COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 96-2697-CR &
96-3459-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DARRYL D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Darryl D. Johnson appeals from a judgment convicting him of two counts of first-degree intentional homicide while armed with a dangerous weapon, party to a crime. *See* §§ 940.01(1), 939.63(1)(a)2, and 939.05, STATS. He also appeals from an order denying his postconviction motion.

Johnson claims that: (1) the trial court erred in accepting his jury waiver on the first charge of first-degree intentional homicide while armed with a dangerous weapon, party to a crime; (2) there was insufficient evidence to convict him on this charge; and (3) the trial court erred in denying his postconviction motion for a new trial based on ineffective assistance of counsel with respect to his conviction on the second charge of first-degree intentional homicide while armed with a dangerous weapon, party to a crime. We affirm.

Johnson was charged with two counts of first-degree intentional homicide while armed with a dangerous weapon, party to a crime. The first alleged that Johnson shot Robert Steele, a security guard at a bar, and the second alleged that about one month later, Johnson participated in the shooting of Tony Tucker. Johnson's request for separate trials on the two charges was granted. Johnson waived a jury trial with respect to the first charge, the Steele shooting. Regarding the jury waiver, the trial court had the following colloquy with Johnson.

> THE COURT: We are as I understand it prepared to proceed to trial on [the first charge]. That I've also been advised that it's the defendant's desire to waive his right to a jury trial; is that correct?
>
> DARRYL JOHNSON: Yes, sir.
>
> THE COURT: Okay. Has your lawyer explained to you what a jury trial is?
>
> DARRYL JOHNSON: Yes, sir.
>
> THE COURT: What's your understanding of what a jury trial would be?
>
> DARRYL JOHNSON: That twelve people -- I would have twelve people other than one make a decision if I'm guilty or not guilty, and then the one -- and one juror out of that twelve say they have a disagreement with the rest of the jurors --
>
> THE COURT: Okay. We have twelve citizens from the community come in, they would be the ones who would

> decide your guilt or innocence. They would have to arrive at that verdict unanimously.
>
> DARRYL JOHNSON: Yes.
>
> THE COURT: The option is that the judge is going to listen to the testimony, the judge will determine the issues of fact of your guilt or innocence.
>
> DARRYL JOHNSON: Yes.
>
> THE COURT: You understand that?
>
> DARRYL JOHNSON: Yes, sir.
>
> THE COURT: And you - it's your desire to proceed with the trial to the court rather than the trial to the jury; is that correct?
>
> DARRYL JOHNSON: Yes.
>
> THE COURT: Anybody threatened [sic] you in order to get you to do this?
>
> DARRYL JOHNSON: No, sir.
>
> THE COURT: You're doing this of your own free will, sir?
>
> DARRYL JOHNSON: Yes, sir.

During the trial on this charge, the Steele shooting, four eyewitnesses for the State testified to being present when the shooting occurred. According to the eyewitnesses, there were two rounds of gunfire. The first round of gunfire occurred when Steele apparently shot some people in the bar who were threatening him. During the second round of shooting, Steele was shot and eventually died. One of the eyewitnesses, Johnson's girlfriend, Yanette Herford, denied at trial that she saw Johnson shoot Steele, stating on cross-examination that Johnson left the scene of the crime with his brother before the shooting started. Herford admitted, however, that she testified differently at the preliminary examination, and the State introduced the following portion of testimony given by Herford on direct examination at Johnson's preliminary examination:

> Q And what did -- did you see what [Johnson] did next?

A Well, I was trying to get Anthony [Carrington] [one of the initial shooting victims] when I turned back around, [Steele] was on the floor.

Q Where was [Johnson]?

A Over him, and I seen him shoot him.

Q And how was [Johnson] holding the gun that he was using when he shot [Steele]?

A With booth [sic] hands.

Q How far from [Steele] was [Johnson] when he shot him?

A Standing over him.

Q And how far away from them were you when you saw this?

A About three or four feet.

Q How many shots did you hear at this time?

A Three or four.

Herford also admitted on cross-examination that later on the day of the shooting, and again one month afterward, she told police that Johnson had shot Steele. Subsequently, the trial court found Johnson guilty of killing Steele. A jury found Johnson guilty with respect to the shooting death of Tucker.

Johnson subsequently filed a Notice of Intent to Pursue Postconviction Relief. After Johnson's first postconviction counsel failed to file a postconviction motion, successor counsel filed a no merit brief. We rejected the no merit brief and ordered successor counsel to file a postconviction motion in the trial court. Successor counsel did so, and after an evidentiary hearing, the trial court denied the motion.

