COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3017-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY J. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tony J. Gray appeals from the judgment convicting him of one count of first-degree reckless homicide while using a dangerous weapon, as a party to the crime, in violation of WIS. STAT. §§ 940.02(1), 939.63(1)(a)2, and 939.05 (1997-98), and two counts of recklessly endangering safety while using a dangerous weapon, as a party to the crime, in

violation of WIS. STAT. §§ 941.30(1), 939.63(1)(a)3, and 939.05 (1997-98).[1] Gray first argues that Wisconsin's approach to the admission of conditionally relevant evidence first approved in ***Huddleston v. United States***, 485 U.S. 681, 690 (1988), and adopted in ***State v. Gray***, 225 Wis. 2d 39, 59-61, 590 N.W.2d 918 (1999), violates his due process rights. Next, Gray argues that the trial court erred when it ruled two of four incidents of "other acts" evidence under WIS. STAT. § 904.04(2) were admissible evidence. Gray also argues ineffective assistance of counsel, as trial counsel failed to call a records custodian to support Gray's alibi defense and neglected to request an accomplice jury instruction. Finally, Gray contends that the trial court erred when it refused his request for a *falsus in uno* jury instruction. We disagree with all of Gray's arguments and affirm the judgment of conviction and the order denying postconviction relief.

I. BACKGROUND.

¶2 Gray was charged with one count of first-degree reckless homicide while using a dangerous weapon, as a party to the crime, and two counts of recklessly endangering safety while using a dangerous weapon, as a party to the crime. The charges stemmed from an incident that occurred at approximately 4:35 p.m. on March 28, 1998. Gray and two other members of the "2-4" street gang approached an intersection while driving in a white Nissan Altima and stopped one car length ahead of another car. The second vehicle contained the driver, Robert Mallette, and passengers Wiley Mallette and Charles Holley, all members of the rival "BOS" gang. Gray and another man exited the Altima,

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

approached the second vehicle, and fired shots at the vehicle's occupants, then re-entered the Altima and drove away. Wiley Mallette was slightly wounded, while his brother Robert escaped injury. Holley, however, was struck by one of the shots and collapsed outside the car and died at the scene.

¶3 At trial, the court admitted evidence of four separate incidents offered by the State under WIS. STAT. § 904.04(2), permitting evidence of other crimes, wrongs and acts for a purpose such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. The trial court ruled the evidence admissible for a variety of reasons. The first incident dealt with a shooting on March 27, 1998, which involved a white Nissan Altima. The second incident involved a shooting into Gray's mother's house on the morning of March 28, 1998. The third incident concerned a statement made by Gray, in which he stated that he wanted to "kill those boys," whom he believed to be members of the rival "BOS" gang, for shooting into his mother's house. Finally, the State offered evidence of a phone call placed by Gray to a State's witness during which Gray threatened the witness and told him not to appear in court.

¶4 A jury returned verdicts finding Gray guilty of all counts as charged, and the trial court sentenced him to thirty years in prison for the first count and five years in prison for each of the other two counts, all to run concurrent. After sentencing, Gray filed a motion for postconviction relief, raising all of the issues presented here. The court denied Gray's request without an evidentiary hearing.

II. ANALYSIS.

A. *Constitutionality of Conditionally Relevant Evidence*

¶5 First, Gray asks this court to independently examine Wisconsin's approach to the admission of conditionally relevant evidence under WIS. STAT. § 901.04(2),[2] and to conclude that this approach is unconstitutional. Gray contends that his due process rights were violated when the trial court allowed the State to introduce evidence of the shooting at his mother's house, and evidence of threatening remarks he made to the suspected shooters, and that this evidence was introduced without sufficient proof that the shooting actually occurred and the remarks actually made. The crux of Gray's argument is that admitting evidence on the presumption that a fact will later be proven undermines the reasonable doubt standard as required by the due process clause and relies tenuously on the curative instruction to erase any undue prejudice caused by the admission of unsubstantiated evidence.

¶6 The United States Supreme Court set forth the federal test for admission of conditionally relevant evidence in ***Huddleston***, which was summarized and adopted by the Wisconsin Supreme Court in ***Gray***:

> To determine whether the proponent of the evidence has introduced evidence sufficient to meet [WIS. STAT.] § 901.04(2), the court should neither weigh credibility nor determine whether the state proved the conditional fact. Rather, the circuit court must examine all the evidence presented to the jury and determine if a reasonable jury could find the conditional fact by a preponderance of the

[2] WISCONSIN STAT. § 901.04(2) states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

> evidence. In reaching its conclusion, the circuit court may allow admission of other acts evidence conditioned on later introduction of evidence to make the requisite finding. If the proponent of the other acts evidence fails to provide sufficient evidence to allow the circuit court to conclude that a jury would find the conditional fact by a preponderance of the evidence, the circuit court must instruct the jury to disregard the other acts evidence.

Gray, 225 Wis. 2d at 59-60 (citations omitted).

