COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0477-CR **Cir. Ct. No. 01CF001311**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NELS H. RIETH,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Nels H. Rieth appeals from a judgment entered after a jury found him guilty of arson of a building and theft by fraud, contrary to WIS. STAT. §§ 943.02(1)(b) and 943.20(1)(a) (2001-02).[1] He also appeals from an

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

order denying his postconviction motion. He claims: (1) the trial court erroneously exercised its discretion in admitting certain testimony; (2) the trial court erroneously exercised its discretion in denying his motion for a mistrial based on the admission of certain testimony; and (3) he received ineffective assistance of trial counsel which should, at a minimum, require an evidentiary hearing. Because the trial court did not erroneously exercise its discretion in admitting the challenged testimony or in denying the motion for a mistrial based on the challenged testimony, and because Rieth failed to establish sufficient facts relative to his ineffective assistance of trial counsel claim to require an evidentiary hearing, we affirm.

I. BACKGROUND

¶2 On August 6, 1999, there was a fire at Rieth's home. It was determined that the fire was deliberately set. Police investigation revealed that Rieth discussed with others, a fire at his home two hours before the fire was reported to the fire department. In other words, Rieth knew about the fire before anyone else had discovered it. Rieth was charged with arson and theft by fraud.

¶3 The case was tried to a jury. The State called Paul Ceretto as its first witness. Ceretto, who was employed by Reith, testified that Reith offered him $40,000 if he would burn down the Reith home. Ceretto testified that Reith would frequently discuss solving his financial problems by burning down his home and collecting insurance proceeds. Ceretto testified he knew that Rieth had made a similar proposition to Todd Warner.

¶4 Warner also testified for the State. Warner had been employed by Rieth. In January 1999, Warner was in an accident while driving a plow owned by Rieth. On October 3, 1999, Warner was sued as a result of that accident. There

was some suggestion that these circumstances created motivation for Warner to blame Rieth for the fire. On October 4, 1999, Warner went to the police and gave a statement implicating Rieth in the August 6, 1999 fire.

¶5 Peter Thigpen then testified. He told the jury about a conversation he had with Ceretto between December 1999 and April 2000. During this conversation, Ceretto told Thigpen about Rieth's arson proposition. Thigpen recounted that Rieth offered Ceretto $30,000 and a Jeep to burn down the Rieth home.

¶6 The jury found Rieth guilty. Rieth's postconviction motion was denied. He now appeals.

II. DISCUSSION

A. Evidentiary Admission.

¶7 Rieth claims the trial court erroneously exercised its discretion in allowing Thigpen to testify about a statement Ceretto made to him. He claims the statement was inadmissible because it did not satisfy the criteria of a prior consistent statement. Specifically, he argues that the Thigpen-Ceretto conversation did not pre-date the alleged motive of Ceretto to fabricate his testimony that Rieth wanted Ceretto to burn down Reith's home. The State disputes Rieth's timeline characterization, and also argues that the statement was admissible under the catch-all hearsay exception, WIS. STAT. § 908.03(24).

¶8 In reviewing evidentiary rulings, our determination is limited to whether the trial court erroneously exercised its discretion. If the trial court applied the facts to the law and reached a reasonable determination, we will affirm. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶9 The trial court admitted Thigpen's statement pursuant to the hearsay exception, WIS. STAT. § 908.01(4)(a)2, which provides:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> ….
>
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

¶10 It is clear that Rieth's theory of the case was that Warner made the arson accusations against Rieth out of revenge. Warner went to the police and made his statement implicating Rieth one day after he was sued as a result of the snow plow accident. Warner and Ceretto were friends, and Rieth contended that the two agreed to lie to get back at him.

¶11 Rieth contends that the Thigpen-Ceretto conversation took place after Warner solicited Ceretto to corroborate Warner's fabrication that Rieth was looking for someone to help him burn down his home. He points out that Warner went to police in October 1999, and that the Thigpen-Ceretto conversation did not occur until December 1999, or later. Accordingly, he contends the Thigpen testimony does not qualify as a prior consistent statement. The State responds that it was reasonable for the trial court to infer that the Thigpen-Ceretto conversation predated the motive to fabricate. Although Warner went to the police in October 1999, there was no evidence presented regarding the time parameter relevant to Ceretto's motive to fabricate. Warner could have approached Ceretto well after his police statement. There was no evidence demonstrating that Ceretto's motive

to fabricate (in order to back up his friend Warner) occurred before the Thigpen-Ceretto conversation. Accordingly, the trial court could reasonably conclude that the Thigpen statement satisfied the criteria as a prior consistent statement.[2]

¶12 Moreover, even if the statement should have been excluded, its admission was harmless. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Thigpen's testimony was cumulative to the testimony offered by Ceretto and, therefore, there is no reasonable possibility that this evidence contributed to the jury's verdict. The State's case against Rieth was strong and did not rise or fall on the Thigpen testimony.