Johnson first claims that the trial court erred in accepting his jury waiver with respect to the Steele shooting. It is well established that the right to a jury trial can be waived in favor of trial by the court. ***State v. Livingston***, 159 Wis.2d 561, 565–566, 464 N.W.2d 839, 841 (1991). Section 972.02(1), STATS.,

requires that criminal defendants be tried by a jury of twelve "unless the defendant waives a jury in writing or by statement in open court or under s. 967.08(2)(b), on the record, with the approval of the court and the consent of the state." In ***Livingston***, the court described the actions necessary for a valid waiver:

> [W]e hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally…. The affirmative act by the defendant, in order to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed.

Id., 159 Wis.2d at 569–570, 464 N.W.2d at 843. In addition, a defendant's waiver of the right to a jury trial is valid when he or she understands the basic purpose and function of a jury trial. ***State v. Resio***, 148 Wis.2d 687, 695–696, 436 N.W.2d 603, 606–607 (1989).

Based on these principles, we conclude that Johnson's waiver in this case was valid. The trial court explained to Johnson that he had a right to a jury of twelve persons and that the jury would have to agree unanimously as to his guilt. Johnson personally told the trial court that he desired to waive his right to a jury trial. Further, Johnson submitted to the trial court a document signed by him indicating his desire to waive a jury trial on the Steele charge. The statements and the signed document by Johnson indicating the desire to waive a trial by jury meet the requirements for a valid waiver in § 972.02(1), STATS., and ***Livingston***. Johnson's claim that his waiver was constitutionally insufficient because he did not understand the requirement that the jury's verdict had to be unanimous is without merit. As noted, the trial court conducted a colloquy with Johnson

regarding both the function of the jury trial and the requirement that a jury verdict be unanimous before it can be accepted. Johnson personally made a knowing and voluntary waiver of his right to a jury trial in connection with the shooting death of Steele.

Next, Johnson claims that there was insufficient evidence to establish that he shot Steele to death with intent to kill. Our review of the sufficiency of the evidence is to determine whether the evidence viewed most favorably to the State and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992).

Johnson's challenge to the sufficiency of evidence relates to the fact that although the State's key eyewitness, Herford, exculpated him at trial, her prior statements given at the preliminary hearing in which she stated that she saw Johnson shoot Steele were used by the State, as is permissible under RULE 908.01(4)(a)1, STATS. Johnson claims essentially that the trial court should not have credited the testimony of Herford because she "provided diametrically opposed versions of what she saw transpire," and that her prior statements were given because of police coercion. Although Herford changed her story at trial, the trial court, as finder of fact, was not obliged to accept this altered testimony. The trial court was free to accept her former testimony. *See* ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993) ("Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, [the fact-finder] determines the credibility of each witness and the weight of the evidence."). Further, her claim that the prior statements were given because of police coercion was refuted by police testimony. The trial court, which explained

its verdict on the record, expressly accepted the police officer's testimony in this regard over Herford's. The trial court made a credibility call and, based on Herford's prior statements, the evidence was sufficient to convict Johnson of first-degree intentional homicide.

Finally, Johnson claims that he received ineffective assistance of counsel at the Tucker trial because defense counsel failed to impeach one of the State's witnesses, Willa Mae Leichman, with the fact that shortly before trial, she had been arrested. For a defendant to prevail on an ineffective-assistance-of-counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, must be satisfied. A defendant "must show that counsel's performance was both deficient and prejudicial." ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996). We may dispose of an ineffective assistance of counsel claim if the defendant fails to satisfy either element. ***State v. Johnson***, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

At the ***Machner*** hearing, defense counsel explained her reasons for not cross-examining Leichman about the arrest.[1] She explained that she knew even before Leichman had been arrested that Leichman had reported that Johnson had shot Tucker and had testified as such at Johnson's preliminary hearing. Consequently, defense counsel indicated that any effort to imply that Leichman's testimony was based on an effort to gain consideration from the State on her own charge would have been rebutted by Leichman's testimony at Johnson's preliminary hearing and statements made during an interview with the police that implicated Johnson, which preceded Leichman's arrest. Defense counsel did not

[1] ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

want to encourage the State to introduce these prior consistent statements of Leichman to rebut a possible charge of recent fabrication. This reasoning shows a sound tactical decision; there was no deficient performance. *See* ***State v. Felton***, 110 Wis.2d 485, 502–503, 329 N.W.2d 161, 169 (1983) (trial counsel's strategy will not be second-guessed if it was founded on a reasonable view of the facts and the law).

By the Court.—Judgment and order affirmed.

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