COURT OF APPEALS DECISION DATED AND RELEASED

November 14, 1996

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, 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. 95-3173-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL G. KINCH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Michael G. Kinch appeals from a judgment of conviction for carrying a concealed weapon, § 941.23, STATS.; resisting or obstructing an officer, § 946.41(1), STATS.; and for escape, § 946.42(3)(a), STATS.; and order denying postconviction relief. Specifically, he argues that the circuit court erred in giving the *falsus in uno* jury instruction under the facts, and that he received ineffective assistance of trial counsel where counsel failed to advise

him of his right to individually poll the jurors. Because we conclude that no error occurred, we affirm.

BACKGROUND

Kinch claims that on the night of January 27, 1990, at a Muscoda tavern, a man threatened him and his family. Kinch responded by going home, arming himself with an antique pistol, and waiting outside the tavern for the man to appear.

Two police officers arrived in response to a report of an armed man outside the tavern. What happened next is disputed on two major points.

First, Kinch claims that the police officers asked him whether he had a gun in his pocket. At trial, Kinch testified that because the gun was tucked into his waistband, he answered "no." However, a police officer testified that Kinch was asked whether he had a gun, without specifying where he carried it, and Kinch falsely responded that he had no gun.

The second point of contention is whether, when frisked, Kinch broke away and ran, or whether the police officers released him, and he initially hurried away, shortly slowing into a walk. Specifically, Kinch testified that the officers were pulling him in different directions, and eventually released him as they slipped on a patch of ice. After being released, he jogged a half dozen steps, then slowed and walked home where he waited outside to see if the threatening man would show up. The officers, on the other hand, testified that Kinch ran away "at full speed," and that he "took off running." They also testified that they looked for him, but could not find him that night.

ANALYSIS
Falsus in Uno

Kinch argues that the different versions of the facts indicate variances in memory or perception. On this basis, he argues that the circuit

court erred in giving a *falsus in uno* instruction.[1] *See* ***Pumorlo v. Merrill***, 125 Wis. 102, 111, 103 N.W. 464, 467 (1905), and ***State v. Williamson***, 84 Wis.2d 370, 394, 267 N.W.2d 337, 348 (1978) (*falsus in uno* not favored in the law, should not be given where discrepancies of testimony can be attributed to mistakes or imperfect recollection). We conclude that the court did not err.

A trial court has wide discretion on what instructions will be given to the jury as long as the instructions given accurately reflect the law applicable to the facts of the specific case being tried. ***Vonch v. American Standard Ins. Co.***, 151 Wis.2d 138, 149, 442 N.W.2d 598, 602 (Ct. App. 1989). A discretionary decision will be reviewed to determine whether it is the "product of a rational mental process whereby the facts of record and the law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The court here specifically found the two versions of Kinch's parting with the police were irreconcilable, and held that either Kinch or the police were lying. Under these circumstances, the court properly stated its rationale for giving the *falsus in uno* instruction. Disfavored as it is, Kinch concedes that the instruction has not been abrogated, and the circuit court's statement on the record demonstrates a reasonable exercise of discretion to which we must defer. ***Id.***

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[1] The instruction as given by the circuit court was as follows:

> If you become satisfied beyond a reasonable doubt from the evidence in this case that any witness has, at trial, willfully testified falsely as to any material fact, you are at liberty, in your discretion, to disregard all the testimony of such witness except insofar as you find it corroborated by other evidence which is credible.

Jury Poll

Kinch argues that he received ineffective assistance of counsel because trial counsel failed to advise Kinch that the right to request an individual jury poll was his personal decision to make. Kinch also argues ineffective assistance of counsel based on counsel's own failure to request an individual jury poll. We reject these arguments.

The right to poll a jury individually can be both delegated to counsel and waived (personally or by counsel). ***State v. Jackson***, 188 Wis.2d 537, 543, 525 N.W.2d 165, 168 (Ct. App. 1994). Kinch attempts to distinguish ***Jackson*** on the grounds that Jackson never claimed to have received ineffective assistance of counsel. Kinch therefore reads ***Jackson*** as a narrow holding that the circuit court itself had no duty to engage defendant in a colloquy about jury polling. According to Kinch, ***Jackson*** leaves open the question of whether counsel can be ineffective for failing to discuss with defendant whether the jury should be polled.

Since Kinch has briefed this issue, we have decided ***State v. Yang***, 201 Wis.2d 721, 549 N.W.2d 769 (Ct. App. 1996). We held that "[b]ecause the decision whether to request an individual polling is one delegated to counsel, we decline to hold that counsel's failure to inform a defendant of the right to an individual polling is, in itself, deficient performance." ***Id***. at 740, 549 N.W.2d at 776-77.

To prevail on his second claim that counsel was ineffective for himself failing to request an individual jury poll, Kinch would have to show that (1) his counsel's performance was deficient, and (2) that deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. *See also* ***State v. Ambuehl***, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988). Whether counsel's failure to request an individual polling is deficient representation "depends on all the circumstances." ***Yang***, 201 Wis.2d at 741, 549 N.W.2d at 777.

At a postconviction hearing, trial counsel testified that he saw each juror raise their hand when polled collectively by the court. He further testified that he thought an individual poll would not gain anything, that it would waste time, and that requesting an individual poll might cast the defendant in a bad light with the court. Also, as in ***Yang***, there was no indication that the jury's verdict was not unanimous. ***Id***. at 742, 549 N.W.2d at 777.

Although Kinch correctly points to the benefits of individual jury polling, ***State v. Wojtalewicz***, 127 Wis.2d 344, 379 N.W.2d 388 (Ct. App. 1985), the fact that benefits exist does not mean that there is no downside risk to exercising them. These sorts of strategic trade-offs commonly confront attorneys, and the United States Supreme Court has insulated attorneys from second-guessing by holding that informed strategic choices "are virtually unchallengeable." ***Strickland,*** 466 U.S. at 690-91. Counsel's determination to forego the benefits of individual jury polling to avoid wasting time and casting defendant into a bad light falls into this category, and hence is not ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

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