COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-1283-CR-NM

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMETT KAPRIES DUNLAP,

DEFENDANT-APPELLANT,

GREGORY DARNELL PERKINS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Emmett Dunlap appeals his conviction for second-degree intentional homicide, as a party to the crime, after a trial by jury,

having received a thirty-eight-year prison term. The jury found Dunlap not guilty of a second count of false imprisonment, party to a crime. Dunlap's counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Dunlap received a copy of the report and has filed a response. Counsel's no merit report raises six possible arguments: (1) the State furnished insufficient evidence of probable cause at the preliminary hearing; (2) the prosecution improperly charged a crime in the information not found in the criminal complaint; (3) the evidence did not prove Dunlap's guilt beyond a reasonable doubt; (4) the trial court improperly instructed the jury concerning how it should weigh and consider the various possible verdicts; (5) trial counsel ineffectively failed to employ a private investigator; and (6) trial counsel erroneously failed to call exculpatory witnesses. Upon review of the record, we are satisfied that the no merit report properly analyzes these issues and that they have no arguable merit. Accordingly, we adopt the no merit report's analysis of those issues and will not discuss them further, except to the extent Dunlap addresses them in his response.

In his *pro se* responses, Dunlap raises multiple arguments: (1) Dunlap's accomplice's mother lied during the trial about Dunlap's role in the crime; (2) Dunlap was innocent of the homicide by virtue of duress; (3) the jury wrongly received a lesser-included offense instruction; (4) the prosecution wrongly charged a different crime in the information than in the criminal complaint; (5) the victim had already died by the time Dunlap took any part in the matter; (6) trial counsel should have obtained an expert witness to investigate the time of the victim's death; and (7) everyone thought the victim was already dead by the time Dunlap took any part in the matter. Most of these arguments center on several long-standing but seldom-arising principles of substantive criminal law that Dunlap believes exonerate him of guilt in the homicide: (1) Dunlap took part

in the homicide under threat of death by another; (2) Dunlap participated in the homicide at a time when the victim was already dead; and (3) Dunlap and the other participants believed, right or wrong, that the victim was already dead at the time they took part in the homicide. We conclude that Dunlap's *pro se* arguments have no merit. We therefore reject Dunlap's arguments, affirm his conviction, and discharge his appellate counsel of his obligation to represent Dunlap further in this appeal.

On February 14, 1995, Dunlap, Milton Gordon, Gregory Perkins, Perkins's girlfriend Tasha Jones, Perkins's mother, and Perkins's mother's boyfriend were drinking alcohol at Perkins's house. Perkins and Jones began to argue, possibly over Jones's flirting with men that evening. According to Perkins's mother, Perkins struck Jones with his fist; Dunlap testified that Perkins and Jones were just playing around. In any event, Dunlap observed a handgun in Perkins's hand. Dunlap admitted then telling Perkins, "If you're going to shoot her, shoot her"; Dunlap testified that he was joking and drunk. A moment later, Perkins raised the handgun and fired, hitting Jones in the head. The mother's memory was hazy. She thought Perkins stated, "I shot her, mama"; he may have also stated "she is dead." The mother went into the bedroom and saw Jones lying unclothed on the bed, "breathing real hard," and gasping for air. She told Perkins to call the paramedics. He balked, stating he feared jail. Instead, Dunlap and Gordon helped Perkins wrap Jones in a blanket, carry her outside, and put her in the trunk of a car. They drove a few minutes to a bridge, took her from the trunk, placed her on the ledge, and pushed her off. She hit the frozen ground thirty-feet below, her unclothed body still draped in the blanket. The prosecution's medical expert testified that Jones was alive when she hit the ground; she died later from

the combined effects of the fall and the gunshot wound. The expert could not say whether Jones would have survived the gunshot wound alone.

