COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0476-CR **Cir. Ct. No. 01CF004093**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS HENTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Dennis Hentz appeals from: (1) a judgment, entered after a jury trial, convicting him of one count of felony murder—armed robbery, party to a crime, as a habitual offender, pursuant to WIS. STAT.

§§ 940.03, 939.05, and 939.62 (2001-02),[1] and one count of possession of a firearm by a felon, as a habitual offender, pursuant to WIS. STAT. §§ 941.29(2) and 939.05; and (2) an order denying his motion for postconviction relief. Hentz contends that the trial court erroneously exercised its discretion when it denied his motion for a mistrial and his request for a *falsus in uno* jury instruction. Because the trial court properly denied both his motion for a mistrial and his request for a *falsus in uno* instruction, this court affirms.

I. BACKGROUND.

¶2 On July 29, 2001, at around noon, Barbara Johnson arrived at the liquor store owned by Carlos Ramos. Johnson worked at the liquor store, and upon her arrival, Ramos was relieved of his duties at the front counter and retired to his apartment, which is attached to the liquor store, leaving Johnson and another male employee in charge. Around one hour later, two men entered the liquor store. Johnson subsequently identified the men as Hentz and Julious King. King eventually approached Johnson at the counter and asked for a bottle of liquor that was on a shelf behind her. She took the bottle from the shelf, and as she went to place it on the counter she noticed that King was holding what appeared to be a small silver handgun. He placed his hand, with the gun, on the counter and told her: "This is a robbery, give me all of the money in the register." Johnson gave King all of the money in the register, and King ordered her to get down on the floor. Johnson proceeded to crouch behind the counter, and heard footsteps running toward the back of the store, some scuffling, and then two to four gun

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

shots from the direction of Ramos' apartment. She rose from her crouched position, saw King and Hentz running from the back toward the front of the store, and crouched back behind the counter after King pointed the gun at her a second time. After King and Hentz exited the store, she ran to Ramos' apartment and saw him sitting on the floor, covered in blood.

¶3 King was interviewed by the police while hospitalized for a bullet wound. He first told the police that he was unarmed and unaware of Hentz's intentions to rob the store. He claimed that Hentz grabbed a six-pack of beer from the water cooler, handed it to him, and then went to the rear of the store. He said that he (King) went to the counter, put the beer down, and saw Hentz display a handgun. King said that Hentz pointed the gun at the male employee and at Johnson and told Johnson to give King the money. King said that he took the money, and Hentz went to the back of the store with the male employee, while King remained at the front counter. He said he then heard some commotion and Hentz yelling "JuJu," King's nickname. King said he then heard three or four gunshots, a door flew open, and Hentz came running out. He said that he looked into the doorway, saw blood on the wall, and then heard two gunshots and felt stinging in his chest, after which time he ran out of the store.

¶4 On July 31st, after being advised of his rights, King told the police that he was armed during the robbery and that he demanded the money from Johnson after Hentz yelled: "Give him the money." He also said that as soon as he took the money, he heard a scuffle and Hentz call "JuJu." He claimed he then ran to the back of the store and saw Hentz in a room adjacent to the liquor store. Hentz was at the other end of a hallway, standing next to the male employee, holding his gun up in the air. King related that a man (Ramos) then jumped from the living room and grabbed King's gun. He recalled that while struggling with

the man, the gun went flying, and he pushed the man away. In the meantime, the male employee started punching King in the head. After he struggled with the employee and pushed him away, he heard three or four gunshots. He said that he saw Hentz firing the shots, and that Hentz was standing over and pointing the gun at the man with whom King had originally been struggling. He said that he turned and began running back into the liquor store as the shots were fired. He then ran back into the room to look for his gun, and observed the man that Hentz shot reaching for it. He said he then turned around, started to run, heard a single shot, and felt pain in the middle of his back. King and Hentz then ran out of the store.

