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November 20, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP2430-CR State of Wisconsin v. Cortney M. McBride (L.C. # 2015CF3293)

Before Brennan, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Cortney M. McBride appeals the judgment convicting him of first-degree reckless homicide as a party to a crime with the use of a dangerous weapon and of possession of a firearm by a felon, both counts as a repeater. *See* WIS. STAT. §§ 940.02(1), 939.05, 939.63(1)(b),

939.62(1)(b)-(c), and 941.29(2)(a) (through 2015 Wis. Act 109, Nov. 13, 2015).[1] He also appeals the order denying his postconviction motion. McBride contends that the trial court erroneously exercised its discretion when it denied his request for the *falsus in uno* jury instruction. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

Background

The charges against McBride stemmed from allegations that he shot and killed Clayton Mosley at a gathering on July 4, 2015. The criminal complaint alleged that Witness One,[2] who is McBride's cousin, told police investigating the shooting that earlier in the evening, she saw McBride with a gun tucked into his waistband. She later saw McBride shoot Mosley and overheard her aunt, McBride's mother, exclaim "Cortney No" afterward.

The case proceeded to trial where a jury found McBride guilty of first-degree reckless homicide as a party to a crime with the use of a dangerous weapon and of possession of a firearm by a felon. On the charge of first-degree reckless homicide, the trial court sentenced McBride to thirty years of initial confinement and fifteen years of extended supervision. On the charge of possessing a firearm as a felon, the trial court sentenced him to a consecutive sentence of five years of initial confinement and five years of extended supervision.

[1] WISCONSIN STAT. § 941.29(2)(a) no longer exists. It was repealed by 2015 Wis. Act 109, effective November 13, 2015. McBride, however, was charged prior to its repeal. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Witness One was a minor at the time of trial. We refer to her as such to protect her identity and privacy.

Postconviction, McBride filed a motion arguing that the trial court erroneously exercised its discretion when it denied his request for the *falsus in uno* jury instruction with regard to Witness One's trial testimony. The trial court denied the motion, and McBride now appeals the issue. Additional facts are included below.

Discussion

Wisconsin's *falsus in uno* instruction derives from the Latin maxim "*falsus in uno, falsus in omnibus*," meaning "false as to one thing, false as to all things." ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 658, 505 N.W.2d 399 (Ct. App. 1993) (citation omitted). The pattern instruction informs the jury that if it "become[s] satisfied from the evidence that any witness has willfully testified falsely as to any material fact, [it] may disregard all the testimony of the witness which is not supported by other credible evidence in the case." WIS JI—CRIMINAL 305.

Falsus in uno instructions are generally disfavored. *See* ***State v. Plude***, 2008 WI 58, ¶71, 310 Wis. 2d 28, 750 N.W.2d 42 (Ziegler, J., concurring). In fact, the pattern *falsus in uno* instruction is preceded by the bracketed phrase: "USE OF THIS INSTRUCTION IS NOT FAVORED." WIS JI—CRIMINAL 305. However, while *falsus in uno* instructions are disfavored, their use "is not foreclosed if the appropriate circumstances are present." ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988).

The instruction may be given if the false testimony is willful and intentional and is on a material point. ***Id.*** The trial court has great latitude in determining which jury instructions to give. ***State v. Laxton***, 2002 WI 82, ¶29, 254 Wis. 2d 185, 647 N.W.2d 784. "Only if the jury

instructions, as a whole, misled the jury or communicated an incorrect statement of law will we reverse and order a new trial." *See* ***id.***

In this case, McBride argued a *falsus in uno* instruction was appropriate as to Witness One because her testimony was willfully untrue.

Early on in her testimony, Witness One declared, "I don't want to talk no more. I just want to leave." When asked if she saw anyone at the Fourth of July gathering with a handgun, Witness One again stated, "I don't want to do this." The trial court instructed Witness One that she had to answer the questions to the best of her ability, and she responded, "I know, but I don't [want to]."

The trial court then excused the jury, and the State asked that Witness One be instructed once more to answer questions or be held in contempt for failing to answer. The trial court engaged Witness One in a brief colloquy to ensure she understood what she was doing and what the consequences were. The trial court then found Witness One in contempt, referred her to the Wisconsin State Public Defender's Office for guidance, and remanded her into juvenile custody.

