COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2252-CR **Cir. Ct. No. 2005CF538**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CODY D. SKINKIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Cody Skinkis, pro se, appeals a judgment of conviction for first-degree intentional homicide, attempted first-degree intentional homicide and operating a vehicle without owner's consent, together with the denial of his postconviction motion. Skinkis contends his trial counsel was

ineffective in numerous respects. He also argues he is entitled to a new trial in the interests of justice for cumulative errors. We reject his arguments and affirm the conviction.

¶2 On the morning of May 21, 2005, Samuel Warpinski's mother was notified by police that Warpinski's vehicle had been discovered burned on the Menominee reservation. Warpinski's sister went to the residence he shared with David LaCount and found Warpinski lying in bed. Warpinski said he had been shot by Skinkis around 7:00 a.m. and Skinkis "took his keys and stole his car." Warpinski also stated LaCount was dead, and that Skinkis also shot him. LaCount was subsequently discovered dead in the basement. Skinkis was found guilty after a jury trial. The circuit court denied a postconviction motion and this appeal follows.

¶3 Skinkis alleges his trial counsel was ineffective. Skinkis's first contention of ineffectiveness is difficult to discern. It appears Skinkis contends his trial counsel failed to properly argue that other acts evidence from a charge pending against him in Brown County case No. 2006CF68 ("the DePere evidence") was overly prejudicial and cumulative.

¶4 The DePere evidence involved a shooting that took place at approximately 3:00 a.m. on May 21, 2005, (three or four hours before the shooting of LaCount and Warpinski) near the St. Norbert campus in DePere. Bianca White reported she encountered LaCount, whom she knew from high school, in DePere early that morning with two other men. Although she did not know the two men at the time, she identified them at trial as Skinkis and Michael Dickensen. After she and Skinkis became involved in an argument involving racial slurs, Skinkis shot two times at or near White and her brother Julian. White also stated the man

who shot at her called a taxicab. A cab driver testified she drove three men from DePere to a location near LaCount's home. Ballistics evidence demonstrated the gun fired in DePere was the same gun used to shoot LaCount and Warpinski. Dickensen also identified Skinkis as the shooter.[1] Dickensen further indicated that he was present when Skinkis killed LaCount and shot Warpinski.

¶5 The State asserted the DePere evidence was admissible as evidence of the identity of the individual who shot LaCount and Warpinski. *See* WIS. STAT. § 904.04(2).[2] The circuit court ruled that at least some of the DePere evidence would be allowed. The court concluded the evidence was "extremely relevant" and its probative value was not substantially outweighed by the danger of unfair prejudice. However, the court deemed not relevant the fact that the incident occurred near the St. Norbert campus. The court also found the racial slurs not relevant.

¶6 The court instructed the jury to consider the DePere evidence for the issue of identity, to determine whether the incident occurred, and then to "give it the weight that you determine it deserves. It is not to be used to conclude that Mr. Skinkis is a bad person and for that reason must be guilty of these offenses charged."

¶7 At the postconviction hearing, the State argued the DePere evidence was admissible for purposes of identity, but also admissible irrespective of WIS.

[1] Skinkis was charged with first-degree reckless endangerment in the DePere incident.

[2] All references to the Wisconsin Statutes are to the 2007-08 version.

STAT. § 904.04, because the ballistics analysis demonstrated the DePere incident was part of the same criminal enterprise.

¶8 We conclude the other acts evidence in this case is controlled by ***Herde v. State***, 236 Wis. 408, 295 N.W. 684 (1941), and ***Bridges v. State***, 247 Wis. 350, 19 N.W.2d 529 (1945). In ***Herde***, evidence of a car theft by the defendant twenty hours prior to an armed robbery and murder was admissible to identify him as the robber/murderer through the license plate number. ***Id.*** at 410-11. In the present case, evidence of a shooting by Skinkis hours before a homicide and attempted homicide was similarly admissible to identify him as the shooter through the ballistics evidence showing the same gun was used in both instances.

