COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0579-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHAUNTE OTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

WEDEMEYER, P.J. Chaunte Ott appeals from a judgment of conviction for first-degree intentional homicide (party to a crime), contrary to §§ 940.01(1) and 939.05, STATS., and attempted robbery (party to a crime), contrary to §§ 943.32(1)(a), 939.32, and 939.05, STATS. He also appeals from a postconviction order denying his motion for a new trial. Ott raises four claims of

error: (1) that the trial court erred in refusing to give a cautionary jury instruction concerning accomplice testimony if such instruction was requested; (2) that his trial counsel was ineffective for failing to request the same cautionary accomplice testimony instruction; (3) that the trial court erroneously admitted a prior consistent statement as an exception to the hearsay rule; and (4) that the trial court erroneously received into evidence a box cutter and a knife.

Because the evidence did not require giving the cautionary accomplice testimony instruction, and because the trial court did not erroneously exercise its discretion in admitting the prior consistent statement or the box cutter and knife, we affirm.

I. BACKGROUND

On August 27, 1995, at approximately 12:45 a.m., Jessica Payne, the victim, accompanied Ott, Sam Hadaway, and Richard Gwin in a car driven by Gwin. After a short drive, the car stopped on North 7th and West Burleigh Streets in front of two houses, one of which was vacant. For a time the parties remained in the vehicle engaging in conversation, listening to music on the radio, drinking beer, and smoking marijuana. Then the parties, with the exception of Gwin, exited the vehicle and walked between the houses to the back. The occupied residence was known as a drug "spot." Ott walked with the victim, followed by Hadaway. The area was very dark as the parties proceeded to the back. Ott attempted to search the victim for money but she resisted. A fight broke out between them. Ott told Hadaway to hold the victim's arms while he searched her pockets, but she broke away. The fighting between Ott and the victim continued on a mattress that was lying nearby. Suddenly Hadaway heard gurgling and noticed blood gushing from the victim's throat. He returned to the car and reported what he observed to

Gwin. A few minutes later, Ott returned to the car. Gwin asked Ott where the girl was. Hadaway interrupted and said they tried to rob the victim, but she had no money so Ott cut her throat. Gwin then drove Hadaway and Ott to North 19th and West Galena Streets where he dropped them off.

The victim was found on August 30th. The autopsy revealed she had died of exsanguination from the wounds to her neck. She had been killed approximately forty-eight to sixty hours before discovery. On November 3, 1995, police executed a search warrant at Ott's residence and found two box cutters and a knife in his belongings.

Ott was charged and convicted of first-degree intentional homicide, as a party to a crime, and attempted robbery, as a party to a crime. Hadaway was arrested for first-degree intentional homicide but, pursuant to a plea agreement, pleaded to an attempted robbery charge. The State did not charge Gwin, the driver. Both Hadaway and Gwin testified for the State against Ott. Ott now appeals.

II. ANALYSIS

A. Accomplice Instruction and Ineffective Assistance Claim.[1]

Ott argues that because two State witnesses, Hadaway and Gwin, were his accomplices, the jury instruction for the testimony of accomplices, WIS

[1] Because Ott's first two claims of error; i.e., that the trial court should have given a cautionary accomplice instruction if requested by trial counsel, and that his trial counsel's performance was defective for failing to request the same are interdependent, we treat these claims as a single issue.

J I — CRIMINAL 245 (1991)[2] should have been submitted to the jury. We are not convinced.

A trial court has broad discretion in instructing the jury. *See* ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). We will not find that the trial court erroneously exercised its discretion in charging the jury so long as the instructions adequately cover the law applicable to the facts. *See* ***State v. Lagar***, 190 Wis.2d 423, 433, 526 N.W.2d 836, 840 (Ct. App. 1994). Further, a defendant is not entitled to an instruction unless it is reasonably required by the evidence adduced at trial. *See* ***Shelley v. State***, 89 Wis.2d 263, 286, 278 N.W.2d 251, 262 (Ct. App. 1979).

