

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 15, 2000

Cornelia G. Clark  
Acting Clerk, Court of Appeals  
of Wisconsin

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**No. 98-3103-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH PETER SAGGIO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Joseph P. Saggio appeals from a judgment of conviction for possession with intent to deliver cocaine, as a party to a crime, entered following a jury trial. Saggio argues that: (1) there was insufficient evidence to convict him of the charged crime; and (2) the trial court erred when it

denied his request for a new attorney. Further, Saggio urges us to conclude that in the interests of justice, we must exercise our discretionary powers of reversal under WIS. STAT. § 752.35,<sup>1</sup> and grant him a new trial, because no jury instruction was given concerning the weight to be given to Saggio's confession. We are satisfied that there was sufficient evidence to convince a reasonable jury of Saggio's guilt beyond a reasonable doubt; and that the trial court properly exercised its discretion in denying Saggio's request for a new attorney. Finally, we conclude that Saggio has not presented this court with sufficient reason for us to exercise our discretionary powers of reversal. For these reasons, we affirm the conviction.

### **I. BACKGROUND.**

¶2 On September 8, 1997, Officer Leif Eggum of the Franklin Police Department was patrolling the parking lot of the Skyway Motel in Franklin. According to common department practice, Officer Eggum was checking the license plates on cars in the motel parking lot for registration violations, stolen vehicles, or other suspicious activity. The registration on a blue BMW parked in the lot indicated that the license plate had been stolen. After receiving the report that the license plate was stolen, Officer Eggum got out of his squad car and approached the BMW in order to check the "Vehicle Identification Number," or "VIN." Officer Eggum then returned to his squad car to run a check on the VIN.

¶3 Upon returning to his squad car, Officer Eggum observed Saggio exit from one of the motel rooms on the second floor. Saggio caught Officer

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Eggum's attention because he appeared to be staring at the squad car and watching Officer Eggum closely. Officer Eggum got into his squad car, exited the parking lot, and drove a short distance away from the motel while he ran additional checks on the BMW and waited to see if the car would leave. After running the additional checks and contacting the car's last known owner, Les's Auto Sales, Officer Eggum discovered that although the license plate had been stolen, the car had been purchased several days earlier.

¶4 A short time later, Officer Eggum returned to the motel to speak with the manager about the BMW. Upon returning to the motel, he again observed Saggio leave the room on the second floor. Watching Officer Eggum closely, Saggio walked down the stairs and entered a room on the first floor. Once more Officer Eggum began to leave the parking lot; however, while he was leaving, he observed Saggio and several other individuals watching him.

¶5 Officer Eggum again drove his squad car a short distance from the motel parking lot where he could observe both exits. Suddenly, the BMW exited the parking lot at a high rate of speed, crossed two lanes of traffic, struck the median, and finally accelerated down the street. Officer Eggum advised both the Franklin and Oak Creek Police Departments of the situation, requested assistance, and followed after the fleeing BMW. The chase reached speeds in excess of one hundred miles per hour before ending when the BMW pulled into the parking lot of a second motel, followed closely by Officer Eggum.

¶6 After pulling into the second parking lot, the BMW stopped near a fence. As he was approaching the BMW in his squad car, Officer Eggum observed one man jump the fence while Saggio attempted to exit the front passenger seat of the BMW. It was later learned that a third individual, the driver

of the BMW, had fled into the motel before Officer Eggum arrived. Saggio got out of the BMW, moved toward the front of the car and looked like he was going to run. Officer Eggum exited his squad car and ordered Saggio to stop, warning Saggio that he had a dog in the car and that he would release the dog if Saggio attempted to run. Saggio stopped and stood with his hands in his pockets. Officer Eggum ordered Saggio to remove his hands from his pockets and to lie face down on the pavement. Eventually Saggio removed his left hand, and then, removing his right hand, he appeared to fling a small white object away from him and onto the pavement. The object was later identified as 2.03 grams of cocaine. Officer Eggum then observed a plastic baggie containing 21.835 grams of cocaine on the floor of the front passenger side of the BMW. A cellular phone was also recovered from the BMW, as well as a paper bag containing a .38-caliber Derringer handgun located between the two front seats.

¶7 Saggio was arrested and charged with possession with intent to deliver more than 15 grams but less than 40 grams of a controlled substance, as a party to a crime. Saggio pled not guilty and a jury trial proceeded. At trial, Officer Eggum testified that he interviewed Saggio in the presence of his attorney at the Criminal Justice Facility following his arrest. Officer Eggum testified that during the interview, Saggio identified an individual by the name of James Bardo as the driver of the BMW. Saggio related that he had known Bardo for about a year and a half and on several occasions he had delivered small quantities of cocaine for Bardo. Saggio asserted that he never received money or bought drugs from Bardo, but that he “partied with [] Bardo for free.” During the interview, Saggio also recounted that on September 7, 1997, the night before the incident, he ran into Bardo at a local bar. According to Saggio, Bardo told him that he was going to the Skyway Motel to “party” and Saggio accompanied Bardo to the

motel. Saggio stated that he had stayed awake all night drinking and using cocaine. Saggio also told the police that the next morning, he warned Bardo that a police officer seemed to be taking great interest in the BMW.

