COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP702-CR **Cir. Ct. No. 2004CF3425**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MIGUEL MUNIZ-MUNOZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Miguel Muniz-Munoz appeals the judgment, convicting him following a jury trial, of first-degree intentional homicide and first-degree recklessly endangering safety, both as a party to a crime, contrary to WIS.

STAT. §§ 940.01(1)(a), 941.30(1), and 939.05 (2003-04).[1] Muniz-Munoz raises four issues. He argues that the trial court erroneously exercised its discretion when it: (1) denied his request to *voir dire* several "sleeping" jurors; (2) violated Muniz-Munoz's confrontation rights when it permitted a different medical examiner who did not originally perform the autopsy on the victim to render a medical opinion as to the cause of death; (3) refused to give Muniz-Munoz's special jury instruction on police interrogations; and (4) refused Muniz-Munoz's motion seeking discovery of evidence of excessive force used against him when apprehended by Mexican authorities.

¶2 We are satisfied that the trial court properly exercised its discretion when it denied the motions for the following reasons: (1) the requested *voir dire* of the "sleeping" jurors was properly denied because the trial court found the jurors were not sleeping, and this finding is not clearly erroneous; (2) the trial court did not violate Muniz-Munoz's confrontation rights because the doctor testified to his own independent opinion regarding the cause of death; (3) the trial court determined that the request for a special jury instruction did not reflect Wisconsin law, and the trial court read the jury the standard jury instruction but without the paragraph dealing with unrecorded interrogations as the law did not require recorded interrogations at the time of Muniz-Munoz's interrogation; and (4) the trial court properly denied the discovery motion because even if Muniz-

[1] We note that the judgment roll has several errors. It incorrectly states that Muniz-Munoz pled "guilty" to the charges, which is untrue, and it states that Muniz-Munoz was convicted of attempted first-degree intentional homicide rather than the lesser included charge found by the jury of first-degree recklessly endangering safety as party to a crime. On remand, the judgment roll should be corrected to reflect the actual plea and conviction. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (trial court may correct the clerical error in a written judgment or direct the clerk's office to make the correction).

Munoz's allegations were true, it would not lead to the dismissal of his charges. Consequently, we affirm.

BACKGROUND

¶3 Following a police investigation into an August 3, 2003 shooting at a south-side bar in Milwaukee, Muniz-Munoz was charged with first-degree intentional homicide and attempted first-degree intentional homicide, both as a party to a crime, on June 30, 2004. In July, Muniz-Munoz waived his right to a preliminary hearing. Various motions were filed by both sides. Bail for Muniz-Munoz was set at $100,000, and on December 15, 2004, Muniz-Munoz posted bail. Muniz-Munoz was scheduled to be back in court on February 25, 2005. When Muniz-Munoz failed to appear on that date, a bench warrant was issued for his arrest and his bail was forfeited by the trial court.

¶4 Muniz-Munoz was arrested in Mexico and first appeared back in a Milwaukee County court on August 3, 2010. New motions were filed by both the State and Muniz-Munoz. Pertinent to this appeal, Muniz-Munoz filed a motion to compel discovery seeking information about Muniz-Munoz's capture in Mexico and deportation to the United States. He also sought information concerning the U.S.-Mexico Extradition Treaty and whether when he was arrested, there was compliance with the United Nations Vienna Convention on Consular Relations. Muniz-Munoz contended that he was forcibly abducted and tortured while in the custody of the Mexican Federal Police. The State filed a brief in opposition to Muniz-Munoz's motion. On October 14, 2011, the trial court, after hearing argument, denied Muniz-Munoz's motion.

¶5 In December of 2011, the State filed a motion asking the trial court to reconsider its preliminary determination that the State would not be able to call

Dr. Brian Peterson to discuss the victim of the homicide, Adrian Lara's, cause of death. The trial court denied the motion in part, and granted it in part. The trial court ruled that the State could elicit testimony from Dr. Peterson concerning his independent opinions.