¶5 Hentz was eventually arrested and charged with felony murder and possession of a firearm by a felon. During the trial, the State called Irvin Arcenuax to the stand. Arcenuax was the fiancé of Vicki Luckett, King's mother. Arcenuax testified that at around 1:00 or 1:30 p.m. on July 29, 2001, three men brought King to his house. He did not know two of the men, but knew one of them by the name "Dennis," and he identified Hentz in the courtroom as that person. He estimated that he had known Hentz for fourteen years. He also detailed the conversation he heard regarding what had occurred at the liquor store. On cross-examination, the following exchange occurred:

> [DEFENSE COUNSEL]: And you also said that Dennis, the person you identified as Dennis, was in possession of a black-handled, real long handgun?
>
> [ARCENUAX]: A .9 mm.
>
> [DEFENSE COUNSEL]: Did you tell [the detective] it was a .9 mm?
>
> [ARCENUAX]: That is what it was.
>
> [DEFENSE COUNSEL]: Did you tell [the detective] it was a .9 mm?

> [ARCENUAX]: I can't recall what I told her, but he used to come to the house all the time with that gun in his pocket.
>
> [DEFENSE COUNSEL]: At this point in time I think we need a sidebar.
>
> THE COURT: All right. Sidebar.
>
> (Whereupon, there was discussion held off the record at the bench.)
>
> [DEFENSE COUNSEL]: There is a motion to strike the last portion of that testimony.
>
> ….
>
> THE COURT: All right.
>
> Then at this time the Court will sustain the objection and strike the answer as being nonresponsive to the question.
>
> [DEFENSE COUNSEL]: And, Mr. Arcenuax, I would ask you to pay attention to my questions, and if you could try to be responsive just to the questions?
>
> [ARCENUAX]: Yeah.
>
> [DEFENSE COUNSEL]: Did you tell [the detective] on July 29th that Dennis was in possession of a .9 mm?
>
> [ARCENUAX]: Yes.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [ARCENUAX]: Cause every day –
>
> [DEFENSE COUNSEL]: Thank you, Mr. Arcenuax.
>
> ….

¶6 According to Hentz, defense counsel moved for a mistrial during the sidebar, but the court reserved its ruling on the motion. Defense counsel then moved to strike the nonresponsive answer and the trial court granted that request. After the witness was excused, the following exchange occurred outside the presence of the jury:

THE COURT: I just want to put a sidebar on the record real quick.

[DEFENSE COUNSEL], there was, essentially, a request to reserve the right for a motion for a mistrial. I indicated that I really didn't indicate what I wanted to do, but you want to preserve that, and that is essentially where we left it. Once we reconvened, you then made a motion to strike for being nonresponsive to the question. Essentially, that is what the sidebar was.

[DEFENSE COUNSEL]: That is correct.

Very briefly, I asked Mr. Arcenuax whether he told [the detective] that Mr. Hentz was in possession of the .9 mm, and his response was, he has been carrying that .9 mm, I don't know how many times, regarding the .9 mm. It was unresponsive, and it is 904 evidence.

I didn't think that a jury instruction is sufficient, so I move for a mistrial.

THE COURT: State?

[PROSECUTOR]: I think that the motion to strike as nonresponsive is appropriate. I indicated that at sidebar, and said that I couldn't make that because it wasn't my witness. I had no objection to the motion or to the testimony being stricken.

There can and should be a curative instruction given. Jurors are held to follow those instructions, and I think that is appropriate.

THE COURT: All right….

….

THE COURT: With respect to the motion for a mistrial, I will deny the motion for a mistrial. I feel that the subsequent motion to strike was an appropriate motion. I did grant that motion on that objection.

In terms of the mistrial, at this point in terms of the 904.04 evidence, I don't feel that there is a need for a mistrial. I can deal with it in terms of a cautionary or curative instruction, if you wish, and that is why these things-- The more attention you bring to it, it then seems to sort of have a greater impression. I will instruct the jury

> with respect to any evidence that was struck, that they are to disregard it and not take it into account.
>
> But, you know, if there is a need for an additional curative instruction, I will entertain that request as well.
>
> [DEFENSE COUNSEL]: The 275 instruction in the way of the case law. If we choose not to ask for one, we will let you know.
>
> THE COURT: All right.
>
> At this point the motion for mistrial is denied. I just don't feel there is a basis to grant the motion for a mistrial….

Before the matter was submitted to the jury, Hentz was offered "a more detailed instruction as to ignoring or disregarding the stricken testimony of Mr. Arcenuax[,]" which he declined for tactical reasons.

