**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 8, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-1431-CR**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**COREY MILLER,**

**DEFENDANT-APPELLANT.**

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

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

PER CURIAM. Corey Miller appeals from a judgment entered after a jury convicted him of one count of first-degree reckless injury, while armed, contrary to §§ 940.23(1) and 939.63, STATS. He also appeals from an order denying his postconviction motion. Miller claims: (1) the trial court erred in instructing the jury on the penalty enhancer "while armed"; (2) the trial court

erred in denying his ineffective assistance claim without holding a ***Machner*** hearing;[1] (3) the trial court erroneously exercised its discretion in admitting certain testimony; (4) the evidence was insufficient to support the conviction; (5) the trial court erred in admitting certain testimony under the excited utterance exception to the hearsay rule; and (6) we should reverse in the interests of justice pursuant to § 752.35, STATS. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

## I. BACKGROUND

On December 12, 1995, shortly before 7:00 a.m., Ira George was shot in the back near his spine. He called 911 from a pay telephone and was conveyed to the hospital for treatment. He was interviewed by Police Detective Mark Ciske at the hospital. In response to questions, George said that he was shot outside 1534 North 37th Street by a man he knew as "Cobaby," which was a nickname for a person he knew only as "Corey." George described Corey as a black male, in his early twenties, about 5 feet 3 inches tall, 135 pounds, muscular build, short-haired and clean-shaven. George said Corey shot him after accusing George of taking money from Corey's pocket. George was shot outside the residence of Miller's sister, Cantina Miller. George was living with Cantina at the time of the shooting.

After interviewing George, Ciske and Police Detective Billy Ball went to Cantina's residence. Cantina answered the door. The detectives located Corey Miller asleep in a bedroom of the residence. Miller identified himself as "Corey" and was arrested. Ciske radioed Police Detective Stephen Rowe, who

[1] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

was at the hospital with George. Ciske stated that they had Corey Miller in custody and that Miller's description was 5 feet 4 inches tall, 150 pounds, muscular build, short-haired, clean-shaven, light-colored shirt with a dark logo and light-colored blue jeans. George, who heard the radio transmission spontaneously, said "that's him."

Miller was charged with first-degree reckless injury while using a dangerous weapon, although the police were unable to locate the gun. At the time of trial, George could not be located and, therefore, did not testify. George's statements of identification, however, were admitted through the testimony of police detectives, as were Cantina's statements to police that she heard Corey and George arguing about $30, that George walked out the front door and Corey followed him, that Corey was holding a silver handgun Cantina believed to be either a .22 or .25 caliber, that she heard George say "Corey don't shoot me. Don't shoot me," and a few seconds later she heard gunshots. When Cantina testified at trial, however, she denied making most of these statements.

The State also presented the testimony of a jail inmate, Richard Vaillancourt, who overheard Corey talking about the shooting. Vaillancourt testified that Corey talked about how he had shot somebody and the bullet was too close to the spine to be removed and that the police would never find the gun he used. Vaillancourt also testified that Corey stated his sister had told the police Corey had a gun, but she would retract that assertion, lie for him and testify that he did not have a gun. Vaillancourt said he thought Corey's sister's name was "Catara" or "Contra."

Vaillancourt told his public defender about what he had heard. The public defender also testified at trial confirming that Vaillancourt had relayed what

he overhead from Corey. The public defender also testified that, although the prosecution had made no offers to induce Vaillancourt to testify, Vaillancourt hoped he would get "a break" and avoid jail on some pending charges as a result of his testimony.

The jury found Corey Miller guilty. Miller filed postconviction motions alleging ineffective assistance of counsel. Specifically, he asserted that his lawyer failed to adequately investigate the factual circumstances surrounding the offense; failed to interview Vaillancourt; failed to secure George's presence at the trial; and failed to object to the hearsay statements admitted under the excited utterance exception. The trial court summarily rejected each contention. Miller now appeals.

## II. DISCUSSION

*A. Jury Instruction.*

Miller claims the trial court erred because it failed to instruct the jury regarding the nexus between the reckless injury charge and the "while armed" enhancer. Citing ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994), he argues that the State was required to prove a nexus between the crime and the weapon the defendant possessed. We are not persuaded. Our review of a challenge to jury instructions is limited to determining whether the trial court erroneously exercised its discretion when it instructed the jury. *See* ***State v. Michael J.W.***, 210 Wis.2d 132, 140, 565 N.W.2d 179, 183 (Ct. App. 1997). If the instructions, as a whole, adequately stated the law and did not prejudice the defendant, we will not reverse. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

Under the weapons penalty enhancer statute, § 939.63, STATS., the state is required to prove that a defendant committed the underlying crime while "possessing, using or threatening" to use a dangerous weapon. In the instant case, the State elected the "using" option. The jury was asked "Did the defendant use a dangerous weapon in the commission of the offense?" The jury was never asked to determine whether the defendant "possessed" a dangerous weapon, which was the subject of the ***Peete*** case.