¶6 Shortly before the end of the jury trial, Muniz-Munoz filed a special jury instruction with the court concerning the police department's lack of an electronic recording of Muniz-Munoz's interrogations. At the close of testimony, the trial court took up the question of whether Muniz-Munoz's special jury instruction asking the jury that they "should weigh the evidence of the defendant's statement with great caution and care" should be given. Muniz-Munoz wanted this special instruction given because the police never recorded any of Muniz-Munoz's interrogations. The trial court ruled that it would not give the special jury instruction.

¶7 According to the criminal complaint and the testimony adduced at the jury trial, on August 3, 2003, the police were dispatched to a bar on Milwaukee's south side for a report of a shooting. On their arrival, the police observed two victims, Adrian Lara, who subsequently died, and N.S., who was injured but conscious. At trial, N.S. testified that on the evening of the shooting, he was at a bar with Lara, a member of the C-14 gang, and several others. He was told that the bar was run by the C-14 gang, a rival gang to the Mexican Posse gang. While in the bar, he saw three men come into the bar dressed in Mexican Posse attire with bandanas over their faces. All three of the men who entered had guns, and after entering, they locked the door. N.S. said he was shot, and he saw Muniz-Munoz, whom he recognized, and the third shooter, shoot Lara numerous times. N.S. explained that there was "bad blood" between Muniz-Munoz and Lara. N.S. said he was also shot numerous times but survived. When the gunmen

left, N.S. observed Lara lying on the floor asking for help. N.S. admitted that he did not immediately identify Muniz-Munoz as one of the shooters. Rather, he waited until several months before the trial to inform the police that Muniz-Munoz was one of the shooters. He said he refused to name Muniz-Munoz earlier because he had planned to personally avenge the shooting.

¶8 Also testifying at trial was one of the other shooters, Leonel Diaz-Luna, whose nickname was "Scooby." He confirmed that he entered the bar on the evening in question with Muniz-Munoz and Humberto Rangel, and that he was one of the shooters. Before entering the bar, someone told him that they were going inside the bar because they were looking for the person who shot up Muniz-Munoz's house. He admitted that originally he did not tell the police the truth about his involvement, but ultimately he pled guilty to several reduced charges in exchange for his testifying truthfully at the trial.

¶9 The third shooter, Rangel, also testified at the trial as a witness. He admitted being a former member of the Mexican Posse but claimed he was no longer a member. He also claimed to have severe memory loss, and, as a result, he could remember little of the events of the evening in question or, for that matter, many events that occurred in the past. Although he remembered entering the bar and conceded that a shooting took place there, he could remember nothing that occurred before entering the bar or afterward. He testified that he was with "Scooby" (Diaz-Luna) and "Chato." When asked about a statement he gave to the police after his arrest in which he claimed to have been in the bar with "Scooby" and Muniz-Munoz, he said that he told the police that because he was ordered to do so by "Chato."

¶10 When presented with his signed statement given to the police in 2003, Rangel said at first he told the police he was not involved in the shooting, but later, on orders from Chato, he told them that Muniz-Munoz was the third shooter. In this interrogation, Rangel admitted to being with Muniz-Munoz and Diaz-Luna when they shot up the bar, killing Lara and injuring N.S. He also conceded that he pled guilty to reduced charges in exchange for his truthful testimony, which the State believed would have had him implicate Muniz-Munoz in the shooting. When asked why he did not reveal earlier that "Chato" was the third shooter, he said he thought Muniz-Munoz would plead guilty and he would not have to reveal the real shooter. In rebuttal, Detective Scott Gastrow testified that he took one of the later statements from Rangel and Rangel confessed that the reason he originally refused to admit to his involvement in the shooting was because he was terrified of Muniz-Munoz and his brother.

¶11 After other witnesses were called, the jury trial was concluded on February 17, 2012, and the jury returned in the afternoon with a verdict. The jury found Muniz-Munoz guilty of count one, first-degree intentional homicide, as a party to a crime, and as to count two, guilty to the lesser included charge of first-degree recklessly endangering safety, as party to a crime. The trial court sentenced Muniz-Munoz to life imprisonment with eligibility for extended supervision after 35 years on count one. As to the other charge, the trial court sentenced him to five years incarceration, to be followed by five years extended supervision to be served concurrent to the life sentence.

