COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

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

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

No. 94-2528-CR
94-2529-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS W. REIMANN,

Defendant-Appellant.

APPEAL from judgments and orders of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

EICH, C.J. Thomas Reimann appeals from judgments convicting him of two controlled substance violations and a weapon violation, and from orders denying his postconviction motions and a motion to reopen a postconviction evidentiary hearing.

He raises several issues: (1) whether tape recordings of his telephone conversations with a police informant were improperly admitted into evidence because (a) the statute allowing one-party-consent conversations into evidence, enacted before trial but after the recordings were made, cannot be applied retroactively and, alternatively, (b) the recordings were not properly authenticated; (2) whether the State's failure to turn over exculpatory evidence violated his due process rights; (3) whether the trial court erroneously instructed the jury that it was required to accept the testimony of one of the State's witnesses; (4) whether the court erred in allowing the hearsay testimony of another State witness; and (5) whether the court erred when it denied his request to reopen the postconviction motion hearing.

We reject all his arguments and affirm the judgments and orders.

Two cases are consolidated on this appeal. In the first, Reimann entered a plea of guilty to a charge of possession of a firearm by a felon and to a charge of possession of Dilaudid, a controlled substance. He was charged after police officers, who were serving an arrest warrant on him at a Madison motel, found pills in the bathroom and a sawed-off shotgun under the bed. The second case, in which he was charged with delivery of heroin (as a repeater), went to trial and was found guilty by the jury.

Through several postconviction attorneys and several postconviction motions, he sought to withdraw his plea to the firearm-possession charge and a new trial on the heroin charge. The trial court conducted three days of evidentiary hearings on the motions over a three-month period in 1992. After the hearings, Reimann, both pro se and through counsel, filed several briefs with the court, as well as several other documents suggesting additional grounds for relief. He also moved to reopen the hearings to take additional evidence. The trial court denied all Reimann's motions.

I. Admission of the Tape Recordings

The primary witness at Reimann's drug trial was Felipe Banuelos, a special agent employed by the Division of Criminal Investigation of the Wisconsin Department of Justice. Banuelos, working undercover, met a man

named Robert Watson who was being held at the Dane County Jail on a charge of obtaining a prescription by fraud. Watson suggested Reimann as a possible subject for investigation and offered to assist in the investigation.

In Banuelos's presence and at his direction, Watson telephoned Reimann to arrange a drug purchase. The call was tape-recorded. Watson told Reimann that his "buddy" wanted some morphine sulfate tablets, and Reimann responded that he was going to have to take heroin instead. When informed that Watson's "buddy" had $400 to spend, Reimann said: "[T]ell him I'll give him four grams .... Maybe I can give him like five and you can get one for yourself ..." They arranged to meet later in the day.

Banuelos and Watson drove to the agreed-upon location, where Reimann told them he wanted $230 for the heroin. When Banuelos attempted to hand him the money, he refused it, telling him to give it to Watson instead. Watson went to Reimann's car with the money and returned moments later with a small package containing a "brown substance"[1] and a "little round ball." Banuelos was wearing a recording device during his meeting with Reimann, and their recorded conversations were allowed into evidence at the trial.

Reimann's theory of defense was entrapment: he testified that, while he was a serious drug user, he was not a seller, and had sold the heroin to Banuelos only because Watson told him Banuelos was going to "hurt" him (Watson) unless he could come up with some money to pay off a debt.

While Reimann concedes the accuracy of the tape recordings (insofar as they are audible), he challenges their admission on two grounds. First, acknowledging the constitutionality of § 968.29(3)(b), STATS., which permits intercepted communications to be introduced into evidence in drug prosecutions,[2] he argues that the statute, which became effective after

[1] The brown substance eventually tested out as heroin.

[2] Section 968.29(3)(b), STATS., provides that:

> any person who has received ... any information concerning a wire, electronic or oral communication or evidence derived therefrom, may disclose the contents of that communication

Banuelos's recordings were made, cannot be retroactively applied to him. Alternatively, he argues that if § 968.29(3)(b) applies to the recordings in question, they still were not admissible because they were not "authenticated," as required by the statute.

