COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2224-CR **Cir. Ct. No. 2010CF431**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC G. KOULA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Eric Koula appeals a judgment of conviction for two counts of first-degree intentional homicide and one count of forgery, and an order denying his motion for postconviction relief. Koula contends that: (1) the circuit court erred in admitting out-of-court statements of one of the victims; (2)

he received ineffective assistance of counsel at trial; (3) the circuit court erred in excluding evidence at trial; and (4) he should be granted a new trial in the interest of justice because the real controversy was not fully tried. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Eric was charged with two counts of first-degree intentional homicide in connection with the May 21, 2010, shooting deaths of his parents, Dennis and Merna Koula, and one count of forgery, in connection with a forged check on his parents' account in the amount of $50,000, which was cashed by Eric the day after their murders. The State theorized that Eric was motivated to kill Dennis and Merna because he was having significant financial troubles and because he knew or was concerned that Dennis, who had in the past provided substantial financial assistance to Eric, would cut off Eric financially.

¶3 According to a statement that Eric gave to police, Dennis was always willing to give Eric money when Eric needed it, and had given Eric a blank check the day before Dennis was killed. The State sought to rebut the inference that Dennis willingly gave Eric the check by showing that: (1) the $50,000 check had been forged by Eric; (2) *Dennis had told Leroy Koula, Dennis's brother, and Helen Van Roo, Dennis's co-worker, at least two days prior to his murder that he was going to cut off his kids financially*; (3) Dennis and Eric had talked two days prior to his murder; (4) Eric was at his parents' house the day before the murders; and (5) the day before and the day of the murder, Eric was seeking a cash advance from his credit card and inquiring about a check that had been returned for insufficient funds on his investment account.

¶4 Prior to trial, Eric moved the circuit court to exclude from trial the above-emphasized statements made by Dennis to Leroy and Helen on the basis that such statements were inadmissible hearsay and lacked relevance. The court denied Eric's motion, concluding that any such statements were admissible for the purpose of showing Dennis's state of mind. The court explained:

> I view the statement that was made as showing a state of mind on the part of Dennis … that he intended to cut back substantially on the financial support that he was giving his children, and … is admissible to show action on the part of the declarant, Dennis, that he took steps in accordance with that state of mind. I don't view it as evidence that's being introduced for the purpose of showing action on the part of Eric or any other third party.

¶5 Eric was found guilty of all charges. He moved for postconviction relief on the basis that he received ineffective assistance of counsel and in the interest of justice. The circuit court denied Eric's motion following a ***Machner***[1] hearing. Eric appeals. Additional facts are discussed below where relevant.

DISCUSSION

¶6 Eric contends that he is entitled to a new trial because: (1) the circuit court erroneously exercised its discretion by admitting out-of-court statements by Dennis to the effect that Dennis intended to cut his kids off financially; (2) Eric received ineffective assistance of counsel at trial; and (3) in the interest of justice.

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) (an evidentiary hearing may be held to evaluate counsel's effectiveness).

A. Admission of Out-of-Court Statements

¶7 Eric contends that the circuit court erroneously exercised its discretion by ruling before trial that out-of-court statements from Dennis to Leroy and Helen that Dennis intended to cut off his kids financially were admissible.

¶8 A circuit court's decision to admit or exclude evidence is generally a matter within the court's discretion, and this court will not disturb the court's discretionary decision unless the circuit court erroneously exercised its discretion. ***State v. Kutz***, 2003 WI App 205, ¶33, 267 Wis. 2d 531, 671 N.W.2d 660. On review, the question is not whether this court would have admitted the evidence, but rather, whether the circuit court applied the correct legal standard to the relevant facts of the record. *See* ***id.***; ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Accordingly, we will uphold a circuit court's evidentiary rulings if the court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶9 Hearsay, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," WIS. STAT. § 908.01(3) (2013-14),[2] is inadmissible except as provided by statute or rule. *See* WIS. STAT. § 908.02. One exception under which hearsay can be admitted is the "[t]hen existing mental, emotional, or physical condition" exception. *See* WIS. STAT. § 908.03(3). Under this exception, "[a] statement of

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

the declarant's then existing state of mind …[,] such as intent, plan, motive, design" may be admissible. ***Id.*** Even if a hearsay statement falls within an exception to the hearsay rule, the statement is not necessarily admissible. *See* ***State v. Jacobs***, 2012 WI App 104, ¶27, 344 Wis. 2d 142, 822 N.W.2d 885.