¶12 Twice during the jury trial, concerns were raised regarding whether two jurors may have been sleeping. In each instance, the trial court determined that the jurors had not been sleeping and denied the defense's request to either remove the first sleeping juror from the jury, or to *voir dire* both as to their ability

to hear all the evidence. The trial court explained that he had been observing the two jurors and did not believe that either had actually fallen asleep. The request to remove the first juror, as well as the request to *voir dire* the jurors, was denied.

ANALYSIS

1. The trial court's findings that the jurors were not actually sleeping were not clearly erroneous.

¶13 Muniz-Munoz argues that his constitutional right to a fair trial and an impartial jury were violated by sleeping jurors. He contends that there were two sleeping jurors.

¶14 The right to an impartial jury, guaranteed by article I, section 7 of the Wisconsin Constitution and the Sixth Amendment to the United States Constitution, and the right to due process, guaranteed by the Fourteenth Amendment to the United States Constitution, both include the right of a criminal defendant not to be tried by a juror who cannot comprehend testimony. *See* ***State v. Turner***, 186 Wis. 2d 277, 284, 521 N.W.2d 148 (Ct. App. 1994). Whether this right has been violated is a question of law that we review *de novo*, but in our review, we accept the factual findings of the trial court unless they are clearly erroneous. ***Id.*** A sleeping juror falls within the category of a "juror who cannot comprehend the testimony." *See* ***State v. Hampton***, 201 Wis. 2d 662, 668-69, 760, 549 N.W.2d 756 (Ct. App. 1996).

¶15 During the trial, the trial court advised the attorneys that he saw one of the jurors nod his head and close his eyes. One of Muniz-Munoz's attorneys also saw this juror close his eyes "quite a bit." Muniz-Munoz's attorney asked that the juror be removed from the jury or be *voir dired* to explore whether he was awake or asleep. The trial court denied the request stating that:

> I don't believe he was asleep and missed testimony. I believe he was closing his eyes and listening without looking which isn't the best of situations but it's not the worst. So I don't believe we're in a situation where we need to release him or repeat any of the testimony.

¶16 During the afternoon session of the same day, concerns were raised by defense counsel about the possibility that another juror may have been sleeping. Defense counsel requested the trial court to *voir dire* both jurors. The trial court denied the request. The State confirmed that the juror it had been concerned about was the earlier one, not the second juror. The State told the trial court that it had no complaints about the second juror.

¶17 Muniz-Munoz now asks us to remand the matter to the trial court to determine the length of inattentiveness of any sleeping juror, what, if any, important evidence was missed by the sleeping jurors, and whether Muniz-Munoz was prejudiced.

¶18 The trial court's explanation concerning juror number two was that: "I have not seen him nod off before.… The minute they brought it to my attention I had kept looking and had not seen a single problem after that." It is clear that the trial court found that neither juror was sleeping. During the trial, the trial court had been diligently monitoring the jury, and although there were some briefly closed eyes, the trial court did not believe either juror was sleeping. These findings by the trial court were not clearly erroneous. Therefore, Muniz-Munoz's constitutional right to an impartial jury was not impaired.

2. Muniz-Munoz's rights to confrontation was not violated when the trial court allowed Dr. Peterson to testify as an expert witness.

¶19 Muniz-Munoz contends that the trial court erroneously exercised its discretion when it allowed Dr. Brian Peterson to testify concerning the cause of

death of the homicide victim. Muniz-Munoz filed both a motion seeking to exclude the testimony of Dr. Peterson and a brief in support of the motion. This issue arose because the doctor who performed the autopsy had died before trial.

