COURT OF APPEALS
DECISION
DATED AND RELEASED

August 8, 1995

No. 95-0225-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT HEIMERMANN,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., ARLENE D. CONNORS and DAVID A. HANSHER, Judges.[1] *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

[1] The Honorable Laurence C. Gram, Jr. presided over the trial. The Honorable Arlene D. Connors decided Heimermann's postconviction motions by orders dated November 23, 1992, and August 16, 1993. The Honorable David A. Hansher presided over the ***Machner*** hearing, and denied Heimermann's ineffective assistance of counsel claim by order dated January 10, 1995. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

PER CURIAM. Scott A. Heimermann appeals from a judgment of conviction for two counts of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. He also appeals from orders denying his postconviction motions. Heimermann raises six issues for our consideration: (1) whether he received ineffective assistance of counsel; (2) whether he is entitled to a new trial in the interests of justice, pursuant to § 752.35, STATS.;[2] (3) whether the trial court erred in concluding that affidavits submitted by prison inmates did not constitute newly discovered evidence; (4) whether the trial court erroneously exercised its discretion in limiting the admission of evidence concerning a co-conspirator's alleged connections with the mafia; (5) whether the trial court erred in determining that aiding a felon by destroying physical evidence is not a lesser-included offense of first-degree intentional homicide; and (6) whether the trial court erred in refusing to give WIS J I—CRIMINAL 245. Because we resolve each of these issues in favor of upholding the judgment, we affirm.

I. BACKGROUND

The State charged Heimermann, Edward Piscitello, and Joseph Isajiw with two counts of first-degree intentional homicide as parties to the crime. The two victims of the homicide were Muhammad Binwalee, known as "T.C.," and Dion Russell. In early August 1989, T.C. and Russell were shot to death and buried in the basement of a Milwaukee residence where Heimermann and Piscitello lived. Their remains were not discovered until March 8, 1991.

---

[2] Section 752.35, STATS., provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Heimermann's trial took place in December 1991. During the trial, Isajiw testified that he came to Milwaukee during the summer of 1989 to purchase cocaine, and through his renewed acquaintance with Heimermann, he was introduced to a drug dealer named T.C. He also indicated that he became friendly with Piscitello. Isajiw testified that Piscitello was feuding with T.C. because T.C. had "shorted" Piscitello in some cocaine purchases. As a result of this feud, Isajiw indicated that Piscitello talked about killing T.C. Isajiw described the events of the day before the murder: He said that Piscitello told Heimermann and him that he (Piscitello) had a plan; that he took them down into the basement of the residence and pointed out some dirt areas, indicating that these dirt areas could be used to bury the bodies of T.C. and Russell, who was T.C.'s bodyguard; that Heimermann was to phone T.C. to order some cocaine as a pretext of getting T.C. to the residence; that when T.C. and Russell arrived, Heimermann should lead them down into the basement, where Isajiw would be waiting with a .380 caliber revolver; that Piscitello would follow them down into the basement and use his .45 caliber revolver; and that Heimermann responded that the plan was "okay."

Isajiw also testified about the day of the murder. He indicated: that Heimermann made the phone call as planned; that when T.C. and Russell showed up, Heimermann led them downstairs; that as soon as Heimermann turned the corner, Piscitello opened fire and that he (Isajiw) began firing his weapon; that although Russell was down, he was not dead and Piscitello put his revolver to Russell's chest, placed a pillow over it and fired. Further testimony from Isajiw revealed the post-murder activities: the conspirators took the victim's cocaine, a .25 caliber revolver, a gold watch and jewelry; Piscitello and Isajiw took T.C.'s car and abandoned it in another part of town; Heimermann followed the men in a car and picked them up; a short time later, they returned to the residence and took turns digging holes in the basement floor; they put the two bodies in the holes, covered the bodies with dirt, and then cemented over the area with recently purchased concrete mix.

Following the murders, the three conspirators went their separate ways, although testimony indicated there was some contact between them. In defense of himself, Heimermann testified that he was not involved in the "planning" and he did not know that the intent was to murder these men. He indicated that he was surprised when Piscitello and Isajiw discharged their weapons. He testified that it was out of fear of Piscitello's connections with the mafia that he went along with the post-murder activities.