Rather than directly arguing that the statute is inapplicable on retroactivity grounds, Reimann contends that his counsel was ineffective for not timely raising the retroactivity issue during trial. We assume he does so because he did not raise the issue in the trial court and is familiar with the well-known rule that we generally will decline to entertain such arguments. *See* ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). However he frames the argument, we reject it.

Reimann correctly points out that prior to the adoption of § 968.29(3)(b), STATS., tape recordings made with the consent of only one party to a conversation were not admissible in evidence. ***State ex rel. Arnold v. County Court,*** 51 Wis.2d 434, 444, 187 N.W.2d 354, 359 (1971). Section 968.29(3)(b), as we have said, amended the statute to render such recordings admissible in controlled-substance cases under chapter 161; the amendment became effective after Banuelos had made the recordings but before the trial.

Whether a statute may be applied retroactively is a question of law which we review independently, owing no deference to the trial court's analysis. ***Schulz v. Ystad***, 155 Wis.2d 574, 596, 456 N.W.2d 312, 370 (1990). Generally, if a statute is unclear in regard to its prospective or retroactive application, it is considered to apply prospectively only. ***Wipperfurth v. U-Haul Co.***, 98 Wis.2d 516, 522, 297 N.W.2d 65, 68 (Ct. App. 1980), *aff'd*, 101 Wis.2d 586, 304 N.W.2d 767 (1981). However, if a statute "is remedial or procedural, rather than substantive in nature, it will be given retroactive application unless there is a clearly expressed legislative intent to the contrary or unless retroactive

(..continued)

> ... while ... [testifying] in any proceeding ... in which a person is accused of any act constituting a felony under ch. 161 [the controlled substance law], and only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording.

application will disturb contracts or vested rights." ***City of Madison v. Town of Madison***, 127 Wis.2d 96, 102, 377 N.W.2d 221, 224 (Ct. App. 1985).

We discussed the distinction between "procedural" and "substantive" laws in ***City of Madison***, 127 Wis.2d at 102, 377 N.W.2d at 224. If a statute "simply prescribes the method—the `legal machinery'—used in enforcing a right or remedy," it is considered to be procedural. ***Id.*** (quoted source omitted). However, if a law "creates, defines or regulates rights or obligations, it is substantive—a change in the substantive law of the state." ***Id.***

Reimann argues that, prior to the adoption of § 968.29(3)(b), STATS., Wisconsin citizens had a substantive right to privacy in oral communications—a right he says the supreme court recognized in ***Arnold***—which was abrogated by the enactment of the statute. As a result, Reimann says, § 968.29(3)(b) cannot be retroactively applied to him. We disagree. We believe the change wrought by the enactment of subsection (b) was procedural, not substantive, and that ***Arnold*** does not require a contrary result.

Prior to the addition of subsection (b) to Section 968.29(3), STATS., one-party-consent communications were subject to interception by law enforcement authorities and could be disclosed in court, subject only to the general rules of evidence, if the interception had been authorized by the court under procedures set forth in chapter 968.[3] Additionally, the "consenting" party's testimony describing the contents of the conversation has always been admissible independently of the admissibility of the recording of the conversation. ***State v. Smith***, 72 Wis.2d 711, 713-17, 242 N.W.2d 184, 185-87

[3] Sections 968.28, 968.29 and 968.30, STATS., set forth the procedures for applying to the court for authority to intercept wire, electronic or oral communications. Section 968.29(3)(a) states:

> Any person who has received, by any means authorized by ss. 968.28 to 968.37 ..., any information concerning a wire, electronic or oral communication ... may disclose the contents of that communication ... while giving testimony ... in any proceeding in any court ....

(1976); ***State v. Maloney***, 161 Wis.2d 127, 129-30, 467 N.W.2d 215, 216 (Ct. App. 1991); *see also* ***Rathbun v. United States***, 355 U.S. 107, 110 (1957) ("The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone.").

Thus, a person in Reimann's position had no way of knowing or ensuring that his conversations with Watson would not be recorded and, if recorded, could not be used against him in police investigations—and, if certain prerequisites were met, in a court of law. In other words, he had no substantive right of privacy in the contents of his conversations with Watson. The adoption of § 968.29(3)(b), STATS., altered only the "legal machinery" through which intercepted communications could be used in court proceedings.

