

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 5, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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Appeal No. 2005AP2599-CR

Cir. Ct. No. 2002CF16

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS ROBERT SOCHA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Forest County: MARK MANGERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Thomas Socha appeals a judgment after a trial to the court, convicting him of being a party to the crime of first-degree intentional homicide in the death of Lance Leonard. He also appeals an order denying his postconviction motion in which he alleged ineffective assistance of counsel, newly

discovered evidence and prosecutorial misconduct. Socha raises the same issues on appeal, in addition to challenging the sufficiency of the evidence to support the conviction.¹ Because the State presented overwhelming evidence of Socha's participation in the conspiracy to kill Leonard; and the evidence presented at the postconviction hearing does not undermine our confidence in the outcome, justify a new trial based on newly discovered evidence, or establish any prejudice from the prosecutor's failure to disclose information to the defense, we affirm the judgment and order.

¶2 Leonard was shot to death with a shotgun and buried in a shallow grave in the woods near Crandon. The State alleged that Socha, Dennis Drews, Victor Holm and Beth Mrazik conspired to kill Leonard. The murder was carried out by Drews, Holm, and Holm's brother, Vincent, who was not present when the conspiracy was formed. Socha and Mrazik did not directly participate in the shooting and went to several bars that night to establish an alibi. All three of the original co-conspirators testified against Socha. Although their testimony was inconsistent on some of the details, with each of the co-conspirators describing the murder scheme in the light most favorable to himself or herself, they all testified that Socha had at least one motive for killing Leonard and discussed when, where and how to kill him. Socha called Holm several times on the day of the murder to determine whether it had been completed and reacted violently when the police began to unravel the murder plot.

¹ Leonard's brief also argues that the trial court misused its discretion by its "failure to come to terms with" discrepancies in the testimony of Socha's accusers. The brief does not identify any particular discretionary decision and applies the wrong standard of review to the trial court's determination of the witnesses' credibility. We therefore decline to address this contention further.

¶3 Drews pled no contest to first-degree intentional homicide and testified against Socha in return for the State's recommendation of a life sentence with parole eligibility in twenty to twenty-five years. Drews testified that Socha was afraid Leonard would implicate him in a fraudulent check scheme and that Leonard was aware of Socha's theft of cocaine from his supplier worth \$12,000 to \$16,000. Socha, Victor Holm and Mrazik discussed killing Leonard at several meetings, and agreed to provide alibis for each other. A bartender at a tavern where one of the meetings occurred testified that they met in his tavern and were suddenly silent when he approached them.

¶4 Victor Holm testified against Socha after pleading no contest to first-degree intentional homicide in return for the State's sentence recommendation of life in prison, with the State taking no position on parole eligibility. Victor testified that Socha wanted Leonard killed because of Leonard's knowledge of Socha's involvement in the fraudulent check scheme and the cocaine theft. He confirmed that he, Socha and Drews agreed on how, when and where to kill Leonard. His testimony and Drews' varied on which of them pulled the trigger.

¶5 Mrazik testified against Socha after pleading no contest to reckless homicide based on the State's agreement to recommend probation. She testified that she was present during parts of meetings at which Leonard's murder was discussed. She denied that she was aware of when the murder would take place and did not know that she was assisting Socha in creating an alibi when she went to bars with him on the night of the murder. She did not know the degree of Socha's involvement, but did hear him say, "If you're going to kill him, use buckshot." When it became apparent that the police were about to solve the crime, Socha threatened Mrazik that the mafia would be at her door if anything bad happened to him. She also witnessed Socha holding a gun to Holm's head,

shouting, “They know. They know.” Mrazik was also threatened by Holm, and she told others of his involvement in the killing so that he would get arrested. After two individuals, Jeff Cole and Kerry Miller, went to the police with Mrazik’s information, Socha confronted Miller, asking what she knew about the checks and the murder so he could decide whether to get out of town.

¶6 Socha also made statements to the police that acknowledged his involvement in the murder plot. While Deputy Tony Jakubiec transported Socha, Socha asked whether the police had arrested Mrazik because she was involved and knew as much as anyone about the murder. Socha then asked Jakubiec to explain what intent meant because “[h]e did not have any problem being charged with party to a crime, but that he couldn’t see why he was being charged with intent to commit homicide.”

