COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3432-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES E. HENNINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Charles E. Hennings appeals from a judgment entered after a jury convicted him of felony murder, contrary to WIS. STAT. § 940.03 (1999-2000).[1] Hennings also appeals from the trial court's order denying his postconviction motion for a new trial. Hennings argues that the circuit court

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

erred in denying his postconviction motion and entering judgment because: (1) an alternate juror tainted the jury's deliberations by sharing extraneous prejudicial information with the jury; (2) he was denied his constitutional right to confront two witnesses against him; (3) the out-of-court photo identification array was impermissibly suggestive; (4) the trial court failed to declare a mistrial after the jury advised the court that it was unable to reach a verdict; (5) instructing the jury on WIS JI—CRIMINAL 520 compromised the verdict; and (6) the evidence was insufficient as a matter of law for a conviction. We affirm.

I. BACKGROUND.

¶2 Patrick Nash was shot on May 11, 1999. The main eyewitness to the shooting, Douglas Boyd, testified that he and Nash had driven to 2011 West Hadley Street to sell someone marijuana. Boyd further testified that he and Nash picked up Hennings at the location, and Hennings told them to pull around the corner and park. Boyd testified that while in the backseat of the car, he witnessed Hennings point a gun at Nash and proceed to rob Nash of a bag of marijuana and some cash. A struggle ensued between Nash and Hennings, causing the gun to discharge. Nash was shot three times – twice in the chest and once in the neck. He died of blood loss from the gunshot wound to his neck.

¶3 Boyd identified Hennings as the shooter from a photo array shown to him on May 31, 1999. Hennings was arrested on June 29, 1999, and was charged with first-degree intentional homicide, contrary to WIS. STAT. § 940.01(1)(a), and armed robbery, contrary to WIS. STAT. § 943.32(2). Hennings's first trial resulted in a hung jury, and the trial court granted a mistrial. A second jury convicted Hennings of felony murder, a lesser-included offense.

¶4 At the second trial, the court ruled that two witnesses from the first trial, Charlotte and Joevashaun Ward, were unavailable and allowed their former testimony to be read to the jury. Hennings had been arrested at the Wards' home on June 29, 1999. Joevashaun was a friend of Hennings, and Charlotte is Joevashaun's mother. Both Joevashaun and Charlotte testified that before his arrest, Hennings told them he was wanted by the police in relation to a homicide. Charlotte also testified that Hennings appeared to be nervous in the days following the shooting.

¶5 At the sentencing phase of the second trial, Hennings raised the issue of jury tampering. Hennings's mother had informed defense counsel that she had had a conversation in the hallway of the courthouse with a juror, Thomas Buchanan. Buchanan was an alternate juror who had been dismissed from jury duty prior to deliberations. After he had been struck from jury duty, Buchanan allegedly told Hennings's mother that he knew that the first trial had involved additional witnesses, and had resulted in a mistrial. At sentencing and in his postconviction motion, Hennings alleged that Buchanan leaked this extraneous information about the outcome of the first trial and the absent witnesses to other jurors while he was still on the panel. The trial court denied Hennings's motions for adjournment and postconviction relief, concluding that even if his allegations were true, the extraneous information would not have been prejudicial to Hennings.

II. ANALYSIS.

A. The extraneous information did not taint the jury.

¶6 Whether extraneous information brought to the jury's attention constitutes prejudicial error requiring reversal is a question of law, which we

review *de novo*. ***State v. Broomfield***, 223 Wis. 2d 465, 480, 589 N.W.2d 225 (1999); *see also* ***State v. Poh***, 116 Wis. 2d 510, 523, 343 N.W.2d 108 (1984) (concluding that prejudice to the moving party will usually be a question of law and the circuit court's determination is not accorded deferential review). The party claiming the jury deliberations were tainted has the burden to demonstrate: (1) that a juror's testimony is competent under WIS. STAT. § 906.06(2)[2]; (2) that the juror made or heard the statements or engaged in the conduct alleged; and (3) that the information constitutes prejudicial error requiring reversal. ***State v. Faucher***, 227 Wis. 2d 700, 728-29 n.6, 596 N.W.2d 770 (1999). Because Hennings failed to establish that the juror's testimony was admissible under § 906.06(2), he is not entitled to a new trial.