Although, as Miller argues, the trial court did give both the "possession" and "using" instruction to the jury, we are not convinced that such action infected the totality of the instructions. The jury verdict specifically employed the term "using" and the crime itself, without a doubt, involved the use of a gun as it was alleged that the victim was shot in the back so close to the spine that the bullet could not be removed. Under these circumstances, the trial court's instruction on both terms did not prejudice Miller. The instructions given, combined with the facts presented and the verdict question, provided sufficient nexus between the underlying crime and the weapons enhancer.

*B. Ineffective Assistance Claim.*

Next, Miller contends the trial court erred in denying his ineffective assistance claim without the benefit of a ***Machner*** hearing. We are not persuaded.

Our standard of review was set forth in ***State v. Bentley,*** 201 Wis.2d 303, 548 N.W.2d 50 (1996). The test for determining whether a hearing is required involves a mixed standard of review. *See* ***id.*** at 310-11, 548 N.W.2d at 53. "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.… However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a

postconviction motion without a hearing." ***Id.*** at 310-11, 548 N.W.2d at 53 (citation omitted). A discretionary decision will not be reversed absent an erroneous exercise of discretion. *See* ***State v. Harrell***, 182 Wis.2d 408, 414, 513 N.W.2d 676, 678 (Ct. App. 1994). Further, the trial court has the discretion to deny a hearing if the record conclusively demonstrates that a defendant is not entitled to relief. *See* ***Bentley***, 201 Wis.2d at 317-18, 548 N.W.2d at 56. Finally, in the context of an ineffective assistance claim, Miller must make a sufficient factual showing both that counsel's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Miller first contends that trial counsel was ineffective for failing to investigate the facts surrounding the offense and for failing to interview Vaillancourt. Miller alleges that if trial counsel had done so, he could have further impeached Vaillancourt with information that Vaillancourt was a racist and had a motive to fabricate his testimony. The trial court rejected the claim outright on the basis that Miller failed to allege sufficient facts to demonstrate prejudice resulting from trial counsel's failure. We agree. As noted by the trial court in its decision denying the postconviction motion, the jury was apprised of Vaillancourt's questionable credibility. The jury knew that he had seventeen prior convictions and additional pending charges, that he hoped to receive some favorable treatment for testifying and that he was an opportunist.

Despite Vaillancourt's credibility problems, he provided persuasive testimony because he related details about the crime that he could only have learned from hearing Miller discuss them. These included the location of the bullet, the fact that the gun was never found, and the information regarding Miller's sister. Accordingly, even if counsel was deficient for failing to interview

Vaillancourt, this conduct was not prejudicial and a hearing on this claim was not required.

Miller next argues trial counsel was ineffective for failing to secure George's presence at the trial. He contends that George would have told the jury that Miller did not shoot him and such testimony would have resulted in an acquittal. We are not convinced. First, as noted by the trial court, both sides attempted to locate George in order to have him testify at trial. Neither side could locate him. Second, Miller's motion itself fails to assert facts showing that trial counsel either failed to try to locate George or that reasonable efforts would have led trial counsel to locate George. Further, Miller's claim that trial counsel should have sought admission of George's preliminary hearing testimony, which indicated George did not know who shot him, is without merit. The record indicates that, despite the State's efforts to admit the preliminary hearing testimony, the defense successfully convinced the trial court to exclude it. The decision to exclude it was based on trial counsel's argument that Miller did not have an adequate opportunity to cross-examine George at the preliminary hearing. This was a strategic decision which we cannot conclude constituted ineffective assistance of counsel.

Miller's final ineffective assistance of counsel assertion is that trial counsel should have objected to the hearsay statements of the victim introduced through police witnesses. We reject this claim as well. As noted by the trial court, trial counsel did challenge the admission of these statements. The trial court determined, however, the statements were admissible under the excited utterance exception to the hearsay rule. Accordingly, there was no reason to hold a ***Machner*** hearing relative to this contention.

*C. Admission of Testimony by Vaillancourt's Public Defender.*

Miller next claims the trial court erroneously exercised its discretion when it allowed Vaillancourt's public defender to confirm Vaillancourt's testimony because this improperly bolstered Vaillancourt's credibility. Miller contends that the public defender's testimony was hearsay and did not constitute prior consistent statements. Although we are persuaded by Miller's claim that the trial court erroneously admitted this evidence, we conclude the error was harmless and therefore reject his claim.