¶7 Hentz did request a *falsus in uno* instruction, however, based on a claim that King perjured himself when he testified inconsistently with his July 31 statement. The trial court denied that request:

> In terms of 305, or at least the Falsus in Uno instruction, clearly that instruction has fallen out of favor, which essentially is identified or it's not particularly looked upon as being a favored or likely instruction by the State, by the courts in Wisconsin.
>
> The instructions are within the discretion of this Court, and obviously, in terms of any false statements, [defense counsel], you are free to argue in terms of any false statements that you feel that the witnesses' [sic] gave in this matter, and the jury can than weigh based on those false statements. They can judge credibility. I'm going to deny giving the Falsus in Uno instruction.

¶8 Hentz was convicted on both counts following the jury trial. He was sentenced to seventy years on count one, comprised of fifty years of initial confinement and twenty years of extended supervision, and sixteen years on the second count, comprised of eleven years of initial confinement and five years of

extended supervision, to run concurrently with the sentence on the first count. It is from the denial of the motion for mistrial and the denial of Hentz's request for the *falsus in uno* instruction that he now appeals.

II. ANALYSIS.

A. The trial court's denial of Hentz's motion for mistrial was proper.

¶9 Hentz contends that "the record in this case indicates that the defendant's mistrial motion was prompted by counsel's conclusion that the court's action in striking Mr. Arcenuax's answer as non-responsive was not adequate to remove the taint of his repeated attempts to place 'other acts' testimony before the jury." He insists that Arcenuax's testimony constituted prohibited "other acts" testimony, and that it is "clear" that Arcenuax "twice offered this testimony in an attempt to convince the jury that the defendant, whom, he claimed, carried a gun every day was a 'bad man' who must have committed this crime because that's what 'bad men' do: they commit crimes." Accordingly, Hentz contends that striking the nonresponsive answer was not adequate to remove the "taint" of the "other acts" testimony, and that the trial court erroneously exercised its discretion in failing "to address the issue of Mr. Arcenuax's repeated conduct."

¶10 "A motion for a mistrial is addressed to the sound discretion of the trial court, and its decision will not be reversed unless there has been [an erroneous exercise of discretion]." ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). "In such determinations, the curative effect of the court's admonition to the jury to disregard the evidence may be considered." ***Harris v. State***, 52 Wis. 2d

703, 705-06, 191 N.W.2d 198 (1971). Indeed, "[w]e presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). "The denial of a motion for mistrial will be reversed only on a clear showing of an [erroneous exercise] of discretion by the trial court." ***Pankow***, 144 Wis. 2d at 47. Further, "where the defendant seeks a mistrial on grounds not related to the [prosecution's actions], we give the trial court's ruling great deference." ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted).

¶11 In ***Harris***, the supreme court noted that there is a difference between an erroneous admission of a confession and a remark that "does not go directly to the issue of guilt as a confession by the accused." 52 Wis. 2d at 705. The latter remarks are to be "considered in the context of the other facts of the case." ***Id.*** As in ***Harris***, "[h]ere, the remark was stricken as not responsive as to the question and the jury was admonished to disregard it." ***Id.*** at 706. The supreme court concluded, in that case, that "the evidence in support of the guilt [was] so strong and convincing that it render[ed] any potential harmfulness of the remark nugatory." ***Id.*** The trial court came to a similar conclusion. In denying Hentz's motion for postconviction relief, that trial court stated: "The evidence was overwhelming against the defendant, and Arcenuax's testimony, to which the defendant objects, was insignificant in comparison with the overall testimony." We agree.

¶12 Although Hentz undertakes a thorough discussion of the admissibility of "other acts" evidence, and insists that the trial court erred in not doing so, the trial court did not need to address whether the "other acts" evidence was admissible, because it already struck the portion of the testimony that allegedly introduced the "other acts" evidence. Further, "[i]f the trial court's

decision is supportable by the record, we will not reverse even if the trial court gave the wrong reason, or no reason at all[.]" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Here, there was overwhelming evidence introduced to prove that Hentz was in possession of a gun on the day in question. Not only did several witnesses, whether they saw him in the store or after the fact, testify that Hentz had a gun that day, but King also testified that Hentz had his gun pointed at Ramos and shot him in the face. It is reasonable to conclude that the court's admonition to the jury to disregard Arcenuax's statements was sufficient to remove the alleged "taint" of the statements in light of the overwhelming evidence introduced throughout the course of the trial.