The jury convicted Heimermann and he was sentenced in February 1992. In November 1992, he filed a motion for a new trial, claiming the trial court erred in excluding certain witness testimony and in refusing to give WIS J I—CRIMINAL 245, and that newly discovered evidence of Piscitello and Isajiw's jailhouse confessions to other inmates that Heimermann did not have prior knowledge of the killings, justified granting a new trial. This motion was denied. In August 1993, Heimermann filed additional postconviction motions, alleging that he received ineffective assistance of counsel, a lesser-included offense instruction should have been given, and prosecutorial misconduct contributed to his conviction. The trial court rejected all but the ineffective assistance claim, indicating that a ***Machner*** hearing was necessary to resolve the claim.[3] The hearing was held in December 1994, and the trial court determined that Heimermann received effective assistance. He now appeals.

[3] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

II. DISCUSSION

A. Ineffective Assistance Claim.

Heimermann claims he received ineffective assistance because his trial counsel never discussed the propriety of requesting the lesser-included offense instruction for second-degree intentional homicide, based on the coercion defense. *See* § 940.01(2), STATS.[4] The trial court found that trial counsel's performance was not deficient.

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.*** at 687. This demonstration must be accomplished against the "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis.2d at 127-128, 449 N.W.2d at 848 (citation omitted).

---

[4] Section 940.01(2), STATS., provides in pertinent part:

> MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ....
>
> (d) *Coercion; necessity*. Death was caused in the exercise of a privilege under s. 939.45 (1).

At the ***Machner*** hearing, trial counsel testified that Heimermann insisted that he had no knowledge of Piscitello and Isajiw's intent to commit the murders and that he participated in the post-murder conduct because he feared Piscitello. Trial counsel explained that the coercion element to their defense related only to the post-murder activities. Heimermann testified at the ***Machner*** hearing that he was not coerced into making the phone call to T.C., and that he was not coerced into leading T.C. and Russell into the basement. Heimermann insisted only that he was unaware of Piscitello and Isajiw's plan to kill. Heimermann admitted that he had agreed to an all or nothing strategy for his defense.

Heimermann produced a letter dated December 11, 1991, that he purportedly gave to trial counsel during the trial. The letter discussed the possibility of seeking a reduction in charges. Trial counsel testified at the ***Machner*** hearing that he does not recall ever seeing the letter. Heimermann's appellate counsel represented to the trial court that this letter was not contained in trial counsel's file. The trial court found that this letter was "incredulous." Based on trial counsel's representations that he had never seen this letter, that Heimermann had agreed to an all or nothing defense strategy and the fact that this letter was absent from the trial file, this finding is not clearly erroneous.

We conclude that Heimermann has not satisfied his burden of proving that trial counsel's performance was deficient. The record demonstrates that Heimermann agreed to pursue an all or nothing defense; and that Heimermann's testimony, in fact, did not allow for an instruction on second-degree intentional homicide instruction because the only coercive evidence related to his post-murder conduct.

Because we conclude trial counsel's performance was not deficient, we need not address the second prong of the ***Strickland*** test. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848.

B. Discretionary Reversal.

Heimermann contends that we should exercise our discretionary authority pursuant to § 752.35, STATS., to reverse his judgment of conviction and

order a new trial "in the interests of justice" because the real controversy was not tried. He claims that the trial court's exclusion of a variety of testimony prevented him from receiving a fair trial. Specifically, Heimermann asserts that the trial court should have received testimony: (1) regarding other attempts on the victim's lives that were foiled by Heimermann; (2) from defense witnesses Gail Grady and Bobby Lang, which was intended to support his coercion defense; and (3) from state witnesses, Joanne Danbrova and Isajiw, during cross-examination, regarding Piscitello's connections to the mafia.

We may exercise our discretionary power of reversal if we conclude that the "jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." ***State v. Wyss*** 124 Wis.2d 681, 735, 370 N.W.2d 745, 770-71 (1985). In reviewing Heimermann's claim, we note that exclusion of evidence is addressed to the discretion of the trial court. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983).

Heimermann's complaint with respect to the "prior foiled attempts defense" relates solely to a potential witness, Ann Schrader. Her testimony was not actually excluded by the trial court. Rather, trial counsel decided not to call her because when he spoke with her, she told trial counsel she would "bury" Heimermann. The trial court did allow Heimermann to testify regarding this defense. Based on the foregoing, Schrader's testimony would not have been important testimony for the defense.