¶10 The circuit court determined that Dennis's statements to Leroy and Helen were admissible under the state-of-mind hearsay exception. Eric asserts on appeal that the statements were not admissible under that exception. However, a close look at Eric's arguments reveals that Eric is really challenging the circuit court's determination that the statements are relevant to establish Eric's motive for killing his parents. Eric argues that where, as here, a hearsay statement of intent to do (or not do) something is relevant to prove a third party's actions or motive (here, Eric's actions or motive), the statement is relevant only when there is evidence, independent of the statement, that the third party knew of the declarant's intent. In support of his argument, Eric relies on out-of-state decisions in which courts have concluded that out-of-court statements are admissible under the state-of-mind hearsay exception to prove a defendant's motive only when there is evidence that the defendant was aware of the declarant's state of mind at the time of the crime. *See, e.g.*, ***People v. Riccardi***, 281 P.3d 1, 49 (Cal. 2012); ***Commonwealth v. Qualls***, 680 N.E.2d 61, 64 (Mass. 1997); ***State v Doze***, 384 So. 2d 351, 353 (La. 1980); ***State v. Revelle***, 957 S.W.2d 428, 432 (Mo. 1997); ***State v. Calleia***, 20 A.3d 402, 415 (N.J. 2011); ***Hodges v. Commonwealth***, 634 S.E. 2d 680, 690-91 (Va. 2006).

¶11 The State agrees with Eric's assertion that in order for a declarant's out-of-court statements to be admissible under the state-of-mind hearsay exception for the purpose of establishing the defendant's motive for the crime, there must be evidence that the defendant knew of the declarant's state of mind prior to

committing the crime, and so do we. Accordingly, we conclude that in order for Dennis's statements that he intended to cut his kids off financially to be admissible, there must have been evidence tending to show that Eric was aware through some source or clue that Dennis had expressed the intent, or taken some steps, to cut off his kids financially prior to Dennis killing his parents.

¶12 Eric argues that there "was no independent evidence that [he] had knowledge of any plan to cut him off." Eric asserts that there was no evidence: (1) that Dennis had taken any active steps toward cutting him or his sister off financially that Eric was aware of; (2) that Dennis had cut Eric or his sister out of his will, or that Dennis had spoken with his attorney about doing so; (3) that Dennis had told Eric that Dennis planned to cut him off financially; or (4) that Eric behaved in a manner suggesting that Eric realized that he had lost or was about to lose Dennis's financial support, which Eric admits was his "primary source of income." In contrast, the State argues that it presented sufficient evidence, albeit circumstantial evidence, at trial to show that Eric was aware that Dennis planned on cutting him off financially. We agree with the State.

¶13 The State presented the following pertinent evidence: Eric attempted unsuccessfully to support himself as a day trader, and had received hundreds of thousands of dollars from Dennis and Merna between 2007 and their murders; between 2007 and 2009, Eric had lost at least $600,000, including almost $60,000 in the weeks prior to his parents' murders; at the time of or at least shortly before the murders, Eric's savings and checking accounts had a combined balance of only $1,342, his IRA had a balance of $138, his Fidelity investment account had a balance of only $158 (a decrease of approximately $793,000 since November 2007), and the account he used for trading stocks had a balance of only $1,673. The State also presented evidence that Eric's liabilities, in contrast, were

significant: his home was mortgaged with a balance of approximately $65,000; he owed $26,000 to the Internal Revenue Service, $20,100 on a line of credit, and he had $34,715 in credit card debt. Eric testified that the balance in his trading account was not enough to do any trading, and that in order to continue day trading, he needed an additional $50,000. The State presented evidence that the day before the murders, Eric contacted his credit card company about obtaining a cash advance, and was informed that he could obtain an advance of only $1,131.00 at 24.99 percent interest, and that on the day of the murders, prior to when the murders took place, Eric contacted a stock trading website to inquire about a check that had been presented on his account but that had been denied due to insufficient funds in the account. The State presented further evidence that Eric cashed a $50,000 check on his parents' account the morning after the murder, that the check had been filled out by Eric, that Eric had forged Dennis's signature on the check, and that Eric initially lied to police by saying that Dennis had signed the check. In addition, evidence was presented establishing that although Eric had signed checks for Dennis for some purposes in the past, he had not done so for a number of years.