In so concluding, we reject Reimann's argument that ***Arnold*** recognized a substantive right in such circumstances. Arnold, who was being prosecuted for bribery, sued to prohibit the state from introducing into evidence tape-recordings of his conversations obtained through the use of a hidden microphone. ***Arnold***, 51 Wis.2d at 436, 187 N.W.2d at 355. The ***Arnold*** court began its discussion by noting that the United States Supreme Court, in ***United States v. White***, 401 U.S. 745, 749 (1971), held that one does not have a constitutionally protected expectation that a person with whom he or she is communicating "will not then or later reveal the conversation to the police."[4] ***Arnold***, 51 Wis.2d at 438, 187 N.W.2d at 356. The court then concluded that Arnold's conversations were privileged under Wisconsin statutes because the interception had not been previously approved by the circuit court under § 968.29(3)(a), which, as we noted, *supra* note 3, was a condition of admissibility. ***Arnold***, 51 Wis.2d at 442, 187 N.W.2d at 358.

There is, therefore, nothing in ***Arnold*** to suggest that the court based its conclusion on a holding that Arnold had an expectation of privacy in the conversations. The court held only that because the interceptions had not been approved or authorized under applicable provisions of chapter 968,

[4] In a more recent case, ***United States v. Caceres***, 440 U.S. 741, 750 (1979), the Supreme Court confirmed that the Fourth Amendment does not protect against interception of a conversation with another party who has consented to the interception.

STATS., they were not admissible in evidence. ***Arnold***, 51 Wis.2d at 444, 187 N.W.2d at 359.[5]

Alternatively, Reimann contends that because neither he nor Banuelos specifically testified that the telephone recordings were "an accurate accounting of the conversation[s] [they] purported to represent," they were not properly authenticated under § 968.29, STATS., and should not have been admitted.

Section 968.29(3)(b), STATS., requires that a recording of an intercepted conversation may be admitted in a felony drug prosecution "only if the party who consented to the interception is available to testify at the proceeding or if another witness is available to authenticate the recording." Because Watson died prior to the trial, admission had to be based on another witness's "authenticat[ion]" of the tapes.

Whether an item of evidence has been sufficiently authenticated is a decision resting in the trial court's discretion. ***Zinda v. Pavloski***, 29 Wis.2d 640, 646, 139 N.W.2d 563, 566 (1966) (trial court's determination that photographs were properly authenticated was well within its discretion). "We

---

[5] Reimann points to a passage in ***Arnold*** which he says demonstrates that the ***Arnold*** court was indeed recognizing a substantive right to privacy in his conversations:

> The American people are rightly jealous of their freedom of privacy and from "bugging" by the police. While the demands of our complex society require improved methods of crime detection, they do not require that a citizen's right of privacy must be indiscriminately invaded by electronic surveillance or may be invaded with the consent of only one party to a wire or oral conversation having a privileged character.

State ex rel. Arnold v. County Court, 51 Wis.2d 434, 440, 187 N.W.2d 354, 357 (1971).

Taken in context—immediately following the court's statement that it was seeking to "discover[] the legislative intent" behind the electronics surveillance statute—it is apparent to us that the ***Arnold*** court's discussion of § 968.29, STATS., was, at most, a description of the sentiments prompting the legislature's enactment of the electronic surveillance statute. It did not establish any substantive privacy rights.

will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). "[W]here the record shows that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). Indeed, we will not overturn a discretionary decision unless the trial court has erroneously exercised its discretion. ***Id***. at 591, 478 N.W.2d at 39.

An item of evidence is properly authenticated if there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." § 909.01, STATS. And its sufficiency in this regard may be demonstrated by the "testimony of a witness with the knowledge that a matter is what it is claimed to be." § 909.015(1).

Banuelos testified that he directed Watson to telephone Reimann and that he was with Watson continuously from the time the telephone conversation began through the transaction in the parking lot. He was familiar with Reimann's voice and was able to identify it on the tapes.[6] Banuelos took custody of the tapes immediately following the conversations and he testified that they had not been altered prior to trial. And, as we noted above, Reimann himself conceded at trial that the tapes were accurate to the extent the conversations were audible. We are satisfied that is sufficient "authenticat[ion]" under § 968.29, STATS.[7]

---

[6] A voice may be identified, whether heard firsthand or through a mechanical recording, "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." § 909.015(5), STATS.