Perkins's mother and Dunlap agreed that Perkins was drunk when he pulled the trigger. They differed, however, on other points. According to the mother, Dunlap stated "If you're going to shoot the bitch, shoot her." Dunlap testified that he stated "If you're going to shoot her, shoot her," advice that he considered a drunken jest and on which he never expected Perkins to act. The mother testified that Dunlap was the one who suggested throwing Jones off the bridge. She testified that Dunlap stated at the house that Jones was alive and that he later told her Jones was still alive when they pushed her off the bridge. Dunlap disclaimed prior knowledge that they were headed to the bridge. He testified Perkins forced him to help dispose of Jones at gunpoint: Perkins came out of the bedroom panic stricken, waiving the gun back and forth, ordering everyone to help him dispose of the body and conceal the crime. The mother corroborated part of this, confirming that Perkins threatened to shoot at least anyone who left the house. Dunlap claimed he feared Perkins would kill anyone who did not help. Dunlap also limited his role. While he helped put Jones on the ledge, he denied helping push her off; he claimed that he hesitated to take part in that final act and managed to evade it in the darkness, evidently without Perkins's knowledge and despite his gun-wielding commands. Dunlap told police he did not know with certainty whether Jones was alive or dead when they put her in the trunk. He testified at trial that he thought she was dead. The mother testified she warned everyone as they carried Jones out the door that she was alive.

Dunlap first argues that Perkins's mother lied during the trial. Dunlap states that the mother falsely implicated him in a furtive, misguided attempt to diminish her son's culpability and curry favor for her son's benefit.

Juries, however, not appellate courts, determine the credibility of witnesses and the weight of their testimony. ***Gedicks v. State***, 62 Wis.2d 74, 79, 214 N.W.2d 569, 572 (1974). We may overrule a jury verdict only if the jury relied on evidence that was inherently or patently incredible. ***Beavers v. State***, 63 Wis.2d 597, 603-04, 217 N.W.2d 307, 310 (1974). Here, as the above-described testimony indicates, Perkins's mother testified about Dunlap's role in the homicide. Her testimony did not differ from his in ways material to the outcome; their testimonies both confirmed his complicity in the incident, whether voluntary or involuntary. Dunlap himself admitted that he had a role, defending his actions on the ground that his accomplice coerced him by threat of death. Further, Dunlap has not indicated what information Perkins's mother provided that was both false and material to his conviction. Dunlap's own testimony furnished a good deal of incriminating evidence. This testimony, by itself, corroborated key points of the mother's testimony. Under these circumstances, Dunlap has given this court no basis to overturn the jury's evaluation of Pekins's mother's testimony.

Dunlap next argues that he is innocent of the homicide. He bases his innocence on coercion; on fear for his own life. He maintains that his accomplice compelled his participation in the homicide under threat of death. While Dunlap claims innocence on the basis of coercion, he misapprehends the role duress or coercion plays in the law of homicide. As Justice Holmes stated, Dunlap's misconception is one of the "oldest fallacies of the law." *See* ***The Eliza Lines***, 199 U.S. 119, 130 (1905) (Holmes, J.), quoted in ROLLIN M. PERKINS, CRIMINAL LAW 949 (2d ed. 1969). At common law, duress or compulsion, even the threat of instant death, did not excuse the intentional killing of an innocent person. *See* PERKINS at 951. In the words of Sir William Blackstone, the killer "ought rather to die himself than escape by the murder of an innocent." *See* PERKINS at 951

(quoting 4 BLACKSTONE'S COMMENTARIES *30). While Wisconsin has made coercion a mitigating factor, it still does not exonerate the killer; it merely reduces his crime from first-degree intentional homicide to second-degree intentional homicide. *See* §§ 939.46(1) and 940.05, STATS. Here, the jury convicted Dunlap of second-degree intentional homicide and thereby accepted his claim of coercion. Dunlap has already received the full measure of what the law allows—mitigation, not exoneration.