It is uncontroverted here that the proposed instruction was neither requested nor given. This instruction is given when there is evidence introduced demonstrating that the State's witness was an accomplice of the defendant. For one to be considered an accomplice for the purposes of the desired instruction, one must be a participant in the particular crime charged. *See* ***Cheney v. State***, 44

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[2] WIS J I — CRIMINAL 245, "TESTIMONY OF ACCOMPLICES" provides:

> (Name) has testified on behalf of the State, and if the testimony is true, (name) participated in the crime charged against the defendant. Such a person is referred to as an accomplice.
>
> A verdict of guilty may be based upon this testimony provided it is of such a character, taken in connection with all the other evidence in the case, as to satisfy you of the guilt of the defendant beyond a reasonable doubt. But ordinarily, it is unsafe to convict upon the uncorroborated testimony of an accomplice. Therefore, you should examine this evidence with the utmost care and caution, scrutinize it closely, and weigh it in the light of all of the attending circumstances as shown by all of the evidence. You should not base a verdict of guilty upon it alone, unless after such scrutiny and consideration it satisfies you of the guilt of the defendant beyond a reasonable doubt.

Wis.2d 454, 467, 171 N.W.2d 339, 345 (1969), *overruled on other grounds by* ***Byrd v. State***, 65 Wis.2d 415, 222 N.W.2d 696 (1974). Additionally, it is well recognized that the failure to give an accomplice instruction is not error when the testimony of the accomplice is sufficiently corroborated. *See* ***State v. Smith***, 170 Wis.2d 701, 715, 490 N.W.2d 40, 46 (Ct. App. 1992). We conclude that the trial court did not err in failing to give this instruction because Gwin was not an accomplice and because Hadaway's testimony was corroborated.

We first consider the status of Gwin, the driver. Regardless of whether Gwin was charged with any crime as a result of these activities, as correctly observed by the trial court, there is no evidence "whatsoever establishing his involvement" in the homicide or the attempted robbery. Ott, the victim, and Hadaway walked between the two houses to the back where first the attempted robbery occurred and then the homicide. Gwin waited in the car. There is no evidence that Gwin knew what was going to transpire nor did he know what happened until he was told by both Hadaway and Ott. The evidence is uncontradicted. Therefore, Gwin cannot be regarded as an accomplice,[3] and there was no reason to require the special instruction for accomplice testimony.

[3] Ott offers two theories under which he argues that Gwin was an accomplice. First, he claims that the testimony of Gwin as to what Ott and Hadaway had told Gwin could only have been received into evidence as a hearsay exception if Gwin were a co-conspirator under § 908.01(4)(b)5, STATS. We disagree. The mere repeating of a statement at trial of what one had been previously told by a defendant or a defendant's accomplice does not make one a co-conspirator or an accomplice. Here, no objection was made to Gwin's testimony. As a result the testimony was admitted without any hearsay analysis. The underpinning for Ott's claim that Gwin is a co-conspirator and consequentially an accomplice fails.

(continued)

Next, we consider Hadaway's status in this sequence of events. Initially, based on Hadaway's admission to Gwin that he and Ott tried to rob the victim, there is no doubt that he is an accomplice of Ott in the attempted robbery. During the course of the homicide investigation, Hadaway gave several statements to the police. He later worked out a plea agreement to plead guilty to attempted robbery and to testify for the State. At trial, he detailed his involvement in the attempted robbery and testified to what he observed Ott do to the victim. Our analysis thus centers on whether there is sufficient corroboration to obviate the need to give the accomplice instruction. We conclude that Hadaway's testimony was corroborated by several sources.

As noted, Gwin observed Ott, the victim, and Hadaway leave the car and proceed back between the two houses. Gwin testified that after about ten minutes, Hadaway was the first to return, with Ott returning minutes later. He further testified that when he inquired about the girl, Hadaway stated, "She didn't have no money so Chaunte [Ott] cut her throat." He stated that in reaction to Hadaway's words, Ott said nothing except, "I got the bitch." Thus, the record demonstrates corroboration of Hadaway's testimony by Gwin and, in the broader context, by the admissible declaration against interest of the defendant himself. *See* § 908.01(4)(b)1, STATS.

Second, in a somewhat unclear analysis, Ott reasons that because Gwin drove him away from the scene of the crime, lied to police, and generally obstructed their investigation, Gwin was an aider and abettor as an accessory after the fact. Because the "accessory after the fact" element no longer independently exists in our body of criminal law, we review Ott's contention in terms of "aiding and abetting." We reject Ott's claim for two reasons. First, there is no evidence that Gwin had the necessary knowledge or intent to be a party to a crime of first-degree intentional homicide or attempted robbery. Second, there is no evidence that Gwin knew that Ott was going to rob or kill the victim. *See* WIS J I — CRIMINAL 401 (1996).

