COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3518-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL HIRN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Michael Hirn appeals a judgment convicting him of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. Hirn presents four arguments on appeal: (1) the trial court erroneously permitted hearsay evidence to be introduced to his prejudice; (2) he received ineffective assistance of counsel; (3) his trial attorney had a conflict of

interest that entitles him to a new trial; and (4) he should receive a new trial in the interest of justice. We reject these arguments and, accordingly, affirm.

Hirn was convicted along with five other defendants for the murder of Thomas Monfils, an employee of James River Corporation. Hirn and the other defendants were Monfils's co-workers. One of those defendants, Keith Kutska, obtained a police tape in which an anonymous caller reported that Kutska intended to steal an expensive electrical cord from his employer. Kutska identified the caller as Monfils. Kutska played the tape for some employees, and later confronted Monfils with it. Monfils admitted it was his voice on the tape. At trial, the State argued that Kutska, along with Hirn and four other employees, verbally confronted and then physically attacked Monfils. Monfils was rendered unconscious by a blow to the back of the head; his partially decomposed body was found the following day in a pulp vat, with a heavy weight tied around his neck.

The six defendants were tried together. At trial, the court permitted Brian Kellner to testify regarding statements Kutska made to him at a bar on July 4, 1994. Kellner testified that sometime between 8 and 10 p.m., Kustka began discussing the events of November 21, 1992, the day of Monfils's death. Kellner testified that Kutska described the circumstances surrounding the playing of the tape, and identified the people present:

> Q. Can you tell the jury who Mr. Kutska told you were present in the No. 9 coop after the tape had initially been played to Mr. Monfils?
>
> A. Yes, sir. There was Rey Moore, he was the last man in. There was Mike Johnson, Dale Basten, Keith, John Mineau, Mike Hirn.
>
> Q. Did he indicate anyone else?
>
> A. Yes, sir. He said there was two others, but I don't remember who they are.

> Q. What did he say occurred?
>
> A. He said that they played the tape. I don't know if the guys in the coop were getting wound up about it and that they wanted to go confront Tom [Monfils] about it.

Kellner also testified that Kutska directed himself, Kellner's wife, and Kutska's wife in a role-play of the confrontation and explained events in the context of "what if" situations. He testified:

> Q. What did [Kutska] say happened?
>
> A. He said that during this confrontation that somebody had come up and given Tom [Monfils] a slap upside the back of his head.
>
> ….
>
> Q. Did Mr. Kutska ever indicate that Tom [Monfils] had been struck in any other manner at that time?
>
> A. He did. That what if somebody had used a wrench or board or something from that area ….

Hirn contends that the court erred by permitting Kellner to testify to Kutska's statement because it was inadmissible hearsay. He further asserts that the court failed to appropriately review the statement's admissibility and, contrary to the court's conclusion, the statement is not an admission against interest.

Generally, the question of the admissibility of evidence lies within the sound discretion of the trial court. ***State v. Pepin***, 110 Wis.2d 431, 435, 328 N.W.2d 898, 900 (Ct. App. 1982). Whether a statement is inadmissible under a hearsay objection, however, is a question of law we review de novo. ***State v. Stevens***, 171 Wis.2d 106, 112, 490 N.W.2d 753, 756 (Ct. App. 1992).

We first consider whether the statement is admissible as a statement against penal interest. A declarant's statement against his penal or societal interest

is admissible under § 908.045(4), STATS., notwithstanding the general bar of the hearsay rule. That section provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> (4) STATEMENT AGAINST INTEREST. A statement which at the time of its making … so far tended to subject the declarant to civil or criminal liability … or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

The rationale for allowing statements against interest into evidence is that such statements possess circumstantial guarantees of trustworthiness based on the assumption that people do not falsely make damaging statements about themselves. *See* ***State v. Buelow***, 122 Wis.2d 465, 477, 363 N.W.2d 255, 262 (Ct. App. 1984) (citing Advisory Committee Notes on Proposed Rules, 28 U.S.C. Rule 804(b)(3) (1982), *rev'd on other grounds by* ***Buelow v. Dickey***, 847 F.2d 420 (7th Cir. 1988). It is not necessary for a statement against interest to amount to a confession, but it must *tend* to subject the declarant to criminal liability. ***Ryan v. State***, 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), *overruled on other grounds by* ***State v. Anderson***, 141 Wis.2d 653, 416 N.W.2d 276 (1987) (emphasis added). Whether a statement is against interest is determined under the circumstances existing at the time the statement was made. *See* ***United States v. Hamilton***, 19 F.3d 350, 357 (7th Cir. 1994).

