COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1618-CR **Cir. Ct. No. 2009CF1349**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARREN M. WOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER and DONALD J. HASSIN, JR., Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In this murder-for-hire case, a jury found Darren Wold guilty of first-degree intentional homicide as a party to a crime (PTAC).

Wold appeals the judgment of conviction and the order denying his motion for postconviction relief. We reject his arguments and affirm.

¶2 Wold's former girlfriend, Kimberly Smith, was found stabbed to death in 2009. The State alleged that Wold hatched a plot to kill Smith to whom he feared losing custody of their four-year-old son. The plan was that Wold's longtime friend, Jack Johnson, and a third man, Justin Welch, would travel to Wisconsin from Mexico where the pair lived. Welch, who would do the killing, had no connection to Wisconsin or to Smith. All three were charged with PTAC first-degree intentional homicide. Welch pled guilty and testified for the State at Wold's and Johnson's joint trial. The jury found both guilty. Wold's motion for postconviction relief was denied. He appeals.[1]

¶3 Wold first contends that the trial court erroneously denied his motion to sever his and his codefendants' joint trial.[2] The court concluded that initial joinder was proper under WIS. STAT. § 971.12(2) (2011-12),[3] that there was no sufficiently specific showing of antagonistic defenses, and that joinder presented no confrontation issues.

¶4 A motion for severance is committed to the trial court's discretion. ***State v. Locke***, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). The court must determine whether prejudice would result from a joined trial, then weigh any potential prejudice against the public interest in conducting a trial on multiple

[1] Johnson also appealed. *See* ***State v. Johnson***, 2013 WI App 140, 352 Wis. 2d 98, 841 N.W.2d 302. Welch did not file an appeal.

[2] Welch had not yet pled guilty when Wold moved for separate trials.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

counts. ***Id.*** "An erroneous exercise of discretion … will not be found unless the defendant can establish that failure to sever the counts caused 'substantial prejudice.'" ***Id.*** (citation omitted).

¶5 Welch testified about statements Johnson allegedly made to him implicating Wold in a conspiracy to kill Smith and about an exchange with Smith in which Welch acknowledged that he was at her house because of Wold. Wold complains that these statements were inadmissible hearsay and violated his right of confrontation.

¶6 The threshold question is whether the evidence is admissible under the rules of evidence. ***State v. Lenarchick***, 74 Wis. 2d 425, 433, 247 N.W.2d 80 (1976). If no, our analysis ends. If yes, we next examine whether admitting the statements violated the defendant's right to confront his or her accusers. ***State v. Savanh***, 2005 WI App 245, ¶13, 287 Wis. 2d 876, 707 N.W.2d 549.

¶7 An out-of-court statement offered against a party is not hearsay if it is "[a] statement by a coconspirator … during the course and in furtherance of the conspiracy." WIS. STAT. § 908.01(4)(b)5. A coconspirator's statement "is in furtherance of the conspiracy if it reassures and keeps the other participants cohesive in their illegal endeavor, or apprises them of developments." ***State v. Whitaker***, 167 Wis. 2d 247, 262, 481 N.W.2d 649 (Ct. App. 1992). Whether a statement is "in furtherance of a conspiracy" is a finding of fact to be overturned only if clearly erroneous. ***United States v. Monroe***, 866 F.2d 1357, 1363 (11th Cir. 1989).

¶8 Welch told the jury that he and Johnson discussed travel logistics, ways to accomplish the murder, a failed prior arrangement Wold and Johnson had made with other hit men who took the money and ran, requests to Wold to wire

more money for Welch's travel expenses, and not being paid the full $7,000 Wold had agreed to pay for the job. Welch also said he heard Johnson tell Wold he needed money "for his truck" or to "open a bar" because Wold said they should "talk in code" when discussing money.

¶9 Such statements are admissible. Besides that Welch's statements were subject to cross-examination, the truth of the statements was not the issue. Rather, they were offered to show that they came during the course and in furtherance of the conspiracy, apprised coconspirators of developments, revealed efforts to conceal the crime, and explained why and how Welch might travel from Mexico to Wisconsin to kill someone he never met. No confrontation violation occurs where a coconspirator's statement is offered only to prove that the statement was made so as to explain the prior, concurrent or subsequent conduct of another person. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 426-27, 430, 351 N.W.2d 758 (Ct. App. 1984).

¶10 Welch's exchange with Smith[4] likewise was not hearsay. WISCONSIN STAT. § 908.01(4)(b)5. requires only that the declarant (Welch) and

[4] Welch testified that when he entered Smith's house the morning of the crime "[s]he asked me what did I want." This exchange with the prosecutor followed:

Q: Did you answer?

A: Yes.

Q: What did you tell her?

A: I told her, "You know why I am here."

Q: Did she have a response to that?

A: Yes.

Q: What did she say?