¶7 Clearly, the ***Huddleston/Gray*** approach controls issues of admissibility of conditionally relevant evidence in this state. The court of appeals does not have the authority to overrule a standard set by the Wisconsin Supreme Court. ***State v. Thorstad***, 2000 WI App 199, ¶11, 238 Wis. 2d 666, 618 N.W.2d 240. The supreme court has stated that it is the "*only* state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (emphasis added). Therefore, we must reject Gray's constitutional challenge to the admission of conditionally relevant evidence under WIS. STAT. § 901.04(2).

B. *Admissibility of "Other Acts" Evidence*

¶8 Next, Gray challenges the trial court's admission of evidence of both the shooting at his mother's house and his threatening remarks. This court reviews a trial court's determination of admissibility of "other acts" evidence for an erroneous exercise of discretion. ***State v. Davidson***, 2000 WI 91, ¶53, 236 Wis. 2d 537, 613 N.W.2d 606; *see also* ***State v. Hammer***, 2000 WI 92, ¶43, 236 Wis. 2d 686, 613 N.W.2d 629. On appeal, the question is not "'whether this court ... would have permitted [the evidence] to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in

accordance with the facts of record.'" ***Hammer***, 2000 WI 92 at ¶43 (citation omitted).

¶9 At the pretrial hearing, the State offered four items of "other acts" evidence under WIS. STAT. § 904.04(2): (1) the March 27, 1998 shooting; (2) the shooting into Gray's mother's house; (3) Gray's threatening statement; and (4) Gray's telephone call to a trial witness. The trial court believed the four incidents offered as "other acts" evidence were actually relevant circumstantial evidence; nevertheless, it evaluated the evidence using the three-step analysis set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). Under ***Sullivan***, the trial court must assess whether (1) the "other acts" evidence is offered for an acceptable purpose; (2) the "other acts" evidence is relevant; and (3) the probative value of the "other acts" evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ***Id***. at 772-73 (citation omitted).

¶10 After engaging in the ***Sullivan*** analysis, the trial court received all four incidents into evidence, finding that the evidence served a variety of permissible purposes by proving Gray's motive, his identity as one of the shooters, and his preparation or plan to commit the shooting, and by putting the crime in its proper context. The court also concluded that the evidence was extremely relevant to Holley's murder, and that the high probative value was not substantially outweighed by the potential danger of unfair prejudice.

¶11 Gray disagrees with the trial court's analysis and contends that the two acts are inadmissible as prejudicial character evidence. He argues that these acts reflect upon his character rather than demonstrate proof of motive, opportunity, intent, etc., as permitted under WIS. STAT. § 904.04(2) and,

furthermore, that the acts are irrelevant to the question of whether he was guilty of Holley's murder. We agree with the trial court's thoughtful and thorough analysis:

> In ***Sullivan*** the Supreme Court states that the [c]ourt has to determine that the evidence is being offered for an acceptable purpose such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.... I think it's probative of the requisite intent standard but probably more probative of preparation, plan and knowledge.... [W]hether the other act evidence has a tendency to make a consequential fact or proposition more probable or less probable than without the evidence, I think that it's clear that this is directly relevant. I don't have a ***Sullivan*** type situation here.
>
> And the last is the 403 analysis which is always required where I have to balance the probative value against the prejudicial impact . . . . But I think that considering how very probative this March 27 shooting is, I can't say that it's more prejudicial than probative. I think that clearly the probative value outweighs any unfair prejudicial impact.

We adopt the trial court's decision as our own. The two acts of which Gray complains were properly admitted. The two acts not only were admissible as circumstantial evidence, but also were proper "other acts" evidence. Therefore, the trial court properly exercised its discretion when it admitted the evidence.

C. *Ineffectiveness of Counsel*

¶12 Gray next argues that his trial counsel's performance was ineffective and that the trial court erred in denying Gray's motion for a ***Machner*** evidentiary hearing. The test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of

professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. ***Id***. We will "strongly presume" counsel to have rendered adequate assistance. ***Id***.

¶13 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id***. at 687. In order to succeed, "[t]he 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. If this court concludes that the defendant has not proven one prong, we need not address the other prong. ***Id***. at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. ***Id.***

¶14 If a postconviction motion alleges sufficient facts which entitle the defendant to relief on his ineffective assistance of counsel claim, the trial court must hold an evidentiary ***Machner*** hearing. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (1979); *see also* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether a motion alleges sufficient facts is a question of law, which this court reviews *de novo*. ***Bentley***, 201 Wis. 2d at 310. However, a trial court may use its discretion and deny a motion that "fails to allege sufficient facts ... or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," and this court will review such a decision using the erroneous exercise of discretion standard. ***Id***. at 310-11.

¶15 Gray advances two arguments supporting his ineffective assistance of counsel claim and his allegation of trial court error in not granting him a

Machner hearing. First, he contends that trial counsel did not sufficiently ensure that crucial supporting testimony relating to Gray's whereabouts at the time of Holley's murder was effectively presented to the jury.

