COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1509-CR **Cir. Ct. No. 2007CT559**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN SIEFERT, Judge, and ROBERT HAWLEY, Reserve Judge.[1] *Reversed and cause remanded for a new trial.*

[1] The Honorable John Siefert presided over both jury trials, and the Honorable Robert Hawley, Reserve Judge, decided the postconviction motion.

¶1 CURLEY, P.J.[2] Jerry L. Miller appeals the judgment, entered following a jury trial, convicting him of operating a motor vehicle while under the influence of an intoxicant, third offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2) (2007-08).[3] He also appeals the denial of his postconviction motion. Miller argues that his trial attorney was ineffective because he "failed to take reasonable steps to locate an essential defense witness [Jamie Peaslee] and serve him with a subpoena" for his jury trial, thus preventing the jury from hearing from two witnesses who would have testified that Peaslee, who accompanied Miller the night of his arrest, admitted to them that he was the actual driver of the truck.[4] Miller also argues that the postconviction court erred in denying his postconviction motion when it reversed the finding of the trial court and determined that Miller's trial attorney's performance was not deficient in his attempt to subpoena Peaslee, but nevertheless refused to revisit the trial court's determination that the admissions allegedly made by Peaslee to two witnesses

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08).

[3] Miller was originally charged with operating a motor vehicle while under the influence of an intoxicant, second offense. The State filed an amended complaint charging him with operating a motor vehicle while under the influence of an intoxicant, third offense, and operating a motor vehicle with a prohibited alcohol concentration. The judgment of conviction erroneously states that this was Miller's second offense. This court directs the clerk of courts to correct the error.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[4] Peaslee's first name is referenced as Jamie, Jaime, Jerry, and James by the parties and in the record.

were ambiguous, were not statements against penal interest and were uncorroborated. WIS. STAT. § 908.045(4).[5]

¶2 Based upon a reading of the entire record, this court agrees with the postconviction court that Miller's trial attorney was not ineffective in his attempts to subpoena Peaslee, and that consequently, Peaslee was "unavailable" as that term is used in the hearsay exception found in WIS. STAT. § 908.04(1)(e).[6] Further, the statements made to two witnesses by Peaslee were unambiguous, exculpatory, and corroborated. As a consequence, they should have been admitted and this error was not harmless. Thus, this court reverses and remands for a new trial.

I. BACKGROUND.

¶3 Miller was arrested on January 25, 2007, in the City of Greenfield. His first jury trial began on August 20, 2007. At it, the State called Lisa Havlicek and two City of Greenfield police officers to testify. Havlicek recounted how she

[5] WISCONSIN STAT. § 908.045(4) reads, in pertinent part: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated."

[6] WISCONSIN STAT. § 908.04(1)(e) provides:

> **Hearsay exceptions; declarant unavailable**; **definition of unavailability.**
>
> **(1)** "Unavailability as a witness" includes situations in which the declarant:
>
> ….
>
> (e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

had been outside a store smoking cigarettes with another person when they saw a blue truck come into the parking lot and park. She described the two men in the truck and recalled their movements. She testified that Miller was the driver. The officers explained to the jury how they came to be at the parking lot that evening, what they observed and what occurred once they were there. Miller testified on his own behalf, claiming that Peaslee was the driver of the truck that evening. Peaslee, who had been subpoenaed, failed to appear. Miller's attorney, Steven Wiechmann, asked for a body attachment. The trial court denied his request.[7] Miller was recalled to verify that he had been in the House of Correction with Peaslee and that Peaslee had told him in the presence of another prisoner, Juan Franco, that he, Peaslee, was the driver, and that he would testify at trial to that fact. The defense then called Franco, who told the jury that he heard Peaslee state that if he were called to court he would "man up to it"; that is, he would admit to being the driver.

¶4 Following the giving of jury instructions and closing arguments, the jury began their deliberations. The next day the foreperson of the jury told the trial court that they were deadlocked. The court then declared a mistrial, and eventually the case was again scheduled for a jury trial.

