COURT OF APPEALS
DECISION
DATED AND RELEASED

July 19, 1995

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.

NOTICE

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No. 93-3442-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. EAGAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Green Lake County: JOHN B. DANFORTH, Reserve Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Daniel J. Eagan has appealed from a judgment convicting him of the first-degree intentional homicide of his former wife, Darlene Eagan, in violation of § 940.01(1), STATS., and from an order denying postconviction relief. On appeal, he challenges the effectiveness of his trial counsel, various evidentiary rulings made by the trial court, and the sufficiency of the evidence to support his conviction. Because we conclude that these issues lack merit, we affirm the judgment and the order.

Darlene died after the car she was driving swerved off a county highway, traveled sixty feet down an embankment and landed in a creek. Eagan was a passenger in the car at the time of the accident. He testified that the accident occurred when Darlene yelled "Deer!" and abruptly swerved. He testified that his next recollection was of looking over at her after the car had come to rest and finding her slumped over and unresponsive. He testified that he ran for help to a nearby blasting company and upon his return found her outside the car, face down in the water. He testified that he pulled her onto a bank of the creek. A blasting company employee ran to the scene after calling for help and found Eagan on the bank of the creek, leaning over Darlene's body.

The State's theory at trial was that Eagan caused the crash by grabbing the steering wheel from his position in the front passenger seat, and forcibly drowned Darlene after the crash. In furtherance of this theory, the State presented testimony by a state trooper, Dennis McConnell, who testified that the accident was preceded by a deliberate, sharp steering maneuver to the right, that he saw no skidmarks or other signs of braking, and that he saw no evidence of corrective steering action after the car was turned to the right.

Eagan contends that his trial counsel rendered ineffective assistance when she failed to retain an accident reconstruction expert to assist her in investigating the case and failed to request a jury view of the scene of the accident. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48. The appropriate measure of attorney performance is reasonableness, considering all of the circumstances. ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985).

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***Johnson***, 153 Wis.2d at 127, 449 N.W.2d at 848. To establish prejudice, a defendant must show that counsel's errors were so serious as to deprive him or her of a fair trial, a trial whose result is reliable. ***Id.*** The 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. ***Id.*** at 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

Trial counsel's investigatory duty was to make a reasonable investigation or to make a reasonable decision that made a particular investigation unnecessary. ***State v. Hubert***, 181 Wis.2d 333, 343-44, 510 N.W.2d 799, 803 (Ct. App. 1993) (citing ***Strickland v. Washington***, 466 U.S. 668, 691 (1984)). In rejecting Eagan's claim of ineffectiveness, the trial court found that counsel's decision not to hire an accident reconstructionist to assist in investigating the case was informed and reasonable. We agree.

The testimony at the postconviction hearing makes clear that trial counsel's failure to hire an accident reconstructionist was not the result of oversight or failing to consider the issue. Counsel testified that she had worked with reconstructionists in prior litigation, had some sense of what they could do and considered hiring one here. However, she concluded that a

reconstructionist, while possibly able to limit the potential theories regarding the cause of the accident, could not select a theory as to how the accident occurred. Counsel testified that she ultimately determined that it was preferable to challenge the State's reconstructionist through cross-examination and to focus the defense on the cause of Darlene's death, emphasizing evidence regarding the nature of Darlene's injuries which supported a conclusion that her drowning was accidental rather than intentional. Trial counsel also consulted a reconstructionist for assistance in cross-examining the State's expert and extensively cross-examined the expert at trial, eliciting an admission that a car may be moving with its tires in a locked position, as in braking, without leaving skidmarks.

The record thus clearly indicates that trial counsel's decision to forgo an independent investigation by an accident reconstructionist was tactical and strategic. Moreover, a trial attorney may select a particular defense from the available alternative defenses. ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992), *cert. denied,* 114 S. Ct. 99 (1993). In this case, Eagan's trial counsel had no basis to believe that a reconstructionist could verify that there was an innocent cause for the crash, while excluding an incriminating explanation. Because it was therefore reasonable to conclude that use of a reconstructionist would have added little, if anything, to Eagan's defense, counsel's decision to focus on cross-examining the State's expert and emphasizing the cause of Darlene's drowning cannot be deemed deficient.