Heimermann's next complaint involves the trial court's exclusion of testimony from witnesses, Gail Grady and Bobby Lang, who were supposed to testify regarding Piscitello's violent character and his coercive nature. The trial court excluded this evidence on the basis of relevance. Section 904.01, STATS.[5] The trial court reasoned that since the defense did not allege or present any credible evidence that Heimermann was coerced into action on the night of the murders, character evidence about Piscitello would not make the fact of

[5] Section 904.01, STATS., provides:

> **Definition of "relevant evidence."** "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

consequence (whether Heimermann had prior knowledge that Piscitello and Isajiw were planning to murder T.C. and Russell) any more or less probable. We agree with the trial court's assessment.

Finally, Heimermann claims that the trial court limited cross-examination of two witnesses for the State regarding Piscitello's connections with organized crime. The trial court excluded this testimony on the basis that it was inadmissible character evidence. Section 904.04, STATS. We agree. In addition, this evidence is irrelevant for the same reasons Grady and Lang's testimony was irrelevant. All the evidence presented on coercion related to post-murder conduct. Therefore, it was not relevant to the issue presented to the trial court.

C. Newly Discovered Evidence.

Heimermann next claims that he is entitled to a new trial based on newly discovered evidence—affidavits of three inmates, who attest that Piscitello and Isajiw told them that Heimermann was not involved in planning the murders. Heimermann submitted affidavits from: (1) Richard Allen Miles, who was a cellmate with Piscitello; (2) Clifton Wells, who had conversations with Isajiw; and (3) Richard Player Paul, who shared a cell-hall with Isajiw. The trial court rejected Heimermann's argument because the affidavits were not corroborated by other evidence. *See* ***Nicholas v. State***, 49 Wis.2d 683, 694, 183 N.W.2d 11, 17 (1971) (holding that "a new trial may be based on an admission of perjury only if the facts in the affidavit are corroborated by other newly discovered evidence").

In order to succeed on this claim, Heimermann must show by clear and convincing evidence that: (1) the evidence must have been discovered by the moving party after trial; (2) the moving party must not have been negligent in failing to discover the evidence prior to trial; (3) the evidence must be material to a contested issue at trial; (4) the evidence must not be merely cumulative to testimony already introduced at trial; and (5) the evidence must raise a reasonable probability that a different result would be reached at a new trial. ***State v. Bembenek***, 140 Wis.2d 248, 252, 409 N.W.2d 432, 434 (Ct. App. 1987). Whether the evidence qualifies as newly discovered evidence is a

constitutional issue independently reviewed on appeal. ***Id.*** at 252, 409 N.W.2d at 434.

Our supreme court has held that affidavits admitting perjury, standing alone, are not sufficient to support a request for a new trial. ***Zillmer v. State***, 39 Wis.2d 607, 616, 159 N.W.2d 669, 673 (1968). We recently re-affirmed this holding in ***State v. Marcum***, 166 Wis.2d 908, 928, 480 N.W.2d 545, 555 (Ct. App. 1992) (absent other newly discovered evidence, a recantation is of no legal significance). Heimermann has not presented any other evidence to corroborate the facts contained in the inmate affidavits. Thus, the affidavits submitted by Heimermann are insufficient to warrant a new trial. In fact, these affidavits are not true recantations by a *witness*. There is no affidavit from Isajiw, the witness, who allegedly perjured himself. The affidavits are from other individuals who are repeating what Isajiw allegedly told them. For these reasons, we must reject Heimermann's claim.

D. Limiting Testimony Regarding Mafia Connection.

Heimermann next claims that the trial court erred in excluding certain testimony intended to elicit Piscitello's connections with organized crime. The trial excluded it as irrelevant. Section 904.01, STATS.

A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal where the trial court "examined the facts of record, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion." ***State v. Hamm***, 146 Wis.2d 130, 145, 430 N.W.2d 584, 591 (Ct. App. 1988).

As noted earlier in this opinion, the trial court did not erroneously exercise its discretion in excluding testimony regarding Piscitello's mafia connections because this testimony was not relevant to a fact of consequence. Because a defendant's constitutional right to present a defense extends only to *relevant* evidence, the exclusion here was not violative of Heimermann's rights. ***State v. Pulizzano***, 155 Wis.2d 633, 646, 456 N.W.2d 325, 330-31 (1990).