B. The trial court's denial of Hentz's request for a falsus in uno *instruction was proper.*

¶13 Hentz argues that although the *falsus in uno* instruction is not favored, "the mere fact that it is no longer favored does not, standing alone, make it inappropriate under any and all circumstances." He insists that the instruction "is appropriate when a witness willfully and intentionally gives false testimony on a material fact of the case[,]" and that King deliberately attempted to mislead the jury, which warranted a *falsus in uno* instruction. The instruction provides:

> If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may disregard all the testimony of the witness which is not supported by other credible evidence in this case.

WIS JI—CRIMINAL 305. The State contends that the denial of the request for the instruction was not clearly erroneous in that "the inconsistencies are not so significant as to plainly show perjury." The State further argues that the trial court gave the jury the standard credibility instruction, which advised the jury to consider each witness's bias and possible motives for testifying falsely, advised

the jury that the fact that a witness has been convicted of crimes bears upon his or her credibility, and instructed the jury to remember that King was involved in the crime and received concessions for his testimony when weighing his testimony. Accordingly, the State insists that "these instructions adequately covered the question of King's credibility." We agree.

¶14 "The decision to give or not to give a requested jury instruction lies within the trial court's discretion. We will not reverse such a determination absent an erroneous exercise of discretion." ***State v. Miller***, 231 Wis. 2d 447, 464, 605 N.W.2d 567 (Ct. App. 1999). A trial court properly exercised its discretion if it "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 415, 320 N.W.2d 175 (1982). Further, "[w]e will not find error if the instructions adequately cover the law applicable to the facts[,]" ***State v. Lagar***, 190 Wis. 2d 423, 433, 526 N.W.2d 836 (Ct. App. 1994), and "[we] must consider the instructions as a whole[,]" ***State v. Robinson***, 145 Wis. 2d 273, 283, 426 N.W.2d 606 (Ct. App. 1988).

¶15 *Falsus in uno* instructions are "not favored." ***Lagar***, 190 Wis. 2d at 433. "In this state, a *falsus in uno* instruction is appropriate only in situations where a witness willfully and intentionally gives false testimony relating to a material fact, and is not proper where there are '[m]ere discrepancies in the testimony that are most likely attributed to defects of memory or mistake.'" ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 659-60, 505 N.W.2d 399 (Ct. App. 1993) (citation omitted).

¶16 It is important to remember that Wisconsin's *falsus in uno* instruction does not mandate, but simply permits the jury to "disregard all the

testimony of the witness *which is not supported by other credible evidence in this case*." WIS JI—CRIMINAL 305 (emphasis added). The *falsus in uno* instruction informs the jurors that they are permitted to disregard testimony that they believe lacks credibility, as do the standard credibility and accomplice instructions. *See* WIS JI—CRIMINAL 300[2] and WIS JI—CRIMINAL 245.[3] As this court has explained:

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[2] WIS JI—CRIMINAL 300 provides, in relevant part:

> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.
>
> In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:
>
> - whether the witness has an interest or lack of interest in the result of this trial;
> - the witness' conduct, appearance, and demeanor on the witness stand;
> - the clearness of lack of clearness of the witness' recollections;
> - the opportunity the witness had for observing and for knowing the matter the witness testified about;
> - the reasonableness of the witness' testimony;
> - the apparent intelligence of the witness;
> - bias or prejudice, if any has been shown;
> - possible motives for falsifying testimony; and
> - all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

(continued)

> The *falsus in uno* instruction informs the jurors that they are allowed to disbelieve, in part or in whole, the testimony of a witness whom they believe has lied. We conclude, however, that the import of the instruction is more than adequately conveyed by the general instruction on credibility and weight of evidence. The principle embodied in the *falsus in uno* instruction is not unique to the law. That one might disbelieve statements of a known liar is, as a matter of common sense, a principle that applies in all aspects of daily living. Jurors, once informed of their role as the sole judges of credibility, need no further instruction on how to assess the credibility of a witness who they believe has given willfully false testimony.

