question was improper, but in the context of this case, we conclude that it was harmless error.

¶19 The admission of opinion testimony lies within the discretion of the trial court whose decision will be upheld unless discretion was not exercised or there was no reasonable basis for the trial court's decision. *Wester v. Bruggink*, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994). To be admissible, the lay opinion must first be rationally based, and second, it must assist the jury in understanding the witness's testimony or in determining a disputed fact. *See* WIS. STAT. § 907.01.

¶20 While the witness could properly state that, in her opinion, Dancer and Collins were having an affair, as this opinion was based upon her perceptions of the two, her opinion that he was the father of Collins's baby and the man threatening Collins was not so based. Thus, the trial court erroneously exercised its discretion when it permitted Bell to answer this question.

¶21 We next consider whether the error was harmless. This court must conduct a harmless error analysis to determine whether the error "affected the substantial rights of the party." *Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. An error affects the substantial rights of the party where "there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." *State v. Moore*, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276 (quoting *State v. Williams*, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644

N.W.2d 919). When determining whether an error is harmless, the reviewing court considers the entire record. *See State v. Patricia A.M.*, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993). “[E]rror is harmless if it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’” *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

¶22 As noted by the State, Dancer’s coercion defense was “totally unbelievable.” After originally confessing to killing the victims out of anger and a fear of being found out as Kaylee’s father, Dancer told the jury that he was made to kill them by two unknown men. What he failed to logically explain, however, was how the murder weapon was found in his kitchen. His attempt at explaining the knife’s discovery in his home was labeled by the prosecutor “a miraculous coincidence.” We agree with this characterization. Dancer’s story, that he washed his bloody hands when he arrived home and the drops of blood must have spattered onto the butcher block where the knife was found, was preposterous. The case against Dancer was very strong. The improper admission of Bell’s lay opinion does not undermine our confidence in the verdict. Moreover, Bell stated that Collins never actually named Dancer as the father, and the trial court gave a cautionary instruction concerning Bell’s opinion. Thus, the error in admitting Bell’s opinion was harmless beyond a reasonable doubt. As a result, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