¶14 We conclude that a reasonable judge could determine that a reasonable inference from the totality of the evidence set forth in the previous paragraph was that Eric had knowledge, whether by virtue of the particular out-of-court statements at issue or by some other means, that Dennis intended to stop providing financial support to Eric. Accordingly, we conclude that it was not an erroneous exercise of the court's discretion to admit the out-of-court statements.

B. Ineffective Assistance of Counsel

¶15 Eric contends that his trial counsel was ineffective for failing to object to a jury instruction addressing the out-of-court statements discussed above in paragraphs 7-13.

¶16 Whether a defendant receives ineffective assistance of counsel presents a mixed question of fact and law. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the court's legal conclusions as to whether counsel's performance was deficient and if so, prejudicial, are questions of law that we review de novo. ***Id.*** at 128.

¶17 To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. We give great deference to counsel's performance, and, therefore, a defendant must overcome "'a strong presumption that counsel acted reasonably within professional norms.'" ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801. To prove prejudice, a defendant must demonstrate that counsel's errors had some adverse effect on the defense. ***Strickland***, 466 U.S. at 693. The defendant must show the alleged deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. The defendant cannot meet this burden by simply showing that an error had some conceivable effect on the outcome. ***Id.*** at 693. Instead, the defendant must

show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶18 Before Leroy testified regarding Dennis's out-of-court statements, the circuit court and counsel for the parties discussed how the jury should be instructed on the evidence. The circuit court proposed an instruction and Eric's trial counsel requested a few modifications to that instruction. Consistent with the proposed instruction as modified by Eric's counsel, the court instructed the jury as follows after Leroy testified about Dennis's out-of-court statements:

> Ladies and gentlemen, the following instruction applies to testimony from this witness. In the event another witness testifies similarly, this instruction would apply to similar testimony from another witness as well:
>
> The court has received evidence that Dennis Koula intended to, quote unquote, cut off, quote unquote, the kids financially. This statement was received as evidence of Dennis Koula's state of mind at the time the statement was made. And if you find the statement was made, you may consider this statement, along with all the other evidence in the case in determining whether Dennis Koula was referring to Eric Koula, whether he stopped giving money to his children, and in determining whether Eric Koula may have had a motive to kill Dennis and or [Merna] Koula. You should keep in mind that motive does not by itself establish guilt, and you should consider this evidence along with all the other evidence in this case.

The jury was given this instruction again before the jury began its deliberations.

¶19 Eric argues that the instructions were improper because they failed to include language advising the jury under what circumstances Dennis's out-of-court statements could be used in determining whether Eric had a motive to kill Dennis and Merna. Eric argues that counsel "could have" suggested that additional language be included in the instruction so that the instruction would provide in relevant part that "the jury could 'consider this statement along with all

the other evidence in the case in determining whether Dennis Koula was referring to Eric Koula, whether he stopped giving money to his children, and—*if you first determine that this statement was communicated to or otherwise known by Eric Koula*—in determining whether Eric Koula may have had a motive to kill Dennis and/or Merna Koula" (suggested additional language emphasized). Eric argues that the language he suggests would not have cured all problems with the instruction, but that it would have at least cautioned the jury against speculation as to Eric's knowledge of Dennis's out-of-court statements.

¶20 We will assume, without deciding, that Eric is correct that his trial counsel was deficient in agreeing to the instructions and in failing to seek the inclusion of the additional language italicized in the preceding paragraph. We conclude, however, that Eric has not shown that his trial counsel's error was prejudicial.

¶21 Eric's burden on appeal is to show that there is a reasonable probability that the result of the trial would have been different had his trial counsel requested the instructions on Dennis's out-of-court statements be modified to include language further limiting the jury's usage of that evidence. ***Strickland***, 466 U.S. at 686. However, Eric has not presented this court with a developed argument that this is the case. Eric argues that the jury instruction "rendered the outcome unreliable" and "tipped the scales toward conviction," and also that the instruction "tainted" what he characterizes as "[t]he most significant" evidence against him, Dennis's out-of-court statements. Arguing that the instruction may have had an effect on the trial is not the same as making a showing that there is a reasonable probability that he would have been found not guilty but for the instruction.

¶22 However, even if Eric had presented a developed argument that there is a reasonable probability that the result of the trial would have been different had his trial counsel objected to the instruction, we would not be persuaded.