We first hold that the trial court correctly concluded that Kutska was unavailable based on the fact that he was a defendant in a criminal trial whom the State could not compel to testify. As we previously discussed in ***State v. Basten***, Nos. 97-0918-CR, 97-1193-CR, 97-0919-CR, unpublished slip op. at 24 (Wis.

App. Feb. 17, 1998): "Under no circumstances could the State call Kutska to the witness stand without incurring a mistrial and, therefore, he was unavailable."

Further, Kutska's statement meets the criteria for a statement against interest under § 908.045(4), STATS. At the time he made the statement, Kutska had been questioned by police; no arrests had yet been made and an investigation was pending. Moreover, at the time Kutska described the events to Kellner, Kutska was a party in a civil wrongful death action brought by Monfils's widow and children. We conclude that under these circumstances, Kutska's statement was such that it would subject him to criminal charges for at least battery, as party to a crime. Even if Kutska was not fully cognizant of the impact of his statement or believed he was exculpating himself by stating he was not actively involved in the confrontation,[1] under the circumstances existing at the time, the trial court was entitled to conclude that a reasonable person would not untruthfully assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later.

We further reject Hirn's argument that the court failed to conduct the appropriate preliminary review of the admissibility of the statement by failing to consider the trustworthiness of the statement. Hirn appears to assert that Kellner's testimony lacks requisite guarantees of trustworthiness because Kellner later recanted, the statement's trustworthiness was lessened because Kutska made the statements while drinking, and the trial court stated in its decision and order in ***State v. Basten***, No. 95-CF-242, that Kellner was barely credible. At issue, however, are the circumstances surrounding the *statement*'s trustworthiness, not

[1] The State persuasively argues that Kutska's appreciation of the inculpatory nature of his admissions is demonstrated by his use of the equivocation, "what if."

Kellner's personal trustworthiness or the court's interpretation of his credibility. For the reasons stated above, the statement possessed the requisite circumstantial guarantees of trustworthiness.[2] We therefore uphold the trial court's exercise of discretion.

We turn now to Hirn's assertion that he received ineffective assistance of counsel. Hirn contends his trial counsel was ineffective for failing to request jury instructions with respect to withdrawal from a conspiracy, multiple conspiracy, or a lesser included offense. He also argues trial counsel's closing argument was prejudicially deficient for failing both to discuss the elements of party to a crime, and failing to argue alternative theories of defense.

A criminal defendant who claims his conviction should be reversed because he received ineffective assistance must demonstrate both that his attorney's performance was deficient and that any deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Strategic trial decisions that are rationally based on the facts and the law will not support a claim of ineffective assistance of counsel. ***State v. Elm***, 201 Wis.2d 452, 464-65, 549 N.W.2d 471, 476 (Ct. App. 1996).

At the postconviction hearing, Hirn's trial attorney gave the following explanation as to why he did not request the withdrawal or multiple conspiracy jury instructions:

> I think a trial lawyer has to make decisions as to how he is going to take care of his closing argument. … I don't believe this judge would give it, but secondly I couldn't have made one up because I think it would have been so

[2] Having found that the trial court properly admitted Kutska's out-of-court statement, we need not consider the State's argument that it constituted a prior inconsistent statement.

> cumbersome I don't think it would have worked to the benefit of Mr. Hirn. And I think my skill is such that I could make that jury understand what our position was. And in light of the instructions of the Court, those instructions certainly helped Mr. Hirn, did not hurt Mr. Hirn, because we know he did not directly commit the crime, No. 1. No. 2, he was not an aider and abetter for the simple reason that he had had an alibi. He was not even there when the crime started, was being committed, or was completed.