Witness One ultimately returned to the witness stand and resumed her testimony. At first, Witness One testified that she did not remember telling officers that McBride had shot Mosley. The State then elicited testimony from Witness One that she loved her family and McBride specifically and that her testimony at trial was the first time Witness One had said she did not know who the shooter was. Witness One went on to admit that she told detectives "it was Cortney" who shot Mosley just hours after the shooting occurred.

During cross-examination, when questioned about her vantage point related to the shooting, Witness One testified that she was not sure how many feet away she was, stating that she "lied." Then she explained, "I don't know how many feets [sic] I was because I'm not good at math, so I'm only sixteen, so what do you expect?" As to her earlier testimony that she did not see the shooter, again, Witness One said she lied and that she did, in fact, see McBride shoot Mosley. Later, Witness One testified: "I'm telling you what I saw. Exactly what I told the [district attorney] I saw," which was "my cousin [McBride] shooting [Mosley]."

Because of her changing testimony, McBride's trial counsel requested that the trial court give the *falsus in uno* jury instruction at the close of evidence. Trial counsel argued that Witness One "clearly got on the stand and lied." The State objected, highlighting that the instruction was "highly disfavored" and recounting how difficult it was for Witness One to testify.

The trial court denied trial counsel's request after finding that Witness One's testimony did not constitute willful false swearing. The trial court explained that while some of Witness One's statements were "different," and she had "referred to some of her earlier statements as lies[,] … it's a stretch to say that she's willfully false swearing on the earlier occasions." The trial court determined that the standard jury instruction on witness credibility was sufficient. *See* WIS JI—CRIMINAL 300.

When it ruled on McBride's postconviction motion, the trial court reiterated that the *falsus in uno* instruction is disfavored, and the court noted that it was in the best position to decide whether the instruction was warranted. The trial court explained that it had the opportunity to observe Witness One and "did not interpret the change in her statements as

willful[] false swearing, and for all the other reasons given [during the jury instruction conference], the court did not believe the instruction to be appropriate[.]"

On appeal, McBride asserts that this is a case where the *falsus in uno* instruction is not only appropriate but required by a conflict or contradiction between Witness One's testimony and that of other witnesses. He claims Witness One told another witness Mosley was shot in the chest but the medical examiner did not testify that Mosley suffered a chest wound. He submits: "That which [Witness One] claimed to have seen could not, and did not, happen."

The State responds by highlighting the medical examiner's testimony that the fatal gunshot "went through [Mosely's] aorta … the large artery that leaves the heart and distributes blood to the whole body." The State submits that in light of this testimony, it is possible that Witness One thought she saw Mosley with a gunshot wound to his chest and was simply being imprecise with her wording during her statement to police after the shooting occurred. We agree. "Mere discrepancies in the testimony that are most likely attributed to defects of memory or mistake are no basis for rejecting a witness's testimony entirely." *See* ***State v. Williamson***, 84 Wis. 2d 370, 394, 267 N.W.2d 337 (1978), *abrogated on other grounds by* ***Manson v. State***, 101 Wis. 2d 413, 304 N.W.2d 729 (1981).

McBride additionally claims that Witness One "testified to things that she could not have seen." According to him, Witness One testified to witnessing the shooting "from a location that would have required her to be able to see through walls in order for her testimony to be accurate." On cross-examination, Witness One was questioned about her vantage point during the shooting. The jury had the benefit of hearing her testimony and seeing various demonstrative exhibits and pictures of the area so as to make its own determination as to whether the shooting

was visible from where Witness One said she was standing. *See* ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978) ("The question of credibility between witnesses or in respect to the same witness is a matter for the jury to determine and not for a trial judge or for this court, unless it can be said that the testimony is incredible as a matter of law." (citation omitted)).

We accord "much weight" to the trial court's determination that it was for the jury to resolve inconsistencies and determine witness credibility, rather than a necessary basis for a *falsus in uno* instruction. *See* ***Robinson***, 145 Wis. 2d at 282 ("Because the trial court has the benefit of observing the actual testimony of all of the witnesses, its determination ought to be given much weight.").[3] Here, after assessing Witness One's testimony, the trial court concluded that the jury would be able to properly assess her credibility if given the general instruction on witness credibility. We agree with the trial court's conclusion that the *falsus in uno* instruction was not appropriate under the circumstances presented.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] Because we affirm on this basis we need not address the alternative basis offered by the State. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").