COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1287-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES M. EVERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed in part; reversed in part.*

CANE, C.J. James Evers appeals from a judgment of conviction and a postconviction order for causing injury by the operation of a snowmobile while intoxicated, as a repeat offender, contrary to § 350.101(2)(a), STATS.; party to the crime of obstructing an officer, as a repeat offender contrary to § 946.41(1), STATS., and party to the crime of resisting a conservation warden, as a repeat offender contrary to § 29.64, STATS.

Evers argues that the prosecution arbitrarily exercised its discretion in prosecuting him for obstructing an officer, the evidence was insufficient to prove that he aided and abetted a co-defendant's false statement to a conservation warden and that he was intoxicated,[1] the jury instructions were defective, the trial court erroneously admitted evidence that the police officers suspected his statements to be false, expert testimony was inadmissible for lack of foundation, he was denied effective assistance of counsel, and he should receive a new trial in the interest of justice. Because the evidence is insufficient that he aided and abetted a co-defendant's false statement to a warden, his conviction under § 29.64, STATS., is reversed. All other issues are affirmed.

I. FACTS

This case results from a snowmobile accident that occurred in the early morning hours[2] of February 18, 1996, in Shawano. Evers, Tammy Werdeo, Todd Paschke, Brett Arnoldussen, and Jennifer Van Pay began snowmobiling together at approximately 4 p.m on February 17. Evers and Werdeo rode together on Werdeo's snowmobile, while the others rode their own machines. Evers drove Werdeo's sled while the group snowmobiled and stopped at several taverns.

All the members of the group drank alcohol except Werdeo. A tavern stop at Quacker's was the last stop before the accident occurred. Shortly after the group left Quacker's, they discovered that Paschke was not following them. Evers and Werdeo then turned around to locate Paschke, who had pulled off

[1] Evers purports to argue for a new trial in the interest of justice because the issue whether he was intoxicated was not fully tried. As did the State, this court reads his argument as one of sufficiency of the evidence, and therefore treats it as such.

[2] Police were dispatched to the accident scene at approximately 1:50 a.m.

the trail because he thought the others were traveling in the wrong direction. While looking for Paschke, Evers and Werdeo struck him with their snowmobile, injuring him. Both Evers and Werdeo told the police that Werdeo was driving the snowmobile. Paschke also stated that he thought Werdeo was driving the snowmobile that struck him.

After further investigation, the police concluded that when the snowmobile struck Paschke, Evers was driving the snowmobile while intoxicated. The State therefore charged Evers with obstructing an officer, resisting a conversation warden, and operating a snowmobile while intoxicated, all repeat offenses. Following a one-day trial, a jury found Evers guilty. The trial court denied his postconviction motion; Evers appealed. Additional facts will be discussed as necessary.

II. ANALYSIS

Evers first argues that the prosecution arbitrarily exercised its discretion when it failed to prosecute Paschke for obstructing a law enforcement officer. Evers, Werdeo, and Paschke all allegedly made statements that Werdeo was driving when the accident occurred. Evers argues that because Paschke also stated that Werdeo was driving,[3] the State's failure to also charge him with obstructing an officer was selective enforcement that violated his equal protection rights. This court disagrees.

[3] After the accident, Paschke, who was injured, made two separate statements that Werdeo had hit him.

In the absence of valid prosecutorial discretion, the Fourteenth Amendment[4] protects those accused of violating criminal statutes from persistent and intentional discrimination of a statute's enforcement. ***State v. Johnson***, 74 Wis.2d 169, 172, 246 N.W.2d 503, 505 (1976). In Wisconsin, the district attorney has great discretion in determining whether to initiate prosecution in a particular case. ***Sears v. State***, 94 Wis.2d 128, 133, 287 N.W.2d 785, 787 (1980). Wisconsin courts have rejected claims that broad prosecutorial discretion deprives defendants of equal protection in the absence of circumstances constituting an abuse of discretion or discriminatory prosecution. ***State v. Lindsey***, 203 Wis.2d 423, 445, 554 N.W.2d 215, 223-24 (Ct. App. 1996); *see also* ***Locklear v. State***, 86 Wis.2d 603, 609-10, 273 N.W.2d 334, 336-37 (1979).