¶7 Upon a challenge to the sufficiency of the evidence, the reviewing court may not reverse unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The standard of review is the same in either a direct or circumstantial evidence case. *Id.* When faced with an evidentiary record which supports more than one inference, this court must accept and follow the inference drawn by the trier of fact unless the underlying evidence is incredible as a matter of law. *Id.* Socha’s incriminating statements, along with direct testimony from the co-conspirators and Socha’s guilty reaction when the plot began to unravel provide overwhelming evidence of his complicity in the murder.

¶8 Socha argues that his trial counsel was ineffective for failing to call numerous witnesses. To establish ineffective assistance of counsel, Socha must show that his counsel provided deficient performance that prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Socha must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one that undermines our confidence in the outcome. *Id.* at 694. Because we conclude that Socha has failed to establish prejudice, we need not review whether his counsel's performance was deficient. *Id.* at 697.

¶9 Socha faults counsel for failing to present evidence that Holm committed a murder in Arizona and was acquitted after he orchestrated a coverup of his involvement in the crime. Socha argues that this evidence would have shown that Holm was capable of killing Leonard without any prompting from Socha, would commit a murder for a relatively marginal payoff, and could then motivate or intimidate others into helping to frame someone else. Socha contends that if the trial court had been made aware of Holms' conduct in Arizona, it would have regarded his testimony with greater skepticism.

¶10 The case was tried to the court after Socha waived a jury trial. Although the question of prejudice to the defense is a question of law that we review independently, we defer to the trial court on questions of fact and the credibility of witnesses. *See State v. Guerard*, 2004 WI 85, ¶19, 273 Wis. 2d 250, 682 N.W.2d 12. Upon hearing the details of the Arizona case at the postconviction hearing, the trial court did not change its assessment of the witnesses' credibility.

¶11 Evidence that Holm was capable of committing murder without prompting from Socha does not undermine evidence that Socha conspired to kill

Leonard. It only shows that he enlisted the aid of an accomplished killer. Evidence that Holm was able to orchestrate an acquittal on the Arizona murder charge does not establish a basis for believing that he would or could orchestrate evidence to inculcate Socha after Holm himself pled no contest. Neither Holm nor Drews received substantial concessions from the State in return for their no contest pleas. Socha's theory would require the court to believe that they would admit their own involvement for little concession by the State and for some reason inculcate an innocent man. Socha contends that jealousy motivated Holm to incriminate Socha, but he offers no plausible explanation why Drews would admit his own guilt and falsely accuse Socha. While Mrazik benefited from a more favorable plea agreement, the agreement required that she testify truthfully. It is not reasonable to believe that she would jeopardize her favorable plea bargain merely to falsely accuse Socha of involvement in the plot. Furthermore, as the trial court noted, Mrazik displayed no loyalty to Holm. Socha's argument also fails to account for his own damaging statements to the police that displayed his knowledge of the conspiracy and expressed no problem with being charged as a party to the crime. None of the evidence relating to the Arizona murder undermines our confidence in the outcome.

¶12 Socha next argues that his trial counsel should have presented witnesses who would have shown that Holm despised and brutalized Leonard, contradicting his self-serving testimony in which he portrayed himself as Leonard's friend. As the trial court noted, each of the conspirators may have had independent reasons for wanting Leonard dead. Proving that Holm wanted to kill Leonard for his own reasons does not undermine the State's evidence that Socha had reasons for murdering Leonard.

¶13 Socha next argues that his counsel should have presented witnesses to show that Mrazik and Holm plotted to accuse Socha of coercing Holm to commit the

murder. By the time of Socha's trial, Holm had already pled no contest and the prosecutor had agreed to make no recommendation regarding parole eligibility. By his plea, Holm waived any coercion defense. Information that Mrazik was motivated to implicate Socha in order to present Holm in a more favorable light before Holm's trial would not explain her willingness to follow through after Holm pled no contest, jeopardizing her own plea agreement. Furthermore, it does not necessarily follow that Socha was innocent merely because Holm falsely accused him of coercion. It would be expected that a person attempting a coercion defense would blame a true co-conspirator for his actions. Failure to present these witnesses does not undermine our confidence in the outcome.

¶14 Socha next argues that his counsel should have called Vincent Holm as a witness, again to establish his brother's motive for killing Leonard and because Vincent's written statement implicating his own brother did not mention Socha's involvement. There is no evidence that Vincent Holm was present when the agreement to kill Leonard was reached. Vincent only became involved when his brother, Drews and Leonard arrived unexpectedly at his home. Vincent's shotgun was used for the murder, and Vincent assisted in digging the grave. There is no evidence establishing that Vincent knew or should have known of Socha's involvement in the plot.