¶5 The second jury trial began on April 28, 2008. At it, Havlicek again testified, as did Gary Bartz. They both testified that they were standing outside the store smoking cigarettes when they saw a truck enter and park in the parking lot.

[7] At the start of the second jury trial, Wiechmann argued that he asked for a body attachment during the first jury trial and that his request was denied. Although his request and the court's denial do not appear in the appellate record related to the first trial, neither the parties nor the court disputed that the request had been made.

They also both testified that the passenger got out of the truck from the passenger side and that his pants almost fell down and that the driver exited shortly thereafter from the driver's side. According to the witnesses, the passenger went into the store, but the driver remained outside and spoke to the two of them. At trial, the witnesses identified Miller as the driver. The State also called the manager of the store that the passenger entered. He testified that he called the police because "[Miller and Peaslee] were demonstrating signs of being intoxicated and we were concerned about them leaving the parking lot and basically getting into an accident."

¶6 Two police officers also again testified. They related that they arrived at the store after an employee called and expressed concern because two customers appeared intoxicated. Officer Scott Simons stated that when he arrived on the scene he observed Miller sitting in the driver's side of a parked truck holding a key to the ignition. Although Miller was holding the key, he denied driving the truck. Officer Simons ran a check on the truck and it came back belonging to Peaslee.

¶7 Officer Steven Springob also testified. He stated that after he spoke to the witnesses inside the store, he observed Miller in the driver's side of the truck and he asked him to step out of the vehicle and perform some field sobriety tests. Officer Springob stated that Miller showed many classic signs of intoxication. Miller's response to questions was "slow and slurred" and his eyes were "bloodshot and glassy." Miller was unable to successfully perform the field sobriety tests and he was arrested.

¶8 Also admitted at the trial were the results of a blood test taken of Miller's blood within three hours of the time he was alleged to have driven the

truck. The test results revealed .263 grams of alcohol in one hundred milliliters of Miller's blood. The trial court later instructed the jury that the law prohibits an alcoholic concentration of .08 grams or more of alcohol in one hundred milliliters of a person's blood.

¶9 Almustafa Bennett testified outside the presence of the jury concerning what Peaslee had told Bennett, specifically, that Peaslee admitted he was the driver of the truck the night Miller was arrested. After considerable legal argument, the trial court refused to allow the testimony of either Bennett or Franco, concluding that Wiechmann had not used "reasonable means" to procure Peaslee's attendance at the trial. Further, the trial court ruled that even if Wiechmann had successfully subpoenaed Peaslee, the trial court would not have permitted the witnesses to testify because the statements were ambiguous, non-exculpatory and lacked corroboration. Miller was the final witness. He denied he was the driver the night of the incident.

¶10 The jury returned a verdict of guilty. The trial court sentenced Miller to nine months in the House of Correction and imposed a $1200 fine. Miller filed a postconviction motion, claiming that Wiechmann was deficient and that he was prejudiced as a result. The postconviction court, in a written decision, adopted the State's position and disagreed with the trial court's ruling concerning whether trial counsel was deficient in his attempts to serve Peaslee, concluding that "the record demonstrates that counsel undertook substantial efforts to serve Peaslee both before the jury trial began and during the jury trial…." (Record citation omitted.) However, the court wrote that it would not "revisit" the trial court's ruling that Peaslee's admissions to Franco and Bennett that he was the driver were "ambiguous, uncorroborated, non-exculpatory, and not a statement against penal interest" and denied the motion.