Furthermore, even assuming arguendo that trial counsel's failure to retain a reconstructionist was deficient, no basis exists for concluding that Eagan was prejudiced by her inaction. In support of his claim of ineffectiveness, Eagan retained Scott Rhode, an accident reconstructionist who testified at the postconviction hearing. Rhode testified that he saw no evidence of braking up to the vehicle's final resting place and believed that he would have observed skidmarks from braking if the passenger had grabbed the steering wheel. He also testified that evidence did not suggest that two people were actively engaged in steering against each other's will at the time of the accident. However, he admitted that he could not tell whether one or two people had their hands on the wheel when the car left the road and could not exclude that the passenger grabbed the wheel and steered it to the right. In addition, he testified that brake marks often would be seen if a driver saw an animal in front of the car, as Darlene allegedly did. Rhode also testified that he saw no corrective steering maneuver before the vehicle left the road and that, while he

observed corrective steering after the vehicle left the road and was traveling down to the ditch, he generally would have seen some corrective action to keep the vehicle near the road in an accident involving an animal.

While Rhode also testified that a much more comprehensive review of the accident could have been done, he indicated that he was not claiming that errors existed in the report of the State's expert. While suggesting possible alternative tests that could be performed, including additional tests on the car and site, he also acknowledged that the alternative tests had not been performed for purposes of the postconviction proceedings and that it would be completely speculative to conclude that they would produce anything helpful to the defense.

Rhode's testimony thus provides no basis for concluding that retaining an accident reconstruction expert at the time of trial would have resulted in evidence or information that would have aided the defense. His testimony essentially was consistent with the testimony of the State's expert indicating that the accident was preceded by a sharp steering maneuver to the right, with no signs of braking. His testimony did not provide any meaningful support for Eagan's claim that Darlene swerved because she believed she saw a deer and did not exclude the theory that Eagan grabbed the wheel. Because Rhode's testimony would have added nothing significant to his defense, Eagan has failed to show that his counsel's failure to hire an accident reconstructionist deprived him of a trial whose result was reliable and has failed to satisfy the prejudice prong of the ineffectiveness test.

We also agree with the trial court that Eagan failed to show that his trial counsel was ineffective for failing to request a jury view of the accident site. Eagan contended that a jury view would have given the jury a better idea of how long it would have taken for him to run back and forth to the blasting company and whether it was possible to accidentally drown in the creek.

Trial counsel testified that she did not request a jury view because she thought the view, which she assumed would be from a distance, would be deceptive. She also testified that she attempted to inform the jury what it was like to be in the creek through photographs and testimony.

Trial counsel's conclusions were reasonable under the circumstances. As noted by the trial court, the accident site at the time of trial could have appeared substantially different from its appearance at the time of the crash, which had occurred two years earlier. This conclusion was supported by trial testimony indicating that the water level in the creek fluctuated tremendously.

The trial court also properly concluded that the site was adequately depicted by photographs which showed the scene at the time of the crash and the location of the blasting company in relation to the crash site. The scene was also detailed through witnesses who described the depth of the water at the time of the accident and the degree to which a person in the creek sank down into its mucky bottom, something that would not have been apparent from merely looking at the site. In addition, an investigatory agent testified as to the distance between the crash site and the blasting company, the terrain between the two sites, and how long it took him to run back and forth. Based on this evidence, trial counsel reasonably determined that a jury view of the site was unnecessary and that the jury could obtain an adequate, if not better, understanding of the site from the testimony and photographs.