¶20 In his brief, Muniz-Munoz argues that based on ***Crawford v. Washington***, 541 U.S. 36 (2004), the U.S. Supreme Court redefined the application of the Confrontation Clause and said that the threshold question in any Confrontation Clause issue is whether the State has used "testimonial" evidence against the accused without showing the unavailability of the source witness, and without giving the accused a prior opportunity to cross-examine that witness. *See* ***id.*** at 68-69. In support, he also cites ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), where the Supreme Court opined that certificates of state crime lab analysts could not be admitted absent their testimony because these certificates were testimonial. *See* ***id.*** at 307-11. Further support for his position that the "surrogate" doctor should not have been allowed to testify comes from the case of ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011), where the Supreme Court found that reports of a blood analyst were testimonial and could not be introduced through the testimony of an analyst who neither participated in nor observed the actual analysis. *See* ***id.*** at 2710, 2713.

¶21 The State, at the time of the trial, relied on ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, a case that predated the above mentioned United States Supreme Court cases for support of the doctor's testimony. There, our supreme court determined that Williams's right to confrontation "was not violated when the unit leader, rather than the analyst who performed the tests, testified in part based on the report containing the lab test results." ***Id.***, ¶2. In ***Williams***, the supreme court surveyed the then-current case law concerning the issue and concluded that:

> Taken together, these cases teach that the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id., ¶20.

¶22 Although a trial court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review. *See* ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

¶23 The trial court expressed some concern over the efficacy of the ***Williams*** holding at the time of the trial, but ultimately allowed the State to elicit Dr. Peterson's independent opinion as to Lara's cause of death. After the trial was concluded and the briefing in this case began, our supreme court released ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567. There, our supreme court, after reviewing the United States Supreme Court's numerous decisions on the confrontation issue, affirmatively stated that: "[the expert witness's] review of Griep's laboratory file, including the forensic test results of an analyst who was unavailable for trial, *to form an independent opinion* to which he testified did not violate Griep's right of confrontation." ***Id.***, ¶3 (emphasis added). The supreme court reasoned that where an expert testifies to his or her independent opinion, the right of confrontation is not violated. *See* ***id.***, ¶¶47-57.

¶24 Here, Dr. Peterson rendered his independent opinion concerning Lara's cause of death. He testified that after reviewing the autopsy file and the

photographs reflecting multiple gunshot injuries, that it was his opinion, to a reasonable degree of medical certainty, that Lara's cause of death was the result of multiple gunshot wounds.

¶25 We agree that Dr. Peterson's independent opinion regarding the cause of Lara's death did not violate Muniz-Munoz's right to confrontation. *See* ***id.***, ¶3. Further, we observe that inasmuch as Muniz-Munoz's defense was that he was not present at the time of the shooting and took no part in the shooting, the question of the victim's cause of death was not an essential part of his defense.

3. The trial court properly exercised its discretion when it declined to give Muniz-Munoz's special jury instruction.

¶26 Muniz-Munoz argues that it was "fundamentally unfair to refuse a jury instruction on unrecorded interrogation[s]." (Capitalization omitted.) Muniz-Munoz notes that the trial court gave the standard jury instruction WIS JI—CRIMINAL 180, but did not include the paragraph referring to unrecorded interrogations.[2] He argues that the failure to give this instruction was prejudicial

[2] WIS JI—CRIMINAL 180 states:

> The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.
>
> In evaluating (the) (each) statement, you must determine three things:
>
> - [W]hether 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.
>
> - [W]hether the statement was accurately restated here at trial.

(continued)

since the theory of defense was that Muniz-Munoz was not present and did not commit the shooting and none of his custodial statements stating to the contrary were recorded.

¶27 "A [trial] court has broad discretion in crafting jury instructions based on the facts and circumstances of the case." ***Dakter v. Cavallino***, 2015 WI 67, ¶31, 363 Wis. 2d 738, 866 N.W.2d 656. A trial court is "required, however, to exercise its discretion 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** (citation omitted).