Dunlap next argues that he did not want a lesser-included offense submitted to the jury. He wanted to argue coercion as a defense to the first-degree intentional homicide charge, free of any lesser-included offense. He claims that his trial counsel was ineffective for having disobeyed his wishes on the matter. Dunlap must satisfy a two-pronged standard to show ineffective trial counsel; he must show both deficient performance and resulting prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Dunlap has shown neither. As noted above, Dunlap misapprehends the role that duress or coercion plays in the law homicide. Coercion is an exonerating factor for lesser crimes, *see* § 939.46(1), STATS., but it plays no more than a mitigating role in the law of homicide. For example, while coercion would exonerate the crime of concealing a corpse, *see* § 940.11, STATS., it merely mitigates, not exonerates, a homicide. Dunlap had no right to confuse the jury with claims of coercion without reference to the lesser-included offense of second-degree intentional homicide. If he wanted to argue coercion in a homicide context, he had to pursue the issue within the limits of what Wisconsin law allows, a lesser-included offense resting on the concept of mitigation. Trial counsel followed this procedure, and the jury accepted Dunlap's claim of coercion, convicting him of the lesser-included offense. In sum, Dunlap has shown no breach of the ***Strickland*** standards.

Dunlap next argues that the prosecution improperly charged a different crime in the information than in the criminal complaint. After the preliminary hearing, the prosecution changed its first-degree reckless homicide charge to first-degree intentional homicide. The prosecution could make this change as long as the new charge arose out of the same transaction as the old one. *See* ***Bailey v. State***, 65 Wis.2d 331, 341, 222 N.W.2d 871, 876-77 (1974). The prosecution has considerable discretion on such amendments; the new charge must merely be not wholly unrelated to the old one. *See* ***id.*** If the new charge concerns the same witnesses, place, time, evidence, motive, and intent, then it arises out of the same transaction. *See* ***id.*** Here, the prosecution's amendment satisfied these standards. Both charges involved the same witnesses, place, time, and evidence; it also involved similar motives and intent. The preliminary hearing testimony centered on the incident at Perkins's residence and the subsequent disposal of the body. It fully allowed the first-degree intentional homicide charge. In addition, the amendment caused Dunlap no unfair prejudice. From his standpoint, the amendment did not hinder his basic defense of duress or the kind of evidence he would submit in defense. Under these circumstances, we are satisfied that the trial court lawfully allowed the prosecution to charge a new crime in the information.

Dunlap next argues that the victim was dead by the time he helped push her off the bridge. If this were true, he would not be guilty of a homicide. *See* PERKINS at 31 (citing ***United States v. Hewson***, 26 Fed. Cas. 303 (C.C.D. Mass. 1844) (No. 15,360) (Story, J.) (woman who cast her seemingly dead baby off ship into sea not guilty)). The prosecution's expert witness testified, however, that the victim was alive when Dunlap helped push her off the bridge. The jury was entitled to conclude that this testimony refuted Dunlap's claim beyond a reasonable doubt. We also reject Dunlap's related argument that the prosecution

should have provided him his own expert witness at the public expense to examine the body and independently determine the time of the victim's death; Dunlap's trial counsel did not seek such an expert. Dunlap evidently believes that he has a constitutional right to state-paid expert witnesses in a criminal case. Indigent defendants have no constitutional right to state-paid expert witnesses, except for medical experts on the insanity issue in capital crimes. *See* ***Ake v. Oklahoma***, 470 U.S. 68, 86-87 (1985); ***Smith v. Baldi***, 344 U.S. 561, 568 (1953); ***Mason v. Procunier***, 748 F.2d 852, 853 (4th Cir. 1984). Dunlap's requested expert witness does not meet this standard; Dunlap is not claiming mental disease or defect and is not facing the death penalty. As a result, the State had no obligation to furnish him an expert witness to determine the victim's time of death.

Dunlap next argues that trial counsel should have done more to investigate the time of death. Dunlap suggests that trial counsel should have procured an expert to review the records of the Milwaukee County medical examiner and give an independent, second opinion on the time of death. For ineffective counsel, Dunlap must satisfy a two-pronged standard; he must show both deficient performance and resulting prejudice. *See* ***Strickland***, 466 U.S. at 687. Here, Dunlap has not met the prejudice prong. First, trial counsel extensively cross-examined the medical examiner about the time of death. This uncovered no substantial defects or avenues for independent investigation. The witness gave straightforward answers to the parties' questions and examined the evidence in a fair-minded way. Second, Dunlap has identified nothing in the evidence tending to show a need for another expert. His response to the no merit report has not pointed out any conclusions by the medical examiner that were in doubt or in need of confirmation by another expert. At the postconviction stage of proceedings, Dunlap may not rely on general allegations of unfairness to show

Strickland prejudice; he must show specific gaps in the prosecution's evidence that an additional expert witness would have exploited and remedied. In the absence of such evidence, we may assume that the evidence would have been cumulative. In short, Dunlap has shown no prejudice under the ***Strickland*** standard.