[7] Reimann contends that, absent Banuelos's specific testimony that he listened closely to every word of Watson's conversations with him, the tapes could not be properly authenticated because it is possible that Watson turned off the tape to "coax[] incriminating statements from [him]" or "recorded new statements over the words he actually uttered during the conversations to mask the true context of Reimann's words." We reject the argument.

II. Exculpatory Evidence

Reimann next argues that his right to due process of law was violated when the prosecution failed to turn over exculpatory evidence to him.

Prior to trial, the prosecutor was ordered to turn over to Reimann any evidence relevant to Reimann's claim that Watson may have been induced to assist the State in gathering evidence against Reimann by promises of lenient treatment in another case. The prosecutor produced a document indicating that Department of Justice agents had discussed with Watson giving him some consideration on the pending charge in return for his assistance in the Reimann investigation. Banuelos testified at trial, however, that no agreement was ever made with Watson to that effect, and no promises or concessions were made to Watson with respect to his pending case in exchange for his cooperation in Reimann's case. According to Banuelos, he simply told Watson that Watson's cooperation would be mentioned to the district attorney.[8]

(..continued)

First, Reimann never challenged the authenticity of the tapes on this basis in the trial court. Second, authenticity may be shown by circumstantial evidence, and the proponent of the evidence need not eliminate the possibility of alterations absolutely, but only as a reasonable possibility. ***United States v. Bright***, 630 F.2d 804, 819 (5th Cir. 1980). Reimann has not persuaded us that the trial court erroneously exercised its discretion in determining that the tapes were sufficiently authenticated to be admissible in evidence.

[8] Banuelos's testimony at trial regarding any promises made to Watson is as follows:

Q: And what if any arrangements, agreements, or promises did you make with Mr. Watson to get him to participate with you in th[e] investigation [of Reimann]?

A: Well, actually, there w[ere] no promises made to Mr. Watson. The only thing I had mentioned to Mr. Watson at the time that I interviewed him was that I would mention this to the Assistant DA in Dane County and that maybe his assistance would be taken into consideration at that time or later.... Toward the pending case that he had against him.

....

After the trial, Reimann learned that the Department of Justice had prepared a draft agreement stating that, in exchange for Watson's cooperation in Reimann's case, the Department would not pursue—or assist other agencies in pursuing—federal charges against him and, depending on the degree of his cooperation, might recommend to the district attorney that his pending drug charge be dropped. The agreement was never finalized or signed by any of the parties.

Though unsigned, Reimann argues that the document was essential to his defense because it would have cast doubt upon Banuelos's credibility and buttressed Reimann's entrapment defense by showing that Watson had a substantial motive to pressure him into selling the drugs to Banuelos. And he contends that the State's failure to provide it prior to trial denied him due process of law.

(..continued)

Q: All right, that sort of came up in the discussions. You just didn't walk in and say, "Gee how would you like to be a snitch?" and he said, "I can't wait?"

A: I never used any pressure on Watson. He wanted to do this.

Q: Okay, he wanted to do this, right?

A: Yeah. We never promised any chances of him getting out of his pending charge.

Q: But you did promise to go to the district attorney's office to tell them the results of his cooperation, correct?

A: To tell them what Watson had told me, and that he could be utilized and whether it would be okay and --

Q: And by going to the district attorney, if he's able to succeed in setting somebody up, you're going to recommend leniency or a reduced sentence to the district attorney, correct?

A: We don't recommend. We just tell the assistant [district] attorney what the person has done. And I believe that the assistant district attorney decides from there.

Whether a defendant has been denied a constitutional right is a question of constitutional fact which we review independently. ***State v. Haste***, 175 Wis.2d 1, 23, 500 N.W.2d 678, 687 (Ct. App. 1993). Under the Fourteenth Amendment, due process is violated where the prosecution suppresses material evidence favorable to the defendant. ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). Evidence is material where "there exists a `reasonable probability' that had the evidence been disclosed the result [of the proceeding] would have been different." ***Wood v. Bartholomew***, 116 S. Ct. 7, 10 (1995) (citation omitted; quoted source omitted). "A `reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***United States v. Bagley***, 473 U.S. 667, 682 (1985) (quoted source omitted).