II. ANALYSIS.

A. Wiechmann was not ineffective.

¶11 Miller argues that Wiechmann, his trial attorney, was deficient because he failed to make reasonable efforts to serve Peaslee with a subpoena. Further, he contends that he was prejudiced by this deficiency. The State, on the other hand, maintains that Wiechmann's efforts to serve Peaslee were reasonable, but the State claims that the statements of both Franco and Bennett were not admissible because the statements were not corroborated.[8]

¶12 We review claims of ineffective assistance of counsel under the two-prong standard of ***Strickland v. Washington***, 466 U.S. 668 (1984). To prevail on such a claim, the defendant must prove that the attorney's performance was deficient and that the deficiency was prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. "'[B]oth the performance and prejudice components ... are mixed questions of law and fact.'" ***State v. Pitsch***, 124 Wis. 2d 628, 633-634, 369 N.W.2d 711 (1985) (citation omitted). The trial court's findings of fact will not be overturned unless clearly erroneous. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Whether the attorney's

[8] Ironically, both the defense and the State have changed positions since the trial with respect to the issue of whether Wiechmann used "reasonable means" to secure Peaslee's attendance at trial. At trial, Wiechmann argued that he had made reasonable efforts at trying to locate and serve Peaslee. The State disagreed and argued that the efforts were not reasonable, with the assistant district attorney characterizing Wiechmann's efforts as "11th hour efforts, running around all over town on the day of trial." In addition, the trial court also changed its mind. At the first trial, the court permitted Franco to testify to what Peaslee told him. At the second trial, the trial court concluded that the statements made to Franco and Bennett were ambiguous and non-exculpatory.

performance was deficient and whether the deficiency prejudiced the defense are questions of law that we review *de novo*. ***Id.*** at 128.

¶13 WISCONSIN STAT. § 908.045 discusses hearsay exceptions when the declarant is unavailable. Section 908.045(4) permits a statement against interest to be admissible if the declarant is found to be unavailable, but has an additional requirement when the declarant is exposed to criminal liability. Section 908.045(4) reads, in pertinent part: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated." Pursuant to WIS. STAT. § 908.04(1)(e), a declarant is unavailable if the declarant "[i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means."

¶14 "Construction of a statute, or its application to undisputed facts, is a question of law, which we decide independently, without deference to the trial court's determination." ***Truttschel v. Martin***, 208 Wis. 2d 361, 364-65, 560 N.W.2d 315 (Ct. App. 1997). However, the admission of evidence lies within the sound discretion of the trial court. ***State v. Pepin***, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). "When we review a discretionary decision, we examine the record to determine if the [trial] court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Wanta***, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999). In considering whether the proper legal standard was applied, however, no deference is due. This court's function is to correct legal errors. *See* ***Vogel v. Grant-Lafayette Elec. Coop.***, 195 Wis. 2d 198, 209, 536 N.W.2d 140 (Ct. App. 1995) (noting that we may reverse a discretionary decision which was based on an erroneous view of the law), *rev'd on*

other grounds, 201 Wis. 2d 416, 548 N.W.2d 829 (1996). "Therefore, we review *de novo* whether the evidence before the [trial] court was legally sufficient to support its rulings. Furthermore, if evidence has been erroneously admitted or excluded, we will independently determine whether that error was harmless or prejudicial." ***Ansani v. Cascade Mountain, Inc.***, 223 Wis. 2d 39, 46, 588 N.W.2d 321 (Ct. App. 1998) (citation omitted).

¶15 At the beginning of the second jury trial, Wiechmann set forth the efforts taken by him to secure Peaslee's attendance at trial. Wiechmann explained that he received a letter from a Racine County deputy sheriff in which the deputy stated that ten days before the trial he was unable to serve Peaslee with a subpoena at the address provided by Wiechmann because Peaslee no longer lived there. Wiechmann advised the trial court that Peaslee had been served at this address twice previously, including service approximately four months before the date the second jury trial began. Wiechmann also reminded the court that at the first jury trial Peaslee was properly served, and when he did not appear, Wiechmann requested a body attachment for him but the trial court refused to issue one. Wiechmann stated that after getting the letter advising that Peaslee had not been served, Wiechmann searched his file and left messages at phone numbers he had for Peaslee, which proved unproductive. Then Wiechmann, knowing that Peaslee had been sentenced and was on probation, contacted several probation agents and was given Peaslee's phone number and his new address on South 43rd Street in Milwaukee. Armed with this new information, Wiechmann hired a private investigator to serve Peaslee with a subpoena. The private investigator both called Peaslee and went to his home, but no one answered the door and no phone messages were returned. Ultimately, the trial court urged the State to help

Wiechmann serve Peaslee with a subpoena and adjourned the matter to the next afternoon to permit the defense to serve him.