B. Mistrial.

¶13 Rieth also argues that the trial court erroneously exercised its discretion in denying his motion for a mistrial based on the admission of the Thigpen testimony. We reject this argument.

¶14 Whether to grant a mistrial rests within the discretion of the trial court. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must determine whether the error was sufficiently prejudicial, in the context of the entire proceeding, to justify a new trial. ***Id.***

¶15 Here, we have concluded that the trial court did not err in admitting Thigpen's testimony and that, even if it was error, it was harmless. Accordingly, there is no basis for Rieth's mistrial claim of error.

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[2] Rieth also argued that this hearsay exception did not apply because he did not have the opportunity to cross-examine Ceretto about the statement made to Thigpen. We reject his complaint. Rieth was offered the opportunity to cross-examine Ceretto, and he declined. Accordingly, he waived his right to object on this basis.

C. Ineffective Assistance.

¶16 Rieth's final claim is that he received ineffective assistance of trial counsel. He claims that trial counsel was ineffective for failing to preserve the issue of "sleeping and inattentive jurors," or to move for a mistrial after being informed that at least one of the jurors slept through a substantial portion of the testimony.

¶17 To establish ineffective assistance, Rieth must show that counsel's performance was deficient and that the deficient performance prejudiced the outcome. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If he cannot make both showings, his claim fails. ***Id.*** To be entitled to an evidentiary hearing, Rieth may not rely on conclusory allegations. If the claim is conclusory in nature, or if the record conclusively shows the appellant is not entitled to relief, the trial court may deny the motion without an evidentiary hearing. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 313-18, 548 N.W.2d 50 (1996). To obtain an evidentiary hearing on the ineffective assistance of counsel claim, the appellant must allege with specificity both deficient performance and prejudice in the postconviction motion. ***Id.*** at 313-18. Whether the motion sufficiently alleges facts which, if true, would entitle the appellant to relief is a question of law to be reviewed independently by this court. ***Id.*** at 310. If the trial court refuses to hold a hearing based on its finding that the record conclusively demonstrates that the defendant is not entitled to relief, this court's review of that determination is limited to whether the court erroneously exercised its discretion in making that determination. ***Id.*** at 318.

¶18 Here, Rieth submitted affidavits from individuals watching the trial who averred to have seen one or two jurors sleeping or dozing through substantial

portions of the testimony. Three of the affiants stated that they were "personally aware that the juror's behavior was called to the attention of the defendant's attorney." Rieth also submitted a letter from his sister who stated that she observed one juror dozing and another juror "sleeping soundly" during the trial. She indicated that the family told Rieth about the sleeping jurors on the second day of trial, and that on the fourth day of trial, Rieth asked the family to repeat the information to his trial counsel.

¶19 Rieth has failed to satisfy the requisite burden to necessitate an evidentiary hearing. Although he has alleged that there were one or two problematic jurors, he has not demonstrated deficient performance or prejudice. He failed to submit any specific facts indicating that trial counsel failed to discuss this issue with him, that trial counsel acted in negligent disregard once this information was received, or that trial counsel ignored Rieth's desire to raise the issue with the trial court. The absence of this averment leaves this court with the reasonable inference that trial counsel was not deficient in failing to raise any issue regarding the sleeping jurors, but rather, strategically kept silent in the hopes of a positive result. "A party who learns of a misconduct of a juror during trial may not keep silent and then attempt to take advantage of it in the event of an adverse verdict." ***State v. Henderson***, 355 N.W.2d 484, 485 (Minn. App. 1984).

¶20 Moreover, Rieth has failed to establish sufficient facts on the prejudice portion of the ineffective assistance test. First, it is undisputed that one of the problematic jurors was excused for cause before the case was submitted to the jury. Second, the letter from Rieth's sister states that the trial court instructed jurors to do whatever was necessary to "stay awake" such as chewing gum or bringing drinks into the courtroom. There is no specific factual allegation in the

remainder of Rieth's submissions that the juror inattentiveness occurred after the trial court's instruction.

By the Court.—Judgment and order affirmed.

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