Banuelos testified that, while he told Watson his cooperation would be made known to the district attorney prosecuting the pending charge against him, he made no promises that the charge would be dropped—or even that Watson's cooperation in the Reimann case would result in a recommendation to this effect to the district attorney. And he stated at the postconviction hearing that although the contents of the document were discussed with Watson, no agreement was ever finalized.

In other words, no such agreement existed, and if it did not exist, we do not see how it could have influenced Watson's actions. Indeed, as the State suggests, if such a potential agreement had been dangled before Watson but never consummated, it might more reasonably be considered as a *disincentive* to Watson to assist the prosecution.

Nor do we see the prosecution's failure to disclose the document to Reimann prior to trial as raising a reasonable probability that, had disclosure been made, the outcome of the trial would have been different. Reimann simply has not persuaded us that he could have used the document to impeach Banuelos's credibility to such an extent that the jury "[would] have disbelieved everything [he] said"—or that the document would somehow have bolstered his entrapment claim. He has not shown a denial of due process.

III. Hearsay Statements

Reimann next argues that Banuelos's testimony recounting various statements made to him by Watson was inadmissible hearsay, and that its admission violated his constitutional right to confront witnesses against him.

Banuelos testified that when Watson returned with the heroin after giving Reimann the money, he had two packages with him—Banuelos's "purchase" and a smaller "ball," which he (Watson) said Reimann had given him "as a favor" for bringing him a new customer. Reimann objected on hearsay grounds and the trial court overruled the objection, instructing the jury that it could not consider Watson's statement for the truth of its content, but only to determine whether Watson had in fact made the statement.[9]

---

[9] The testimony was not specifically sought by the prosecutor. Banuelos was asked to "describe what it was that [he] received from Mr. Watson" on the date in question. He responded that Watson gave him a plastic "baggy" containing a "brown substance," and went on to state: "The other little round ball of substance was—according to Mr. Watson, was given to Mr. Watson as a return for the favor for—", at which time the testimony was interrupted by Reimann's hearsay objection.

A few minutes earlier, Banuelos—again in response to a general question—began to testify as to what Watson said to him when he returned from meeting with Reimann and Reimann interposed a hearsay objection. The prosecutor responded that the statement was not being offered for its truth, but simply to explain what was happening, and the trial court stated:

Let me explain this to the jury, and it's sometimes difficult to understand.

> What Mr. Watson may have said is hearsay and cannot be considered by you for the truth [o]f what Mr. Watson is saying. In other words, you can't accept as true what Mr. Watson is telling ... this witness. But I am allowing it in to explain what happened, why the officer did whatever [he] did next, to give you a complete picture of the scene. But you can't accept what Mr. Watson was saying was true.

After a few intervening questions, Banuelos gave his "brown substance" answer and, in response to Reimann's hearsay objection, the trial court stated:

Banuelos's testimony was plainly inadmissible to show that the "ball" of heroin was in fact a "favor" to Watson. See § 908.01(3), STATS., which defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." As indicated, however, trial court instructed the jury at the time of the objection that statements made by Watson to Banuelos "should not be accepted for the truth of what he said"; it made and remade that point to the jury in its final instructions (as we discuss in Part IV of this opinion). We presume that jurors follow such admonitory instructions, ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987), and Reimann has not persuaded us that presumption should not apply here.[10]

IV. Jury Instructions

Reimann also argues that his conviction should be reversed because the trial court erroneously instructed the jury that it was required to accept Banuelos as a credible witness, thus violating "his most fundamental rights to due process."

The challenged instruction relates to the court's ruling on the hearsay objection we have discussed immediately above. Apparently fearing that there might have been some confusion about its admonition to the jury at the time it ruled on Reimann's objections to Banuelos's testimony about what Watson had told him, the court decided to instruct the jury at some length at the conclusion of the trial as to the distinction between taking Watson's hearsay statement for the truth of its content, as opposed to considering it only as evidence that the statement had been made. The court told the jury:

(..continued)

> So the jury understands again, anything that Mr. Watson says to this witness is hearsay and should not be accepted for the truth of what he said.

