COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1476-CR **Cir. Ct. No. 98-CF-213**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA A. WEED,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Patricia Weed appeals from a judgment of conviction for first-degree homicide while armed and from an order denying her postconviction relief. She raises three issues. First, she claims that the circuit court incorrectly applied the recent-perception hearsay exception in admitting a statement allegedly made by her husband, Michael Weed, denying her the right to

confront an adverse witness. Second, Patricia contends that her constitutional right to effective assistance of counsel was violated when trial counsel did not object on the grounds that admission of the hearsay statement violated Patricia's right to confront a witness. Third, Patricia argues that she did not knowingly waive her right to testify. We conclude that any error the circuit court may have made in admitting the hearsay statement was harmless and that Patricia's waiver was knowing and voluntary.

¶2 In September 1998, Michael and Patricia went to the cottage of Fred Fuerbringer, a friend of Michael's. While there, Patricia and Michael engaged in a heated discussion. Michael was outside with Fuerbringer and Fuerbringer's son when Patricia came out of the cabin and asked Michael for the car keys because she wanted to go home. Michael would not let her have the keys because she had been drinking. Patricia returned inside, and Michael allegedly said, "[t]hat's the reason I took the bullets out of the .357."[1] Three days later, Patricia, using the same gun, shot and killed her husband. The State charged and the jury convicted Patricia of first-degree intentional homicide.

¶3 At trial, Patricia objected on hearsay grounds to the State's presentation of the testimony of Fuerbringer and Fuerbringer's son as to Michael's statement about unloading his gun. The State submitted that it fell under the "statement of recent perception" exception, *see* WIS. STAT. § 908.045(2) (1999-2000),[2] and the circuit court agreed. Patricia contends that this was error.

[1] The importance of this statement for the State's case is that Patricia's having to stop and load the gun would show intent.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 We need not address the merits of Patricia's hearsay challenge because we hold that if there was any error in the admission of Michael's statement about unloading the gun, such error was harmless. "The test of harmless error is whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt." ***State v. Givens***, 217 Wis. 2d 180, 193, 580 N.W.2d 340 (Ct. App. 1998). That is, assuming the statement about the gun should have been excluded, is there a reasonable possibility that its admission contributed to Patricia's conviction? *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). The burden of showing that the error was harmless falls upon the State. ***Id.***

¶5 There was overwhelming evidence that Patricia intended to kill Michael, even without the statement in question. In a statement taped after the shooting, Patricia said that Michael had told her that night that he was seeing another woman, Brenda, and that he loved Brenda. Patricia shot at Michael six times and hit him at least four times, a fact that belies Patricia's claim that she only meant to scare him. Regardless of whether Patricia had to load the gun before the attack, she continued to pull the trigger. Further, Patricia told a police officer who responded to the scene: "I shot him; he's in love with another [woman] and I cannot live without him." Because there was sufficient evidence, other than Michael's alleged hearsay statement, to convict Patricia beyond a

reasonable doubt, we hold that any error in the admission of the Fuerbringers' testimony was harmless.[3]

¶6 Patricia's final argument is that her waiver of her right to testify was not knowing, intelligent and voluntary. Whether Patricia knowingly waived her right to testify is a question of constitutional fact and thus presents a mixed standard of review. ***State v. Hajicek***, 2001 WI 3, ¶15, 240 Wis. 2d 349, 620 N.W.2d 781. This court reviews the circuit court's findings of historical fact on the clearly erroneous standard and then reviews the circuit court's conclusions of law de novo. ***Id.***

¶7 A defendant's right to testify is a fundamental constitutional right. ***State v. Simpson***, 185 Wis. 2d 772, 778, 519 N.W.2d 662 (Ct. App. 1994). The right, however, may be waived. "The standard is whether the record demonstrates that the defendant knowingly and voluntarily waived the right." ***Id.*** at 778-79. In determining whether a waiver is knowing and voluntary, the reviewing court considers the totality of the record. ***Id.*** at 779.

¶8 Patricia makes two arguments regarding her right to testify. Patricia first claims that she is entitled to a new trial because she did not testify at trial and she did not personally and expressly waive her right to testify on the record before the circuit court. Patricia argues that because the right to testify is a fundamental constitutional right, it must be waived personally and expressly. Patricia relies on

[3] Patricia's second argument is that she was denied effective assistance of counsel when her trial counsel failed to object to the hearsay testimony. Because we find the admission to be harmless error, there is no need to engage in an ineffective assistance analysis. ***State v. Pharm***, 2001 WI App 167, ¶26, 238 Wis. 2d 97, 617 N.W.2d 163 (if the defendant fails to show prejudice, the court need not address deficient performance).

State v. Huebner, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, and ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), claiming that these cases effectively overruled ***State v. Simpson***, 185 Wis. 2d 772, 519 N.W.2d 662 (Ct. App. 1994), and ***State v. Wilson***, 179 Wis. 2d 660, 508 N.W.2d 44 (Ct. App. 1993). Both ***Simpson*** and ***Wilson***, citing ***State v. Albright***, 96 Wis. 2d 122, 291 N.W.2d 487 (1980), held that circuit courts are not required to undertake an on-the-record colloquy with the defendant regarding the right to testify. ***Simpson***, 185 Wis. 2d at 779; ***Wilson***, 179 Wis. 2d at 672 n.3. Rather, as noted above, the test is whether the record reflects a knowing and voluntary waiver. Neither ***Huebner*** nor ***Klessig*** addresses the right to testify. Therefore, ***Albright***, ***Simpson*** and ***Wilson*** remain good law, and a personally expressed waiver of Patricia's right to testify was not required.

¶9 Patricia next argues that even if the right to testify does not require an express and personal waiver, the totality of the record shows that the State failed to prove that Patricia's waiver of that right was knowing and voluntary. In support of her position, Patricia indicates that at the time of trial she was taking multiple medications, some of them psychotropic. To show that these medications rendered her waiver invalid, Patricia points to the testimony of her trial attorney, who testified at a postconviction hearing[4] that "about 70 percent of the time it was very difficult to talk about the case with her because of her psychological state." Patricia herself testified at the hearing that on the day of the trial she had not known it was her decision whether or not to testify.

[4] Patricia's appellate counsel moved for a new trial, and Patricia's trial counsel testified at the hearing on that motion.

¶10 In contrast, Patricia's trial attorney testified that Patricia understood her right to testify and waived it knowingly and voluntarily. Patricia's trial attorney testified that although he advised Patricia not to testify, he made it clear to her that it was her decision whether or not to do so. He said that if Patricia had insisted on testifying he would have put her on the stand, as he has done in other cases. In his opinion, Patricia understood that she could make a choice contrary to his advice. He stated that Patricia was capable of making major decisions even though she was emotionally stressed during the trial.

¶11 The trial court heard this conflicting testimony and concluded that Patricia's trial attorney was more credible than Patricia and that Patricia's waiver was knowing and voluntary. The trial court is the ultimate arbiter of witness credibility. ***State v. Hahn***, 2000 WI 24 ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. Our review of the record reveals nothing to undermine the circuit court's determination. We conclude that Patricia's waiver was knowing and voluntary.

By the Court.—Judgment and order affirmed.

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