COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP75-CR **Cir. Ct. No. 2013CF877**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY JOSEPH STARKMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Jeffrey Joseph Starkman appeals a judgment of conviction entered after a jury found him guilty of multiple charges including two counts of attempted first-degree intentional homicide, and an order denying his motion for postconviction relief. Starkman argues that the evidence was

insufficient to support his attempted first-degree intentional homicide conviction as to the female victim, K.P., and that trial counsel provided ineffective assistance. We reject these claims and affirm.

BACKGROUND

¶2 Based on events that occurred on April 13, 2013, Starkman was charged with multiple offenses including the attempted first-degree intentional homicide of K.P. and of J.B.[1] Starkman and K.P. were previously involved in a long-term relationship and shared two children, but had separated five weeks before the incident. Starkman arrived at K.P's house to get the children at around 7:00 p.m. at which time he saw J.B., a male, arrive with what appeared to be an overnight bag. Starkman returned at around 10:00 p.m. Armed with a shingle hammer, he approached K.P. who was on the front porch, and struck her twice in the head. Starkman then went upstairs and struck J.B. with the hammer on the head, shoulder, side, and leg. Starkman fled the scene and was apprehended the next morning. A jury convicted Starkman on all counts.

¶3 Starkman filed a postconviction motion alleging that trial counsel provided ineffective assistance by failing to relay a plea offer and by failing to request a jury instruction on the defense of adequate provocation. Following an

[1] In addition to the two counts of attempted first-degree intentional homicide, Starkman was charged with one count of burglary, one count of attempting to flee or elude a traffic officer, and two counts of aggravated battery by use of a dangerous weapon.

evidentiary ***Machner***[2] hearing at which Starkman and both of his trial attorneys[3] testified, the circuit court denied the motion in full.

DISCUSSION

I. Sufficiency of the Evidence

¶4 Starkman argues that the evidence at trial was insufficient to support the jury's conclusion that he intended to kill K.P. We review the sufficiency of the evidence de novo, but in the light most favorable to sustaining the conviction. ***State v. Hanson***, 2012 WI 4, ¶15, 338 Wis. 2d 243, 808 N.W.2d 390. The standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). We will sustain a conviction unless the evidence is so insufficient "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." ***Id.*** at 501. In addition,

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citation omitted).

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite … on appeal to preserve the testimony of trial counsel").

[3] At trial, Starkman was represented by two attorneys appearing together as co-counsel. For purposes of this decision, we do not distinguish between the two and refer to both as "trial counsel."

¶5 An attempt to commit a crime has two elements: "criminal intent and some acts in furtherance of the intent." ***State v. Kordas***, 191 Wis. 2d 124, 129, 528 N.W.2d 483 (Ct. App. 1995). With respect to the relationship between attempted first-degree intentional homicide and completed first-degree intentional homicide, this court has stated:

> The law of attempted first-degree intentional homicide is not conceptually different from that of completed first-degree intentional homicide. Both require an intent on the part of the defendant to take the life of another.

State v. Webster, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995) (quoted source omitted).

¶6 To prove the intent element of attempted first-degree intentional homicide, the State must establish that the defendant "acted with the intent to kill," that is, "the defendant had the mental purpose to take the life of another human being or was aware that (his) (her) conduct was practically certain to cause the death of another human being." *See* WIS JI—CRIMINAL 1070; *see also* WIS. STAT. § 939.23 (2013-14).[4] Intent may be inferred from the defendant's conduct, including his or her words and gestures taken in the context of the circumstances. ***Webster***, 196 Wis. 2d at 321.

¶7 We conclude that a reasonable juror could have found beyond a reasonable doubt that Starkman intended to cause the death of K.P. The jury heard undisputed evidence that Starkman struck K.P. twice in the head with the hatchet blade of a roofing hammer. Her treating neurosurgeon testified that one of the

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

blows lacerated K.P.'s scalp and fractured her skull, indenting it by seven to eight millimeters. The neurosurgeon removed an area of bone the size of a fifty-cent piece and repaired the opening with a titanium plate. The jury learned that Starkman did not render assistance but instead fled the scene.

¶8 In support of his contention that the evidence was insufficient to show his specific intent to kill K.P., Starkman points to the following: his testimony that his intent in striking K.P. was to get her out of the way so that he could get to J.B.; his comment to K.P., "That's what you get for sleeping with him," which, Starkman argues, indicates that his intent was to punish K.P.; and that K.P. was obviously alive when Starkman left the scene.

¶9 We are not persuaded. The jury was not required to believe Starkman's testimony that his intent in striking K.P. was to get her out of the doorway.[5] *See* ***Poellinger***, 153 Wis. 2d at 504, 506 (it is the jury's function to determine the credibility of the witnesses, reconcile inconsistent testimony, and weigh the evidence). Nor was the jury required to infer from Starkman's parting comment that he intended to punish but not kill K.P. *See* ***id.*** at 506-07 (if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law."). Regardless, as the jury was instructed, the issue to be decided was Starkman's intent at the time he struck

[5] Starkman testified he thought he hit K.P. only once, but acknowledged the evidence showed he hit her twice. K.P. testified that Starkman "grabbed a hold of my shoulder, and with his other hand he struck me in the top of the head with the ax side. And I dropped down to cover, and he struck me against across the back of my head, and I collapsed on the porch." The jury could reasonably infer that K.P. was attempting to block Starkman's path when he first hit her but was not when he struck the second blow.