There are three ways to show discriminatory enforcement: (1) proof that the enforcement is based on an unjustifiable standard, such as race, religion, color, or other arbitrary classification, *see* ***Sears***, 94 Wis.2d at 134, 287 N.W.2d at 788; (2) proof that the defendant was the only person prosecuted under a statute for a period of time, coupled with improper prosecutorial motives, *see* ***id.*** at 134-35, 287 N.W.2d at 788; and (3) proof of persistent and intentional discrimination of statutory enforcement in the absence of a valid exercise of prosecutorial discretion, s*ee* ***Locklear***, 86 Wis.2d at 610, 273 N.W.2d at 337. If a defendant establishes a prima facie case of discriminatory prosecution, the burden then shifts to the State to show that it validly exercised its discretion. ***Johnson***, 74 Wis.2d at 175, 246 N.W.2d at 507.

[4] The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Evers claims that the "stark facts" of the case, that three people made statements that Werdeo was driving and only two were prosecuted, establishes a prima facie case of discriminatory prosecution. In other words, he argues that the prosecution was arbitrary, and therefore discriminatory, because Paschke was treated differently. This court rejects his argument. Different treatment, without more, does not establish an equal protection violation. *See* ***Oyler v. Boles***, 368 U.S. 448, 456 (1962). Rather, the different treatment must be based on an unjustifiable standard. *See* ***Sears,*** 94 Wis.2d at 134, 287 N.W.2d at 788. Under Evers' reasoning, different treatment is discriminatory per se, and this conclusion directly contradicts Wisconsin law. Because Evers has shown no more than different treatment and has not shown an arbitrary exercise of prosecutorial discretion, his equal protection challenge is rejected.[5]

Evers next argues that the evidence was insufficient for the jury to find him guilty as a party to a crime of obstructing a conservation warden. On February 18, Evers and Werdeo told police officers that Werdeo was driving the snowmobile when the accident occurred. Then on February 21, Conservation Warden Richard Herzfeldt had phone conversations with Evers and Werdeo about the accident. Evers did not convey much information to Herzfeldt, and specifically, he did not identify Werdeo as the driver. However, Werdeo acknowledged that she was driving the snowmobile that hit Paschke. The State charged Evers for giving false information to a conservation warden during a snowmobile investigation, as a party to a crime. The State's sole argument is that

[5] Because Evers fails to establish a prima facie case of discriminatory prosecution, this court need not address if the State met its burden to show a valid exercise of prosecutorial discretion. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (Only dispositive issues need be addressed.).

based on Evers' *prior statements* to police that Werdeo was the driver, it was reasonable for the jury to infer that Evers was ready and willing to obstruct the warden when Werdeo gave a statement to Herzfeldt.[6]

Section 29.64, STATS., provides that a person may not obstruct any warden in the performance of duty. Although Evers was charged as a party to the crime under § 939.05, STATS, the jury received only the aiding and abetting instruction. The jury was instructed, in part, that a person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly assists the person who commits the crime or is *ready and willing* to assist and if the person who commits the crime knows of the willingness to assist.[7]

This court may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 500-01, 451 N.W.2d 752, 755 (1990). We do not substitute our judgment for the jury's. *See* ***id***. at 507, 451 N.W.2d at 757-58. "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," this court may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it. ***Id***. at 507, 451 N.W.2d at 758. This

[6] The jury did not receive a conspiracy instruction.

[7] Under § 939.05, STATS., a person intentionally aids and abets a crime if the person: (1) undertakes conduct which as matter of objective fact aids another person in the execution of a crime; and (2) consciously desires or intends that his conduct will yield such assistance. ***State v. Hecht***, 116 Wis.2d 605, 620, 342 N.W.2d 721, 729 (1984).

court is bound to accept the jury's reasonable inferences unless the evidence on which the inferences are based is incredible as a matter of law. ***Id***. at 507, 451 N.W.2d at 757. A review for sufficiency of the evidence is the same whether the evidence is direct or circumstantial. ***Id***. at 500, 451 N.W.2d at 755.

