COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

No. 98-2692-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN R. HUISMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: N. PATRICK CROOKS and J. D. MCKAY, Judges. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian Huisman appeals a judgment convicting him of first-degree intentional homicide and an order denying his motion for a new trial. He argues: (1) his confession should have been suppressed because he was

illegally arrested and the officers failed to timely read him his ***Miranda***[1] rights; (2) his trial counsel was ineffective because he agreed to postpone the preliminary examination and because, in his closing argument at trial, he encouraged the jury to find Huisman guilty of second-degree intentional homicide; (3) he is entitled to a new trial in the interest of justice because the controversy was not fully tried; and (4) a post-trial letter to Huisman from a juror establishes that the jury considered extraneous information when it rejected his plea of not guilty by reason of mental disease or defect. We reject these arguments and affirm the judgment and order.

¶2 Huisman was not unlawfully arrested. The record supports the trial court's finding that Huisman voluntarily accompanied officers to the police department for questioning. The officers told him they would bring him home after the questioning was concluded. He was not told that he was under arrest, was not handcuffed and was not booked upon arrival at the police station. He was interviewed in an unlocked room. These circumstances do not compare with the investigatory arrest described in ***Dunaway v. New York***, 442 U.S. 200, 202 (1979), where the defendant was involuntarily taken to the police station. The fact that officers persuaded Huisman to accompany them after he expressed reluctance does not render his agreement involuntary.

¶3 The trial court properly exercised its discretion when it admitted Huisman's confession into evidence. Huisman argues that he was not promptly informed of his ***Miranda*** rights when he became a suspect. The tape recording of Huisman's confession establishes that the police informed him of his ***Miranda***

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

rights immediately before the statement. Even if the police should have administered the ***Miranda*** warnings earlier, administering them before his taped statement renders the statement admissible. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 363, 588 N.W.2d 606 (1999) (quoting ***Oregon v. Elstad***, 470 U.S. 298, 314 (1985)). Because none of Huisman's earlier statements were procured by coercive means or improper police pressure, his confession after receiving his ***Miranda*** warnings was not tainted by any earlier statements. In addition, Huisman does not identify any prejudicial inculpatory statements that he made to the police before hearing his ***Miranda*** rights. His pre-***Miranda*** statements were largely neutral and did not directly implicate him in the homicide. Moreover, he repeated the pre-***Miranda*** statements in his post-***Miranda*** taped statement. Suppressing any pre-***Miranda*** statements would not have altered the verdict.

¶4 Huisman has not established ineffective assistance of trial counsel. To establish ineffective assistance, he must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defense, and must overcome a strong presumption that counsel's performance might be considered sound trial strategy. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 691 (1984). The reasonableness of counsel's actions may be determined or substantially influenced by Huisman's own statements. *See* ***id.***

¶5 Counsel's agreement to delay the preliminary examination provides no basis for relief. A fair trial cures any errors that occurred at the preliminary hearing. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). Huisman argues that the failure to timely conduct the preliminary examination is a jurisdictional defect. The cases he cites in support of that proposition were overruled by ***Webb***.

¶6 Huisman has not established any prejudice from his counsel's closing argument urging the jury to find him guilty of second-degree intentional homicide. Huisman's confession and his testimony at trial along with the autopsy results conclusively showed that Huisman intentionally killed the victim, Shari LeGros. After cutting and stabbing her numerous times, including a deep six-inch long cut to her neck, Huisman tied a shoelace around her neck and fashioned a tourniquet with a stick, asphyxiating her. He contended that he acted in self-defense. In light of his own testimony, counsel employed a reasonable trial strategy consistent with excessive force in self-defense or Huisman's insanity plea. To argue for Huisman's complete exoneration by contending that he used reasonable force to prevent LeGros from scratching and kicking him would have undermined Huisman's and his attorney's credibility on the defenses arguably supported by his testimony.

¶7 Huisman has established no basis for a new trial in the interest of justice. He argues that the legal community had not fully appreciated the significance of "stalking" at the time of his trial. He contends that LeGros was stalking him and that retrial today would allow the jury to consider self-defense in light of recent recognition of stalking as a crime. While the term "stalking" may have come into common parlance after Huisman's 1990 trial, the concept of bothering a person with unwanted attention existed and was presented to the jury at Huisman's trial. Huisman concedes that at trial "he gave considerable sworn testimony of the consistent harassment, following him wherever he went within and without the school, waiting for him, hitting him, and threatening him with violence from her friends who were Satanic worshipers." To the degree stalking relates to self-defense and the reasonableness of Huisman's reaction, we conclude

that the issue was fully and fairly presented to the jury even though the term "stalking" was not used.

¶8 Finally, Huisman argues that a letter from a juror shows that the jury considered extraneous information when it rejected his insanity plea. He raises the issue by a footnote that attempts to incorporate arguments from another brief. That issue is not properly before this court. *See* ***State v. Thompson***, 222 Wis. 2d 179, 190-91 n.7, 585 N.W.2d 905 (Ct. App. 1998). We also conclude that the juror's letter does not establish jury misconduct. In the context of the whole letter, the statements merely reflect the juror's belief that Huisman was not a bad person merely because he did a bad act and that he is better off in prison than in a mental hospital. The letter does not purport to suggest that the verdict in the second phase of Huisman's trial resulted from those beliefs or any extraneous information, or that any juror disagreed with the published verdict.

By the Court.—Judgment and order affirmed.

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