COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2660-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES L. CREAMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. James Creamer appeals from a judgment convicting him of attempted armed robbery and attempted first-degree intentional homicide and from an order denying his motion for postconviction relief. He argues that: (1) his constitutional right to confront witnesses was abridged when the trial court allowed evidence of a deceased witness's prior testimony; (2) the trial court

improperly denied him the opportunity to impeach the witness's testimony; (3) his trial counsel was ineffective; and (4) he is entitled to a new trial in the interest of justice because of an error in the jury instructions.

We conclude that the trial court did not err in allowing the prior testimony or in instructing the jury. While the court did, in our judgment, improperly disallow Creamer's attempted impeachment evidence, the error was harmless. We also conclude that Creamer's counsel was not ineffective for failing to request a lesser-included-offense instruction, and that Creamer is not entitled to a new trial in the interest of justice. We therefore affirm.

The charges against Creamer arose out of a confrontation with Greg Henderson. Henderson testified at the preliminary hearing that Creamer and another man, Michael Jones, approached him and his cousin in a parking lot. Henderson said Creamer pressed a gun to his stomach, demanding money, and when he broke away and attempted to flee, he was shot in the back. Sometime after the hearing but before Creamer's trial, Henderson was shot and killed in an unrelated incident. Over Creamer's objections, the trial court allowed Henderson's testimony from the preliminary hearing to be read to the jury.

The jury found Creamer guilty of both charges, and he was sentenced to forty-five years in prison for attempted first-degree homicide and twenty years in prison for attempted armed robbery, the sentences to run concurrently. His motions for postconviction relief were denied, and he appeals.

I. The Prior Testimony

Creamer first argues that permitting Henderson's preliminary-hearing testimony to be read to the jury violated his right to confront witnesses under the Sixth Amendment to the U.S. Constitution and Article I, § 7 of the Wisconsin Constitution. The right to confront witnesses is not absolute; if it were, it would exclude any statement made by a declarant who is not present at trial, thus nullifying the hearsay rule. ***State v. Bauer,*** 109 Wis.2d 204, 209, 325 N.W.2d 857, 860 (1982). The threshold question in any confrontation analysis is whether the challenged evidence is admissible under the Wisconsin Rules of Evidence—whether it "fits within a recognized hearsay exception." ***Id***. at 210, 215, 325 N.W.2d at 860, 863. If it does not, it must be excluded. ***Id***. at 210, 325 N.W.2d at 860. Only after it is established that the evidence is admissible does it become necessary to consider the confrontation clause. ***Id***.

In order to satisfy the confrontation clause, the witness must be unavailable and the evidence must bear some "indicia of reliability"—which will be inferred if the evidence "fits within a firmly rooted hearsay exception." ***Id.*** at 215, 325 N.W.2d at 863. Even when indicia of reliability are present, if "unusual circumstances" exist that would warrant exclusion the evidence may not be admitted. ***Id***.

Creamer concedes that Henderson's testimony meets the threshold inquiry—that it is admissible under § 908.045(1), STATS., which excepts "prior testimony" from the hearsay rule. He also agrees that Henderson was unavailable within the meaning of the rule. He argues only that "unusual circumstances" warrant exclusion of the testimony—specifically, that his cross-examination of Henderson was unduly restricted.

Noting that the preliminary hearing was on the robbery charge only (the attempted homicide charge was added later), Creamer contends that, as a result, his cross-examination of Henderson was unduly restricted. He claims that he was unable to inquire fully into several facts relevant to the identity of the person who fired the shot which hit Henderson and to Henderson's credibility as a witness.[1]

While we agree with Creamer that the preliminary hearing related to the robbery charge, the homicide charge arose from the same transaction, and Creamer's attorney testified that he was aware from the outset that his client would also be charged with attempted homicide. As a result, he said, he questioned Henderson extensively about all the events that transpired that evening. And while some of counsel's inquiries were limited at the preliminary hearing, we do not consider such constraints to be significant in light of the extent to which counsel was able to cross-examine Henderson.[2] Indeed, Creamer's trial counsel testified that his ability to examine Henderson was much broader than he "could

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[1] Specifically, Creamer claims in his brief:

> [His attorney]'s questioning was limited when he attempted to inquire on 1) details on when Creamer allegedly called [Henderson] by name, 2) other questions relating to what was said, going to the question of identity and intent at the time of firearm discharge, 3) how far [Henderson] ran and his contacts with the police immediately after the incident, and 4) the identity, to the extent it could be ascertained, of the person or persons who fired the shots.