This court agrees with Evers that the evidence is insufficient to support his conviction under § 29.64, STATS., as a party to a crime. Viewing the evidence most favorably to the State and the conviction, no trier of fact, acting reasonably, could have found Evers guilty of obstructing a warden beyond a reasonable doubt. To support the verdict, the State relies solely on Evers' previous statements to police that Werdeo was the driver. As a matter of law, it is incredible for the jury to infer that, based solely on Evers' previous statements to police that Werdeo was driving, without more, he was ready and willing to aid Werdeo in obstructing the warden and that Werdeo knew of his willingness to assist. In contrast, based on that evidence alone, it is pure speculation that Evers was ready and willing to aid Werdeo in obstructing a warden during her phone conversation with Herzfeldt. Accordingly, his conviction under § 29.64 is reversed.

Evers also argues that the evidence was insufficient to find him guilty of operating a snowmobile while intoxicated and causing injury. Section 350.101(2)(a), STATS., requires the defendant's intoxication to render him "incapable of safe snowmobile operation," and there is ample and sufficient evidence to support the jury's guilty verdict. Four law enforcement officers testified regarding Evers' state of intoxication. Officers Robert Shanahan and Jeffrey Heffernon, with approximately twenty-one and eleven years' experience respectively, testified that they believed Evers' level of intoxication impaired his ability to operate a vehicle. Officer Jody Johnson, who interviewed Evers in the

squad car after the accident, testified that Evers smelled strongly of alcohol, that his eyes were glassy and watery, that his speech was slurred, and that she believed he was intoxicated. Finally, sergeant Staber Cook transported Evers and Werdeo home from Shawano Hospital at approximately 6:32 a.m. Cook testified that in his opinion, Evers was still "extremely intoxicated even at that hour of the morning," and that he had consumed enough alcohol to impair his ability to drive. Moreover, Paschke and Werdeo testified that Evers had been drinking that evening, and Evers himself also acknowledged that he had consumed alcohol.

Evers argues that the State's evidence is "conclusory" and that other evidence shows that he was capable of safely operating a snowmobile. While other evidence may indeed show he could safely drive a snowmobile, it is the jury, not this court, that determines the credibility of witnesses, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. *See* ***Poellinger***, 153 Wis.2d at 503, 506, 451 N.W.2d at 756-57. The jury is free to choose among conflicting inferences and may, within the bounds of reason, reject an inference consistent with Evers' innocence. *See* ***id.*** at 506, 451 N.W.2d at 757. In this case, the evidence in support of the jury's verdict has such probative value and force that a jury could reasonably conclude that Evers was intoxicated at the time of the collision. His request for a new trial based on insufficiency of the evidence is rejected.

Next, Evers argues that the jury instructions were defective because they "deflected the jury's attention from the need to consider whether defendant was intoxicated and affirmatively misinformed it about the definition of intoxication." He also argues that the jury should have been instructed that evidence of Evers' false statements was not proof that he operated a snowmobile while intoxicated. However, Evers acknowledges that he failed to object to the

instructions.[8] Section 805.13(3), STATS., provides that failure to object at the jury instruction conference "constitutes a waiver of any error in the proposed instructions or verdict." Wisconsin's case law echoes its statutory law. Without a timely and specific request before the jury convenes, it is not error if a trial court does not give a particular instruction. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988). If a party fails to request a jury instruction, that party waives its right to later claim that the trial court's failure to give such an instruction was error. *See* ***id***.