¶16 Gray's alibi witnesses testified that he was with them at Dalvell Richardson's home on the afternoon of March 28, and that Gray left the Richardson home five minutes after witness Cora Pierce arrived at the home after being discharged from the hospital. Pierce originally testified she left the hospital at 4:00 p.m. and arrived at the Richardson home no later than 4:15 p.m. However, after reviewing her hospital discharge form, which had been introduced as an exhibit by the defense, Pierce testified the form listed the discharge time as "16:50" or "16:80."[3]

¶17 The trial court refused to admit the form into evidence, agreeing with the State that the form appeared to have been altered and had not been authenticated. The court also refused to take judicial notice of the discharge time as written on the form. Thus, although trial counsel offered the form as an exhibit and attempted to persuade the court to receive Pierce's questionable discharge time of 4:50 p.m. into evidence, and although Pierce herself testified she arrived at the Richardson home at 4:15 p.m., Gray continues to argue that counsel "did not take sufficient steps to ensure that the proper time of discharge, [4:50 p.m.], was persuasively presented to the jury."

¶18 The disputed hospital discharge form would not have established an alibi because the 4:50 p.m. discharge time would have only proven that Pierce arrived at the Richardson home at 5:00 p.m. or later. This still would have given

[3] The record indicates some uncertainty on the part of the witnesses as to the actual time written on the hospital discharge form. Detective Randolph Olson of the Milwaukee Police Department testified that the time of release appeared to be 16:50 military time, which translates to 4:50 p.m., but noted that there was another number written under the "5."

Gray ample time to return to the home after the Holley shooting, which occurred at approximately 4:35 p.m. Accordingly, Gray failed to demonstrate that but for trial counsel's alleged deficient performance the outcome would have been different; therefore, Gray has failed to prove prejudice.

¶19 Gray also argues that trial counsel was ineffective by failing to request an accomplice jury instruction relating to Derrick Carson, who testified he was in the car with Gray and fired shots at the scene of Holley's murder. Under an accomplice jury instruction, the trial court advises the jury to not base a guilty verdict solely upon the testimony of an accomplice to the crime, unless that testimony is sufficient to satisfy the jury of the defendant's guilt beyond a reasonable doubt.[4]

¶20 An accomplice jury instruction is not necessary when the accomplice testimony is corroborated by other independent evidence. ***Linse v. State***, 93 Wis. 2d 163, 171, 286 N.W.2d 554 (1980). Here, both Robert Mallette and Wiley Mallette identified Gray as one of the men who fired into the car they shared with Holley. Further, other witnesses testified about Gray's retaliatory comments against the assailants who shot into his mother's house who, Gray believed, were members of the same gang as the Mallettes and Holley. The jury was not forced to rely exclusively upon Carson's accomplice testimony in making its decision to convict Gray.

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[4] WISCONSIN JI—CRIMINAL 245 states:

> You have heard testimony from (name accomplice) who stated that (he) (she) was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

¶21 As long as the trial court's instructions adequately cover the applicable law, "a reviewing court will not find error in refusing special instructions even though the refused instructions would not be erroneous." ***State v. Morgan***, 195 Wis. 2d 388, 448, 536 N.W.2d 425 (Ct. App. 1995) (quotations and citation omitted). In this case, the trial court properly gave the standard instructions regarding the credibility of witnesses, the weight of evidence, and the state's burden of proof beyond a reasonable doubt. Therefore, trial counsel's performance was not deficient because an accomplice jury instruction was not necessary. In addition, because the trial court's instructions adequately advised the jury with regards to the witness' testimony, Gray suffered no prejudice. Thus, the record conclusively demonstrates that Gray is not entitled to relief, because no prejudice was proven by the alleged deficient performance of his attorney. We conclude that the trial court properly denied Gray's motion without a hearing. *See* ***Bentley***, 201 Wis. 2d at 310-11.

D. *Falsus in Uno Jury Instruction*

¶22 Finally, Gray argues that the trial court erroneously exercised its discretion by denying his request for a *falsus in uno* jury instruction. "The trial court has broad discretion in instructing the jury and [the appellate court] will not find error as long as the instructions cover the applicable law." ***State v. Robinson***, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988). We consider all jury instructions given by the trial court in determining whether those instructions adequately cover the witness' credibility. ***Id***. at 283.

¶23 The *falsus in uno* jury instruction states: "If you become satisfied from the evidence that any witness has willfully testified falsely as to any material fact, you may, in your discretion, disregard all the testimony of such witness which is not supported by other credible evidence in the case." WIS JI—CRIMINAL 305. Generally, this instruction is not favored in Wisconsin. ***Robinson***,

145 Wis. 2d at 281; ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 659, 505 N.W.2d 399 (Ct. App. 1993).

¶24 Gray contends that Derrick Carson's trial testimony fluctuated to such an extent as to warrant an instruction to the jury to disregard the testimony in its entirety. The trial court instructed the jury on how to assess a witness's credibility and on its duty to hold the State to its burden of proving guilt beyond a reasonable doubt. These instructions cover the issues addressed more specifically in the disfavored WIS JI—CRIMINAL 305. Thus, we conclude that the court properly exercised its discretion in refusing Gray's request for a *falsus in uno* instruction.

¶25 Accordingly, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See Wis. Stat. Rule 809.23(1)(b)5.