¶7 Wisconsin traditionally clings to the common law's strict prohibition against a juror testifying in order to impeach a verdict. ***State v. Messelt***, 185 Wis. 2d 254, 265, 518 N.W.2d 232 (1994). This prohibition developed "[i]n order to promote verdict finality and maintain the integrity of the jury as a decision-

[2] WISCONSIN STAT. § 906.06(2) provides:

> **906.06 Competency of juror as witness.**
>
> **(2)** INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

making body." ***State v. Eison***, 188 Wis. 2d 298, 304, 525 N.W.2d 91 (Ct. App. 1994). WISCONSIN STAT. § 906.06(2) provides a few limited exceptions to the prohibition on juror testimony. Jurors may testify for the purposes of determining: (1) "whether a juror failed to reveal potentially prejudicial information during voir dire," (2) "whether extraneous prejudicial information was improperly brought to the jury's attention," or (3) "whether any outside influence was improperly brought to bear upon any juror." ***Broomfield***, 223 Wis. 2d at 474-75 (citations omitted). In the instant case, we deal with the second exception.

¶8 Hennings claims that Buchanan had a discussion with his mother in the hallway of the courthouse indicating that he knew that there was a previous trial that had resulted in a mistrial. Although the conversation between Buchanan and Hennings's mother took place after Buchanan had been released from jury duty, Hennings argues that Buchanan shared this information with other jurors before his dismissal, thereby tainting the jury. Buchanan allegedly obtained this information from a courthouse employee.

¶9 The issue first arose while Hennings awaited sentencing. Hennings requested an adjournment to investigate these allegations. In denying Hennings's request to adjourn the sentencing proceedings, the trial court concluded:

> Now in essence, the defense is taking the position that if Mr. Buchan[a]n had learned that there had been a prior trial where other witnesses testified, and if he conveyed this information to the rest of the jurors … that this is extraneous, prejudicial information improperly brought to the jury's attention and potentially should result in or may result in a new trial.
>
> The defense … didn't file an affidavit to that. Defense has just put these allegations out.
>
> ….
>
> I'm not satisfied that the defense has made any showing. There [are] no affidavits, there is no testimony, there are these vague allegations. That's the first thing.

> Second … even assuming that it was Mr. Buchan[a]n who learned this or someone who learned this, there is no way that there is a substantial ground sufficient to overturn the verdict or that the defendant's rights were prejudiced.

¶10 Hennings raised the issue again in his postconviction motion, but rather than attaching a supporting affidavit, Hennings attached a report from a private investigator. Hennings hired the investigator after sentencing to track down Buchanan. The investigator found Buchanan, who allegedly told the investigator that he had "heard about [Hennings] first trial" from someone who worked at the courthouse, and had learned that "they already had one trial in that [case]," which resulted in "a mistrial or something like that."

¶11 In ***Broomfield***, the supreme court established a two-pronged test to determine whether a party may impeach a verdict based upon extraneous information brought before the jury. First, a party must prove that juror's testimony is admissible under § 906.06(2) by establishing: "(1) that the juror's testimony concerns extraneous information (rather than the deliberative process of the jurors), (2) that the extraneous information was improperly brought to the jury's attention, and (3) that the extraneous information was potentially prejudicial." ***Broomfield***, 223 Wis. 2d at 477. Second, after determining that the testimony is competent under § 906.06(2), courts must conduct two additional analyses before deciding whether a new trial is warranted: (1) "the [] court must determine by clear, satisfactory, and convincing evidence that the juror made or heard the statements or engaged in the conduct alleged," ***id.*** at 479; and (2) "[o]nly if the evidence is clear, satisfactory, and convincing must the court then make the legal determination of whether the extraneous information constitutes prejudicial error requiring reversal of the verdict," ***id***.

¶12 We conclude, and the State concedes, that any information regarding Hennings's prior trial is "extraneous" in that "[i]t is information coming from the outside," which was "obtain[ed] from a non-evidentiary source." ***Eison***, 188 Wis. 2d at 307. However, even if Hennings's request for adjournment or his postconviction motion were supported by an affidavit from Buchanan verifying the allegations in the investigator's report, Hennings fails to establish: (1) that the extraneous information was brought to the jury's attention, and (2) that the extraneous information was potentially prejudicial. *See* ***Broomfield***, 223 Wis. 2d at 477. Hennings may not, therefore, impeach the verdict.