[2] Creamer's attorney probed into at least three of the four areas of which he now complains. Henderson testified that Creamer called him by name almost immediately when the incident began and thereafter. He drew a diagram illustrating the approximate location of events as well as the direction of his flight. His contact with the police was explored, as were the facts relating to the shooting and questions about the identity of the shooter—including the nature and position of the weapon Creamer had brandished at the scene, the extent of Henderson's visibility as he ran away, and a variety of other facts surrounding the incident.

have ever hoped for," and he was "quite content" that he questioned Henderson "under oath on some statements prior to the time that the district attorney has fully prepared him for trial." Counsel also stated:

> [O]nce I received the [preliminary hearing] transcript and had a chance to review it, I recognized that I had … probably as extensive an opportunity to explore with the victim his recollection of the facts that constituted the incidents as I normally would have expected to get at trial. I even had him draw a diagram.

With particular respect to Creamer's argument that he was unable to explore issues relating to Henderson's "credibility," we note that his attorney was able to cast doubt on Henderson's veracity in a variety of ways: through inconsistent statements Henderson had made at his own and Jones's preliminary hearings, and through the testimony of the police officers and the only other eyewitness to the incident, Henderson's cousin. We think it significant in this regard that Creamer's attorney testified that he had "an adequate opportunity to challenge [Henderson's] credibility" at the preliminary hearing.

Creamer has not satisfied us that sufficient "unusual circumstances" exist in this case to warrant exclusion of the evidence and reversal of his conviction.[3]

II. Excluded Evidence

[3] Creamer argues in the alternative that, even if there was no confrontation-clause violation, the trial court should have admitted Henderson's testimony only with respect to the armed robbery charge, and that charge should have been severed from the attempted homicide charge. He cites no authority for the argument, however, and we decline to address it further, *see* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (arguments unsupported by references to legal authority not considered), other than to note that the purpose of a preliminary hearing is simply to determine whether there is probable cause to believe that a felony has been committed, and once a defendant is bound over for trial, the prosecutor has discretion to bring additional charges not wholly unrelated to the charge or charges for which the defendant was bound over. ***State v. Williams***, 198 Wis.2d 479, 488-94, 544 N.W.2d 400, 403-06 (1996).

Creamer next argues that other evidentiary rulings by the trial court improperly denied him the opportunity to impeach Henderson's testimony in several respects.

The admission or rejection of evidence is committed to the trial court's discretion, ***State v. Buelow,*** 122 Wis.2d 465, 476, 363 N.W.2d 255, 261 (Ct. App. 1984), and we will not reverse a discretionary ruling if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "Where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations omitted). "Indeed, 'we generally look for reasons to sustain discretionary decisions.'" ***Id***. at 591, 478 N.W.2d at 39 (quoting ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990)).

Creamer sought to introduce testimony from Sylvan Fleming that, on four occasions, Fleming purchased "crack" cocaine from Henderson.[4] That evidence, according to Creamer, would directly contradict Henderson's testimony that he was not a drug user and did not "associate" himself with drugs. The trial court rejected the evidence, concluding that if Henderson had been alive and present to testify, "extrinsic evidence could not be introduced of the purchases of

[4] Creamer also claims that Henderson sold Fleming a "beat-bag"—a package of non-drugs passed off as drugs. However, he does not develop a separate argument with respect to the beat-bag, limiting his comments to the purported drug sales.

drugs." We presume the ruling was based on § 906.08(2), STATS., the "character evidence" rule stating that extrinsic evidence of specific instances of conduct may not be admitted for the purpose of attacking a witness's credibility.