¶23 As set forth in detail in paragraph 13, the State presented evidence that Eric had lost hundreds of thousands of dollars; Eric had significant debt at the time of the murders and no immediate means of earning any money without a significant influx of cash; Eric was eligible to receive only approximately $1,000 in a cash advance on his credit card; and Eric forged the $50,000 on his parents' account and then lied to the police about it. In addition, the State presented evidence that Eric put a letter inside Dennis's mailbox which stated "fixed you," which Eric represented to police had been put in his mailbox, purportedly from the individual who killed Dennis and Merna; that Eric lied to police that he touched Dennis's body upon finding Dennis; and that Eric informed a friend that he was glad he retained a receipt from the night of the murders because that proved he could not have murdered Dennis and Merna, but at the time it was unknown to anyone but the murderer that Dennis and Merna had been killed on Friday.

¶24 In light of this evidence, we are not convinced that there is a reasonable probability that the result of the trial would have been different had the jury been instructed, as Eric argues, that it could only consider Dennis's out-of-court statements in determining whether Eric had a motive to kill Dennis and Merna only if the jury first determined that Eric was aware that Dennis had stated he planned to financially cut off his kids.

C. Google Maps

¶25 Eric contends that the circuit court erred in excluding from trial the admission of evidence that when a search of the address of a neighbor of Dennis

and Merna was conducted on Google Maps, the search resulted in a destination marker in front of Dennis's and Merna's home. Eric argues that the evidence was admissible because it was probative of his theory at trial that a hired killer targeting Dennis's and Merna's neighbor, who had received death threats prior to the murders, went to Dennis and Merna's house and murdered them by mistake.

¶26 In denying the admission of the evidence, the court stated:

> There's been no showing in this case that this proposed hit man relied on [Google Maps] or any other search engine for that matter.… I guess more importantly, however, [the Google Maps evidence] demonstrates that at least as of May 24, 2010, the street address was plainly visible from the road. Now, the defense … is postulating [that] an organized experienced killer … took one search engine which landed him in an area, he went up the driveway without confirming the address from the obvious sign on the street, and went inside and killed the occupants, and that does not strike me as a reasonable proposition … this idea that you're going to have a hit man who may or may not have used any search engine, … that you're describing, ignores the street address that's plain as day, of the street and charges up and kills the occupants, frankly, I think is preposterous, and that evidence is excluded under [WIS. STAT. §] 904.03[3] ….

¶27 We review a circuit court's decision to exclude evidence for an erroneous exercise of discretion, ***Kutz***, 267 Wis. 2d 531, ¶33, and will uphold the court's decision if the court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach. ***Loy***, 107 Wis. 2d at 414-15.

[3] WISCONSIN STAT. § 904.03 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

¶28 To be admissible, evidence must tend "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." WIS. STAT. § 904.01. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." WIS. STAT. § 904.03.

¶29 The evidence of the Google Maps search did not have the probative value that Eric contends. First, Eric acknowledges that his defense team did not discover until the fifteenth day of trial that a Google Maps search of the neighbor's address resulted in a marker in front of his parents' home. Eric has not argued that the same search result occurred at the time of the murders. Second, Eric has not presented any evidence that Dennis and Merna's residence had in fact been mistaken for their neighbor's address by someone conducting a Google Maps search of the neighbor's address. Third, Eric has not directed this court to evidence that a search of the neighbor's address on other mapping programs had the same result as the Google Maps. Fourth, Eric has not offered an explanation as to why a hired killer would disregard the address sign on the street, which the court found was an obvious indicator of Dennis and Merna's address.

¶30 Thus, the circuit court used a proper legal standard, that of WIS. STAT. § 904.03, and using facts in the record, including the existing and visible address sign on the street and the lack of any evidence of a nexus between the alleged killer and the use of Google Maps, and reasoned that the proffered evidence would mislead the jury and was, therefore, not admissible. That is a proper and appropriate exercise of discretion and we affirm the circuit court's decision.

D. Real Controversy

¶31 Eric contends that we should reverse his convictions under WIS. STAT. § 752.35, on the ground that the real controversy was not fully tried as a result of the exclusion of Google Maps evidence. As we explained above, the Google Maps evidence was speculative and properly excluded under WIS. STAT. § 904.03. We conclude that the real controversy was fully tried, and we decline to exercise our discretion to reverse on that ground.

CONCLUSION

¶32 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

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