Lastly, Hadaway's account of how the victim suffered a fatal wound is corroborated by the testimony of Dr. Richard Teggatz who performed the autopsy on the victim. Teggatz confirmed that the victim had received a cutting injury to the neck and opined that the time of death was in the time frame described by Hadaway. These corroborative sources obviated any necessity for an accomplice testimony instruction.

With the foregoing analysis and disposition in mind we now address the second portion of Ott's first claim of error–that is, his contention that his trial counsel was ineffective for not requesting the standard cautionary accomplice testimony instruction. In assessing Ott's claim, we need not address both the deficient performance and prejudice components of the applicable standard, as set forth in ***Strickland v. Washington***, 466 U.S 668, 697 (1984), if he is unable to make a sufficient showing on either one. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). Here, however, Ott fails to meet either test of the two-pronged ***Strickland*** formula. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *See* ***State v. Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986). The trial court's findings of what the attorney did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether the attorney's conduct amounted to ineffective assistance is a question of law which we review de novo. *See* ***id.***

First, as previously noted, the evidence did not require that the cautionary instruction be given and, thus, it is axiomatic that there could be no deficiency on trial counsel's part for failing to request the instruction. Second, because the trial court would not have erred in denying the proposed instruction if

it, indeed, had been requested, there is no demonstrable showing of prejudice to Ott. For these reasons, this claim of error fails.

B. Prior Consistent Statement.

Ott's second claim of error is that the trial court erroneously exercised its discretion when it admitted into evidence the statement Hadaway gave to Police Detective James DeValkenaere.

The factual and procedural setting for this claim of error is as follows. After Hadaway had testified for the State and pointed the evidentiary finger at Ott for the homicide, the defense cross-examined Hadaway about his plea agreement with the State. The cross-examination revealed that if Hadaway testified truthfully, he would receive a reduced charge of attempted robbery with a maximum prison exposure of five years. The cross-examination further emphasized that he had strong motivation to insure that the State believed he was telling the truth. Earlier, the defense, in its opening statement, had forecast the contents of his plea agreement to demonstrate what concessions the State had made "to get Mr. Hadaway to say that Mr. Ott committed this crime." To rebut this suggested motive to lie, the State recalled Detective DeValkenaere to testify about a "pre-plea-agreement" statement Hadaway had given in his presence that was consistent with, and substantially the same as, Hadaway's trial testimony. Defense counsel objected on general hearsay grounds to the admission of this evidence. The trial court denied the objection for unstated reasons.[4] In considering Ott's postconviction motion, however, the trial court ruled that

[4] This court is not bound by a trial court's determination that statements are admissible for whatever unstated reasons. If the trial court reached the right result for the wrong reason, we may affirm. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

DeValkenaere's testimony was admissible as a prior consistent statement pursuant to § 908.01(4)(a)2, STATS.[5]

A challenge to the admissibility of evidence presents a matter of trial court discretion. *See* ***State v. Stinson***, 134 Wis.2d 224, 232, 397 N.W.2d 136, 139 (Ct. App. 1986). Under the erroneous exercise of discretion rubric, the question is not whether this court would have permitted the admission of the evidence in question, but whether the trial court exercised its discretion in accordance with accepted legal standards and in consideration of the facts of record. If there is a reasonable basis for the trial court's determination, we shall not reverse its exercise of discretion. *See* ***id.*** Whether particular statements fall within a hearsay exception presents a question of law which we review independently. *See* ***State v. Mares***, 149 Wis.2d 519, 525, 439 N.W.2d 146, 148 (Ct. App. 1989).

Ott claims that the statement does not fall under § 908.01(4)(a)2, STATS., because the statement did not precede the existence of Hadaway's motive to lie. *See* ***State v. Peters***, 166 Wis.2d 168, 177, 479 N.W.2d 198, 201 (Ct. App. 1991).[6] Ott argues that Hadaway's motive to lie existed from the date of his arrest

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[5] Section 908.01(4)(a)2, STATS., provides:

> STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> (a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> ….
>
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

[6] It is undisputed that the statement was consistent with Hadaway's trial testimony.

for first-degree intentional homicide on October 25 and that the statement at issue was not given until October 27. Thus, Ott claims, because the consistent statement did not precede the existence of the motive to lie, it is not admissible. We reject this claim of error for two reasons.

