COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2095-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICK NEIL RUCKER,

DEFENDANT-APPELLANT.

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

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 PER CURIAM. Patrick Rucker appeals from a judgment convicting him of first- and second-degree intentional homicide, one count each, and two counts of attempted first-degree intentional homicide. He also appeals from an order denying postconviction relief. The issues are whether the trial court

properly decided two evidentiary issues, and properly dismissed a juror for cause. We affirm.

¶2 In front of several witnesses, Rucker shot four people during a street altercation. At his trial, during voir dire, the State and Rucker stipulated that the court could dismiss any jurors with conflicting obligations, and that each side could then use six peremptory strikes, rather than the seven accorded by statute. The trial court dismissed five jurors under the agreement, for cause, and the parties peremptorily struck six jurors each. That left a panel of fourteen, with the two alternates to be selected at random after the trial.

¶3 Only one of the fourteen selected jurors, Boeldridge McClain, was an African American. However, before the trial began, the court learned that McClain, a medical student, was under considerable pressure to take a scheduled exam. The trial court concluded that McClain could probably not concentrate on the trial with such concerns weighing on him, and excused him from the panel. Rucker's counsel moved for a mistrial, stating that he would have used a different strategy during jury selection had he known that the stipulated method of selecting the jury would have resulted in no minority members. The trial court denied a mistrial on the following grounds:

> Mr. McClain could have suffered any number of occurrences that would have resulted in him not being on the ultimate panel that decides this case. He could have been selected by random selection as an alternate at the end of the trial … and that's a risk that both sides took in making every selection.

The trial court added that any particular juror is always subject to being excused for personal reasons.

¶4 Rucker never disputed shooting four people, but contended at trial that the shootings accidentally occurred in the course of a struggle, with two of the victims, for control of his gun. As evidence, Rucker sought to introduce a statement he made to police after his arrest that was consistent with his defense. He contended that it was admissible as a statement against interest, WIS. STAT. § 908.045(4) (1997-98),[1] because he confessed to felonious conduct. The trial court refused to admit the statement, however, because it was exculpatory as to the crimes charged.

¶5 The trial court also excluded, as not relevant, testimony from Rucker's stepfather as to Rucker's demeanor on the day he turned himself in, three days after the shootings. After Rucker's conviction, the trial court reaffirmed its trial rulings in postconviction proceedings. This appeal resulted.

¶6 The trial court properly excluded Rucker's statement to police. Prior statements from an unavailable declarant are admissible under WIS. STAT. § 908.045(4) if they "so far tended to subject the declarant to … criminal liability … that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." To be admissible under this rule the declarant must have made the statement in circumstances that assure trustworthiness, and without any probable motive to lie. *See* ***State v. Pepin***, 110 Wis. 2d 431, 439, 328 N.W.2d 898 (Ct. App. 1982). Here, the trial court reasonably exercised its discretion to exclude the statement because Rucker plainly had motive to falsely admit to accidental shootings in the hopes of avoiding convictions for intentional homicide.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 The trial court also properly excluded evidence of Rucker's demeanor three days after the shootings. Rucker's stepfather would have testified that Rucker cried about the incident when his stepfather spoke with him three days after it occurred. The trial court properly excluded that testimony, however, because it was irrelevant. Whether Rucker demonstrated remorse three days after the event proved nothing concerning how the shootings occurred, or Rucker's intent at the time.

¶8 Rucker is not entitled to a new trial because the court excused McClain from the jury panel. Rucker contends that he agreed to fewer strikes than the statutorily guaranteed number only on the understanding that the reduced strikes would be exercised on a group of jurors including McClain. "The later dismissal of McClain for cause defeated this understanding and destroyed Rucker's tactical choices and the use of his peremptory challenges," he asserts. He further contends that the result was irremediable prejudice. However, the trial court disagreed and so do we. Rucker cites no authority for the proposition that he is entitled to have a particular juror on the panel. As the trial court noted, jurors are always subject to removal after the jury has been selected. No reason therefore exists to relieve Rucker of the effects of his stipulation on peremptory strikes.

By the Court.—Judgment and order affirmed.

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