¶13 First, "[i]nformation not on the record is not properly before the jury even if only one juror is exposed to it." ***Broomfield***, 223 Wis. 2d at 479. Assuming Buchanan knew about the first trial, Hennings fails to establish that Buchanan informed even one juror. The investigator's report claims:

> Mr. Buchanan stated that the 2nd day he was just listening and listening because he couldn't say anything. He told this black girl, Jackie or Jacqueline, that this one guy told him that he (Hennings) already had a trial. He said that he thinks he told some white girls that were on the jury about it too ….

¶14 This report fails to establish that the extraneous information was improperly brought to the jury's attention. There was no female juror by the name of Jackie or Jacqueline. When Buchanan was later asked by the investigator if there was a juror by the name of Sabrina, Buchanan "said he thinks that she is the one whose name he thought was Jackie or Jacqueline." These vague statements from Buchanan regarding what he thinks he might have told "some white girls" and "this black girl," whose names he cannot remember, do not constitute convincing evidence that extraneous information reached the jury.

¶15 Second, "[t]he extraneous information, in order to fall within the exception of Wis. Stat. § 906.02(2), must also be potentially prejudicial." ***Broomfield***, 223 Wis. 2d at 478. While the level of prejudice required for purposes of determining competency under § 906.06(2) is lower than the prejudice needed to impeach a verdict, to prove potential prejudice, Hennings must still establish a "reasonable possibility" that the evidence would prejudice an average juror. *See* ***Poh***, 116 Wis. 2d at 530.

¶16 Here, the extraneous information that juror Buchanan heard was not potentially prejudicial to Hennings. If anything, this evidence was potentially prejudicial to the State. The information consisted of three facts: (1) Hennings had a previous trial; (2) the trial resulted in a mistrial because of a hung jury; and (3) two witnesses, the Wards, who testified in the first trial, could not testify in the second trial. These facts would likely sway an average juror, questioning Hennings's guilt, toward a finding of reasonable doubt and acquittal, rather than a conviction; this information would have suggested to any jurors "on the fence" that other jurors in the previous trial were also not convinced of Hennings's guilt.

¶17 Additionally, Hennings fails to put forth any arguments regarding the prejudicial nature of this extraneous information. He simply concludes that the "extraneous prejudicial information … prejudiced the rights of Hennings and of the State to an impartial jury." In his reply brief, Hennings asserts that "evidence pertaining to a prior trial, which resulted in a hung jury, would have or could have a prejudicial effect upon a new jury," but fails to delineate the prejudicial effect. These conclusory statements are inadequate and fail to establish that the extraneous information is potentially prejudicial. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989) (stating that we need not decide the validity of constitutional claims broadly stated but never specifically

argued). Thus, Hennings has not met his burden of demonstrating a reasonable possibility that the evidence would prejudice an average juror.

¶18 Because Hennings has failed to establish that the extraneous information was improperly brought to the jury's attention and that the extraneous information was potentially prejudicial, Hennings's effort to impeach the verdict fails.

B. Hennings was not denied the right to face his accusers.

¶19 Hennings contends that his right to confront the witnesses against him was denied when the former testimony of two witnesses, Charlotte and Joevashaun Ward, was admitted into evidence. We disagree. Because the witnesses were unavailable and their testimony bore indicia of reliability, Hennings was not denied his right to confrontation.

¶20 Generally, the trial court's decision on the admissibility of former testimony is a matter of discretion. ***State v. La Fernier***, 44 Wis. 2d 440, 446, 171 N.W.2d 408 (1969). However, in the present case, where the focus of the claim is on the constitutional right of a defendant to confront unavailable witnesses, the issue is one of constitutional fact. ***State v. Dunlap***, 2000 WI App 251, ¶17, 239 Wis. 2d 423, 620 N.W.2d 398 ("a determination of whether the circuit court's actions violate the defendant's constitutional rights to confrontation and to present a defense is a question of constitutional fact"). "This court has traditionally treated questions of constitutional fact as mixed questions of fact and law, and it has applied a two-step standard when reviewing lower court determinations of constitutional fact." ***State v. Phillips***, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998).