Eagan's next argument on appeal is that the trial court erroneously admitted evidence in eleven separate situations. In each situation, he alleges that the probative value of the evidence was outweighed by its prejudicial nature.[1]

Upon review of evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). This court will not find an erroneous exercise of discretion if the record provides a reasonable basis for

[1] In footnotes four and five in his reply brief, Eagan raises additional grounds for challenging two of the trial court's evidentiary rulings. Because these arguments were not raised in his brief-in-chief, they will not be considered by this court. ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 (Ct. App. 1990), *rev'd on other grounds,* 163 Wis.2d 1, 471 N.W.2d 216 (1991).

the trial court's decision, even if the trial court failed to set forth the reasons for its decision.[2] ***Id.*** at 342-43, 340 N.W.2d at 501-02.

In determining whether evidence is relevant, the issue is whether there is a logical or rational connection between the fact which is sought to be proved and a fact which is at issue in the case. ***State v. Oberlander***, 149 Wis.2d 132, 143, 438 N.W.2d 580, 584 (1989). Moreover, while relevant evidence may be excluded pursuant to § 904.03, STATS., if its probative value is substantially outweighed by the danger of unfair prejudice, exclusion is required only if the evidence is unfairly prejudicial, and it is not enough that the evidence will prejudice the defendant. ***State v. Patricia A.M.***, 176 Wis.2d 542, 553-54, 500 N.W.2d 289, 294 (1993). Evidence is unfairly prejudicial when it tends to influence the outcome of the case by improper means, or it appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish or otherwise causes the jury to base its decision on extraneous considerations. ***Id.*** at 554, 500 N.W.2d at 294.

Eagan's first evidentiary challenges are to testimony from his coworker, Shirley Geoffroy, indicating that Eagan once told her that he would like to put cement shoes on Darlene and take her fishing. Geoffroy also testified that Eagan once discussed with her, in an apparently serious tone, how it would be possible to tamper with Darlene's scuba diving equipment so that she would run out of air and it would be the "end of the dance" while appearing to be an accident. In addition, Eagan objects to testimony by Oscar Miller, a production supervisor at the plant where Eagan worked, indicating that Eagan told Miller that he would like to take Darlene ice fishing with cement overshoes. Miller indicated that at the time Eagan made the statement, he told Miller that he was upset because Darlene had served him with legal papers seeking a change in custody of their two children and to move them to a different city.

We discern nothing erroneous in the trial court's admission of this evidence. It was clearly probative of Eagan's desire and intent to kill Darlene and, with regard to the scuba diving statements, to make her death appear

[2] The Wisconsin Supreme Court has changed the terminology used in reviewing a trial court's discretionary act from "abuse of discretion" to "erroneous exercise of discretion." ***State v. Plymesser***, 172 Wis.2d 583, 585-86 n.1, 493 N.W.2d 367, 369 (1992). The substance of the standard of review, however, has not changed. ***Id.***

accidental. Miller's testimony also was relevant to Eagan's motive for the murder, since it indicated that he was particularly upset with Darlene because of custody issues. Moreover, while this testimony was prejudicial to Eagan's claim of innocence, it did not appeal to the jury to decide the case based on improper means and was not unfairly prejudicial.

Eagan's next challenges are to testimony by Barbara Nelson and Catherine Lessmiller, indicating that Darlene told Nelson that she was "in fear of" Eagan and told Lessmiller that she was afraid of Eagan and "did not trust him at all." We agree with the State that this evidence was relevant to the issue of whether Darlene's death was accidental or intentional. To buttress his claim that the death was accidental, Eagan testified that Darlene came to his home to pick up their children and that he told her the children were at his mother's home. He testified that Darlene then asked him to ride with her to pick up the children. Evidence regarding Darlene's fear of Eagan was relevant to the credibility of Eagan's version of the events and supported a claim that she was unlikely to have invited him into her car. Because the issue of whether Darlene's death was accidental or a homicide was the paramount issue for trial, no basis exists to conclude that the relevance of the evidence regarding Darlene's state of mind was outweighed by the danger of unfair prejudice.[3]

Lessmiller, a state trooper who was part of an honor guard at Darlene's funeral, also testified that at the funeral visitation she observed Eagan look into the casket with "a very satisfied look" and "no remorse in his face." Eagan argues that the trial court should have excluded this testimony, as well as testimony by Roger Jones, another state trooper, who testified that Eagan appeared to laugh when looking into Darlene's casket.