We agree with Creamer that 906.08(2), STATS., is inapplicable. Instead, § 908.06, STATS., is the applicable rule because Creamer sought to attack the credibility of a declarant of hearsay evidence. Section 908.06 specifically allows admission of "any evidence which would be admissible for those purposes if [the] declarant had testified as a witness," and states that evidence of inconsistent statements or conduct by the declarant "is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." Thus, because Henderson testified at the preliminary hearing that he had no involvement with drugs, and that hearsay testimony was admitted at Creamer's trial, Creamer had the right under § 908.06 to introduce evidence contradicting that testimony. We discussed the interplay of §§ 908.045(2) and 908.06 in ***State v. Evans***, 187 Wis.2d 66, 79-80, 522 N.W.2d 554, 558-59 (Ct. App. 1994), concluding that

> although one cannot cross-examine a hearsay declarant (the mode of credibility impeachment under § 906.08(2), STATS.), all of the other § 906.08(2) limitations on use of extrinsic evidence survive except that pursuant to § 908.06, STATS., one can use "[e]vidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement" to impeach a hearsay declarant's credibility.

Because the trial court's exercise of discretion to disallow the proffered evidence rested on an erroneous view of the law, the ruling exceeded the bounds of its discretion. ***State v. Daniels***, 160 Wis.2d 85, 102-03, 465 N.W.2d 633, 639 (1991).

That does not end our inquiry, however, for if we are satisfied that the error was harmless—that it did not affect the verdict, or had such slight effect as to be *de minimis*—we will not reverse. ***State v. Dyess,*** 124 Wis.2d 525, 540, 541-42, 370 N.W.2d 222, 230, 230-31 (1985). Under the accepted test, an error will be considered harmless if no reasonable probability exists that it contributed to the defendant's conviction—that is, the error has not undermined our confidence in the verdict. ***Id.*** at 543, 545, 370 N.W.2d at 231-32, 232.

Without evidence of Henderson's selling drugs to Fleming, Creamer complains that he was unable to impeach Henderson's credibility by showing the jury that his denial of any "association" with drugs was untrue. As the State points out, however, evidence of Henderson's drug use was before the jury. The jurors were aware that, upon his death several weeks after the preliminary hearing, cocaine and marijuana were found in Henderson's bloodstream. It may be that the excluded evidence would have emphasized Henderson's drug use, but it would also be largely cumulative and we are not persuaded that, had it been allowed, there is a reasonable probability that the outcome of the trial would have been different.

Creamer also argues that the trial court erroneously excluded other evidence going to Henderson's credibility: (1) evidence suggesting that Henderson's complaint to police in January 1995, that he had been the victim of an unprovoked attack by Fleming, was actually a drug-related incident; (2) evidence that Henderson allegedly stole liquor from a bar in April 1995; and (3) evidence that in July 1995—several months after the robbery and shooting—Henderson threatened a man with a knife and stole cocaine from him.

In each instance, the trial court explained the reasons for its rulings in considerable detail. It disallowed evidence of the January 1995 incident not only because it was "inconclusive" and had an "extremely low" probative value, which would be "substantially outweighed by [the] danger of confusion of the issues," but also because the evidence would raise collateral issues, resulting in undue delay in the trial and a waste of the jury's time. As to the April 1995 incident involving an alleged theft of liquor—and the suggestion that Henderson lied to the police—the court concluded that there was "no foundation" for such evidence, stating:

> There are two versions [of the incident]. There are a number of witnesses and to get off again into a side trial about what … happened and who was telling the truth would run into all of the same dangers that I described previously. There would be … virtually no probative value because the evidence would be so weak ….
>
> [T]he jury would be left not knowing exactly what happened. It wouldn't prove anything.[5]

Finally, the trial court rejected evidence that, in July 1995, Henderson threatened another man and stole drugs from him. Again, the court stated that to litigate what happened in that incident—where the victim never reported the event and the police never arrested or charged Henderson—"would once again lead to the same minitrial …. [and] would completely subsume the evidence in this case," requiring the trial itself to "take a back seat to the many minitrials going on about vague … [and] unproven allegations of bad acts."