Alternatively, Evers insists that he is entitled to a new trial in the interest of justice because the real controversies, namely whether Evers and Werdeo made false statements and whether Evers was driving the snowmobile, were not fully tried because of the erroneous jury instructions. While the objections to the instructions were waived, this court may still reverse the judgment and order a new trial in the interest of justice if the real controversy has not been fully tried or justice has miscarried. Section 752.35, STATS.;[9] ***Vollmer v. Luety***, 156 Wis.2d 1, 17, 456 N.W.2d 797, 804 (1990). To reverse on the grounds that the real controversy has not been fully tried under § 752.35, this court need not find a substantial probability of a different result. ***Id***. at 16, 456 N.W.2d at 804. It is sufficient if the erroneous jury instructions had a significant adverse impact on the case and prevented the defendants from having a full, fair trial. ***Air***

[8] In his brief, Evers states that "[n]o objection was tendered to either jury instruction," and the question is therefore whether he waived this issue.

[9] Section 752.35, STATS., provides that "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court [of appeals] may reverse the judgment or order appealed from ...."

Wisconsin, Inc. v. North Cent. Airlines, 98 Wis.2d 301, 317-18, 296 N.W.2d 749, 756 (1980). Further, when no objection is made to the jury instructions, this court exercises its discretionary authority to order a new trial in the interest of justice "only in exceptional cases." ***State v. Martinez***, 210 Wis.2d 396, 403, 563 N.W.2d 922, 925 (Ct. App. 1977). Here, Evers has not satisfied us that this is an exceptional case; therefore, Evers' arguments for a new trial in the interest of justice are rejected.

First, the jury instruction on operating a snowmobile while intoxicated was not erroneous and did not prevent the real controversy from being tried. *See* ***State v. Grobstick***, 200 Wis.2d 242, 253, 546 N.W.2d 187, 191 (Ct. App. 1996). There is no pattern jury instruction for § 350.101(2)(a), STATS., causing injury while snowmobiling intoxicated, so the trial court modified the pattern jury instruction for causing injury by operating a motor vehicle while intoxicated. It changed "vehicle" and "motor vehicle" to "snowmobile." While the language of §§ 346.63(2)(a) and 350.101(2)(a), STATS., are nearly identical, Evers insists that the snowmobile statute requires the State to prove a greater degree of intoxication than does the motor vehicle statute. The purported difference is that "under the influence" means "impaired" under the motor vehicle law, but that "under the influence" under the snowmobile statute means "incapable of safe snowmobile operation." Based on this difference, Evers reasons that the jury found him guilty under a lesser standard that diminished the State's burden of proof. This instruction, he argues, misinformed the jury. This court disagrees.

First, the source of the "higher burden" of which Evers claims the jury was not informed comes from the comments to WIS J I--CRIMINAL 2666, operating a motor vehicle while under the influence. Here, however, the analogous pattern jury instruction is WIS J I--CRIMINAL, 2665, operating a motor

vehicle while under the influence of an intoxicant and causing injury, not 2666. Giving the jury comments to a jury instruction based on a dissimilar statute, one not addressing when an intoxicated person injures another, *would* mislead the jury. Second, §§ 346.63(2)(a) and 350.101(2)(a), STATS., are nearly identical. Section 346.63(2)(a) provides that it is unlawful for any person to cause injury to another person by operating a motor vehicle while under the influence of an intoxicant which renders the person "incapable of safely driving." Similarly, § 350.101(2)(a) provides that no person may cause injury to another person by operation of a snowmobile while the person is under the influence of an intoxicant "to a degree which renders him or her incapable of safe snowmobile operation." The corresponding jury instruction to § 346.63(3)(a) indeed uses the "impaired standard," so it was appropriate for the trial court to so instruct the jury. This court therefore concludes that no erroneous jury instructions misinformed the jury; in contrast, the instructions accurately informed the jury of the essential elements of the crime.

Additionally, Evers contends that under ***Peters v. State***, 70 Wis.2d 22, 233 N.W.2d 420 (1975), he is entitled to a new trial in the interest of justice because the trial court's failure to submit a "special cautionary instruction," one instructing the jury in "clear and certain terms" not to consider Evers' false statements as proof of intoxication, prejudiced him. This court is not persuaded.