¶9 In ***Bridges***, eyewitness evidence that the defendant was in a certain vicinity dressed in a soldier uniform was admissible to identify him as the man dressed as a soldier who sexually assaulted a child in that same vicinity approximately thirty minutes later. ***Id.*** at 360-61, 369. Here, the evidence served to identify Skinkis as the individual who was with LaCount and Dickensen in DePere a few hours before shooting LaCount and Warpinski in Dickensen's presence. The evidence was not cumulative and the court did not erroneously exercise its discretion in concluding the evidence was highly relevant and not overly prejudicial. The other acts evidence was admissible for purposes of identity.[3]

[3] Furthermore, the court instructed the jury to limit its consideration of the evidence to the identity issue and a jury is presumed to follow the court's instructions. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475.

¶10 Alternatively, we conclude the DePere evidence was admissible to establish the full context of Skinkis's criminal activities. Other acts evidence "is admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." ***State v. Bettinger***, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981). A fact tending "to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable. Relevancy is not determined by resemblance to, but by connection with, other facts." ***State v. Pharr***, 115 Wis. 2d 334, 346, 340 N.W.2d 498 (1983).

¶11 The evidence showed that Skinkis was with LaCount and Dickensen in DePere several hours before the shootings of LaCount and Warpinski. While in DePere, Skinkis discharged the same gun later used to shoot the two men, and he travelled from DePere to LaCount's neighborhood by taxicab. The DePere evidence was a link in the story of the crime. Skinkis has failed to show trial counsel was ineffective with regard to the DePere evidence.

¶12 Skinkis next argues his trial counsel was ineffective for failing to seek witness sequestration. At the ***Machner***[4] hearing, counsel explained that he did not seek sequestration of the prosecution witnesses because it would have necessitated sequestration of defense witnesses, and Skinkis wanted his family there as much as possible. The circuit court noted that Skinkis never contradicted counsel's explanation, which the court found made "complete and total sense."

[4] Referring to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

¶13 The State further notes on appeal that "[n]owhere in his postconviction motion or appellate brief has Skinkis even suggested how the lack of sequestration damaged his case. He has identified no instance where a witness's testimony was influenced by another witness's testimony. Obviously, he has failed to prove prejudice." Skinkis does not attempt to address this in his reply brief. Skinkis is therefore deemed to have conceded that he was not prejudiced by the lack of sequestration. *See* ***Charolais Breeding Ranches, Ltd v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶14 Skinkis next complains about trial counsel's handling of five trial witnesses. The first complaint concerns Warpinski's sister, Rachel Boerst. As Boerst began to tell the jury what Warpinski stated after she discovered him shot, defense counsel objected on hearsay grounds. The court admitted the testimony as an excited utterance, and also under the residual hearsay provision of WIS. STAT. § 908.03(24).

¶15 The circuit court did not err. First, the evidence constituted an excited utterance. While the interval between the startling event and the hearsay utterance is a factor, "time is measured by the duration of the condition of excitement rather than mere time lapse from the event described." ***State v. Patino***, 177 Wis. 2d 348, 365, 502 N.W.2d 601 (Ct. App. 1993). When Boerst found Warpinski, he was covered in blood, paralyzed, feverish and in pain. Warpinski was "still under shock of [the] injuries or other stress" caused by the shooting. *See* ***State v. Moats***, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990). Warpinski spent the time he endured waiting for help in the same "condition of excitement" that he was in from the moment he was shot. *See* ***Patino***, 177 Wis. 2d at 365.

¶16 In addition, the circuit court did not erroneously exercise its discretion by concluding the testimony was admissable under the residual hearsay rule, WIS. STAT. § 908.03(24). As the court stated, "He was … laying there thinking about whether he was going to die and whether he wanted to die, whether dying would be preferential [sic] to the condition that he was in." The court did not err in concluding the testimony had extremely strong guarantees of trustworthiness under the circumstances of this case.