[3] Eagan contends that admission of Darlene's statements regarding her fear of him was prohibited by ***Runge v. State***, 160 Wis. 8, 150 N.W. 977 (1915), which held that testimony regarding the deceased's statements that she was afraid of the defendant was hearsay and inadmissible. However, ***Runge*** was written decades before the adoption of § 908.03(3), STATS., which was the basis for the trial court's admission of the evidence as a statement of Darlene's then-existing state of mind. Eagan's brief-in-chief does not discuss the trial court's ruling that evidence regarding Darlene's state of mind was admissible under hearsay rules, and we therefore will not address that issue.

Lessmiller's testimony regarding Eagan's demeanor was elicited by defense counsel during cross-examination and without objection. By failing to make a timely objection to the evidence, Eagan waived his right to challenge its admission on appeal. *See* ***Caccitolo v. State***, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975). Moreover, while Eagan challenged Jones's testimony regarding his demeanor in a motion in limine, the trial court elected not to rule on the issue in advance of trial. At trial, Eagan failed to object to Jones's testimony. By failing to bring his objection to the attention of the trial court in a timely manner, Eagan waived his right to challenge the evidence on appeal. *See* ***State v. Gilles***, 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992). In any event, we also conclude that the evidence was relevant to the issue of whether Eagan intended to kill Darlene and that the trial court reasonably could conclude that its prejudicial nature did not exceed its probative value.

Eagan also challenges testimony by Jeffrey Malcore, Darlene's boyfriend, indicating that he overheard Darlene's side of a telephone conversation with Eagan a few days before her death. Malcore testified that Darlene and Eagan discussed an order requiring Eagan to pay child support which had recently been issued by a trial court, that Darlene told Eagan that she had not requested the support, that it was not her fault he could not afford it, and that she was not going to call the judge to ask him to rescind it. Malcore testified that he also heard Darlene say she was going to pick the children up at Eagan's farm on the following Wednesday, which was the day she died. In addition, he testified that Darlene was agitated and upset during and after the conversation and that when she got off the telephone she told him that Eagan told her she would be sorry if the support order was not rescinded.

We agree with the trial court that this evidence was relevant to Eagan's motive for killing Darlene and his intent to do so. Because it provided strong evidence of Eagan's motive for the killing and the hostile relationship existing between Eagan and Darlene shortly before her death, we also conclude that the trial court acted properly in determining that its probative value outweighed any prejudicial effect.

For similar reasons, we reject Eagan's objection to testimony by the attorney who probated Darlene's estate, indicating that to pay a lawyer to whom he owed money, Eagan assigned the lawyer a $1400 debt owed to him by Darlene. The lawyer then filed a claim against Darlene's estate based on the

assignment. The State argued that this evidence demonstrated that the child support order was difficult for Eagan because he had other debts to pay, including this one, and thereby established a financial motive for Eagan to kill Darlene. We agree with the State that the evidence was relevant on this ground and that no unfair prejudice arose from it.

Eagan's final evidentiary challenges are to the admission of evidence regarding a rope and a piece of hair found in Darlene's car after her death. While Eagan denied taking a rope with him when he got into Darlene's car, the evidence indicated that Eagan knew how to tie the type of knot that was in the rope and that the rope was knotted identically to the way Eagan had knotted a rope in a boat he sold a few months before the crime. In addition, Malcore testified that he had not seen the rope in Darlene's car while helping her move in the days before her death.

The State sought to admit the evidence to establish that the rope belonged to Eagan and that he could have used it to coerce or intimidate Darlene. We agree with the State that the presence of the rope was suspicious and supported an inference that Eagan used it or intended to use it in furtherance of a plan to harm Darlene. Since this evidence also could not be deemed unfairly prejudicial, no basis exists to disturb the judgment of conviction based on its admission.

