COURT OF APPEALS
DECISION
DATED AND FILED

January 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2241-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR M. KENNEDY,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Victor M. Kennedy appeals from the judgment of conviction, following a jury trial, for first-degree reckless homicide while armed, and from the trial court order denying his postconviction motion. He argues that trial counsel was ineffective for failing to call a witness to introduce a report, and

that the trial court erred in excluding portions of a witness's statements to police. We affirm.

I. Background

The crime in this case is set against a somewhat complicated background involving the relationships among Kennedy and two women: Keywarner Young, the victim, and Shawaunee Edwards, the witness of Kennedy's shooting of Young.

On the morning of May 16, 1994, while an inmate of the Abode, a community-based pre-release correctional facility, Kennedy failed to go to work. Instead, he went to look for Young in order to get his car back from her. During the next several hours, Kennedy and Young argued about, looked for, and eventually located the car. At some point during the day, they were joined by Edwards. That afternoon, Kennedy and Edwards went off together, leaving Young behind at Kennedy's aunt's home. At about 10:15 p.m., Kennedy and Edwards again met up with Young who, by this time, was carrying a gun. While together with Kennedy and Edwards in a residence, Young fired the gun.

Shortly thereafter, all three were inside a car, and Kennedy and Young were arguing. Kennedy tried to force Young out of the car, and they both were pulling on her purse. Their struggle carried them outside the car where the gun fell from Young's purse. Both Kennedy and Young tried to get it, and when Kennedy got the gun, Young jumped back into the car and locked the doors, leaving Kennedy in the street. At about the same time, Edwards exited the car. Young then drove the car, and Kennedy shot her through the driver's side window while she was driving either at him, according to Edwards, or away from him,

according to the accounts of three other witnesses. Young died from a gun shot wound to her chest.

The day before the killing, Young had visited Kennedy at the Abode and had been overheard telling him, "[I]f I see you on Monday, I am going to blow your mother fucking head off your shoulders." Her threat was critical to Kennedy's defense that he shot Young in self-defense. It was recorded in an Abode incident report prepared by Officer Arnold Schoenheit. At the trial, however, the defense called Abode Sergeant Michael Claus. He testified about the incident but mistakenly attributed Young's threat to Edwards.

II. Analysis

A. Ineffective Assistance of Counsel

Kennedy contends that because of Sergeant Claus's testimony, the jury not only was denied important exculpatory evidence consistent with his theory of self-defense, but also was misled by evidence suggesting that the threat was made by Edwards. Kennedy argues, therefore, that counsel was ineffective for failing to subpoena Officer Schoenheit in order to introduce the report he prepared.

In evaluating a defendant's ineffective assistance of counsel claim, we apply the two-part test enunciated in ***Strickland v. Washington***, 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id. at 687. Whether counsel's performance was deficient and prejudicial are issues of law we review *de novo*. ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). We may dispose of an ineffective assistance claim if the defendant fails to make either showing. ***Id.***

Testimony at the postconviction hearing on Kennedy's ineffective assistance claim established: (1) that although Officer Schoenheit had heard the comment, he had not observed Young making it; and (2) that Sergeant Claus had been in a better position to observe the person making the threat and, therefore, Officer Schoenheit believed Sergeant Claus probably had more complete knowledge of the incident at Abode.[1] Moreover, trial evidence established that Sergeant Claus and Kennedy had a subsequent discussion in which Kennedy explained that the problem leading to the woman's threat related to an argument over his car, thus clarifying that the threatening comments were made by Young.[2]

Thus, because it was undisputed that Kennedy's argument about a car was with Young, not Edwards, the jury understood that Young made the threat. As a result, defense counsel was able to and did clarify in closing argument that Sergeant Claus had mistakenly attributed the threat to Edwards. Therefore, we conclude, because defense counsel called the witness he reasonably believed was

[1] In fact, the Abode incident report prepared by Officer Schoenheit stated that Sergeant Claus witnessed the incident.

[2] As defense counsel testified at the postconviction motion hearing:

> I was also able to establish in cross-examining Michael [C]laus that there had been a subsequent discussion with Victor Kennedy indicating that the problem between him and the individual who threatened to blow his head off involved his automobile. All of the evidence in this case indicated that the controversy between – regarding the automobile was between Mr. Kennedy and Keywarner Young.

most likely to have knowledge of the threat, and because the jury learned that the threat was from Young, not Edwards, counsel's failure to call Officer Schoenheit to introduce his report was neither deficient nor prejudicial.