> The standard of review by the appellate court of the trial court's findings of evidentiary or historical facts is that those findings will not be upset on appeal unless they are [clearly erroneous]. This standard of review does not apply, however, to the trial court's determination of constitutional questions. Instead, the appellate court independently determines the questions of "constitutional" fact.

State v. Woods, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984) (citation omitted). "[T]he principal reason for independent appellate review of matters of constitutional fact is to provide uniformity in constitutional decision-making." ***Phillips***, 218 Wis. 2d at 194.

¶21 The Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution assure criminal defendants the right to confront any witnesses against them.[3] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …." Article 1, § 7 of the Wisconsin Constitution similarly provides: "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face …."

¶22 This right is "an essential and fundamental requirement for a fair trial," ***Sheehan v. State***, 65 Wis. 2d 757, 764, 223 N.W.2d 600 (1974), because it "assur[es] that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement," ***Dutton v. Evans***, 400 U.S. 74, 89 (1970) (citation omitted). More importantly, the right of cross-examination is "a primary component of the

[3] The confrontation right in the Sixth Amendment of the United States Constitution was made applicable to the states in ***Pointer v. Texas***, 380 U.S. 400 (1965).

more general right of confrontation." ***State v. Bauer***, 109 Wis. 2d 204, 208 n.3, 325 N.W.2d 857 (1982).

¶23 In ***Bauer***, our supreme court summarized the applicable standards for determining whether hearsay evidence is admissible against a criminal defendant in accord with the right of confrontation:

> The threshold question is whether the evidence fits within a recognized hearsay exception. If not, the evidence must be excluded. If so, the confrontation clause must be considered. There are two requisites to satisfaction of the confrontation right. First, the witness must be unavailable. Second, the evidence must bear some indicia of reliability.

Id. at 215.

¶24 Here, Hennings concedes that Charlotte Ward and Joevashaun Ward were "unavailable." While Hennings argues that their testimony was inadmissible because "the witnesses unavailability was due to their own actions in avoiding the law due to bench warrants issued against them," he fails to demonstrate the legal significance of this fact. Thus, we will not address that argument. *See* ***Dumas v. State***, 90 Wis. 2d 518, 523, 280 N.W.2d 310 (Ct. App. 1979) (stating that constitutional points merely raised but not argued will not be reviewed). Therefore, we must only address whether the witnesses' testimonies bear "some indicia of reliability." ***Bauer***, 190 Wis. 2d at 215.

¶25 "If the evidence fits within a firmly rooted hearsay exception, reliability can be inferred and the evidence is generally admissible." ***Id.*** "This inference of reliability does not, however, make the evidence admissible per se." ***Id.*** "The trial court must still examine the case to determine whether there are unusual circumstances which may warrant exclusion of the evidence." ***Id.***

¶26 The witnesses' testimony in question fits within a hearsay exception, WIS. STAT. § 908.045(1). Section 908.045(1) states in relevant part:

> **Hearsay exceptions; declarant unavailable.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> **(1)** FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding … at the instance of or against a party with an opportunity to develop the testimony by direct, cross-, or redirect examination, with motive and interest similar to those of the party against whom now offered.

The former testimonies of the Wards were given at Hennings's first trial, where Hennings was represented by counsel who cross-examined each witness. Consequently, their testimonies fit within § 908.045(1). Further, this a "firmly rooted" exception to the hearsay rule. *See* ***State v. Whiting***, 136 Wis. 2d 400, 417, 402 N.W.2d 723 (Ct. App. 1987) ("The evidence here rests on a firmly rooted exception, namely, the unavailability of the witness."). Therefore, reliability can be inferred.

¶27 However, Hennings also submits that there are unusual circumstances that warrant exclusion of the evidence: (1) Charlotte Ward was present during the preliminary hearing and heard the testimony of other witnesses, despite a sequestration order; and (2) Joevashaun Ward was under investigation for stealing Hennings's property.

¶28 With regard to Charlotte Ward, assuming *arguendo* that this is an unusual circumstance, the reliability of the evidence turns on "whether the purposes behind the confrontation clause have been satisfied." ***Bauer***, 109 Wis. 2d at 219. The primary purpose of the confrontation clause is "to ensure that the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence

admitted in a criminal case." ***Id.*** at 208. While Charlotte Ward was present during the preliminary hearing, despite the sequestration order, she was cross-examined about that fact at the first trial and that cross-examination testimony was read to the jury at the second trial. As a result, we are satisfied that the trial court had a satisfactory basis for evaluating the truthfulness of Mrs. Ward's testimony.