[10] Reimann also claims that admission of Watson's statement via Banuelos's testimony violates the Confrontation Clause. We have held, however, that the evidence was properly admitted under the rules of evidence because, under the court's repeated instructions to the jury, it was not admitted for the truth of the statement. *See* ***Tennessee v. Street***, 471 U.S. 409, 416-17 (1985) (right of confrontation not implicated where statement not admitted for its truth).

> You may not take any statements [attributed to Watson] to be the truth as to what [he] said. In other words, if one of the statements Mr. Watson said was that it was two o'clock, you may not accept that as being truthful.
>
> But you may accept the fact that Mr. Watson made the statements that have come into evidence, and you'll have to decide whether or not he made the statements. But you may not decide whether or not what he said was true. That's a fine line and a fine distinction that sometimes is difficult to understand.
>
> In other words, in this regard Mr. Banuelos and Mr. Reimann have testified to certain things that Mr. Watson said. You can't accept what they say Mr. Watson said as being truthful, but you may decide or accept that Mr. Watson actually made the statements.
>
> And you will have to *accept* the credibility of Mr. Banuelos and Mr. Watson in determining those issues. You may consider the statements of Mr. Watson, if you choose to do so, for whatever impact [they] had on the person or persons he was making the statements to and for whatever happened as a result of those statements or for any state of mind those statements may have had on anyone hearing those statements.

(Emphasis added.)

Reimann's argument centers on the emphasized word "accept"; he claims that it tells the jury, in effect, that Banuelos is a credible witness whose testimony the jury must "accept." He did not object to the instruction and therefore has not preserved the issue for appeal. ***State v. Smith***, 170 Wis.2d 701, 714 n.5, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993); ***State v. Schumacher***, 144 Wis.2d 388, 416, 424 N.W.2d 672, 683 (1988).

He argues, however, that because the claimed error affects his "fundamental [constitutional] rights," it is the type of "plain error"—those errors that are "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time," ***State v. Wiese***, 162 Wis.2d 507, 515, 469 N.W.2d 908, 911 (Ct. App. 1991)—that may be reviewed in the absence of any objection in the trial court. The plain error rule applies when the trial court's evidentiary ruling "constitutes a denial of `any fundamental constitutional right or a substantial impairment of the right of fair trial.'" ***State v. Romero***, 147 Wis.2d 264, 275-76 n.3, 432 N.W.2d 899, 904 (1988).

We do not consider the court's misstatement as constituting plain error. As Reimann correctly points out in his brief, one of the jury's function is to assess the credibility of the witnesses, ***State v. Hines***, 173 Wis.2d 850, 861, 496 N.W.2d 720, 724 (Ct. App. 1993), and the trial court, both at the time of Reimann's objection and later in its full instructions, explained in detail that they were not to accept Watson's statements as true. The court also instructed the jurors that they were the sole judges of the credibility of the witnesses. And while the supreme court has stated that a verdict may be "tainted" if the court's instructions are "given in such a manner that a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights," ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988), that is not the case here. We do not believe that reasonable jurors could have misinterpreted the court's instructions—even given its misstatement (if indeed that was what it was, as opposed to the reporter's typographical error, substituting "accept" for "assess")[11]—to mean that they were barred from evaluating Banuelos's credibility regarding Watson's statements. Even if it could be said that use of the word "accept" was momentarily confusing to the jurors, the trial court also instructed them a few minutes later that:

> By allowing testimony ... to be received over the objection of counsel, the court is not indicating any opinion as to the weight of the evidence. You jurors

[11] In its memorandum decision on Reimann's second set of postconviction motions, the trial court noted that its "standard jury instruction in cases such as [this] contains a statement that the jury `will have to a[ss]ess the credibility of' those [witnesses] whose ... testimony is before it." The court went on to note that it was its intent to advise the jury to "`assess' Banuelos'[s] and Watson's credibility, rather than to `accept' it," and that it could not ascertain "[w]hether the Court mis-spoke or the transcript is inaccurate ...."

> are the judges of the credibility of the witnesses and the weight of the evidence.
>
> It is the duty of the jury to scrutinize and weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility of the several witnesses and of the weight and credit to be given to their testimony.