Hirn fails to demonstrate that his trial counsel was ineffective for either choosing or maintaining a single defense. Rather, the defense was a strategic choice. Hirn's defense was that he was never a party to any conspiracy, but rather left before any physical confrontation with Monfils. Consistent with his defense, Hirn's attorney neither requested the withdrawal nor the multiple conspiracy jury instructions, nor argued an alternative theory of defense in closing. An attorney is not required to dilute the theory of defense by arguing inconsistent alternatives. ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). Counsel's strategy was not unreasonable as a matter of law. Indeed, our review of the record further demonstrates that Hirn's trial attorney made an effective argument by singling Hirn out from the crowd, and arguing he never was involved in the physical confrontation with Monfils.[3]

The decision to not request a lesser-included jury instruction was a strategic choice. Although Hirn argues that his trial attorney did not discuss the lesser-included offense option with him, the trial court found Hirn's contention was not supported by the evidence. Hirn fails to demonstrate that this finding is clearly erroneous. *See* § 805.17(2), STATS. We conclude the trial attorney was not

[3] We are equally unpersuaded that trial counsel's failure to discuss the elements of the offense in the closing argument is per se ineffective. At a minimum, Hirn fails to demonstrate prejudice.

ineffective for pursuing an outright acquittal. Defense counsel has a right to select from the available defenses, and his failure to request a lesser-included instruction when the defense strategy was that defendant had a better chance of acquittal without any lesser-included instructions is not ineffective. *See* ***State v. Koller***, 87 Wis.2d 253, 264, 274 N.W.2d 651, 657 (1979).

Finally, we turn to Hirn's argument that his trial attorney had conflicts of interest that entitle Hirn to a new trial. He contends that trial counsel guaranteed Hirn would not serve a day in prison, and that such a guarantee created a prohibited contingent fee arrangement that constituted an actual conflict of interest. Hirn also argues that the trial attorney violated his right to effective and conflict free representation when the attorney obtained media rights from him.

"A defendant is entitled to a new trial if he can demonstrate by clear and convincing evidence that the lawyer representing him at trial 'actively represented a conflicting interest.'" ***State v. Foster***, 152 Wis.2d 386, 392, 448 N.W.2d 298, 301 (Ct. App. 1989) (quoting ***State v. Kaye***, 106 Wis.2d 1, 8-9, 315 N.W.2d 337, 340 (1982)). A conflict of interest arises when "the defense attorney [is] required to make a choice advancing his own interests to the detriment of his client's interests." *See* ***United States v. Horton***, 845 F.2d 1414, 1419 (7th Cir. 1988). "There is an 'actual' conflict of interest only when the lawyer's advocacy is somehow adversely affected by the competing loyalties." ***Foster***, 152 Wis.2d at 393, 448 N.W.2d at 301.

Findings of fact will not be upset on appeal unless they are clearly erroneous. Section 805.17(2), STATS. At the postconviction hearing, the trial court stated that it found "absolutely no credible evidence to support an assertion that

Mr. Boyle was involved in a publication agreement or that he had any conflict of interest with respect to his client."

Hirn fails to demonstrate that the trial court's finding of no actual conflict of interest is clearly erroneous. At the postconviction hearing, Hirn depended upon the testimony of Ramona Dulde to establish the trial attorney's connection to a publication agreement. The trial court found that Dulde "totally lack[ed] credibility." The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). The trial court's finding is not patently incredible. Further, although there were conflicting dates about when a book was conceived, the court specifically found that the trial attorney was the only credible witness on this issue.[4] Specifically, the trial court rejected the assertion that defense counsel pursued a publication agreement while actively representing Hirn. Hirn fails to point to evidence demonstrating that this finding is clearly erroneous.

In reference to the alleged contingency fee agreement, Hirn is similarly unable to demonstrate that the trial court's finding of no actual conflict is clearly erroneous. Indeed, the record supports the trial court's finding. Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the court did not but could have reached. ***Estate of Dejmal***, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). The record presents no evidence of a contingency fee. At the postconviction hearing, neither Hirn nor

[4] The trial attorney testified that he gave no thought to writing a book before Hirn's sentencing in December 1995, and that the idea was first considered in late January 1996.

his trial attorney testified to the existence of such a fee arrangement. Further, trial counsel's statement about not spending a day in jail does not demonstrate a contingency fee arrangement because the statements were not made as an inducement to obtain representation. Rather, the statements were made after trial counsel was representing Hirn and appear to be counsel's attempt to encourage Hirn. Finally, the record demonstrates that Hirn turned over his house to his trial attorney as partial payment of his legal fees. This supports the conclusion that there was no contingency fee arrangement. Thus, the trial court's finding was not clearly erroneous, but was supported by the evidence.

Finally, Hirn contends he should receive a new trial in the interest of justice. "Larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing …." ***State v. Echols***, 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989). We conclude that there has been no demonstrable error and thus the interests of justice do not entitle Hirn to a new trial.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.