After reading the verdict form to the jury, the trial court instructed the jury, based on WIS J I--CRIMINAL 484, as follows:

> It is for you to determine whether each of the defendants is guilty or not guilty of each of the offenses charged. You must make a finding as to each count of the complaint. Each count charges a separate crime, and you must consider each one separate. Your verdict for the crime

> charged in one count must not affect your verdict on any other count.

Peters requires only that the jury be told that it cannot employ obstruction evidence as affirmative proof of elements of another crime for which the State must introduce separate and independent evidence showing guilt beyond a reasonable doubt. ***Id.*** at 32, 233 N.W.2d at 425-26. The trial court did just that; it used a pattern jury instruction[10] to inform the jury that each count charged was a separate crime and had to be considered separately.[11] We presume that a jury follows a trial court's instructions. ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 758. Therefore, the instruction above cured any potential prejudice.

Evers' final argument for a new trial in the interest of justice is that evidence about a broken snowmobile helmet clouded the real controversy, that is, whether Evers or Werdeo was driving the snowmobile. Evers testified at trial that the helmet was fiberglass, that he could probably break the outer shell with his hands, and that the inner "Styrofoam" was the part that protects the head. Werdeo testified that the helmet broke into numerous pieces. During closing argument, the State argued that Werdeo's snowmobile helmet shattered when Evers hit it with the

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[10] Wisconsin's pattern jury instructions are persuasive, and trial courts should use them. *See* ***State v. Kanzelberger***, 28 Wis.2d 652, 659, 137 N.W.2d 419, 422-23 (1965).

[11] In his reply brief, Evers argues that a general instruction about considering each crime separately is not consistent with the ***Peters*** mandate to "clearly and unequivocally" instruct the jury that evidence of false statements could not be used to find the accused guilty of the substantive offense. He also states that the State's argument that the pattern instruction cured any defect "borders on the unethical." This court disagrees. Of particular note, the instruction the trial court gave was added in response to ***Peters v. State***, 70 Wis.2d 22, 233 N.W.2d 420 (1975). *See* WIS J I--CRIMINAL 484 n.8. Further, although the pattern instruction does not use the exact language, ***Peters***' quotes from ***United States v. Pacente***, 503 F.2d 543, 548 (7th Cir. 1974), the pattern instruction says the same thing and embodies the substance of the instruction the ***Peters*** court suggested.

snowmobile he was driving. The State reasoned that the helmet could not have shattered from Werdeo simply falling off the snowmobile:

> Ladies and gentlemen, from your own common sense you know what helmets are made out of, what they are made to do. You know you don't break them with your hands, that the outside is just for looks and it's the inside that protects your head. They are hard fiberglass, and they are made to protect you, and they don't explode on impact with snow … leaving you with no injuries.
>
> What happened, ladies and gentlemen, was Evers was the operator of this snowmobile. … He hit Ms. Werdeo's snowmobile helmet[,] destroying it.

Based on the postconviction testimony of Suzanne Tylko, a project engineer specializing in protective headgear, Evers contends that the State's helmet damage theory was impermissibly admitted because expert testimony was required to prove the theory. At the postconviction hearing, Tylko testified that to determine if a person wearing a helmet would likely suffer injury from a collision, she would consider, among other things, whether the shell shattered and the condition of the helmet's liner. She agreed, however, that a snowmobile helmet could shatter if a snowmobile ran over it. Evers contends that, without such expert testimony, the jury was presented with "a scientifically unsound and unfairly inculpatory theory."

Expert testimony is mandatory only when the matter is not within the realm of ordinary experience and lay comprehension. ***White v. Leeder***, 149 Wis.2d 948, 960, 440 N.W.2d 557, 562 (1989). Only under extraordinary circumstances is expert testimony required, that is, when the jury is presented with unusually "complex or esoteric" issues. ***Id***. Here, Evers bases his contention on statements made during closing arguments, and the argument was one the State asked the jury to consider using common sense. No evidence was presented

during trial rendering this an esoteric or complex issue; it was only an "issue" in closing argument. The State was addressing Evers' statements about the helmet to question his credibility; it asked the jury to consider whether such statements made sense. No expert testimony was required. In any event, the court cautioned the jury that the attorneys' closing arguments, opinions, and conclusions were not evidence, and that it should draw its own inferences and conclusions from the evidence. Based on the record, this court is satisfied the real issues in controversy were fully and fairly tried and rejects all of Evers' arguments for a new trial in the interest of justice.