Dunlap next claims exoneration on the ground that everyone on the bridge thought Jones was already dead. He believes that such a mistake of fact exonerates him of second-degree intentional homicide. Dunlap misunderstands the law of mistake. Even if Dunlap thought that Jones was dead, he would have admittedly engaged in an unlawful act, concealing a corpse, at the time he helped push Jones off the bridge. *See* § 940.11, STATS. As a general rule, persons who intentionally commit an unlawful act and inflict an unforeseen injury in the process remain criminally liable for the injury. *See* PERKINS at 816 (citing ***State v. Lehman***, 155 N.W. 399, 400 (Minn. 1915) and MATTHEW HALE, PLEAS OF THE CROWN *39)); *see also* WILLIAM L. CLARK & WILLIAM L. MARSHALL, CRIMES § 5.11, at 321 (7th ed. 1967). This is an "age-old" concept of criminal law; wrongdoers may not interpose their mistakes on the degree of harm their unlawful acts cause as a basis for exoneration. *See* PERKINS at 822, 943. Historically, in the homicide context, such wrongdoers were guilty of one of that crime's lesser forms, such as felony murder or manslaughter. *See* PERKINS at 822, 943; CLARK & MARSHALL § 5.04, at 274-76; *see also* ***Boyle v. State***, 57 Wis. 472, 481-84, 15 N.W. 827, 832-33 (1883); ***Rowan v. State***, 30 Wis. 129, 140-41 (1872). Here, Dunlap assumed the risk of his intentional wrongdoing when he committed the wrongful act of disposing of the body. *See* PERKINS at 822, 943. He may not claim exoneration for the resulting homicide on the ground that he honestly and mistakenly believed the victim was dead.

In the once well-known and much-discussed case of ***Jackson v. Commonwealth***, 38 S.W. 422 (Ky. 1896), *on rehearing* 38 S.W. 1091 (Ky. 1897), Kentucky's highest court faced similar circumstances. In ***Jackson***, two young men mutually accused each other of the homicide of a young woman. The conflicting evidence left the jury to weigh and judge the proof on several versions of the homicide. Under one version, Scott Jackson, a dental student at the Ohio Medical College in Cincinnati, Ohio, believed that he had accidentally killed his lover with cocaine he gave her in a failed attempt to induce an abortion of his child. An accomplice who may have had no involvement in the cocaine-giving helped the cocaine-giver dispose of the body. They decapitated the victim and hid her head in an attempt to thwart the body's identification. The effort failed; the victim's shoes contained the name of the store that sold them, and this helped the police identify her. This identification in turn led the police to Jackson and the discovery of inculpatory physical evidence. This physical evidence and testimony by the driver of a horse-drawn hack persuasively showed both men's complicity in the decapitation; the driver testified to taking the two men and a "woman in distress" to the countryside, near the site where the headless body was found. The evidence was not as strong on both men's complicity in the cocaine-giving; it pointed more toward Jackson. Medical testimony at trial indicated that the decapitation, not the cocaine, was the cause of death.

The ***Jackson*** court was called upon to pass on a series of jury instructions. The trial court had issued alternative instructions to cover the various fact scenarios the jury needed to resolve. One of these instructions dealt with the guilt of an accomplice who had aided the decapitation while believing the victim already dead, and who had had no involvement in the cocaine giving. This instruction told the jury that such an accomplice would be guilty of a form of

