COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP894-CR **Cir. Ct. No. 2007CF3578**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICK D. FREEMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Rick Freeman appeals a judgment of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Freeman was convicted of one count of first-degree intentional homicide. We first address his argument that his trial counsel was ineffective by not consulting with and calling at trial an expert who would testify about the fallibility of eyewitness identification. We apply the familiar test for ineffectiveness under ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶3 We agree with the circuit court's conclusion that Freeman's trial counsel declined to present such an expert as part of a reasonable trial strategy. At trial, defense counsel's cross-examination of the eyewitness focused heavily on inconsistencies among her trial testimony, her statements to police, and her testimony at a deposition, including on the issue of identifying the shooter. In closing argument, defense counsel spent considerable time reviewing these inconsistencies, and pointedly questioned the witness's credibility. The thrust of the defense was to suggest that her identification was unreliable due to fabrication. Presenting the expert testimony would have undermined that defense by distracting the jury, and by implying that the witness might genuinely believe that she saw Freeman as the shooter, but was making a good faith mistake due to limitations of human observational skills and memory.

¶4 Freeman also argues that we should grant a new trial in the interest of justice under WIS. STAT. § 752.35 (2009-10)[1] because the real controversy was not fully tried. Freeman claims that it was not fully tried because the jury did not hear the expert testimony about eyewitness identification. We are satisfied that the question of whether Freeman was the shooter was sufficiently tried.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶5 Freeman next argues that it was a violation of his confrontation right for the circuit court to have admitted a portion of a telephone conversation between Freeman and another person while Freeman was in jail. The exchange appears to concern the identification witness having appeared at a deposition. Because he has framed the issue as a confrontation claim, we assume Freeman is not arguing about any of his own statements in the recording. However, Freeman is vague about precisely what portion of the other person's part of the exchange was inadmissible. It appears his argument is directed at statements at the end of the exchange where the other person might be understood to say that he and a third person were at or near the witness's house when she left for the deposition, and that a detective was also there.

¶6 We agree with the State that the statements by the other person were admissible as context for a statement that Freeman made. Earlier in the exchange, Freeman said, after expressing dissatisfaction that the identification witness had attended the deposition: "That's why I told you all to holler at that bitch, man, for real." In response, the other person says, "they came up and got that bitch," and then a bit later says that he, the third person, and the detective were at the witness's residence. The other person's statements imply that when Freeman said he "told you all to holler at that bitch," he was referring to a previous request he had made for the other person to deter the witness from attending the deposition. The other person's statements that "they" (apparently meaning the police) came and got the witness, and that he and a detective were present near the witness's residence, can be understood as explaining why the speaker failed to do what Freeman had earlier "told" them to do.

¶7 Freeman next argues that evidence of an argument and fight between the identification witness and Freeman's girlfriend was irrelevant and prejudicial.

He argues that it was irrelevant because there was no showing that Freeman knew anything about these events until after they occurred, and that it was prejudicial because it left the impression that Freeman encouraged his girlfriend to attack the witness, as a form of witness intimidation.

¶8 The argument appears to be internally inconsistent. It does not appear that the evidence could be both irrelevant and prejudicial in the manner Freeman argues. If it could be inferred that Freeman encouraged the conflicts, then the evidence is relevant, and there is no error for which we must analyze prejudice. Conversely, if no inference could be drawn that Freeman encouraged the conflicts, then the evidence would not be relevant, but nor would it be prejudicial. Therefore, we conclude that any error on this point was harmless.

¶9 Freeman next argues that the court erred by admitting a statement made by an associate of his, before the crime, that the victim had "shot up" the associate's car and that the associate was "going to fuck him up," referring to the victim. Freeman's argument is on hearsay grounds. Although Freeman treats this as one statement, it is actually two.

¶10 In the first statement, the associate stated that the victim had shot up the associate's car. This was not hearsay because it was not being offered to prove the truth of the matter asserted, that is, that the victim had indeed shot up the associate's car. It was instead offered to show that the associate *believed* this to be true, and thus had motive or intent to encourage or assist Freeman in shooting the victim.

¶11 In the second statement, the associate proclaims that he is going to harm the victim. Freeman appears to argue that this was hearsay because it was offered for the truth of the matter that Freeman's associate had a plan to harm the

victim. We question whether the associate's statement of his future intent or hope contained factual material that can be classified as either true or false, as of the time it was made. If the statement was not one that was either true or false at that point, it is not clear to us how it could be offered to prove the truth of what the associate asserted. However, even if it does qualify as hearsay, the State argues, as an alternate ground to the trial court's reasoning, that it would be admissible as a "statement of the declarant's then existing state of mind … such as intent" under WIS. STAT. § 908.03(3). Freeman's reply brief does not reply to this alternate theory, and we agree that it applies to this statement by the associate.

By the Court.—Judgment and order affirmed.

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