

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
Of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2186-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HAROLD S. FIELDS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

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

PER CURIAM. Harold S. Fields appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide as party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. He claims: (1) the trial court erroneously exercised its discretion when it admitted Deng Yang's hearsay statement into evidence during the testimony of a police detective; and (2) the trial court should have granted his motion for a continuance.

Because the admission of Yang's statement was harmless error, and because the trial court did not erroneously exercise its discretion when it denied Fields's motion for a continuance, we affirm.

I. BACKGROUND

On August 15, 1997, Fields's wife was fatally shot in the head in their home. Fields confessed to the crime. The police investigation revealed that Fields had elicited the help of a fifteen-year-old neighbor, Michael Bruss, to kill his wife. Fields offered to pay Bruss \$25,000 and a low-rider truck for the killing. Bruss said that he would not do it, but that a friend of his, Deng Yang, would. Bruss testified that on the morning of the homicide, Fields met with Bruss and Yang in the Fields's basement. Fields provided Yang with a gun and told him that his wife was in the bathroom. Yang went up to the bathroom and shot the victim in the head. Yang and Bruss went home and Fields went to work. When Fields returned home from work, he paid Bruss \$80 and went into his home to call 911 to summon police.

Fields was charged with first-degree intentional homicide and the case was tried to a jury. During the trial, Yang was called to the witness stand but he refused to testify on the grounds that it might incriminate him. Thereafter, the State called Police Detective Kathy Hein to testify regarding the statements Yang had made to police. Hein testified that Yang confirmed the conspiracy between Fields, Bruss and Yang, that Yang agreed to kill the victim, that Fields provided Yang with the murder weapon on the morning of the shooting and that Yang fired one shot into the victim's head while she was sitting on the toilet. Fields objected to the admission of Yang's statement through the police detective's testimony.

The trial court overruled the objection, ruling it could come in as a statement against interest pursuant to § 908.045(4), STATS.¹

Fields was convicted. He now appeals.

II. DISCUSSION

A. Admission of Yang's Statement.

Fields first claims that the trial court should not have allowed Detective Hein to testify regarding Yang's statement. Fields claims that the admission violated his constitutional rights, including his right to confront his accusers, and that the statement was not admissible under § 908.045(4), STATS. We conclude that the admission of Yang's entire statement, through Detective Hein's testimony, was erroneous. Although a statement against a hearsay declarant's penal interest is admissible, that does not make portions of the statement implicating the criminal defendant on trial also admissible. *See Williamson v. United States*, 512 U.S. 594, 599-603 (1994). Nevertheless, we conclude that the erroneous admission was harmless. *See State v. Dyess*, 124 Wis.2d 525, 543-44, 370 N.W.2d 222, 231-32 (1985).

Admission of out-of-court statements in violation of a defendant's constitutional rights may be harmless error, *see Lee v. Illinois*, 476 U.S. 530, 547

¹ 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 proprietary 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.

(1986), where there is no reasonable possibility that the erroneous admission contributed to the conviction, *see State v. King*, 205 Wis.2d 81, 94, 555 N.W.2d 189, 194-95 (Ct. App. 1996). Here, there is no reasonable possibility that the admission of Yang's statement contributed to the conviction. Yang's statement was cumulative to the testimony of Bruss. Bruss told the jury that Fields hired him and Yang to kill his wife. Bruss told the jury the details of the events leading up the shooting, the shooting itself and the events immediately following the shooting. Further, Fields's own confession to the police, implicating himself in the killing of his wife, was admitted into evidence and an independent witness, neighbor Sharon Zigan, corroborated Bruss's version of the events.

Based on the foregoing, we conclude that the admission of Yang's statements through the testimony of Detective Hein was harmless error.

B. Motion for Continuance.

Fields also claims that the trial court erroneously exercised its discretion when it denied his motion for a continuance. We disagree. Whether to grant or deny a continuance is a discretionary call for the trial court, which we will not disturb unless the trial court erroneously exercised its discretion. *See State v. Anastas*, 107 Wis.2d 270, 272, 320 N.W.2d 15, 16 (Ct. App. 1982). There are three factors to consider when the continuance motion is based on a need for more time to obtain witnesses: (1) the materiality of the absent witness's testimony; (2) any neglect on the part of the defendant in seeking to procure witness attendance; and (3) the reasonableness of the expectation that the witness can be located. *See Elam v. State*, 50 Wis.2d 383, 390, 184 N.W.2d 176, 180 (1971).

At the pre-trial hearing on November 24, 1997, Fields requested a continuance because he needed more time to allow Dr. Richard Ofshe an

opportunity to interview him and certain police officers. Dr. Ofshe, a social psychologist specializing in false confessions, was provisionally retained on November 18, 1997. Fields argued that he may have called Dr. Ofshe at trial, depending on the outcome of the interviews with Fields and the police. The trial court denied the motion, noting:

It seems to me that at this stage of the proceedings I have to have one of two things. Most desirably I have an offer of proof, and then I can evaluate that and determine whether or not indeed that's appropriately admissible and then go from there.

In the absence of the offer of proof, I think I have to have some kind of showing that there just hasn't been sufficient time to find any expert, not just this one, but any expert that can give us the information we require because if this is in truth based on some scientific studies, evaluation, which it has to be, then there ought to be more than one person in the world that can do this.

I think that being the case, the Court at this point must deny the motion to adjourn based upon the expert as to confessions.

The trial court also distinguished the case, *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996), *cert. denied*, 119 S. Ct. 2381 (1999), which Fields cites in support of his argument: "See, [the] problem here is that I'm left in the area of guesswork. Hall really doesn't cover this situation because in Hall you had an offer of proof. Here we have no offer of proof." Fields did not present any offer from Dr. Ofshe. Fields has not offered any evidence that Bruss, Yang or he manifested any characteristics consistent with Dr. Ofshe's research to indicate that the confessions were false. Under these circumstances, we cannot conclude that the trial court's decision to deny the continuance was an erroneous exercise of discretion.

By the Court.—Judgment affirmed.

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