¶15 Socha's final claim of ineffective assistance of trial counsel arises from his counsel's failure to call Holm's attorney and investigator as witnesses. At the postconviction hearing, they denied Mrazik's claim that they told her not to tell the police about Socha's involvement because their strategy was to spring this information on the State at Holm's trial and blame Socha for coercing Holm into committing the homicide. Holm's attorney denied ever receiving a letter from Mrazik in which Holm asked for her cooperation in presenting this defense. Once

Holm pled no contest, he lost any advantage that might have been gained by framing Socha and claiming coercion. In light of all of the evidence of Socha's guilt, failure to present evidence that Mrazik was asked to cooperate with Holm's effort to establish a coercion defense or that Mrazik lied about being asked to withhold information does not undermine our confidence in the outcome.

¶16 Socha's arguments regarding newly discovered evidence fail because the new evidence would not have resulted in a different verdict. *See State v. McCallum*, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997). Evidence that only serves to impeach the credibility of a nonessential witness is not sufficient to warrant a new trial because it does not create a reasonable probability of a different result. *See Greer v. State*, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968). Socha's alleged newly discovered evidence consists of a statement by Samuel May, a jail inmate, that Holm hated Socha for Socha's alleged role in reporting the murder and for having sexual relations with Mrazik. May stated that Holm told him "if [Holm] goes down for the murder, so is Socha." The trial court found May's statements to be somewhat cumulative and insufficient to undermine the evidence the court relied on in making its decision. At best, the evidence would have weakened Holm's credibility because he disclaimed any animosity toward Socha. The trial court already recognized problems with Holm's credibility, but believed he testified honestly about Socha's involvement in the conspiracy to kill Leonard. May's statement does nothing to undermine Drew's credibility and does not explain Socha's own inculpatory statements.

¶17 Socha also argues that Holm's investigator's report constitutes newly discovered evidence. It says that Mrazik told the investigator Socha was not involved. Again, this new evidence fails to establish any basis for acquittal. Even at

trial, Mrazik disclaimed knowledge of Socha's involvement, but merely provided some peripheral evidence suggesting his complicity.

¶18 Socha argues that Holm's postconviction attempt to vacate his plea based on an allegation that he was not properly informed of the effect of Socha's coercion constitutes newly discovered evidence. Again, the evidence does not undermine Drews' testimony or explain Socha's incriminating statements. Evidence that Holm sought to present a false coercion defense does not show that Socha was not a party to the murder conspiracy. It merely serves to impeach Holm's general credibility.

¶19 Socha next argues he is entitled to a new trial due to prosecutorial misconduct. First, he faults the prosecutor for failing to provide the notes of a sheriff's deputy who interviewed a jail inmate, Roy Swanson. The notes were not provided until after the trial. Socha describes the notes as "very exculpatory." We disagree. The notes indicate that Holm told Swanson that "[i]t was the same deal in Arizona" where he had killed a man with a shotgun, that Holm indicated he could make Leonard's family disappear and that Holm hated Socha. Swanson's statement again establishes Holm's culpability for the Arizona murder, a matter that neither the trial court nor this court deems particularly significant. It also portrays Holm as a menacing figure although, as the trial court noted, he was not sufficiently menacing to persuade any of his co-conspirators to exonerate him. In addition, other aspects of Swanson's interview were very damaging to the defense. Swanson stated "Tom's a major player in the murder." He indicated that Holm told him that Leonard's knowledge of Socha's cocaine theft was a reason for his murder. The trial court appropriately found Swanson's interview inconsequential.

¶20 Finally, Socha argues that the prosecutor engaged in misconduct by failing to disclose discrepancies between Mrazik’s testimony at Holm’s trial and her testimony at Socha’s trial.² The discrepancy relates to her testimony about the incident in which Socha held a gun to Holm’s head shouting “They know. They know.” The trial court viewed this incident as evidence of Socha’s guilty knowledge. Socha argues that Mrazik’s version of the events at Holm’s trial might be construed not to implicate Socha in the homicide and that any discrepancy in the account affects Mrazik’s credibility. Therefore, he contends that the State was required to alert the defense to Mrazik’s “false testimony.” Our review of Mrazik’s testimony at the two trials does not disclose any major discrepancy that would compel the prosecutor to alert the defense to “false testimony.” As the trial court noted, the significant part of her testimony at both trials shows Socha’s guilty knowledge.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

² Holm entered a guilty plea after his trial commenced and Mrazik testified.