E. Lesser-Included Offense.

Heimermann claims the trial court erred in refusing to instruct the jury on the crime of aiding a felon by destroying physical evidence. Section 946.47(1)(b), STATS.; WIS J I—CRIMINAL 1791. He had requested that this crime be submitted as a lesser-included offense. The trial court held that this crime does not constitute a lesser-included offense of first-degree intentional homicide, § 940.01(1), STATS. We agree.

In determining whether the record requires the submission of a lesser-included offense, Wisconsin generally employs the "elements only" test. ***State v. Carrington***, 134 Wis.2d 260, 264, 397 N.W.2d 484, 486 (1986). With respect to homicides, however, a crime which is a less serious type of criminal homicide than the one charged constitutes a lesser-included offense. Section 939.66(2), STATS. The instruction Heimermann requested does not satisfy either test.

A comparison of the elements of § 940.01(1) and § 946.47(1)(b), STATS., reveals that the latter requires proof of elements that are not included in the former.[6] Hence, the elements only test cannot be satisfied. *See* ***Carrington***, 134 Wis.2d at 265, 397 N.W.2d at 486 (elements only test is not satisfied if the purported lesser-included offense requires proof of elements that are not included in the greater offense).

---

[6] Section 940.01(1), STATS., provides:

> OFFENSE. Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

Section 946.47(1)(b), STATS., provides:

> (1) Whoever does either of the following is guilty of a Class E felony:
>
> (b) With intent to prevent the apprehension, prosecution or conviction of a felon, destroys, alters, hides, or disguises physical evidence or places false evidence.

Further, aiding a felon under § 946.47(1)(b), STATS., is not a "less serious type of criminal homicide" than first-degree intentional homicide. Aiding a felon is not even a homicide.

Accordingly, we reject Heimermann's claim that the trial court erred in refusing to instruct the jury on aiding a felon.

F. WIS J I—CRIMINAL 245.

Finally, Heimermann claims that the trial court erred in declining to give a cautionary instruction on the use of accomplice testimony contained in WIS J I—CRIMINAL 245. The trial court declined to give instruction 245 based on Wisconsin case law, which indicates this instruction should be given where an accomplice's testimony against the defendant is not corroborated by any other evidence. ***Bizzle v. State***, 65 Wis.2d 730, 734, 223 N.W.2d 577, 579 (1974).

"A trial court has wide discretion as to instructions." ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). "If the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions even though the refused instructions themselves would not be erroneous." ***Id.*** *See also* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis.2d 306, 334, 475 N.W.2d 587, 597 (Ct. App. 1991) (trial court's discretion will not be upset if the charge, taken in its entirety correctly states the law).

WIS J I—CRIMINAL 245 provides in pertinent part: "But ordinarily, it is unsafe to convict upon the uncorroborated testimony of an accomplice. Therefore, you should examine this evidence with the utmost care and caution, scrutinize it closely, and weigh it in the light of all of the attending circumstances as shown by all of the evidence."

The purpose of the instruction is to caution the jury to examine closely an accomplice's incriminating testimony when there is no other evidence corroborating the accomplice's representations. ***Bizzle***, 65 Wis.2d at 734, 223 N.W.2d at 579. This cautionary instruction is not required when corroboration

exists. ***Id.*** In the instant case, it was not error to decline to give the instruction because there was both physical evidence and other witness testimony in this record that corroborated Isajiw's testimony. Isajiw testified that two weapons were used to kill the victims, a .380 caliber revolver and a .45 caliber revolver. The physical evidence showed that all the bullets and cartridges recovered from the murder scene and from the victims' bodies were either .380 caliber or .45 caliber. Heimermann testified that he was not coerced into phoning the victims and leading them down into the basement. Isajiw testified that this was the exact plan that had been discussed. Another witness, Danbrova, testified that she overheard a conversation between Piscitello and Heimermann concerning T.C. She indicated that the two men were angry at T.C. and Heimermann stated that in order to get to T.C. they would have to "go through his bodyguard," meaning kill the bodyguard. Her testimony corroborates Isajiw's testimony that Heimermann was involved in the planning of the murders.

Based on the foregoing, it was not error for the trial court to decline to give instruction 245. The trial court did instruct the jury regarding general credibility of witnesses, which was all that was required under the facts of this case.

By the Court.—Judgment and orders affirmed.

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