Ollman, 178 Wis. 2d at 662-63 (footnote omitted). Furthermore, in ***Pumorlo v. City of Merrill***, 125 Wis. 102, 111, 103 N.W.2d 464 (1905) (emphasis added), the supreme court stated that in order to grant a request for a *falsus in uno* instruction:

> The court must find something either in the appearance, demeanor, or manner of a witness while testifying, or such a conflict or contradiction between him and the other witnesses in the case, or such an inherent incredibility in the facts testified to by him, as would reasonably *tend to show that the witness willfully swore falsely*. The decision of the question on the evidence by the judge presiding at

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> Then give to the testimony of each witness the weight you believe it should receive.
>
> ….
>
> There is no magic way for you to evaluate the testimony; instead, you should use your common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

[3] WIS JI—CRIMINAL 245 provides:

> You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

> the trial is given much weight, due to his superior advantages for the observation of witnesses while testifying, the understanding of the application of testimony to the facts and circumstances of the case, and the other matters appearing on the trial which throw light on the honesty and fairness of persons testifying.

¶17 Hentz points to several alleged inconsistencies in support of his argument that King attempted to deliberately mislead the jury, including the facts that: (1) King apparently denied first giving a statement to the police indicating that he was an innocent bystander; (2) King first indicated that he "glanced through" the police reports and later admitted that he read through them; and (3) King testified that the only reason he was testifying against the defendant was because he wanted to tell the truth, when he received concessions from the State in exchange for his testimony.

¶18 Not one of these alleged inconsistencies appears to be "related to a material fact" of the case. In support of the first alleged inconsistency, Hentz points to a portion of King's testimony in which King claimed that he does not remember making certain statements and denied making others while being questioned by Hentz's counsel. The crux of the exchange concerns whether King ever told police that he was an innocent bystander or that he did not have a gun. He was not being questioned about what he ultimately insisted happened on July 29. As such, this questioning is geared mainly toward attacking King's credibility, and "[t]he impeachment of a witness with prior statements does not necessarily mean that a *falsus in uno* instruction is appropriate." ***Lagar***, 190 Wis. 2d at 434.

¶19 In support of the second alleged inconsistency, Hentz points to the following exchange:

> [DEFENSE COUNSEL]: By the way, Mr. King your good counsel here gave you a copy of all the police reports that she had; right?

> [KING]: Yes.
>
> [DEFENSE COUNSEL]: And you had a chance to read through all those police reports; right?
>
> [KING]: Yes.
>
> [DEFENSE COUNSEL]: And you have done that; haven't you?
>
> [KING]: I glanced through them; yes.
>
> [DEFENSE COUNSEL]: You glanced over them or did you read them?
>
> [KING]: I went through them; yes.

Again, this exchange was, at most, an "attack" on King's credibility. It does not present an occurrence of willful and intentional false testimony regarding a material fact.

¶20 In regard to the third alleged inconsistency, the State insists that Hentz is not entitled to raise the "[S]tate concessions" issue as a basis for the instruction, because he failed to do so on the trial court level. Assuming *arguendo* that Hentz is entitled to raise this argument on appeal, he provides nothing more than a conclusion that King "was deliberately attempting to mislead the jury when he knowingly denied that the concessions that he expected to receive from the State had any effect on his decision to testify." Hentz provides nothing more to prove that this was willful and intentional false testimony. Nevertheless, this is either a finding of fact or a credibility issue well within the purview of the jury, and it does not appear to concern a witness intentionally swearing falsely as to a material fact of the case.

¶21 Regardless, we conclude that although the reliability of King's testimony may have been in question, under the circumstances, "even if the *falsus in uno* instruction *might* [arguably] have been appropriate[,] … the failure to give

that instruction was not reversible error because the jury was correctly and adequately informed of its general duty to assess credibility and weigh the evidence, and counsel was allowed to argue the inconsistencies to the jury." ***Ollman***, 178 Wis. 2d at 663-64 (emphasis added). The credibility instructions given by the trial court were more than adequate to inform the jurors of their capacity to disregard all or any portions of King's testimony should they determine it to be incredible or unreliable. The trial court appears to have concluded that the credibility instructions would be adequate to allow the jury to properly assess King's testimony. That was reasonable. Because the trial court adequately instructed the jury on credibility determinations and Hentz was given the opportunity to and did argue the credibility issue extensively during his closing argument, this court cannot conclude that the denial of Hentz's request for a *falsus in uno* instruction was clearly erroneous. *See* ***Lagar***, 190 Wis. 2d at 435.

¶22 Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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