¶8 At trial, Saggio testified that he had stayed up all night partying with Bardo and some other individuals at the motel. Saggio asserted that at some time the following morning, he was standing outside when he noticed Officer Eggum's squad car. Saggio testified that he was interested in the squad car because it was marked as a K-9 unit, and he had never seen one before. Saggio maintained that although he saw Officer Eggum in the parking lot, he never saw the officer looking at Bardo's BMW. Saggio further testified that at approximately 10:30 that morning, he called a cab. Saggio claimed that he told officer Eggum that while he was waiting for the cab, he walked in and out of Bardo's room several times and Bardo finally offered him a ride.

¶9 Saggio testified that he got into the back seat of Bardo's BMW,<sup>2</sup> while Bardo and another individual got into the front seat, with Bardo behind the wheel. When Bardo pulled out of the parking lot and spotted Officer Eggum's squad car, he accelerated down the street. Saggio testified that after the car stopped, Bardo ran into the hotel, the third individual jumped over a fence, and he got out of the car just as Officer Eggum pulled up and ordered him to stop and take his hands out of his pockets. Saggio stated that as he was removing his hands from his pockets, a small amount of cocaine that he had stolen from a dresser in the hotel, "came flying out." Saggio asserted that he did not know that there was

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<sup>2</sup> On cross-examination, the prosecutor confronted Saggio with Officer Eggum's testimony that he had observed Saggio getting out of the front passenger seat and not the back seat as Saggio had testified. Saggio responded by asserting that the officer was mistaken, and the prosecutor moved on to another line of questioning.

more cocaine or a gun in the car. On cross-examination, Saggio stated that he knew Bardo was a drug dealer, and that he had kept the small amounts of cocaine Bardo had given him to deliver because he had a bad drug habit. Despite Saggio's testimony, the jury returned a guilty verdict.

## II. ANALYSIS.

¶10 Saggio argues that: (1) there was insufficient evidence to convict him of the charged crime; and (2) the trial court erred when it denied his request for a new attorney. Finally, Saggio requests that, in the interest of justice, this court exercise our discretionary powers of reversal under WIS. STAT. § 752.35, and grant a new trial because the jury was not given WIS JI—CRIMINAL 180 concerning Saggio's confession. We will address each of Saggio's arguments in turn.

### A. The State presented sufficient evidence to support the conviction.

¶11 Saggio argues that the State presented insufficient evidence to support his conviction for possession of more than 15 grams of cocaine with intent to deliver, as a party to a crime. Saggio asserts that the State failed to establish a "participatory link between [himself] and the drugs and gun found in Bardo's car." Specifically, Saggio contends that the State failed to "present evidence to prove that [he] had any knowledge or belief that Bardo had in excess of 15 grams of cocaine in his BMW, or that [he] intended to assist Bardo in possessing and distributing the cocaine." Therefore, Saggio concludes that the State failed to present sufficient evidence to sustain the conviction. We disagree.

¶12 When the sufficiency of the evidence is challenged on appeal, the issue is whether the trier of fact, acting reasonably, could be convinced by the

evidence to the required degree of certitude. *See State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The test is not whether this court is convinced of Saggio's guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. *See id.* The credibility of the witnesses and the weight of the evidence are for the trier of fact. *See id.* In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. *See id.* Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. *See id.* Reversal is only required when the evidence, considered most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could be convinced of Saggio's guilt beyond a reasonable doubt. *See id.* at 501.

¶13 We are satisfied that the trier of fact, acting reasonably, could have found Saggio guilty beyond a reasonable doubt based on the evidence presented at trial because the evidence clearly supports a reasonable inference that Saggio participated in the possession with intent to deliver over 15 grams of cocaine as a party to a crime. Saggio testified that he knew that Bardo was a drug dealer, and that he had delivered drugs for Bardo on several previous occasions. Saggio also knew that Bardo had cocaine in the room at the Skyway motel; in fact, he testified that the cocaine had been left out for general consumption during the party and that he had stolen a small amount from the dresser before he left. Finally, Officer Eggum observed Saggio get out of the front passenger seat of the BMW, the seat closest to where the cocaine was found in the car. We must consider this evidence

in a light most favorable to the State and the conviction, and we must accept the inferences drawn by the fact finder unless the evidence on which they are based is incredible as a matter of law. We conclude that the evidence presented at trial is not incredible as a matter of law and, therefore, we accept the reasonable inference drawn by the jury that Saggio was a participant in the possession of cocaine with intent to deliver as a party to the crime. The fact that the evidence presented at trial might also support the contrary inference that Saggio was merely an innocent passenger is not a sufficient reason for this court to overturn the jury's verdict.