¶28 During the course of a 2004 interrogation, Muniz-Munoz admitted his involvement in the crimes. His proposed jury instruction would have advised

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> - [W]hether the statement or any part of it ought to be believed.
>
> ADD THE FOLLOWING IF A STATEMENT RESULTING FROM AN UNRECORDED CUSTODIAL INTERROGATION IS ADMITTED AT TRIAL AND NO EXCEPTION APPLIES
>
> [It is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony. You may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in this case.]
>
> CONTINUE WITH THE FOLLOWING IN ALL CASES
>
> You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

(Footnote omitted.)

the jury that they must "weigh the evidence of the defendant's statement with great caution and care." However, this was never the law in Wisconsin. Rather, WIS JI CRIMINAL—180 asks the jury to determine whether the statement was actually made by Muniz-Munoz, whether the statement was accurately restated, and whether it should be believed. In addition, the jury was instructed to consider the facts and circumstances surrounding the statement and to determine how much weight it should be given. The current instruction, unlike that given here, also makes the jury aware that in Wisconsin, it is the policy to make a recording of a custodial interrogation of a person suspected of committing a felony, and if no recording was done, the jury could consider its absence in evaluating the evidence and the statement. However, that legislative change had not occurred when Muniz-Munoz was interrogated.

¶29 The trial court properly instructed the jury as to the law concerning a confession that Muniz-Munoz purportedly made to the police. The instruction given fully and fairly informed the jury of the rules of law applicable to the case.

4. The trial court properly exercised its discretion in denying Muniz-Munoz's motion seeking discovery of evidence of excessive force used against him when Mexican authorities apprehended him for extradition to the United States.

¶30 Before the trial began, Muniz-Munoz filed a motion seeking discovery of evidence of excessive force used against him by Mexican authorities.[3] It was his position that, while in Mexico, he was tortured because he was put in a chokehold, punched repeatedly in the face, his mouth was bleeding,

[3] Muniz-Munoz abandoned his earlier arguments that the extradition treaty between the United States and Mexico and the Vienna Convention supported his request for both discovery and dismissal of the charges.

and he suffered blows to his jaw that still caused him pain twelve weeks later, and as a result, he was entitled to discovery from the State and Federal governments to validate his complaints. It was his belief that evidence obtained through discovery would support his allegations and require the dismissal of his case. He relies principally on the case of ***U.S. v. Toscanino***, 500 F.2d 267 (2d Cir. 1974) *abrogation recognized by* ***Terrorist Bombings of U.S. Embassies in East Africa***, 552 F.3d 157 (2d Cir. 2008). There, the court concluded that the authorities' kidnapping and forcible extradition of Toscanino to the United States required the dismissal of charges on due process grounds. ***Id.*** at 281.

¶31 The trial court denied Muniz-Munoz's motion. The standard of review of trial court discovery decisions is whether the trial court abused its discretion in ordering or prohibiting discovery. *See* ***Shibilski v. St. Joseph's Hosp. of Marshfield, Inc.***, 83 Wis. 2d 459, 470-71, 266 N.W.2d 264 (1978).

¶32 The trial court, in a lengthy decision, denied the discovery motion. The trial court assumed for the sake of argument that Muniz-Munoz's allegations were true. Nevertheless, the trial court concluded that even if discovery would support his allegations, it would not lead to a dismissal of the charges.

¶33 First, the trial court noted that the ***Toscanino*** case is an outlier which has basically been rejected more recently by other courts. *See*, *e.g.*, ***United States v. Best***, 304 F.3d 308 (3d Cir. 2002). The trial court noted the more modern trend is to not dismiss charges based upon actions that occur before the defendant is brought to trial. The trial court was persuaded by the reasoning found in ***Matta-Ballesteros v. Henman***, 896 F.2d 255 (7th Cir. 1990), which observed that "[f]or the past 100 years, the Supreme Court has consistently held that the manner in

which a defendant is brought to trial does not affect the ability of the government to try him." ***Id.*** at 260.

¶34 In addition, the trial court believed that to dismiss the charges would be an "extreme use of supervisory powers." The trial court further observed that Muniz-Munoz had other remedies to address any abuses.

¶35 We agree with the trial court's decision and adopt it as our own. The trial court properly denied the discovery request because it would be futile, as the facts as alleged would not alter the trial court's decision that dismissal of the charges was not an appropriate remedy for any pretrial irregularities.

By the Court.—Judgment affirmed and cause remanded with directions.

Not recommended for publication in the official reports.