Similarly, evidence that a search of the dirt in the bottom of Darlene's car produced a hair which had been forcibly removed from someone's head and was consistent with Eagan's hair was properly admitted because it was relevant to the issue of whether a struggle occurred between Eagan and Darlene or whether she accidentally drowned as Eagan contended. The fact that the hair could have been removed through hair brushing as well as a struggle or that it could have come from other people who were in the car between the time of Darlene's death and the time the hair was found was properly raised in cross-examination by the defense, but did not render the evidence inadmissible under § 904.03, STATS.

Eagan's final challenge is to the sufficiency of the evidence to support his conviction. The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the trier of fact, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***State v. Poellinger,*** 153 Wis.2d 493, 503-04, 451 N.W.2d 752, 756 (1990). The credibility of the witnesses and the weight of the evidence are for the trier of fact. ***Id.*** at 504, 451 N.W.2d at 756. We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the trier of fact. ***Id.***

The evidence was sufficient to support Eagan's conviction. Based on the evidence, it could reasonably be inferred that he had both a financial motive and a personal desire to kill Darlene. The evidence indicated that he was in debt and having financial difficulties, a problem which was exacerbated by the July 1990 order requiring him to pay child support. The evidence also indicated that he was bitter about the support order and change of placement, and he told Darlene that she would be sorry if she did not get the support order rescinded, something she told him she would not try to do. Testimony also indicated that he had expressed a desire to harm Darlene in the past and, in the case of the scuba diving evidence, had given some consideration to killing her and making it appear accidental.

Evidence also supported a conclusion that Eagan had arranged to be alone with Darlene at the time of her death, telling her to pick the children up at his home but ensuring that they were not there. In addition, while Eagan claimed that Darlene asked him to ride with her to pick the children up at his mother's house because she was afraid of his mother, other evidence indicated that it was only Eagan whom she feared and that she had picked the children up at his mother's home many times while alone.

Evidence concerning the drowning also supported an inference that it was intentional rather than accidental. Darlene was experienced in the water but was substantially outweighed by Eagan. Testimony indicated that her body was so mud covered as to be unrecognizable after her death,

containing mud under the eyelids and dirt and weeds so entangled in her hair as to be difficult to remove. In addition, the doctor who did the initial autopsy testified that he was suspicious that the drowning was not accidental because there were no signs of major trauma which would account for her drowning. Dr. Robert Huntington, the forensic pathologist who did the follow-up autopsy, similarly concluded that while Darlene had drowned, the injury pattern was not consistent with what one sees in a typical car crash. He testified that he observed scratches and bruises on her hands, arms, neck and torso which were consistent with fingernail marks and a physical struggle, including having her head forcibly held under the water.[4]

Additional evidence indicated that there were inconsistencies between Eagan's version of the accident, evidence regarding how long it would have taken to run to the blasting company to seek help and whether it was reasonable to believe that Darlene would have drowned in the time he was gone. Evidence also established inconsistencies in the versions of the accident related by Eagan to various witnesses.

It is well-established that a finding of guilt may rest upon evidence that is entirely circumstantial and that such evidence is often much stronger and more satisfactory than direct evidence. ***Id.*** at 501-02, 451 N.W.2d at 755. Here, the circumstantial evidence of Eagan's guilt was clearly sufficient to support the verdict of intentional homicide.

By the Court.—Judgment and order affirmed.

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[4] Eagan objects that Huntington did not testify to a reasonable degree of medical certainty that Darlene's injuries were caused by forcible drowning, but merely testified that certain injuries were consistent with it. However, § 907.02, STATS., permits a trial court to admit expert testimony if it assists the jury in understanding the evidence or in determining a fact in issue. Consequently, even if Huntington's testimony, standing alone, would not have supported a finding that the drowning was intentional, the jury was entitled to consider his testimony along with all of the other evidence in the case to make an ultimate determination of whether Eagan murdered Darlene. Eagan's objection to the sufficiency of the forensic serologist's opinion that a piece of hair found in the car was consistent with his hair and could not be excluded as belonging to him fails for the same reason.

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