¶16 The next afternoon Wiechmann updated the trial court on his efforts to serve Peaslee with a subpoena. After talking to a supervisor of the probation department, Wiechmann obtained a work address for Peaslee and had his private investigator make another attempt at Peaslee's home and at the restaurant where Peaslee worked. He learned from his investigator, who had contacted Peaslee's mother, that Peaslee no longer lived at the South 43rd Street address and had not shown up for work for weeks. Peaslee's mother claimed she did not know how to contact Peaslee. Additionally, Wiechmann received a message from the probation supervisor that she had sent an agent to Peaslee's home, but that no one responded. She also contacted the restaurant where Peaslee worked and learned that Peaslee was not on the schedule that week. In addition, the supervisor advised Wiechmann that she left detailed messages on Peaslee's cell phone that he should contact her, but none were returned. The assistant district attorney told the court that he, too, had contacted the supervisor and learned that Peaslee had not yet been assigned an agent.

¶17 Wiechmann was unable to procure Peaslee's presence at trial by way of a subpoena; nevertheless, he argued that his efforts in attempting to serve Peaslee fell well within the "other reasonable means" set forth in WIS. STAT. § 908.04(1)(e), thus making Peaslee's incriminating statements admissible. The trial court ruled:

> The record stresses the phrase "reasonable means." I do not believe that defense's attempts to procure Jamie Peaslee in court have been reasonable under the statute. Reason Number One. They only attempted to subpoena this witness at the address given on [Consolidated Court Automation Programs (]CCAP[)] on the day the trial

> started. Number Two, they only attempted to subpoena the witness at his alleged place of employment on—during the trial itself.
>
> Number Three, the defendant's address on CCAP was readily available to them prior to trial. Number Four, the defendant was personally in the Circuit Court of Milwaukee County at an earlier time where he could have been served with a subpoena in person had the defendant ascertained that sentencing date from CCAP.

¶18 This court, as did the postconviction court, disagrees with the trial court's legal conclusions. The lynchpin to determining whether Peaslee's statements were admissible, assuming for the moment that the statements tended to expose Peaslee to criminal liability and assuming sufficient corroboration, is whether Wiechmann used reasonable means in attempting to procure Peaslee's attendance at trial. Here, Wiechmann sent a subpoena to the Racine County sheriff at least ten days before trial. He had subpoenaed Peaslee at this address in the past, including a date some four months before the second jury trial date. Up until his contact with the Racine County deputy sheriff, he had no reason to believe Peaslee no longer lived there. After learning that Peaslee no longer lived there, Wiechmann then searched his file and found phone numbers for Peaslee. He was unable to contact Peaslee. Wiechmann then contacted the probation department because he knew Peaslee was on probation. The probation department not only gave him Peaslee's new address and later, Peaslee's workplace address, but also attempted to reach Peaslee by sending an agent both to his home and by contacting his workplace—all to no avail. Wiechmann also hired a private investigator to attempt service. The private investigator was unsuccessful in either contacting Peaslee or serving him.

¶19 In ***State v. Keith***, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997), the court, in addressing the question of whether a witness was "unavailable"

pursuant to WIS. STAT. § 908.04(1)(e), observed that: "The Judicial Council Committee Note of 1974 indicates that the term 'reasonable means' requires due diligence, or a good faith effort to produce the witness.…" ***Keith***, 216 Wis. 2d at 73.

¶20 Here, not only were Wiechmann's efforts reasonable, they were extraordinary: he sent the sheriff's department a subpoena, allowing ample time for it to be served upon Peaslee at an address where Peaslee had been served just four months earlier; he tried to contact Peaslee by phone; he hired a private investigator who attempted service and ultimately contacted Peaslee's mother in an attempt to locate Peaslee; and he contacted the probation department and followed up on the information the supervisor gave him. Indeed, the probation department was no more successful in locating Peaslee at his home or at work than was Wiechmann.