The admission or exclusion of evidence is left to the discretion of the trial court. *See* ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). Accordingly, the rulings will not be overturned if the trial court makes a reasonable decision in accordance with proper legal standards after considering the pertinent facts. *See* ***id.*** Even if evidence is erroneously admitted, however, we will not reverse if the admission was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). An error is harmless if there is no reasonable possibility that the error contributed to the result in the case. *See* ***id.***

Vaillancourt's public defender testified for the State. The attorney's testimony merely repeated Vaillancourt's assertions that he overheard Miller bragging about committing the shooting. In addition, the attorney's testimony actually contradicted Vaillancourt's with respect to his motivation for testifying. Vaillancourt testified he was coming forward out of a sense of doing what is right, whereas his public defender testified that Vaillancourt testified because he hoped to received some favorable treatment in return. Thus, the attorney's testimony further impeded Vaillancourt's already suspect credibility.

We conclude that the admission of this testimony did not bolster Vaillancourt's credibility, but rather further hindered it. Accordingly, its admission was harmless. The jury was most likely persuaded that Vaillancourt's assertions were truthful because of the specific details he related about the shooting, and not because Vaillancourt's public defender confirmed that Vaillancourt had said the same thing to him. The fact that Vaillancourt knew details about the shooting would not have changed even if the public defender had not testified.

*D. Insufficient Evidence.*

Miller also claims the evidence was insufficient to support the verdict. We do not agree. Our standard for reviewing challenges to the sufficiency of the evidence is as follows:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

Specifically, Miller contends there was insufficient evidence to identify him as the shooter. We reject his argument. The jury heard evidence that the victim identified Miller as the shooter. The jury heard evidence that Miller's sister indicated that Miller was the shooter and the jury heard evidence from

Vaillancourt that Miller admitted he was the shooter. This evidence is sufficient to support the verdict. Based on the foregoing, there is a possibility that a reasonable jury could find Miller guilty beyond a reasonable doubt.[2]

*E. Excited Utterance.*

Miller next claims the trial court erroneously exercised its discretion in admitting George's statement made to police detectives at the hospital. Miller contends the statement admitted does not constitute an excited utterance and should have been excluded under the hearsay rule. We are not persuaded.

The specific evidence that Miller objects to is (1) the police radio transmission of the description and the statement "we have him," and (2) George's spontaneous statement after hearing the radio transmission "that's him."

"A hearsay statement is admissible under the excited utterance exception if: (1) there was a startling event or condition, and (2) the declarant made the statement relating to the event or condition while 'under the stress of excitement caused by the event or condition.'" ***State v. Patino***, 177 Wis.2d 348, 364, 502 N.W.2d 601, 607 (Ct. App. 1993) (citation omitted). The trial court did not erroneously exercise its discretion in admitting George's statement under the excited utterance exception.

[2] We also briefly address Miller's somewhat obscure argument that the trial court improperly allowed a police detective to tell the jury about his sister's statements made during the course of the investigation. At trial, Cantina Miller contradicted most of the statements she allegedly made to the police regarding the shooting. In response, the State called the police detective to introduce Cantina's inconsistent statements. Miller's argument on this issue, which is presented in the "insufficient evidence" portion of his brief, is hard to follow. Nevertheless, we conclude that the admission of these prior inconsistent statements did not constitute an erroneous exercise of discretion. The statements were admissible either solely as prior inconsistent statements or to place the prior inconsistent statements in context under the rule of completeness. *See* ***State v. Sharp***, 180 Wis.2d 640, 653-54, 511 N.W.2d 316, 322 (Ct. App. 1993).

Miller does not dispute that the first condition was satisfied, i.e., that there was a startling event. Nor can he. Certainly being shot qualifies as a startling event. Miller contends, however, that the statement came two and a half hours after the startling event and, therefore, the second requirement was not satisfied. We disagree. Under the facts of this case, we cannot reverse the trial court's finding that George was still under the stress of excitement caused by the event when he made the statement. George had been shot in the back and was badly wounded. Detective Rowe testified that when George said "that's him," he was "angry and excited." The two and a half hours that passed between the event and the statement under these circumstances did not eliminate the stress George was under. *See* ***State v. Boshcka***, 178 Wis.2d 628, 639-41, 496 N.W.2d 627, 630-31 (Ct. App. 1992) (adult victim's statements made three to five hours after sexual assault constituted an excited utterance).

Further, Miller's contention that the radio transmission itself is hearsay and should not have been admitted is without merit. The radio transmission itself was not being admitted. Rather, the admission under the excited utterance exception was George's adoption of the radio transmission. Thus, we reject Miller's claim.[3]

[3] We summarily reject Miller's claim that the effect of pain killers that George was taking should have operated to exclude his statements as unreliable. The trial testimony of the police and a physician clearly refute that George was given any pain killers prior to making the statement.

*F. Interest of Justice.*

Miller's last claim is that based on the combination of the errors he asserts above, we should exercise our authority under § 752.35, STATS., to reverse his conviction in the interest of justice. We decline his invitation to do so.

Miller's interest of justice argument does not add any additional errors beyond those he asserted above. We have rejected each of his individual claims of error outright. Therefore, there is no reason for us to reverse in the interest of justice based on the same allegations. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero.").

*By the Court.*—Judgment and order affirmed.

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