¶29 With regard to Joevashaun Ward, although he had been questioned by police about stealing Hennings's car, the matter was resolved before the first trial, and no charges were filed. Additionally, even if Joevashaun Ward had an incentive to lie, the incentive to lie does not constitute an unusual circumstance warranting the exclusion of former testimony where there was an opportunity for cross-examination. *See* ***Whiting***, 136 Wis. 2d at 417-18; ***Ohio v. Roberts***, 448 U.S. 56, 72 (1980).

¶30 Finally, Hennings argues that "[a]lthough these witnesses were subjected to cross-examination during the first trial in this matter, [he] had different counsel for the second trial and the matter was tried before a different jury." We have stated:

> [T]he fact that [the defendant] was represented by a new attorney at the retrial who may not have cross-examined [the witness] in the same manner as [his or] her first attorney is not of constitutional significance. Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

State v. Kirschbaum, 195 Wis. 2d 11, 35, 535 N.W.2d 462 (Ct. App. 1995) (citations omitted) (emphasis in original). Accordingly, Hennings was not denied his right to confront the witnesses against him.

C. Hennings waived any objection to the photo identification.

¶31 Hennings argues that the out-of-court photo identification was impermissibly suggestive. Boyd, the State's eyewitness, identified Hennings as the shooter out of a photo array. Hennings contends that the photo array was impermissibly suggestive because he was the only person wearing "jail clothes." Because Hennings admittedly failed to move to suppress the identification, he has waived his objection. *See* ***Holmes v. State***, 76 Wis. 2d 259, 272, 251 N.W.2d 56 (1977) (holding that "one of the rules of evidence is that an objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony," and that "[f]ailure to object results in a waiver of any contest to that evidence").

¶32 However, Hennings further contends that the admission of the identification should be reviewed by this court regardless of waiver, because the admission constitutes plain error. *See* ***State v. Kruzycki***, 192 Wis. 2d 509, 527, 531 N.W.2d 429 (Ct. App. 1995) ("A defendant's failure to object to a plain error affecting substantial rights does not preclude us from taking notice of the error."). To constitute plain error, the error must be "obvious and substantial, or grave." ***Id.*** The plain error rule is reserved for cases where there is a likelihood that the error denied the defendant a basic constitutional right. ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994).

¶33 Here, the trial court's admission did not deny Hennings a fundamental constitutional right or substantially impair his right to a fair trial. As the trial court noted: "Mr. Hennings expressed some concern about the clothing he was wearing. He apparently says it was jail clothing. If it was, you can't tell that. It looks like he's wearing a white T-shirt and a yellow shirt. If it is jail

clothing, it is not obvious to anyone." We agree. The alleged error is neither "obvious and substantial" nor "grave." Accordingly, we conclude that Hennings has waived any challenge to this evidence.

D. The trial court did not erroneously exercise its discretion by failing to declare a mistrial.

¶34 After deliberating for three and one-half hours, the jury informed the court that it was unable to reach a verdict. Hennings then moved for a mistrial based on a hung jury. The trial court denied the motion.

¶35 "The decision whether to grant a mistrial lies within the sound discretion of the trial court." ***State v. Mendoza***, 101 Wis. 2d 654, 659, 305 N.W.2d 166 (Ct. App. 1981). Although Hennings concludes that "failure to grant a mistrial was clearly erroneous and warrants his conviction to be reversed," he fails to cite any authority or develop his argument. This court does not consider undeveloped arguments unsupported by references to authority. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) ("proper appellate argument requires an argument containing the contention of the party, the reasons therefor, with citation of authorities, statutes and that part of the record relied on; inadequate argument will not be considered") (citing ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980). Accordingly, we will not address this issue. *See* ***Dumas***, 90 Wis. 2d at 523 (stating that constitutional points merely raised but not argued will not be reviewed).