manslaughter. A close reading of the case reveals what Jackson's challenge to that instruction must have been. Jackson claimed that he, not his coassailant, was the above-described accomplice, and that his coassailant, not he, gave the cocaine. Jackson argued that he helped the cocaine-giver decapitate the body under an honest mistake of fact that he was merely helping to conceal the identity of a corpse, a mistake that he evidently thought should exonerate him of the homicide. The ***Jackson*** court held that if these were the true facts, this mistake would not exonerate Jackson of the homicide; it would only mitigate his culpability, leaving him guilty of a form of manslaughter rather than murder, in conformity with the trial court's instruction. *See* ***Jackson***, 38 S.W. at 428. This is the only American case we have found that addressed an accomplice's mistake of fact as to the victim's death. We know of none that exonerated mistaken accomplices. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 34, at 241-42 & nn. 25-27 (1972) (mistake-as-to-death cases); *see also* GLANVILLE L. WILLIAMS, CRIMINAL LAW § 43, at 137-39 (1953) (mistake as to death should be at least manslaughter, if not murder).[1]

Further, in at least one sense, Dunlap's culpability could compare unfavorably with the accomplice's in ***Jackson***. Under the above-discussed version of the ***Jackson*** facts, the court-approved manslaughter instruction assumed that the accomplice had no role in the anterior act of homicide—the administration of cocaine. Under that version, he came to the principal's aid only in the posterior act—the failed, fatal attempt to conceal the corpse's identity by decapitation. Here, however, Dunlap had a role in the anterior act, Perkins's use of the handgun.

[1] Dunlap's conviction for second-degree intentional homicide is Wisconsin's present-day analog to manslaughter. *See* Judicial Council Note, 1988, to § 940.02, STATS.

Before the shooting, Dunlap admittedly stated something like, "If you're going to shoot her, shoot her." This remark must have emboldened Perkins, regardless of whether Dunlap made the remark as a drunken jest. It made Dunlap more culpable, in terms of his role viewed as a whole, than the ***Jackson*** accomplice, who the ***Jackson*** court ruled would be guilty of manslaughter. This higher degree of culpability weakens Dunlap's attempt to use mistake of fact as an exonerating factor. This is true regardless of the fact that Dunlap's remark, which he considers an alcohol-induced jest, may not have been enough by itself to convict him of the homicide as a party to the crime. *See* ***Hicks v. United States***, 150 U.S. 442, 448-50 (1893) (accomplice must intend his remark to cause death for the remark itself to support a homicide conviction as a party to the crime); *see also* CLARK & MARSHALL, § 8.03, at 515 (quoting HALE at 616 (words of bare permission not enough to convict speaker as party to the crime)). In short, Dunlap's role in the anterior act could raise his blameworthiness above the ***Jackson*** accomplice's.[2]

Dunlap may be arguing that coercion and honest mistake, in their combined operation, exonerated him of the homicide. We know of no authority on this proposition. In rare, partly analogous cases, in which coerced accomplices have contributed to other kinds of unintentional homicides, courts have reached different conclusions. Some courts have found exoneration; others have not. *See* ***People v. Petro***, 56 P.2d 984 (Cal. App. 1936); ***People v. Merhige***, 180 N.W. 418 (Mich. 1920); ***People v. Pantano***, 146 N.E. 646 (N.Y. 1925); ***State v. Moretti***, 120 P. 102 (Wash. 1912); *see also* ***People v. Roper***, 181 N.E. 88 (N.Y. 1932); PERKINS

[2] We note that another witness, Milton Gordon, gave testimony that could have raised Dunlap's culpability in the anterior act. According to Gordon, Dunlap gave Perkins the gun, Perkins stated he was going to kill Jones, and Dunlap told him to "take care of business." The prosecution did not cite or otherwise rely on this testimony in its theory of the case.

at 952; CLARK & MARSHALL § 5.16, at 365; LAFAVE & SCOTT § 49, at 377. These cases dealt with the effect of coercion on an accomplice's guilt in an unintentional homicide resulting in a felony-murder charge. In each instance, an accomplice that others forced to help commit a felony contributed to an unintentional homicide during the felony's commission and received a felony-murder charge. Those cases finding exoneration essentially ruled that the exonerating effect coercion would have had on the accomplice's guilt on the underlying felony carried over to the accomplice's guilt on the homicide unintentionally committed during the underlying felony. Those cases finding no exoneration essentially ruled that the exonerating effect coercion would have had on the underlying felony did not carry over to the unintentional homicide.