Evers next argues that Herzfeldt's expert testimony regarding how the collision occurred was inadmissible for lack of foundation because the State failed to elicit the nature of Herzfeldt's training and education. The State replies that Herzfeldt's testimony was proper lay opinion and that this case is identical to ***Vonch v. American Standard Ins. Co***., 151 Wis.2d 138, 150, 442 N.W.2d 598, 602 (Ct. App. 1989), in which we held that an officer's testimony about his personal observations of the accident scene, the location of debris, and the type and nature of the damage to the vehicles was proper lay opinion. *See* ***Wester v. Bruggink***, 190 Wis.2d 308, 317-18, 527 N.W.2d 373, 377 (Ct. App. 1994) (discussing ***Vonch***). The State is correct.

Admission of opinion evidence and a witness' qualifications is a discretionary decision for the trial court. ***Wester***, 190 Wis.2d at 317, 527 N.W.2d at 377. On appeal, the trial court's decision will be upheld unless discretion was not exercised or the trial court had no basis for its decision. ***Id***. Section 907.01, STATS., permits opinion testimony by lay witnesses if the opinions are rationally based on the witness' perceptions and will assist the trier of fact in understanding testimony or determining a fact in issue. Opinion evidence of lay witnesses who

testify to matters within their fields of expertise is generally held to be competent, and the jury determines the probative value of the testimony. *See* ***Black v. General Electric Co.***, 89 Wis.2d 195, 212, 278 N.W.2d 224, 231 (Ct. App. 1979).

Herzfeldt testified that he has been a conservation warden for the DNR for twenty-three years and is responsible to investigate all fatal snowmobile accidents and any injury accidents. In his twenty-three years, he has investigated over 100 snowmobile accidents. Based on his experience, observations of the accident scene, and his investigation, Herzfeldt offered opinions on the point of impact, the driver's ability to see the victim, and the speed the snowmobile was traveling. Like in ***Vonch***, he described the accident scene, the location of debris, and type and nature of the snowmobile's damage, all of which he personally observed. *See* ***Vonch***, 151 Wis.2d at 150-51, 442 N.W.2d at 602-03. Moreover, as in ***Vonch***, even if such testimony is beyond the scope of lay testimony, his experience and personal observations were sufficient to permit him to offer such testimony.

Evers also argues that the trial court erroneously admitted evidence that the investigating officers did not believe Evers' claims that Werdeo drove the snowmobile at the time of the accident. It is well established in Wisconsin that a witness cannot testify that another physically and mentally competent witness is telling the truth. *See* ***State v. Smith***, 170 Wis.2d 701, 718, 490 N.W.2d 40, 48 (Ct. App. 1992). However, when such testimony is not offered to attest to the witness' truthfulness, but to explain the circumstances surrounding an officer's investigation or the course of events during an investigation, the evidence is admissible. *See* ***id.*** Here, the jury heard testimony that officer Cook told Herzfeldt that Werdeo's and Evers' statements did not seem accurate in light of Cook's past experience and Evers' injuries. Herzfeldt had initially investigated the

accident scene and had not planned to continue the investigation until he spoke with Cook. Under § 907.01, STATS., the officers' testimony was rationally based on their perceptions and helped the jury understand why the accident investigation was continued. *See* ***Smith***, 170 Wis.2d at 718, 490 N.W.2d at 42-43. Accordingly, this court concludes that the officers' testimony did not amount to opinions about Evers' truthfulness. Because it was offered for permissible purposes, the trial court did not err by admitting it.[12]

Further, Evers argues that the testimony was unduly prejudicial because the jury was likely to give special weight to the officers' statements. This court disagrees. The trial court instructed the jury that it was the sole judge of the witnesses' credibility; therefore, there is no reason to believe the jury improperly used this testimony to assess Evers' truthfulness. *See* ***id.***

Evers next contends that his attorney's dual representation of himself and Werdeo created a conflict of interest that violated his constitutional right to effective counsel. He offers two arguments to support this contention. First, he argues that an actual conflict existed primarily because of a difference in prosecution evidence and theories in regard to the charge of obstructing a warden. Second, although his argument is somewhat sophisticated, he appears to argue that the fact that his counsel was ineffective for failing to affirmatively challenge the intoxication charge and failing to insist upon correct jury instructions shows that an actual conflict existed.