The term "discretion" contemplates "a reasoning process which considers the applicable law and the facts of record, leading to a conclusion a

[5] The court also noted that Henderson was never charged with either theft or lying to an officer in connection with incident.

reasonable judge could reach." ***Schneller v. St. Mary's Hosp.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990) (citation omitted). The trial court exercised its discretion in making these rulings, and we do not test those discretionary determinations "by some subjective standard, or even by our own sense of what might be a 'right' or 'wrong' decision in the case." ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). Rather, they will stand "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." ***Id***. That cannot be said here.[6]

III. Ineffective Assistance of Counsel

Creamer next argues that his trial counsel was ineffective for failing to request a lesser-included-offense instruction for the charged offense of attempted first-degree intentional homicide.

For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish that counsel's actions constituted deficient performance, and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Since representation is not constitutionally ineffective unless both elements of the test are satisfied, ***State v. Guck***, 170 Wis.2d

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[6] The State points out that Creamer was not left without means of challenging Henderson's credibility at trial. In addition to evidence that Henderson's drug use contradicted his statements to police, Creamer's attorney established at trial that: (1) Henderson gave several differing accounts of the robbery and shooting to police; (2) the incident occurred in an area known for drug-trafficking, where shootings often occur; and (3) Henderson was known to frequent the area. A police officer testified that Henderson's conduct and behavior on the night of the robbery were consistent with those of one who is high on cocaine. Counsel also was able to challenge the credibility of Henderson's cousin, the other eyewitness to the shooting, whose testimony was consistent with Henderson's own preliminary-hearing testimony. It also appears that Creamer declined the opportunity to present evidence regarding Henderson's reputation for truthfulness or untruthfulness under § 906.08(1), STATS.

661, 669, 490 N.W.2d 34, 37 (Ct. App. 1992), we may dispose of an ineffective assistance of counsel claim where the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990). The issues partake of both fact and law. ***Strickland***, 466 U.S. at 698. The trial court's findings as to what the attorney did, what happened at trial, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense are questions of law which we review independently. ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 104-05 (Ct. App. 1992)

"An attorney's performance is not deficient unless it is shown that, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" ***Guck***, 170 Wis.2d at 669, 490 N.W.2d at 38 (quoted source omitted). We thus assess whether such performance was reasonable under the circumstances of the particular case, ***Hubanks***, 173 Wis.2d at 25, 496 N.W.2d at 105; to prevail in the argument the defendant must show that counsel "'made errors so serious that [he or she] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment.'" ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 847 (quoting ***Strickland***, 466 U.S. at 687). In assessing counsel's conduct, we pay great deference to his or her professional judgment and make every effort to avoid making our determination based on hindsight. We consider the claim "from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id***. at 127, 449 N.W.2d at 847-48 (citations omitted).

The defendant must also show prejudice—that counsel's deficient performance actually prejudiced his defense. Counsel's errors must be "so serious as

to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 127, 449 N.W.2d at 848. Thus, he or she must establish that counsel's errors actually had an adverse effect on the defense, for not every error that conceivably could have influenced the outcome undermines the reliability of the result in the proceeding. There must be a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 129, 449 N.W.2d at 848.

Creamer testified at the postconviction hearing that his attorney discussed a lesser-included-offense instruction with him only during pretrial proceedings. His attorney, asked why he did not seek to have the jury instructed on recklessly endangering safety as a lesser-included offense, testified that he considered the endangerment instruction and, after reviewing its terms as well as the "overall trial strategy," he "made a decision not to ask for it." Counsel went on to discuss at length his trial strategy and the defenses he put forth—identity and lack of reasonable doubt on the homicide charge—and then stated:

> As I sit here today, I cannot precisely recall exactly what my reasoning was, but I do recall that there was a general defense posture that … a lesser included offense would only give the jury a basis to convict, when in fact we had a strong case in defense. We felt we had a good chance at winning overall on everything. We went for acquittal.