Section 805.11(2), STATS., requires that a party raising an objection must specify the grounds on which the party predicates the objection. Furthermore, § 901.03, STATS., provides that error from an erroneous ruling may not be predicated upon that ruling unless "a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context." Failure to comply with these evidentiary rules invokes the waiver rule. *See* ***State v. Hartman***, 145 Wis.2d 1, 9, 426 N.W.2d 320, 323 (1988); *see also* ***Miles v. Ace Van Lines & Movers, Inc.***, 72 Wis.2d 538, 545, 241 N.W.2d 186, 189 (1976) (to be considered timely, objections must be made prior to the return of the jury verdict).

A reading of the record reveals that only a non-specific hearsay objection was made. A sidebar bench conference took place off the record and then the trial court overruled the objection without expressing its reasons. No offer of proof appears of record. We deem this waiver on the part of Ott.

Waiver aside, our further review of the record leads us inexorably to a conclusion contrary to the portrayal presented by Ott. From the opening statement through the final argument, Ott focused the jury's attention on the plea agreement Hadaway had reached with the State. The jury learned that in exchange for his testimony against Ott, although he had been arrested for first-degree intentional homicide, he would only be charged with attempted robbery, which carries only a maximum sentence of five years. The jury further learned that as

part of his agreement he had been released to home detention rather than held in custody until the time of trial. Finally, the jury was told the State would make no specific sentencing recommendation against him. In final argument, Ott's trial counsel again returned to this same theme and vigorously maintained that Hadaway's plea agreement was "his motive … his reason to lie." Ott's recent protestation that, in fact, Hadaway's motive to lie existed prior to his October 27 statement is inconsistent with his trial posture. *See* ***State v. Washington***, 142 Wis.2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987) The record demonstrates that Ott primarily attacked Hadaway's veracity by asserting that Hadaway was lying because of the terms of his plea agreement.[7]

C. Admission of Box Cutter and Knife.

Ott's last claim of error relates to the trial court's admission into evidence of a knife and box cutter found in his residence. Ott contends that these two items were not relevant evidence because no witness of the State could connect the two items with the crimes. In addition, any probative value they might have had was substantially outweighed by the danger of unfair prejudice.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Section 904.01, STATS. All relevant evidence is admissible unless otherwise excluded. Relevant

[7] It is undisputed that Hadaway's October 27 statement was given before he had counsel, before any contact was made with the State, and before any agreement was discussed with law enforcement officials. The agreement between Hadaway's counsel and the State was reached on November 5.

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* § 904.03, STATS.

Upon review, a trial court's decision as to the relevance of proffered evidence and the balancing test under rule § 904.03, STATS., is subject to the erroneous exercise of discretion rule. *See* ***State v. Larsen***, 165 Wis.2d 316, 320 n.1, 477 N.W.2d 87, 89 n.1 (Ct. App. 1991). We review a discretionary decision only to determine whether the trial court examined the facts of record, applied a proper legal standard and, using a rational process, reached a reasonable conclusion. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). In reviewing discretionary decisions, we shall look for reasons to sustain a trial court. *See* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). In considering the basis for the exercise of discretion, we may consider the record evidence and recorded arguments of counsel regarding the same, taking into account that the court may have acquiesced in these arguments. *See* ***Hagenkord v. State***, 100 Wis.2d 452, 464, 302 N.W.2d 421, 428 (1981).

Ott contends the knife and box cutter were not relevant because the State could not go beyond stating that both pieces were only "potential instrumentalities" of the crime; i.e., Ott argues potentiality does not make a piece of evidence relevant. We conclude that Ott's analysis is too narrowly focused.

The knife and box cutter constituted circumstantial evidence. In the admission of circumstantial evidence, a trial court has considerable latitude in the exercise of its discretionary power. *See* ***Oseman v. State***, 32 Wis.2d 523, 526-27, 145 N.W.2d 766, 769 (1966). The criterion of relevancy is whether or not the evidence tends to cast any light upon the subject of inquiry. *See* ***id.***

Ott argues that there is nothing special about these two items, contending that they probably could be found in almost any household. This assertion is correct as far as stated, but does not reveal the full context of how these items were found and their nature. On November 3, when the search warrant was executed at Ott's residence, he had already been implicated in the homicide by statements given by Gwin and Hadaway. Police knew the nature of the fatal wound and, not unreasonably, were looking for the weapon that was used. Ott's mother showed the police where Ott's personal possessions were located in the home. The knife was found in one dresser drawer where Ott kept his belongings, while the box cutter was found in another drawer in a separate room that also contained his possessions. In addition, his mother thought that the box cutter came from the liquor store where her son worked.