B. The trial court properly exercised its discretion in denying Saggio's request for substitute counsel.

¶14 Saggio argues that there existed what he perceived to be a “serious and persistent conflict with his attorney from the beginning of their relationship.” Saggio argues that he notified the court of this conflict as early as a status conference more than two months before the trial, and again on the day of trial when he requested a new attorney. Saggio asserts that the problem was compounded when the conflict prompted him to file a grievance with the Board of Attorneys Professional Responsibility, which, Saggio asserts, “illustrates the depth of the breakdown of the attorney-client relationship.” Saggio maintains that despite his “repeated, consistent and early objections to his appointed trial counsel,” the trial court never gave him the opportunity to pursue new counsel, thus denying him “the option of retaining his counsel of choice in violation of the Sixth Amendment right to counsel.” We disagree.

¶15 The Sixth Amendment guarantee of the assistance of counsel does include a qualified right to representation by counsel of the defendant's choice; however, this right is not absolute. *See State v. Miller*, 160 Wis. 2d 646, 652, 467 N.W.2d 118 (1991). At any time during the proceeding the defendant may make a



request for new counsel and the trial court should inquire whether grounds for the substitution of counsel exist. *See State v. Kazee*, 146 Wis. 2d 366, 371, 432 N.W.2d 93 (1988). However, once the request is made the decision to grant or deny the defendant's request is within the discretion of the trial court. *See id.*

¶16 We will sustain the trial court's discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The trial court should set forth the basis of its exercise of discretion, as evidence for an appellate court that discretion was actually exercised. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Nevertheless, even if the trial court fails to set forth the reasoning behind its exercise of discretion, we need not reverse if an independent review of the record reveals a basis for sustaining the trial court's action. *See State v. Pittman*, 174 Wis. 2d 225, 268, 496 N.W.2d 74 (1993). In deciding whether the trial court properly exercised its discretion by denying Saggio's request for new counsel, we must consider numerous factors including:

(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

*Lomax*, 146 Wis. 2d at 359. After reviewing the record and considering all of the relevant factors, we are satisfied that the trial court properly exercised its discretion in denying Saggio's request for new counsel.

¶17 Saggio fails to identify a factual basis for the substitution of counsel and the record is equally bereft of any such basis. Saggio simply refers to an undefined “conflict” with counsel and makes the conclusory allegation that the trial court violated his Sixth Amendment right to counsel. However, the record belies this allegation. The record reflects that Saggio’s original attorney was forced to withdraw due to a conflict that arose after the final pretrial. Unable to hire his own attorney, Saggio requested that new counsel be appointed. At a subsequent hearing, Saggio informed the court that he had a conflict with his new attorney and did not want him as his lawyer. In response to Saggio’s protest the trial court inquired about the alleged conflict. Saggio simply responded, “He is very negative towards my case.” The trial court informed Saggio that an attorney is obligated to evaluate each case and offer the client an honest recommendation as to the strengths and weaknesses of the case. The trial court informed Saggio that despite his attorney’s assessment of his case, if Saggio insisted on going to trial, his attorney was obligated to take the case to trial. The court then instructed Saggio to inform the court if his attorney refused to take the case to trial, and Saggio agreed.

¶18 The second time Saggio protested and requested substitute counsel was on the day of trial. Saggio’s complaint centered around his attorney’s inability to produce Bardo as a witness and his attorney’s failure to produce certain phone records that would have reflected that he called a cab from the hotel the morning of the incident. The record reveals that Saggio’s attorney had attempted to secure Bardo’s testimony, but that Bardo’s attorney had indicated that Bardo would invoke his Fifth Amendment right not to testify. The record also reflects that Saggio’s attorney did, in fact, subpoena the relevant telephone records from Ameritech. Pursuant to the subpoena the phone records were produced and

the parties stipulated that the records indicated that a call had been made from the Skyway Motel to City Veteran Cab on the morning of the incident at the time Saggio asserted he had placed the call. The trial court concluded that there was no conflict of interest and that Saggio's tactics were dilatory. Moreover, we note that at the close of trial, the trial court asked Saggio whether he was satisfied with the representation he had received. Saggio conclusively indicated that he was satisfied and, therefore, he cannot now be heard to complain.

¶19 After reviewing the record, we are satisfied that the trial court's inquiry into Saggio's complaint was adequate. Further, the motion, having been renewed on the day of the trial, would have made rescheduling highly inconvenient for the witnesses and the court had it been granted. Moreover, the court determined that the alleged conflict did not result in a total lack of communication that prevented an adequate defense, nor did it frustrate a fair presentation of the case. We agree and, for the above reasons, we conclude that the trial court properly exercised its discretion in denying Saggio's request for new counsel.