As to his discussions with Creamer about submitting a lesser-included-offense instruction, counsel testified:

> I have a vague recollection that as we sat in the judge's chambers … we had some discussions about lesser includeds, he and I …. [We had a] sort of … head to head closed quarters conversation … essentially to the effect that any lesser includeds [would be] contrary to the strategy we were taking.

He stated that he had many discussions with Creamer during the trial-preparation period and the trial itself, describing Creamer as "a very active client who had all sorts of ideas" about the trial and his defenses.

Referring to his own testimony that counsel never discussed with him during trial the possibility of submitting a lesser-included-offense instruction, Creamer argues that, as a matter of law, the decision is his alone to make and that counsel's "failure to obtain [his] approval for not submitting any … [such] instruction[]" constitutes deficient performance.

Unfortunately, the trial court did not make any findings of fact with respect to the conflicting testimony of Creamer and his counsel as to whether they had, in fact, discussed the point.[7]

Creamer's postconviction counsel made a similar argument to the trial court, claiming that whether a lesser-included-offense instruction should be submitted "is something that needs to be discussed with the defendant and essentially in large part, if not totally, [it is] the defendant's decision, not the attorney's decision." When asked by the court whether he was aware of "any law that it is the defendant's decision … rather than counsel['s]," the attorney replied that he was not. Now, on appeal, Creamer argues that our decision in ***State v. Ambuehl,*** 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), establishes such a right. We disagree.

Ambuehl was charged with attempted first-degree homicide while armed, and with causing injury by conduct regardless of life. Among other things,

[7] The court stated only that, in its view, the evidence was "[not] conclusive one way or the other."

she argued that her trial counsel was ineffective for deciding to forego requesting an instruction on the lesser-included offense of endangering safety by conduct regardless of life or, at the least, for "fail[ing] … to discuss the matter with her at the close of evidence." ***Id***. at 354, 425 N.W.2d at 653. Ambuehl, who had discussed the lesser-included-offense instruction with counsel prior to trial, at which time she had been "vehemently oppos[ed]" to submission of any such instruction, specifically argued that her attorney was deficient because he "unreasonably presumed that the pretrial decision not to request the instruction would be the same after all the evidence was in." ***Id***. at 354, 355, 425 N.W.2d at 653.

We expressly rejected Ambuehl's argument that the decision whether to submit a lesser-included-offense instruction is the defendant's, not the attorney's, noting that nothing could be found in support of such a proposition, other than an American Bar Association publication.[8] ***Id***. at 355-56, 425 N.W.2d at 654. We then discussed trial counsel's "go-for-broke" strategy—which is similar to that pursued by Creamer's attorney in this case—concluding that it was reasonable, and, with respect to counsel's duty to re-examine pre-trial strategic decisions in light of the evidence submitted at trial, we said: "We refuse to hold that, as a matter of law, it is always unreasonable for counsel to presume that the client's pretrial decision not to request a lesser-included instruction will be the same after all the evidence is in." ***Id***. at 357, 425 N.W.2d at 654. We then considered the evidence that came in at Ambuehl's trial and, concluding that nothing in the record indicated she would have "changed her 'vehement

[8] ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2, commentary (2d ed. 1980).

opposition' to a lesser-included instruction," we rejected her claim of ineffective assistance of counsel. ***Id***. at 359-60, 425 N.W.2d at 655.

We do not see ***Ambuehl*** as compelling the result Creamer urges in this case: that, as a matter of law, his counsel was ineffective for failing to obtain his (Creamer's) approval of the decision not to request submission of a lesser-included-offense instruction. As indicated, the issue in ***Ambuehl*** was whether, having jointly decided with the client prior to trial not to pursue submission of a lesser-included-offense instruction, counsel was ineffective for failing to re-confirm that decision with the client—for "presum[ing]" that the client's pretrial views would continue after all the evidence was in. ***Id***. at 357, 425 N.W.2d at 654. As we said in a more recent case, "***Ambuehl*** does not involve … whether trial counsel has the obligation to specifically discuss with the defendant possible lesser-included offense instructions." ***State v. Eckert***, 203 Wis.2d 497, 509, 553 N.W.2d 539, 544 (Ct. App. 1996). We also said in ***Eckert*** that the right to request a lesser-included-offense instruction "is neither a constitutional nor a fundamental right," citing ***State v. Nicholson***, 148 Wis.2d 353, 366, 435 N.W.2d 298, 304 (Ct. App. 1988), and that "the decision … whether to request a lesser-included offense instruction is a complicated one involving legal expertise and trial strategy." ***Eckert***, 203 Wis.2d at 509, 553 N.W.2d at 544. And we held that