(continued)

the party against whom the statement was offered (Wold), not the person to whom the statement was made (Smith), be members of the conspiracy. *See* ***United States v. James***, 712 F.3d 79, 106 (2d Cir. 2013) (construing FED. R. EVID. 801(d)(2)(E), the counterpart of § 908.01(4)(b)5.).

¶11 Furthermore, Welch's statements about what Johnson and Smith said were not testimonial. "[O]nly *testimonial* statements are excluded by the Confrontation Clause." ***Giles v. California***, 554 U.S. 353, 376 (2008). "[S]tatements made in furtherance of a conspiracy by their nature are not testimonial." ***Savanh***, 287 Wis. 2d 876, ¶23; *see also* ***Giles***, 554 U.S. at 374 n.6 (coconspirators' incriminating statements made in furtherance of the conspiracy "would probably never be" testimonial).

¶12 Wold alleges, however, that the reliability of the admitted statements was undermined by "unusual circumstances"—Johnson's decision not to testify and Welch's motivation to lie since he had not yet been sentenced. Neither example strikes us as "unusual." Moreover, if the statements were not "not hearsay" under § 908.01(4)(b)5., they still would be admissible as out-of-court declarations of a coconspirator, evidence that "'falls within a firmly rooted hearsay exception.'" ***Bourjaily v. United States***, 483 U.S. 171, 183 (1987) (citation

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A: She said, "Darren?"

Q: Did you respond to her?

A: Yes.

Q: What did you tell her?

A: I said, "Yes."

omitted). A court need not independently inquire into the reliability of such statements. ***Id.***

¶13 Lastly, Wold asserts that except for Welch's testimony, there is no independent evidence of a conspiracy. A court may consider an out-of-court declaration by a party's alleged coconspirator to determine if a conspiracy existed. WIS. STAT. § 901.04(1). Furthermore, we have concluded that Welch's testimony is admissible. The trial court properly exercised its discretion in denying Wold's motion to sever.

¶14 Wold next contends the trial court erroneously admitted impermissible "other acts" character evidence through testimony of the guardian ad litem (GAL) and social worker who were involved in Wold's and Smith's family court custody dispute. We agree that the evidence was not other acts evidence in the first instance; rather, it gave context to the case.

¶15 WISCONSIN STAT. § 904.04(2) prohibits introducing evidence of a character trait consisting of "crimes, wrongs or acts" so as to prove that a person acted in conformity with the character trait. It does not prohibit testimony about other acts introduced to provide the background or context of a case. ***State v. Hereford***, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

¶16 Here, the GAL and social worker testified about the tenor and substance of their interactions and communications with Wold. One or both testified that Wold made accusations, none of which could be substantiated, of Smith's drug and heavy alcohol use and partying, described heated e-mails, including one stating that Smith's infidelity at the end of their relationship filled Wold "with hate and anger" so that he "couldn't help but feel [he] wanted to get even," and described further anger over his mounting legal fees and having to pay

child support. The social worker, whose custody report was due on October 1, 2009, testified that when she learned that Wold lied about where he lived and had moved 1200 miles away to Lubbock, Texas, she determined to recommend sole custody to Smith with only supervised visitation for Wold. She also testified that Wold knew that her custody report was due on October 1, 2009—the same day Welch killed Smith. This evidence simply was "part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515.

¶17 Wold alternatively argues that, even if not other acts evidence, the testimony of the GAL and social worker should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. *See* WIS. STAT. § 904.03. Again we disagree.

¶18 Relevant and highly probative evidence often is prejudicial and, to the nonprevailing party, may seem unduly so. But even "enormously" prejudicial evidence, as Wold terms it, is not necessarily unfair. If the balance between probative value and unfair prejudice is close, the evidence is admissible because the danger of unfair prejudice must "substantially outweigh[]" its probative value. ***Id.*** The trial court implicitly did that balancing. We see no error in admitting the testimony.

¶19 Finally, Wold argues that, despite filing pretrial motions and motions in limine, which were denied, his trial attorneys were ineffective for failing to renew the same objections at trial. Specifically, he asserts that counsel should have objected to the Johnson statements and to the GAL's and social worker's testimony. We reject these contentions.

¶20 To establish ineffective assistance of counsel, the defendant first must show that defense counsel made errors so serious as to not function as the "counsel" the Sixth Amendment guarantees a defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, the defendant must show that the deficient performance prejudiced the defense so seriously as to deprive the defendant of a fair trial, a trial the result of which is reliable. ***Id.*** Whether a person was deprived of the constitutional right to the effective assistance of counsel is a mixed question of law and of fact. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115.

¶21 Both attorneys testified to the effect that they saw little benefit in restating objections on which the court already had ruled. A second objection may serve to highlight damaging evidence or result in being chastised in front of the jury. The test for deficient performance is whether counsel had a reasonable basis for the challenged acts or omissions. *See* ***State v. Rock***, 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979). Seeing no deficient performance, we need not consider prejudice. *See* ***Strickland***, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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