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[12] At trial, Evers argued that this testimony was inadmissible hearsay, but he did not make this argument in his brief; therefore, he has waived this argument. In any event, the trial court correctly noted that such statements were not offered for the truth of the matter asserted, that is, that Evers made false statements. Rather, they were offered to provide the context of the officers' statements and were therefore not hearsay in the first instance. Section 908.01, STATS.; *see also* ***Caccitolo v. State***, 69 Wis.2d 102, 107, 230 N.W.2d 139, 142 (1975).

Evers' allegation that a conflicting interest rendered his counsel ineffective does not require analysis under the performance and prejudice tests set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Dadas***, 190 Wis.2d 339, 343, 526 N.W.2d 818, 820 (Ct. App. 1994). Rather, if the defendant proves by clear and convincing evidence that his trial counsel actively represented a conflicting interest and that an "actual" conflict of interest adversely affected his attorney's performance, a defendant need not prove specific prejudice because prejudice is presumed. *See* ***State v. Foster***, 152 Wis.2d 386, 393, 448 N.W.2d 298, 301 (Ct. App. 1989). Only an *actual* conflict of interest, as opposed to a potential conflict, adversely affects a lawyer's performance. ***State v Kaye***, 106 Wis.2d 1, 14, 315 N.W.2d 337, 342 (1982). There is an "actual" conflict of interest only when competing loyalties somehow adversely affect the attorney's advocacy. *See* ***Foster***, 152 Wis.2d at 392-93, 448 N.W.2d at 301. Further, it is not sufficient to show a mere possibility or suspicion that a conflict could arise under hypothetical circumstances. *See* ***State v. Franklin***, 111 Wis.2d 681, 686, 331 N.W.2d 633, 636 (Ct. App. 1983).

Under ***Kaye***, a trial court should conduct an inquiry whenever the same attorney represents more than one defendant in the same case. ***Id.*** at 14, 315 N.W.2d at 342.[13] Here, the trial court conducted no ***Kaye*** inquiry; therefore, this court must independently review the record to determine if, under the facts and circumstances, there was an actual conflict of interest. *See* ***Dadas***, 190 Wis.2d at

[13] At the arraignment, the court should inquire about the possibility of actual conflicts, ensure that defendants understand any potential conflicts, and determine if the defendants want separate counsel. *See* ***State v. Kaye***, 106 Wis.2d 1, 14, 315 N.W.2d 337, 342 (1982). If the defendants still insist on the same attorney after being fully advised of potential conflicts, the trial court should permit dual representation only if it is clear that the defendants voluntarily and knowingly waived their right to separate counsel. *See* ***id***.

345, 526 N.W.2d at 820. If the record reflects that Evers and Werdeo "had divergent positions" and that counsel failed to make a plausible argument that would have benefited one and harmed the other, the representation was compromised, and an actual conflict will exist. *See* ***Kaye***, 106 Wis.2d at 13, 315 N.W.2d at 342; ***Foster***, 152 Wis.2d at 394, 448 N.W.2d at 301; ***Franklin***, 111 Wis.2d at 687-88, 331 N.W.2d at 637. This court's de novo review is aided by the fact that the trial court conducted a ***Machner*** hearing[14] in which Evers' counsel testified about his representation of both Evers and Werdeo. *See* ***Dadas***, 190 Wis.2d at 345, 526 N.W.2d at 821.