E. Hennings also waived any objection to WIS JI—CRIMINAL 520.

¶36 After the jury was unable to reach a decision after three and one-half hours of deliberations, the trial court instructed the jury pursuant to WIS JI—CRIMINAL 520.[4] Hennings now contends that the instruction improperly "encouraged the jury to reach a compromised verdict." However, at trial, Hennings's counsel expressly agreed that the instruction should be given if the court denied his motion for a mistrial:

> THE COURT: …. The court has received a little note from the jury that demands attention. It says, "Judge DiMotto, it appears we are unable to come to a common ground on our verdict. Please advise[.]" [I]t's signed by the person that I assume is the foreperson. It would be my intention at this time to note for the jury that they've been deliberating for about three-and-a-half hours and it would be appropriate for me at this juncture to read to them the supplemental instruction on agreement which is instruction 520. Any objection[s]?
>
> [STATE]: No, Judge.
> ….
>
> [DEFENSE]: Well obviously for the record we would move for mistrial again, but short of that, we would – if that's denied of course, then we would agree to have 520 read.

[4] **520** SUPPLEMENTAL INSTRUCTION ON AGREEMENT:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.

¶37 It is well settled that failure to timely object to jury instructions results in waiver of any alleged defects in the instructions. ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988). Hennings not only failed to object, but also approved the instruction. Accordingly, Hennings waived any objection to WIS JI—CRIMINAL 520.

F. There is sufficient evidence of Hennings's guilt.

¶38 Finally, Hennings argues that the evidence does not support the jury's verdict that he committed felony murder.[5] Hennings contends that because "Boyd was an admitted marijuana user and had smoked marijuana on the day in question and consumed alcohol following the shooting," his testimony is insufficient as a matter of law.

¶39 The test for overturning a jury's verdict is set forth in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [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

[5] WISCONSIN STAT. § 940.03 provides:

> **Felony murder.** Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.225(1) or (2)(a), 943.02, 943.10(2) or 943.32(2) may be imprisoned for not more than 20 years in excess of the maximum period of imprisonment provided by law for that crime or attempt.

> believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507. Viewing the evidence most favorably to the State and the conviction, we conclude that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to convict Hennings of felony murder.

¶40 First, it is well established that "intoxication *per se* does not render the testimony of a witness incredible as a matter of law." ***Ruiz v. State***, 75 Wis. 2d 230, 234, 249 N.W.2d 277 (1977). The fact that Boyd testified that he had smoked marijuana approximately two hours prior to the shooting and had consumed alcohol after the shooting are factors to be weighed in determining the credibility of his testimony. *See* ***State v. Powers***, 66 Wis. 2d 84, 93, 224 N.W.2d 206 (1974).

¶41 At trial, Hennings's counsel cross-examined Boyd, challenging his credibility based on his drug use and alcohol consumption. Hennings's attorney also attacked Boyd's credibility during closing arguments. Therefore, the effect to be given to Boyd's testimony was a matter for the jury. ***Id.***

¶42 Second, Boyd's testimony alone was sufficient to support a conviction of felony murder. Boyd testified that Hennings was in the process of committing armed robbery, contrary to WIS. STAT. § 943.32(2), when he caused Nash's death:

> [STATE]: And what did the defendant do after he received the marijuana?
>
> [BOYD]: Leaned back in the seat and stuffed it in the front of his pants.
>
> ….
>
> As he put the weed in his pants, he pulled out a gun.
>
> ….

> [H]e told [Nash] he was taking the … weed.
> ….
>
> [STATE]: As the defendant was patting down Mr. Nash, did you see the defendant remove anything from Mr. Nash's person or clothing that he was wearing?
>
> [BOYD]: Yeah, he took some money from his – I think his right front pocket.
>
> [STATE]: Where was the gun pointed at the time the defendant was patting him down and taking the money from Mr. Nash's person?
>
> [BOYD]: Pointed at Mr. Nash.
> ….
>
> [STATE]: Then what happened?
>
> [BOYD]: Then he patted [Nash] down and the gun went off.

This testimony clearly established that Hennings was stealing property from Nash while armed with a gun, and that Hennings shot Nash while committing the crime. Any issues regarding Boyd's credibility were matters for the jury.

¶43 Based on the above stated reasons, we affirm the trial court's decision to enter judgment against the defendant and deny the motion for postconviction relief.

By the Court.—Judgment and order affirmed.

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