B. Edwards's Statement

Kennedy next argues that the trial court erred in excluding a portion of the statement Edwards gave to the police when they interviewed her shortly after the shooting. As recorded in the police report, Edwards stated, in part:

> Victor ran up by the drivers side of the car and yelled at KK [Keywarner Young] to come out. She refused and he pointed the gun at her. KK tried to *drive toward* Victor and he shot once or twice. The car went across the street and hit another car. The drivers window broke when Victor shot and he opened the car door. She asked Victor if KK was shot and he said "Ya I think so." Victor took KK out of the car and put her on the ground. She saw blood coming from K.K's mouth. Victor then picked up K.K. and told her "Shawaunee" to move the car. She had a problem getting the cars apart. When she got them apart, she drove the car around the corner and parked it. She walked back[] by Victor's aunt's house. Victor and KK were gone. She yelled to Victor's Aunt Betty to see if Victor was by her. His aunt asked if Victor shot K.K. She didn't answer and went over and picked up K.K.['s] purse which was lying in the street. There were some boys outside and she said to them "You all didn't see anything." They replied we didn't see anything its none of our business.

Represented by counsel at Kennedy's trial, Edwards invoked her Fifth Amendment right and declined to testify. Because of her unavailability, Kennedy sought to introduce her statement to the police, as a statement against interest, under § 908.045(4), STATS.[3] The trial court, however, sustained the

[3] Section 908.045(4), STATS., provides:

> STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or

(continued)

State's objection to admitting the portion of the statement recounting Edwards's observation of the shooting, concluding that that description, as distinct from her account of her own post-shooting actions, was not a statement against interest. Given that ruling, the defense elected not to introduce any of the statement.

Kennedy contends that the trial court erred in dividing the statement and excluding part of it. Where statements are contained in a document and the declarant does not testify, the determination of whether portions of the statement qualify as statements against interest involves "the application of a well-settled principle of law to an undisputed fact," thus presenting a question of law. ***State v. Pepin***, 110 Wis.2d 431, 439, 328 N.W.2d 898, 901 (Ct. App. 1982).

As the State explains, under ***Williamson v. United States***, 512 U.S. 594 (1994), the hearsay exception for statements against interest does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. *See* ***id.*** at 599-600; *see also* ***State v. Rogers***, 196 Wis.2d 817, 825 n.2, 539 N.W.2d 897, 900 n.2 (Ct. App. 1995). Further, the statements against interest hearsay exception should be narrowly construed. *See* ***Rogers***, 196 Wis.2d at 825 n.2, 539 N.W.2d at 900 n.2. In ***Meyer v. Mutual Service. Casualty Insurance Co.***, 13 Wis.2d 156, 108 N.W.2d 278, (1961), the supreme court articulated the standard for determining whether and to what extent a purported statement against interest is admissible. *See* ***Meyer***, 13 Wis.2d at 161-65, 108 N.W.2d at 281-82; *see also* JUDICIAL COUNCIL

> propriety interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

COMMITTEE NOTE, 1974, § 908.045 (4), WIS. STATS. ANN. (West 1993). The ***Meyer*** court concluded that a trial court may allow the introduction of statements against interest and "such additional parts ... as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy." ***Meyer***, 13 Wis.2d at 164-65, 108 N.W.2d at 282 (internal quotation marks and quoted source omitted).

Although generally the introduction of "those parts" of a statement having "some bearing and connection with the admission" will serve "to explain or give the proper setting to the declaration," ***id.*** at 162, 108 N.W.2d at 281, the statement in this case logically can be separated into two parts: Edwards's description of the shooting, and Edwards's description of her own conduct after the shooting. One is not needed to explain the other. Thus, the trial court reasonably concluded that Edwards's description of the shooting did not qualify as part of a declaration against her interest because, as the State argues, it was not "so closely connected to Edwards' declarations against interest as to be equally trustworthy since it was obviously supportive of the defendant's self-defense theory and Edwards was not an objective witness to the shooting." Therefore, we conclude that the trial court properly segmented the statement and excluded that portion it reasonably determined not to be a statement against interest.

By the Court.—Judgment and order affirmed.

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