C. We will not exercise our discretionary powers of reversal under WIS. STAT. § 752.35, to grant Saggio a new trial.

¶20 Finally, Saggio argues that in the interests of justice, this court should exercise our discretionary powers of reversal to grant a new trial because the jury was never given WIS JI—CRIMINAL 180, concerning confessions and admissions.<sup>3</sup> Saggio asserts that instruction 180 must be given, "[w]hen evidence

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<sup>3</sup> WISCONSIN JI—CRIMINAL 180 reads:

The State has introduced evidence of [a statement] which it claims [was] made by the defendant. It is for you, the jury, to determine how much weight, if any, to give to [this] statement.

(continued)

has been admitted relating to a statement made by a defendant.” During the trial Officer Eggum testified regarding the content of the statement given by Saggio following his arrest. Then, when Saggio testified, he “disputed certain essential facts and assertions,” contained in Officer Eggum’s testimony. Although there was conflicting testimony regarding Saggio’s statement, the trial court never gave instruction 180 to the jury. Saggio concludes that the trial court’s failure to give instruction 180 constitutes “plain error.” However, neither the State nor Saggio ever requested the instruction, or objected when the instruction was not given; therefore, the issue was not properly preserved for appeal and consideration of the claimed error has been waived. *See* WIS. STAT. § 805.13(3) (1997-98); *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Nevertheless, Saggio urges this court to exercise our discretionary power of reversal under § 752.35, to correct the “plain error,” and grant him a new trial in the interests of justice. We decline.

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In evaluating [the] statement, you should consider three things.

First, you must determine whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.

Second, you must determine whether the statement was accurately restated here at trial.

Finally, if you find that the statement was made by the defendant and accurately restated here at trial, you must determine whether the statement is trustworthy. “Trustworthy” simply means whether the statement ought to be believed.

You should consider the facts and circumstances surrounding the making of [the] statement, along with all the other evidence in the case, in determining how much weight, if any, the statement deserves.

¶21 This court has the “discretionary power to reverse judgments where unobjected-to error results in either the real controversy not having been fully tried or for any reason justice is miscarried under ... [WIS. STAT. § 752.35].” *Vollmer v. Luety*, 156 Wis. 2d 1, 17, 456 N.W.2d 797 (1990). Under the first category of cases, when the real controversy has not been fully tried, we need not decide that the outcome would be different on retrial before exercising our discretionary power. *See id.* at 19. However, under the second category, when for any reason justice is miscarried, we must make a finding of substantial probability of a different result on retrial before exercising out discretionary power. *See id.* This power allows this court “to achieve justice in its discretion in the individual case.” *Id.* We will exercise this discretionary power of reversal “only in exceptional cases.” *Id.* at 11. This is not such a case.

¶22 Omitting WIS JI—CRIMINAL 180 did not prevent the real controversy from being fully tried, or result in a miscarriage of justice. Instruction 180 directs the jury to determine whether the defendant’s statement was actually made by the defendant, was accurately restated at trial, and is trustworthy. Instruction 180 also directs the jury to, “consider the facts and circumstances surrounding the making of the statement, along with all the other evidence in the case, in determining how much weight, if any, the statement deserves.” In all likelihood the trial court would have given instruction 180 had Saggio simply requested it; however, Saggio has not persuaded us that the failure to give the instruction is sufficient reason to exercise our discretionary powers of reversal. We note that although the jury was never given specific instructions regarding Saggio’s statement, the jury was given extensive instructions regarding weighing

the evidence and assessing the credibility of the witnesses and their testimony.<sup>4</sup> Therefore, we are satisfied that while instruction 180 might have given the jury more explicit guidance regarding Saggio's statement, the omission of that instruction did not prevent the real controversy from being tried or result in a miscarriage of justice. For these reasons, Saggio fails to persuade this court that this is an exceptional case that merits reversal under WIS. STAT. § 752.35. Accordingly, we affirm the judgment of the trial court.

*By the Court.*—Judgment affirmed.

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

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<sup>4</sup> The trial court instructed the jury that:

It is the duty of the jury to scrutinize and to weigh the testimony of the witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the witnesses and of the weight and credit to be given to their testimony.

In determining the weight and credit you should give to the testimony of each witness, you should consider interest or lack of interest in the result of this trial, conduct, appearance and demeanor on the witness stand, bias or prejudice, if any has been shown, the clearness or lack of clearness of recollections, the opportunity for observing and knowing the matters and things testified to by the witness and the reasonableness of their testimony.

You should also take into consideration the apparent intelligence of each witness, the possible motive for falsifying, and all other facts and circumstances appearing on the trial [sic] which tend either to support or to discredit the testimony, and then give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive.