The court went on to instruct the jurors as to how they were to assess the "weight and credit" of the testimony of the several witnesses. We are satisfied that the trial court's misstatement did not deny Reimann a fundamentally fair trial or impair his right to due process of law.[12]

V. Motion to Reopen the Postconviction Hearing

Reimann's initial postconviction motions sought a new trial in the heroin case based on the alleged improper withholding of exculpatory evidence and improper admission of the tapes. After the hearing on the motions had been completed, but before they had been decided by the trial court, Reimann discharged his attorney and his new lawyer filed additional motions, including a motion to reopen the evidentiary hearings based on "new" evidence relating to: (1) a claim of ineffective assistance of counsel in connection with his plea to the firearm charge; (2) the admission of the tapes; and (3) the promises he claimed had been made to Watson in exchange for his testimony.

---

[12] Reimann, citing to ***Smuda v. Milwaukee County***, 3 Wis.2d 473, 479, 89 N.W.2d 186, 189 (1958), argues that a correct instruction does not cure an incorrect instruction unless the jury is explicitly informed that the proper instruction is being given to correct the erroneous instruction. ***Smuda*** held that the trial court must expressly inform the jury that it is correcting an erroneous instruction where "the error was on a major point which in the particular circumstances seem[s] quite likely to have affected the result," but that explicit correction is not necessary where "the defect, in its context, could not have been prejudicial." ***Id.*** Because, as we recognize above, there is no reasonable probability that the court's misstatement affected the outcome of Reimann's trial, ***Smuda*** does not materially advance his position on appeal.

The trial court denied the request, concluding that the "tape recording" and "exculpatory evidence" contentions were either simply a "rehash[]" of Reimann's earlier arguments or were matters that would not have altered any decisions made by the court or the jury in the course of the proceedings; thus, they could be decided without further hearing. As for the plea-withdrawal motion, the court concluded that the affidavit Reimann submitted in support of his request provided an insufficient basis for further hearings. Reimann challenges those rulings on appeal.

Whether to reopen a hearing for the taking of additional evidence lies within the sound discretion of the trial court, ***Stivarius v. DiVall***, 121 Wis.2d 145, 157, 358 N.W.2d 530, 536 (1984), and we discussed the rules that govern our review of discretionary decisions in Part I, above. Suffice it to say that we pay considerable deference to such decisions.

A. The Firearm Charge

At the hearing on Reimann's motion to reopen the hearings, Reimann had filed an affidavit stating, in essence, that he only pled to the charge to protect his former wife, whose gun it was, and that he did not know she had previously admitted owning the gun.[13]

Reimann argues that further hearings were necessary to permit him to present evidence that his trial counsel was ineffective in investigating the facts surrounding the plea, and, as a result, his plea was not knowingly and voluntarily entered.

Reimann argues that he pled to the firearm charge in order to protect his former wife—and co-defendant—Cynthia Groholski, from being charged with possession of the weapon, which was found under the bed in a motel room the two were sharing. He asserts that he was unaware, at the time of his plea, that Groholski had already admitted to possession of the gun, and he states that the only reason he entered the plea "was because [his attorney] informed [him] that [Groholski]'s lengthy and extensive criminal record would

[13] Although the affidavit was not sworn to, the trial court accepted it.

guarantee that she would receive at least a 30 year sentence if/when she was convicted..."

The trial court concluded that Reimann's allegations constituted inadequate grounds to reopen the hearings, and we cannot say that is a conclusion a reasonable judge could not reach, given the facts of record and the applicable law. *See* ***Burkes v. Hales***, 165 Wis.2d at 590, 478 N.W.2d at 39.

A defendant claiming ineffective assistance of counsel in the context of a guilty or no contest plea must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (footnote omitted). In ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996), the defendant claimed ineffective assistance in connection with his plea because counsel misinformed him that his minimum parole eligibility date was two years less than cases such as his actually required. The supreme court upheld the trial court's decision not to hold an evidentiary hearing on the motion, observing that Bentley "never explain[ed] how or why the difference between ... minimum parole eligibility date[s] ... would have affected his decision to plead guilty." ***Id.*** at 316-17, 548 N.W.2d at 56. In particular, said the court, Bentley had failed to allege any "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty." ***Id.*** at 317, 548 N.W.2d at 56.