¶21 The trial court faulted Wiechmann for not looking on CCAP for Peaslee's address prior to trial, for not serving him at the CCAP address until the first day of trial and for not attempting service at his place of employment until during trial. Additionally, the trial court stated that Wiechmann should have served Peaslee during Peaslee's most recent court appearance in his separate case. While it is possible that these methods might have proved successful, Wiechmann was not required to exhaust the possible ways Peaslee might have been served. Rather, Wiechmann was only required to use reasonable means; that is, a good faith effort to produce the witness. He did so by attempting service through a law enforcement officer, through a private investigator, through information supplied by the probation department and by personally calling Peaslee. These attempts were more than adequate. Finally, it is also well to remember that, had the trial court issued a body attachment at the beginning of the first jury trial, as

Wiechmann apparently requested, Peaslee would have, in all likelihood, been present to testify.

¶22 In ***Keith***, the trial court found the attempts to contact witnesses were reasonable and the witnesses were declared unavailable when the only search for them consisted of checking the Department of Transportation and police computers for current addresses. ***Id.***, 216 Wis. 2d at 73-74. Far more was done here. Wiechmann's attempts at producing Peaslee for trial fell well within the alternative method of "other reasonable means" set forth in the statute. Moreover, it appears that the trial court applied the wrong standard. Rather than determining what a reasonable attorney would have done, the trial court measured Wiechmann's conduct against that of a police officer who is seeking a person:

> I don't think your efforts at this point are reasonable. If I'd been told by my sergeant in the police department to go locate this guy and I came back with the same efforts you did, well, I went to an address, I sent somebody to an address [where it was believed Peaslee resided], I mean the sergeant would have laughed at me.
>
> I mean, that's what a policeman would do. If you want the guy to show up, you call the—his agent and say make him show up at the district station. If he doesn't, threaten to put a hold on him. You say that the Judge is going to issue a body attachment against him and that will be grounds for putting a hold on him and have that agent or the agent's supervisor contact that probationer and lean on him to appear in court tomorrow afternoon.

Given Wiechmann's diligent efforts, Peaslee was unavailable under WIS. STAT. § 908.04(1)(e). Consequently, Wiechmann was not ineffective. Furthermore, the error would not be harmless if the statements were both exculpatory and corroborated. This is so because Miller was denied the opportunity to call Franco and Bennett, who would have claimed that Peaslee admitted to them that he was the driver.

B. The statements were not ambiguous, were exculpatory and they were corroborated.

¶23 The State argues that Wiechmann's efforts were reasonable, and consequently, that Wiechmann was not deficient in his performance. The State, however, insists that Peaslee's prior statements were not admissible because they were not corroborated. As noted, the trial court found that Wiechmann's efforts were not reasonable. The trial court also stated that, had Peaslee been subpoenaed, it would not have admitted the testimony of Franco and Bennett because the trial court believed the statements were ambiguous, non-exculpatory and uncorroborated. This court disagrees.

¶24 The standard for corroboration of hearsay statements against penal interest "is corroboration sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the statement could be true." ***State v. Anderson***, 141 Wis. 2d 653, 660, 416 N.W.2d 276 (1987).

¶25 During Franco's testimony at the first trial—which presumably would have been his testimony at the second trial—Franco testified that Peaslee told him that he would "man up to it" if called to court. The trial court seized on this testimony and remarked:

> In this trial if the alleged statement of Jamie Peaslee that he would, quote, man up to it, close quote, is interpreted and Juan Franco interprets it that Jamie Peaslee was driving, it does not automatically exclude the possibility of Jerry Miller's guilt.
>
> Peaslee could have been driving part of the night of this incident and then due to his physical incapacity because of his extreme intoxication turned the keys of his truck over to the defendant, Jerry Miller. We can't know if that possibly was what happened.
>
> In addition, the phrase, quote, man up to it, close quote, may simply mean that Jamie Peaslee feels morally

> responsible for Jerry L. Miller's predicament of being a defendant in a drunk driving case because he, comma, Peaslee, comma, got so drunk that Peaslee turned the driving of his truck over to the defendant, Jerry Miller. We can't know if manning up to it merely meant in Peaslee's mind acknowledging his moral responsibility as opposed to Miller's legal responsibility from having been driving part or all of that evening.