¶17 Skinkis insists the circuit court's excited utterance ruling was erroneously predicated upon a recollection that Warpinski testified at a deposition that he was unconscious for large portions of the time prior to being discovered by Boerst. Skinkis claims his trial counsel was ineffective because he failed to correct the court regarding Warpinski's actual deposition testimony that he was only unconscious for brief periods before Boerst's arrival. At the ***Machner*** hearing, counsel did not recall these details, but "didn't think it was a real big factor in the case, how much he was unconscious." We agree the perceived failure to correct the court on this point was trivial in the hearsay analysis given the clear admissibility of the testimony. Moreover, as the court correctly observed, it is unlikely the jury focused on Boerst's hearsay testimony because Warpinski's live "eyewitness identification, his testimony … was devastating to the Defense."

¶18 Skinkis next challenges his counsel's effectiveness concerning the testimony of officer Phillip Scanlan, one of the first police officers on the scene. During cross-examination, Scanlan was asked whether he found marijuana on the kitchen table while searching the premises. The State objected on relevancy grounds. Defense counsel argued the testimony may be relevant depending on how the defense developed during the course of trial. The court indicated that if

the defense decided to include in its case the use of marijuana, it would require Scanlan to come back and testify.

¶19 Skinkis contends trial counsel "should of [sic] asserted the drug related defenses available and by so doing, would have got Scanlan's testimony in …." However, he fails to develop the argument. Skinkis does not specifically identify a defense that would have benefited from Scanlan's testimony or how the testimony would have made a difference to that particular defense. We will not abandon our neutrality to develop arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Furthermore, Skinkis was not prejudiced because the court indicated it would require Scanlan to return to court to provide further testimony if trial developments indicated Scanlan's testimony was relevant on the issue.[5]

¶20 Skinkis next complains his counsel was ineffective concerning the testimony of forensic pathologist Mark Witeck. Prior to Witeck's testimony, counsel sought the court's permission to ask him whether LaCount had THC and alcohol in his body at the time of his death. Counsel argued this information would be relevant to a possible defense theory that "medically speaking [the] level of alcohol or THC in [LaCount's] system might have contributed to his body not being able to withstand the wound he got." The court allowed counsel to question

[5] A defendant claiming ineffective assistance of counsel has the burden of showing both that counsel's performance was deficient and that this deficiency prejudiced the defense. *See, e.g.*, ***State v. Evans***, 187 Wis. 2d 66, 93-94, 522 N.W.2d 554 (Ct. App. 1994) (citing ***Strickland v. Washington***, 466 U.S. 668 (1984)). To establish deficient performance, the defendant must demonstrate specific acts or omissions "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. The test for prejudice is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." ***Id.*** at 687. 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.

Witeck during a brief voir dire examination away from the jury. Witeck testified LaCount died from the gunshot wound and that alcohol and THC did not contribute to his death. Accordingly, the court did not allow counsel to inquire about alcohol or THC levels. Skinkis again alleges on appeal that counsel failed to develop available areas of defense that would have allowed the inquiry, but fails to show what relevance alcohol or THC in LaCount's body would have on any defense that could have been developed. We will not develop Skinkis's argument. *See* ***id.***

¶21 Skinkis next complains about the testimony of detective Steven Darm, who testified about Warpinski's identification of Skinkis in a photo array conducted approximately twenty-four hours after the shooting. The circuit court correctly concluded the testimony was not hearsay because Warpinski was a witness at trial subject to cross-examination and he made the identification of Skinkis "soon" after being shown the photo array. *See* ***State v. Williamson***, 84 Wis. 2d 370, 387-88, 267 N.W.2d 337 (1978), *not followed on other grounds*, ***Manson v. State***, 101 Wis. 2d 413, 422, 304 N.W.2d 729 (1981).

¶22 However, the admission of Darm's testimony was not prejudicial in any event. First, as the circuit court pointed out at the postconviction hearing, Warpinski and Skinkis knew each other prior to the shootings, and therefore the photo array identification had far less evidentiary significance than one between strangers. Indeed, Warpinski identified Skinkis as the shooter in his own live testimony, rendering Darm's testimony about the photo identification insignificant.

