COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 15, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2769-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALAN DAVID MC CORMACK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Burnett County: HARRY F. GUNDERSEN and JAMES H. TAYLOR, Judges. *Affirmed*.

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

PER CURIAM. Alan David McCormack appeals a judgment convicting him of first-degree murder and an order denying his postconviction motion. He argues that his confession should have been suppressed as involuntary because he had been awake for more than twenty-four hours at the time he signed it, that the trial court improperly exercised its discretion when it

denied his request to substitute attorneys on the first day of trial and that his trial counsel was ineffective in eight respects. We reject these arguments and affirm the judgment and order.

McCormack's brother discovered the body of Diane Larson during a visit to the McCormack family cabin in Wisconsin. He returned to the family home in Minnesota and notified the police of the discovery. McCormack then accompanied the officers to the police department for questioning. After making numerous inconsistent and fanciful statements to the police regarding five men who broke into his house looking for Diane and stealing his gun, McCormack accompanied the officers to the cabin in Wisconsin. After a two-hour ride during which McCormack sat in the back seat with his eyes closed, they arrived at the cabin where they found the body and other evidence. Several hours later, the officers drove McCormack to the police station in Wisconsin where they again questioned him and he made both oral and written confessions.

McCormack's statements were not involuntary or the result of police coercion. To prevail on a challenge to the voluntariness of the statement, McCormack must prove that there was coercive conduct on the part of the police. *See* ***State v. Deets***, 187 Wis.2d 630, 635, 523 N.W.2d 180, 182 (Ct. App. 1994). The statement is voluntary if it was the product of a free and rational choice under the totality of the circumstances. *See* ***State v. Moats***, 156 Wis.2d 74, 94, 457 N.W.2d 299, 308 (1990). The trial court found that the officers gave McCormack no promise of leniency and made no threats or coercive comments. The officers complied with McCormack's requests for water and to use the rest room. At McCormack's request, they called both his father and his girlfriend. McCormack never requested that he be allowed to sleep and never told the officers he was too tired to continue. He never complained of fatigue and there was evidence from which the trial court could find McCormack slept during the ride to the scene. McCormack was cooperative and appeared fully awake and lucid, and before signing the written confession made corrections to the document drafted by the police. McCormack was informed of his ***Miranda*** rights several times and knew he was free to discontinue the interrogation at any time. Under the totality of these circumstances, his statements were voluntary.

The trial court properly refused to allow McCormack to fire his trial attorney immediately before the start of jury selection. While the trial court gave no reason for its decision, we will affirm its discretionary decision if our independent review of the record establishes a basis for the trial court's decision. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). The record provides an adequate basis for denying McCormack's request. First, he established no significant conflict between his counsel and himself. McCormack was upset that his counsel did not retain an investigator to inspect the scene of the crime. He has not indicated what he believes the investigator would have found. He also stated he did not like his previous attorney and felt he had been inadequately represented throughout the proceedings. Problems with his previous attorney do not provide a basis for his eleventh hour attempt to substitute attorneys again. Finally, he indicated that family members had made some "preliminary arrangements" to retain private counsel. He gave no indication that substitute counsel would be prepared to try the case within a short time. The court could also have reasonably considered the fact that McCormack had fired previous counsel. Because alternative counsel was not presently available to try the case and that would considerably delay the trial and inconvenience the parties and witnesses, the court properly denied the request to substitute counsel. *See* ***State v. Lomax***, 146 Wis.2d 356, 360, 432 N.W.2d 89, 91 (1988).

McCormack has not established ineffective assistance of trial counsel. To establish ineffective assistance of counsel, McCormack must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If he makes an insufficient showing on one prong of the test, this court need not examine the other prong. ***Id***. at 697. Counsel's strategic choices are virtually unchallengeable. ***Id***. at 690.

Three of McCormack's ineffective assistance claims do not meet the first prong of the test because they are strategic decisions. McCormack argues that counsel presented an illogical defense based on McCormack's nonviolent nature, opening the door to damaging rebuttal evidence. The reasonableness of counsel's actions may be determined or substantially influenced by McCormack's own actions. ***Id***. at 691. Trial counsel testified at the postconviction hearing that McCormack, not counsel, chose this line of defense.

There is no basis for challenging counsel's strategic choice regarding the line of questioning employed against the police interrogator during cross-examination. Counsel tried to establish from the interrogator that McCormack's confession was unreliable. McCormack argues that the questioning instead reiterated McCormack's involvement in the crime and highlighted his confession. The decision to attempt to undermine the confession was a reasonable trial strategy not subject to review by hindsight. ***Id***. at 689.

Next, McCormack argues that his trial counsel should have called to the stand at the ***Goodchild*** hearing a police officer who was falling asleep during McCormack's confession. McCormack has not established that this testimony would be significant. Individuals have varying needs for sleep, and the fact that the officer was sleepy does not prove that McCormack was so sleepy that his confession was involuntary. Counsel's strategic decision to omit the officer's testimony does not constitute deficient performance.

The remainder of McCormack's ineffective assistance claims fail to meet the prejudice prong. This prong requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. ***Strickland***, 466 U.S. at 687. McCormack alleges that counsel talked only briefly with defense witnesses before placing them on the stand and failed to adequately prepare McCormack to testify. McCormack has not indicated any additional information or altered testimony that would have occurred had counsel spent more time preparing witnesses.

McCormack argues that he was prejudiced by counsel's failure to adequately investigate the case prior to trial. Specifically, he contends that counsel could have discovered evidence that Larson knew of an insurance policy obtained by McCormack that made him a co-beneficiary. Even if Larson was aware of the policy, that fact does not tend to reduce McCormack's motive for murdering her.

McCormack also argues that counsel failed to obtain an independent fingerprinting of the shotgun and shells. Only McCormack's fingerprints were identified by the state crime lab analyst. McCormack owned the gun, and admittedly handled it just before the shooting. McCormack does

not explain how an independent fingerprinting of the evidence would be exculpatory.

McCormack also argues that his trial counsel was ineffective for failing to have the opening and closing statements recorded. He identifies no specific prejudice that resulted from this omission.

Finally, there is no basis for granting a new trial in the interest of justice. We conclude that the real controversy was fully and fairly tried. McCormack's counsel was not able to put on a persuasive defense, not due to any defects in the trial, but because admissible evidence overwhelmingly showed McCormack is guilty of murdering Diane Larson.

By the Court.—Judgment and order affirmed.

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