Based on an independent review of the record, this court concludes that Evers has failed to demonstrate by clear and convincing evidence that he and Werdeo "had divergent positions" and that counsel failed to make a plausible argument that would have benefited one and harmed the other. *See* ***Kaye***, 106 Wis.2d at 13, 315 N.W.2d at 342. First, their positions were consistent, not divergent, as both contended that Werdeo drove the snowmobile. Second, this court does not agree with Evers' argument that counsel should have argued that he could not be convicted as a party to a crime for obstructing a warden because Evers never told the warden that Werdeo was driving. Evers appears to argue that his attorney failed to present this "defense," one Evers claims would have benefited him. This court is not persuaded.

As the trial court noted in its oral decision on postconviction motions, Evers was charged as a party to a crime. The fact that Evers did not actually tell the warden that Werdeo was driving does not lessen his culpability as

[14] *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

a party to a crime because he could still be a party to obstructing a warden if he was ready and willing to aid Werdeo in the crime. Further, although the evidence was insufficient to prove this charge, it does not follow that Evers' attorney failed to present a defense that would have benefited him. The "defense" Evers claims his attorney should have presented on his behalf was no defense at all and would neither have benefited him nor harmed Werdeo. No plausible defense was foreclosed.

This court now turns to Evers' argument that counsel's failure to object to proposed jury instructions and affirmatively challenge the intoxication charge shows that an actual conflict existed. While we do not normally engage in a ***Strickland*** analysis to determine if an actual conflict exists, here we are presented with an argument that ineffectiveness under ***Strickland*** shows an actual conflict. Therefore, we must first determine if counsel was ineffective for failing to object to proposed jury instructions and affirmatively challenge the intoxication charge under the two-part ***Strickland*** test: whether his attorney's performance was deficient, and whether the deficient performance prejudiced his defense. *See* ***id.*** at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990). An attorney's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland,*** 466 U.S. at 687. Even if Evers can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice. *See* ***id***. To satisfy the prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." ***Id***. at 694. In assessing the defendant's claim, this court need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***id.*** at 697.

Evers cannot meet ***Strickland's*** prejudice prong because, as discussed above, the jury instructions were not erroneous, so no prejudice could result.[15] Moreover, counsel made a strategic decision that it did not matter if Evers was intoxicated because their defense was that Werdeo, not Evers, was driving the snowmobile. As counsel testified:

> [I]f you are talking about the instruction on operating a snowmobile while impaired or intoxicated. I probably wasn't focusing on that instruction and because it didn't make any difference to me whether or not the jury felt that Jim Evers was intoxicated or not. Again, the theory being that he wasn't driving, and I wasn't going to make a substantial issue out of was or wasn't he – intoxicated, that is.

In any event, Evers' counsel's strategic choice would not provide grounds for a reversal. *See* ***State v. McDonald***, 50 Wis.2d 534, 538, 184 N.W.2d 886, 888 (1971) (A deliberate choice of strategy is binding on a defendant and appellate claim of error based on a defendant's own choice will not be considered by a reviewing tribunal, even if the chosen strategy backfires.). Because his counsel was not ineffective for failing to object to the jury instructions or affirmatively challenge the intoxication charge, his second argument for an actual conflict fails.

[15] Evers makes much of the fact that at the ***Machner*** hearing, Evers' attorney testified that failure to give correct instructions in conformance with ***Peters*** was neither desirable nor relevant. However, as we have already discussed, the court gave the appropriate instruction pursuant to ***Peters*** and told the jury that each count charged was a separate crime and had to be considered separately. Moreover, contrary to Evers' assertion, the jury was properly instructed on the statutory definition of intoxicated operation of a snowmobile.

Because Evers presented no clear and convincing evidence of an actual conflict of interest that adversely affected his attorney's performance, Evers is not entitled to a new trial.

In summary, because the evidence is insufficient to support Evers' conviction for obstructing a conservation warden, that conviction is reversed. However, this court rejects Evers' remaining arguments and affirms the convictions for causing injury by operation of a snowmobile while intoxicated and party to the crime of obstructing an officer.

By the Court.—Judgment and order affirmed in part; reversed in part.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.