The same is true here. Reimann has not referred us to any evidence in the record to suggest that he placed a particular emphasis on protecting Groholski when deciding whether to accept a plea agreement. Indeed, he has not even alleged that his trial counsel was aware of the reasons he now claims warrant withdrawal of his plea. We agree with the State that if Reimann never told his lawyer that he was pleading only to protect his former wife, "counsel ... could not have responded to it at all, let alone responded to it ineffectively."

Finally, under the circumstances surrounding the discovery of the gun in Reimann and Groholski's room, and given her status as a co-defendant in the trial court, her admission that she possessed the gun does not insulate Reimann from prosecution on the same charge. *See* ***Curl v. State***, 40 Wis.2d 474, 483, 162 N.W.2d 77, 82 (1968) (when more than one person may be said to have

control over property, each may be in "possession" of the property within the meaning of the criminal code), *cert. denied*, 394 U.S. 1004 (1969). We conclude that the trial court properly exercised its discretion in refusing to reopen the evidentiary hearing.

B. The "Exculpatory Evidence" Claim

Reimann also argued to the trial court that further hearings were necessary to permit him to offer testimony that, in addition to the unsigned "agreement," an agent of the Department of Justice orally told Watson that, in exchange for his cooperation in the Reimann investigation, the Department would "protect him" from state and federal prosecution in this case and in his pending case. He said this would have contravened Banuelos's testimony that he made no such promises to Watson.

In denying the request, the court, lumping together the exculpatory evidence and tape claims, stated that there were two reasons for denying further hearings: (1) the issues had already been raised and considered; and (2) even if considered anew, they provide no reason to question either the court's earlier rulings or the jury's verdict.[14]

---

[14] The court stated that

> when you put it in context, the issues raised today by the defense are rehashing of a lot of the issues we have dealt with before. They are different twists on a lot of the issues we have dealt with before. That would be one category that they would fall into.
>
> The other category that they would fall into would be that even if correct ... there's no showing that they would have altered any decisions made by the Court in this case or any decisions the jury made in this case....
>
> [T]he issue of the credibility of Watson is nothing new, the issue of ... Banuelos's credibility is nothing new, the tape recording issue is not new.
>
> And when you put it all together, the items being raised today

The court's explanation, while minimal, establishes that it exercised its discretion in denying this request, and we cannot say the decision lacks a rational basis. ***Burkes***, 165 Wis.2d at 590, 478 N.W.2d at 39. Beyond that, Reimann's defense, as we have indicated above, was entrapment: that Banuelos had induced him to commit a criminal offense—to sell the heroin to Banuelos—which he was not otherwise disposed to commit. Proving the defense is a two-step process.

> First, the defendant must prove ... that he or she was induced by law enforcement to commit the crime. The state then bears the burden of proving ... that the defendant had a prior disposition to commit the crime.

State v. Pence, 150 Wis.2d 759, 765, 442 N.W.2d 540, 543 (Ct. App. 1989) (citations omitted). It is a subjective test that focuses on the defendant's state of mind which led to the intent to commit the crime—that is, "whether the police conduct affected or changed a particular defendant's state of mind." ***Id***. at 765, 442 N.W.2d at 542-43.

The only acts of the "police" that could form the basis for the defense would be the alleged "promises" of leniency made to Watson by the Department of Justice, and whether such promises were made to Watson seems to us to be immaterial to Reimann's state of mind. According to Reimann's own testimony, he sold the heroin to Banuelos not because he wanted to see him receive lenient treatment from the police but because Watson told him he owed Banuelos money and Banuelos would "hurt" him if he was unable to pay it back. In that light it is difficult to see how a jury could reasonably believe that it was the Department's purported promise to Watson that induced the sale. They are apples and oranges. We see no error in the trial court's denial of Reimann's request to reopen the hearing on this issue.

(..continued)

> don't change previously made decisions in this case.

C. The Tape Recordings

Finally, Reimann argues that the trial court should have reopened the hearing to permit him to present evidence that his trial counsel was ineffective for failing to make specific objections to use of the tape-recorded conversations at trial, and that counsel had no strategic reasons for doing so. The trial court ruled that the tapes were admissible, and we have affirmed that ruling. Under those circumstances, Reimann's argument that he should be permitted another chance to show counsel was ineffective for failing to keep them out is unavailing.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.