We need not resolve the seeming conflict between these two lines of cases. Here, the evidence showed no bona fide mistake of fact. Dunlap was present at the shooting, and Perkins's mother told everyone they should get the victim medical help. She testified that Dunlap later admitted the victim was still alive on the bridge. Dunlap himself admitted that he did not know whether the victim was alive or dead when they put her in the trunk. He also stated that he and Gordon were hesitant about pushing the victim off the bridge, claiming that he did not join in the final push. Taken together, this suggested that Dunlap knew Jones could still be alive on the bridge. Moreover, the fact that everyone pushed the victim off a thirty-foot-high bridge only a short time after the shooting allowed for a strong inference that they wanted to assure a death of which they were then unsure. All of this nullified the claimed mistake; Dunlap must have known that the victim could still be alive at the time he helped push her off the bridge, and the jury must have reached this conclusion. *See* ***Meath v. State***, 174 Wis. 80, 83, 182 N.W. 334, 335 (1921) (mistake is a subjective standard). And while we realize

that the trial court did not instruct the jury on mistake *per se*—the trial court gave the jury standard instructions on Dunlap's need to have an intent to kill—we think that those instructions, together with the evidence and arguments of counsel, sufficed to apprise the jury of the basic concept of mistake at work in this homicide. *See* § 939.43, STATS. (mistake of fact must negate intent to kill). In short, Dunlap must have known that Jones might still be alive on the bridge, and he may not claim exoneration on coercion's and mistake's combined operation.

Dunlap briefly raises his final three arguments. First, he reiterates his appellate counsel's claim in the no merit report that trial counsel failed to properly investigate witnesses. Dunlap does not indicate what witnesses he thinks his counsel should have investigated, except for some that may have supported his coercion defense. As noted above, this defense was successful, and therefore, those witnesses' absence did not harm his case. We need not pursue his other generalized claims on missing witnesses further; those generalized claims show no deficient performance by counsel or associated prejudice to the trial's outcome. *Cf.* ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1389 (1995). Second, Dunlap asks for bail pending appeal, in order that he may help his counsel properly pursue his appeal. Inasmuch as Dunlap's appeal lacks arguable merit, he has no basis to seek bail pending appeal. *See* ***State v. Salmon***, 163 Wis.2d 369, 374-75, 471 N.W.2d 286, 288 (Ct. App. 1991). Moreover, prisoners' desires to assist counsel pose no special circumstances warranting bail. All prisoners pursuing an appeal face the same circumstances. If Dunlap has any other reasons why the State should release him pending further postconviction challenges, he should address those to the trial court. *See* RULE 809.31, STATS.

Last, Dunlap asks for a copy of his presentence report. We reject this request for several reasons. First, Dunlap has not challenged his sentence or otherwise shown a need for the report. He may not validly seek a copy without first showing the basic relevancy of the report to his appeal. Second, Dunlap has no absolute right to possess a copy of the report; he merely has a right of access, or in other words, a right to review the report. Nothing in either ***State ex rel. Hill v. Zimmerman***, 196 Wis.2d 419, 538 N.W.2d 608 (Ct. App. 1995), or ***State v. Skaff***, 152 Wis.2d 48, 447 N.W.2d 84 (Ct. App. 1989), requires a different conclusion. We have no reason to believe that anyone restricted Dunlap's right to review the report during the trial court proceedings. Last, prisoners have severely reduced rights to presentence reports after sentencing. *See* § 972.15(4), STATS. Presentence reports are confidential. Unlike presentencing disclosure to Dunlap by his trial counsel, in which Dunlap may review but not possess the report, postsentencing disclosure in the ***Anders*** context would involve giving Dunlap a copy. This would pose a much greater risk of a breach of confidentiality than Dunlap's mere review before sentencing. For this reason, in the absence of a compelling need, prisoners' postsentencing rights in this regard are reduced. Dunlap has not shown a high degree of need. Accordingly, we adopt the no merit report, affirm the conviction, and discharge Dunlap's appellate counsel of his obligation to represent Dunlap further in this appeal.

By the Court.—Judgment affirmed.