¶23 Skinkis next contends trial counsel was ineffective regarding Larry Skinkis, who was his uncle and Skinkis's part-time employer. Trial counsel

anticipated the State to assert Skinkis was late for work on the morning of the shootings and therefore must have been doing something improper the night before. Counsel desired to introduce testimony that it was not unusual for Skinkis to be late for work. The circuit court concluded the testimony would not demonstrate "habit."

¶24 Skinkis fails to show how the testimony was relevant.[6] As the State observed at trial:

> I would probably be willing to stipulate that Mr. Skinkis is habitually unreliable. That's all it is going to prove …. Even if he is habitually late, why does that mean I can't say he was expected to be someplace, he didn't show up, he must have been doing something else?

¶25 Additionally, Skinkis insists trial counsel was ineffective for "not properly setting forth the most basic arguement [sic] and case cite to support [Larry's] contention." Skinkis argues:

> In the interim of the overnight break, had [trial counsel] made even the perfunctory effort to read the footnotes of the Statute, § 904.06, (05-06), [sic] it cites as authority **FRENCH V. SOR[A]NO,** [74 Wis. 2d 460], 247 N.W.2d 182 (1976), stating: "That although a specific instance of conduct occurs only once, the evidence may be admissible under sub. (2)."

However, Skinkis improperly relies upon ***French v. Sorano***, 74 Wis. 2d 460, 464-67, 247 N.W.2d 182 (1976). ***French*** neither addresses the number of

[6] Skinkis also fails to demonstrate how the exclusion of the testimony prejudiced the defense. In any event, we conclude the testimony was inconsequential.

incidents necessary to prove "habit," nor suggests that one incident might be sufficient.[7]

¶26 Skinkis next argues trial counsel was ineffective for failing to pursue one or more alternative defenses, including: (1) a drug deal or "rip off" gone bad; (2) a drug debt killing; (3) a burglary attempt gone bad; (4) a "gang related" killing; and (5) an individual named Ryan Furcho did it. Skinkis's theories basically revolve around the victims' alleged involvement in drug dealing. But even the accuracy of Skinkis's factual premise that the victims were drug dealers does not demonstrate that the shootings were consistent with any of his five theories. Further, even if it could be assumed that illegal drug dealing led to the shootings, it does not follow that Skinkis was therefore not the shooter.

¶27 Significantly, contending that the shootings were part of the drug world is simply non-responsive to the issues before the circuit court: (1) whether Skinkis caused or attempted to cause LaCount's and Warpinski's deaths; and (2) whether he intended to kill them. Further, although WIS. STAT. § 940.01(2) lists several mitigating circumstances that may reduce a first-degree intentional homicide charge to a second-degree intentional homicide, none of the defense theories Skinkis proposes comes within the ambit of § 940.01(2).

¶28 As the trial progressed, counsel concluded the best defense was to point the finger of guilt at Dickensen, and emphasize Skinkis's lack of motive. Counsel reasonably feared the drug world evidence could easily backfire,

[7] In addition, there was no overnight break during which counsel could have conducted this research.

especially because the State never developed a motive for the killing in its case in chief. As the circuit court observed:

> I don't see any way that if this door was opened, that the State wouldn't have come driving through it without a Sherman tank. And that's the problem. If Mr. Skinkis … had completely clean hands in terms of being involved in the drug world, this argument might have more merit. But it's clear from all the exhibits that he doesn't.
>
> ….
>
> So, what [counsel] would have been doing is heaping on – while he might have been spraying the splatters around to other people, his client would have got hit with a bunch of that paint.

Quite simply, Skinkis cannot show that counsel's strategy was unreasonable.

¶29 Finally, Skinkis seeks a new trial on the grounds of "cumulative errors" by the circuit court and defense counsel. Because Skinkis's claims are meritless, they do not warrant a new trial in the aggregate. Each is without substance. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

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