> a defendant does not receive ineffective assistance [of counsel] where defense counsel has discussed with the client the general theory of defense, and when, based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with or harmful to, the general theory of defense.

Id. at 510, 553 N.W.2d at 544 (citation omitted).

In this case, the trial court found Creamer's counsel's strategic decision not to request the instruction to be reasonable, and while the court did not specifically find that counsel had discussed "the general theory of the case" with Creamer, counsel's testimony that he had done so is uncontradicted in the record.[9] We conclude, therefore, that even assuming that Creamer's counsel did not specifically discuss the lesser-included-offense instruction with him, or get his "approval" not to seek it, counsel's performance was not deficient.

IV. Jury Instruction

Creamer next argues that he should be granted a new trial in the interest of justice "because the lack of clarity in the jury instruction on attempt[ed

[9] As indicated, counsel testified "*we* had a strong case in defense" and "[*w*]*e* felt *we* had a good chance of winning overall on everything," and, for that reason, "[*w*]*e* went for acquittal," rather than submitting a lesser-included-offense instruction. (Emphasis added.) In addition to testifying that he specifically discussed the lesser-included instruction—which, as indicated, Creamer disputes—counsel stated:

> I know we had many … discussions throughout that week and in the week before and in the weeks leading up to this generally about the case and about the strategy and defense, and we had a number of phone calls, a couple of in person visits, and often times conferences in the courtroom during breaks, and we discussed all the aspects of the strategies, and that's principally because [Creamer] is a very active client who had all sorts of ideas, some good, some not so good, that he wanted me to consider or use.

According to counsel, he and Creamer discussed the defense theory and strategies both prior to and "[t]hroughout the entire trial." He said he and Creamer "had a good working relationship and he fully understood …. the approach that I was taking in the defense."

Creamer's testimony at the postconviction-motion hearing was limited to his disagreements with counsel with respect to his testifying at trial and over communicating the district attorney's amendment of the charge from party-to-the-crime of attempted homicide to attempted homicide. The only other reference to his discussions with counsel was his denial that he had discussed with counsel submission of a lesser-included-offense instruction on the homicide charge. He did not dispute his attorney's testimony regarding their many discussions of the overall theory of the defense and other matters of trial strategy.

armed robbery] allowed the district attorney to confuse the jury." Creamer's apparent complaint is that, while the jury instruction on armed robbery properly identified Henderson as the sole victim, the instruction on the lesser-included offense of attempted armed robbery simply referred back to the armed robbery instruction without making any reference to Henderson, and that this fact, coupled with the prosecutor's alleged reference to both Henderson and his cousin as the victims, must have so confused the jury that "the real controversy has not been fully tried." We disagree.

While discussing the offense of attempted robbery in his closing argument to the jury, the prosecutor stated:

> Attempted robbery is, like I said, when somebody tries to rob someone and here they try to rob Greg or David Henderson – and/or David Henderson, and is the same elements as the robbery, but an additional thing, something out of their control intervened or stopped them.

Henderson, however, was identified as the sole victim of the offense throughout the trial. Indeed, immediately prior to the remarks just quoted, the prosecutor, in discussing the elements of armed robbery, emphasized that the property taken—a set of keys—was taken "from the person or presence of Greg Henderson."

Where, as here, no objection is made to the jury instructions, we exercise our discretionary authority to order a new trial in the interest of justice "only in exceptional cases." ***State v. Martinez***, 210 Wis.2d 397, 404, 563 N.W.2d 922, 925 (Ct. App. 1997). On the facts just discussed, Creamer has not satisfied us that this is such a case.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.