However, Franco testified that Peaslee said far more to him than that he was just going to "man up to it." Franco was asked:

> Q Did he ever specifically say who was driving?
>
> A He said—Mr. Peaslee said that he was driving.
>
> Q So he admitted that he was the driver?
>
> A He admitted that he was the driver.

Franco's testimony was clear and concise. No interpretation was needed. Peaslee admitted to being the driver and did so in the presence of not only Franco, but also Miller.

¶26 Bennett's testimony, which was taken outside the presence of the jury, is even more detailed.

> Q And can you describe what had—what the conversation was at that time?
>
> A The conversation was pretty much about how Mr. Peaslee was the one that was actually driving; that it wasn't Mr. Miller.
>
> Q When you say Mr. Peaslee was the one that was driving, based on Mr. Peaslee's statement—What did Mr. Peaslee say about whether the driving occurred?
>
> A Well, they were driving. They went to a—I believe a video store and I guess they went—They went to the store. He was a passenger—Mr. Miller was a passenger.
>
> Q Okay.

> A Mr. Peaslee was actually the one that was driving and he corroborated the story that I'd already heard from Mr. Miller.
>
> ….
>
> Q To the best of your recollection, using the words that Mr. Peaslee said, what was that statement?
>
> A That he was the one that was driving drunk that night and that it wasn't Jerry Miller.

¶27 As to the issue of corroboration, in reading the transcripts of the two witnesses, their testimony appears straightforward and believable. Both testified they were told by Peaslee at different times that Peaslee was the driver the night of Miller's arrest. As noted in ***State v. Guerard***, 2004 WI 85, ¶5, 273 Wis. 2d 250, 682 N.W.2d 12: The standard for corroboration "can be met in appropriate circumstances by a repetition of the self-inculpatory statement to another witness, and in this sense can be sufficiently 'self-corroborating' to be admissible under the statute." This is what occurred here. Peaslee told two people at different times that he was the driver. As a result, the trial court's decision that there was no corroboration was legally flawed.

¶28 Not only are the statements that Peaslee made to Franco and Bennett unambiguous, there can be no question as to whether the alleged statements were exculpatory. According to the sworn testimony of the two witnesses, Peaslee told them he, not Miller, was driving drunk the night of Miller's arrest.

¶29 Finally, this court also concludes that the failure to admit this evidence does not constitute harmless error. Harmless error has been defined by this court in ***State v. Dyess***, 124 Wis. 2d 525, 370 N.W.2d 222 (1985), as "whether there is a reasonable possibility that the error contributed to the conviction." ***Id.*** at 543. If the record does not support a reasonable possibility that the error

contributed to the defendant's conviction, the error is harmless, and the judgment of conviction should be affirmed. ***Id.***

¶30 When Franco testified at the first jury trial, the trial ended in a mistrial. It is clear that Franco and Bennett had the potential, if believed, to exonerate Miller.[9] Consequently, the error contributed to Miller's conviction. Thus, the judgment is reversed and the matter is remanded for a new trial.

By the Court.—Judgment and order reversed and cause remanded for a new trial.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[9] This court notes that the State's witnesses were equally compelling in their testimony. It is up to the jury to decide the credibility of the witnesses. *See* ***State v. Pallone***, 2000 WI 77, ¶45, 236 Wis. 2d 162, 613 N.W.2d 568 ("[I]t is the role of the fact finder listening to live testimony, not an appellate court relying on a written transcript, to gauge the credibility of witnesses.").