When Dr. Teggatz testified, he opined that in view of the nature of the wound sustained by the victim, it was possible for both the knife and the box cutter to have been the instrument used because the fatal injury required a sharp edge. The knife, however, was the more likely instrument that caused the death. Before ruling on the admission of these exhibits, the trial court listened to the arguments of respective counsel, considered Dr. Teggatz's opinion, and determined that Ott's objections went more to the weight of the evidence than to its admissibility. In terse explication the court decided to admit the knife and box cutter.[8]

[8] In dealing with circumstantial evidence, a witness's testimony linking a potential murder weapon to the crime need not be absolutely certain for the evidence to be admitted. *See* ***Zdiarstek v. State***, 53 Wis.2d 420, 428-29, 192 N.W.2d 833, 837 (1972). The weight and credibility given to the opinions of expert witnesses are uniquely within the province of the fact finder. *See* ***Schorer v. Schorer***, 177 Wis.2d 387, 396, 501 N.W.2d 916, 919 (Ct. App.1993).

This review demonstrates that there was a plausible association between Ott and this evidence. The seized items could be instrumentalities of the fatal wound. With this record, we conclude that there was an adequate basis for the trial court's discretionary act to admit the two exhibits.

Finally, Ott contends that whatever probative value the admission of the knife and box cutter may have had, it was substantially outweighed by the danger of unfair prejudice as provided in § 904.03, STATS. Unfair prejudice as used in § 904.03 means a tendency to influence the outcome of the trial by improper means. *See* ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis.2d 50, 61, 252 N.W.2d 81, 87 (1977).

Ott argues that by admitting the knife and box cutter as evidence, the trial court conveyed to the jury the idea that there is some amount of probability that these items, found among his belongings, were used to commit the homicide. Thus, there was the tendency to influence the outcome of the trial by improper means.

Again, we conclude that Ott overstates his point. As noted, the knife and box cutter were merely circumstantial evidence forming perhaps a link in the evidentiary chain that could make it more likely that Ott committed the homicide. The aspect of probability as emphasized by Ott was for the jury to determine as instructed by the trial court. There is no suggestion in the record that it was unlawful for Ott to possess these instruments and, as is quite evident, both parties took advantage of the opportunity to comment on the evidentiary value of these items. The receipt of this evidence was not improper. Ott has failed to establish

that the probative value of this circumstantial evidence is outweighed by unfair prejudice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. *(concurring)*. I agree with most of the majority's analysis, but disagree that Gwin was not an accomplice for purposes of analyzing whether Ott cleared the first hurdle to require the jury instruction on the testimony of an accomplice. *See* Majority slip op. at 5.

The majority addresses the legal issue of whether Ott was entitled to the instruction by weighing the evidence of Gwin's participation. Such weighing of the evidence could very well have led the jury to conclude that Gwin was not an accomplice. As a matter of law, however, and regardless of whether Gwin was charged, we must view the evidence most favorably to Ott and to the giving of the instruction. *See* ***State v. Stoehr***, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986). Doing so, we must acknowledge that Gwin could have been considered an accomplice. After all, by virtue of his alleged actions with Ott and Hadaway, both before and after the crimes, Gwin could have been prosecuted as a party to both the robbery and the homicide. Granted, the evidence would have been largely circumstantial, but we have often seen the parameters of § 939.05, STATS., surround alleged accomplices on the basis of considerably less evidence than that reaching Gwin in this case.

I concur with the outcome in this case, however, because Gwin's account was corroborated by other evidence, including Hadaway's testimony. Therefore, the accomplice testimony instruction was not required. *See* ***Bizzle v. State***, 65 Wis.2d 730, 734, 223 N.W.2d 577, 579 (1974); *see also* ***Rohl v. State***, 65 Wis.2d 683, 692, 223 N.W.2d 567, 571 (1974).