K.P., not when he was leaving the scene. A natural consequence of striking a person twice in the head with a hatchet blade with sufficient force to cause a skull fracture is that person's death. Starkman is presumed to intend the natural consequences of his acts. *See* ***State v. Dix***, 86 Wis. 2d 474, 482-83, 273 N.W.2d 250 (1979). For the same reason, that K.P. was alive when Starkman left does not defeat a reasonable inference that he intended to kill K.P. at the time he struck her twice in the head with a hatchet blade.

II. Ineffective Assistance of Counsel Claims

¶10 Starkman contends that trial counsel was ineffective for allegedly failing to relay a plea offer from the State and by not requesting that the jury be instructed on the affirmative defense of adequate provocation. To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct" fell "below an objective standard of reasonableness." ***Love***, 284 Wis. 2d 111, ¶30. A defendant must show specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Judicial review of an attorney's performance is "highly deferential" and the reasonableness of an attorney's acts must be viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. ***State v. Maloney***, 2005 WI 74, ¶25, 281 Wis. 2d 595, 698 N.W.2d 583. To prove constitutional prejudice, the defendant must show that but for counsel's unprofessional errors a reasonable probability exists that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 696; ***Love***, 284 Wis. 2d 111, ¶30.

¶11 Whether counsel's actions were deficient or prejudicial is a mixed question of law and fact. ***Strickland***, 466 U.S at 698. The circuit court's findings of fact will not be reversed unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's right to effective assistance of counsel is a legal determination, which this court decides de novo. ***Id.*** We need not address both prongs of the test if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

A. The State's plea offer

¶12 In his postconviction motion, Starkman asserted that trial counsel failed to inform him of a "free to argue" plea offer set forth in an August 22, 2013 letter from the State.[6] At the ***Machner*** hearing, trial counsel testified that he could not recall providing a copy of the written letter to Starkman but that he "[a]bsolutely" discussed the offer with Starkman. The postconviction court found that trial counsel did, in fact, relay the offer to Starkman:

> I believe [trial counsel] when he stated that, in fact, he advised the defendant in each and every case of any offer by the district attorney, and the defendant's choice was that he wanted to hold out for a better offer ….

¶13 Starkman contends that the postconviction court's factual finding was clearly erroneous. He emphasizes trial counsel's uncertainty as to whether

[6] Starkman's postconviction motion asserted that trial counsel conveyed this offer to him "[s]everal weeks" before trial, that Starkman told trial counsel he wanted to accept the offer, and that trial counsel told him it was too late. At the ***Machner*** hearing, Starkman first testified that trial counsel never made him aware of this or any other plea offer. When confronted with his written affidavit, Starkman stated that trial counsel orally informed him of the offer but only after it had expired. There was no specific testimony about if or when this offer expired.

Starkman was provided a copy of the State's written offer and counsel's testimony that he discussed the offer with Starkman prior to the date of the letter. To the extent Starkman is suggesting the only reasonable inference is that trial counsel discussed the offer's substance with Starkman early on in the case and never brought it up again, we disagree.

¶14 Trial counsel indeed testified that the State's first oral offer was identical to the offer memorialized in its August 22, 2013 letter and that Starkman told him "he wouldn't accept that offer way long—long before August 22nd." Trial counsel also testified that plea discussions continued even after the August 22, 2013 letter, and confirmed that he discussed the "free to argue" offer with Starkman on or after August 22, 2013. What is important is whether counsel conveyed the offer, not whether he showed Starkman the letter. *See* ***State v. Winters***, 2009 WI App 48, ¶36, 317 Wis. 2d 401, 766 N.W.2d 754 (citing ***State v. Ludwig***, 124 Wis. 2d 600, 611, 369 N.W.2d 722 (1985)). The postconviction court credited trial counsel's testimony and found that the offer memorialized in the State's August 22, 2013 letter was timely conveyed to and not accepted by Starkman. The fact-finding judge is "the ultimate arbiter of the credibility of a witness," and we defer to the court's determinations "as to weight of testimony and credibility of witnesses." ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (quoted source omitted).

B. The lack of an adequate provocation instruction

¶15 In his postconviction motion, Starkman asserted that trial counsel was ineffective for failing to request that the jury be instructed on the affirmative defense of adequate provocation. The postconviction court disagreed, finding that trial counsel "did not use adequate provocation because he believed it would be

contradictory to the defense, which was that Mr. Starkman did not intend to kill the victims in these matters" and that this was a reasonable strategic decision. The postconviction court further found that trial counsel made a reasonable strategic decision not to pursue this defense in order "to prevent getting into the prior relationship of [K.P. and Starkman] and because there were some things which [trial counsel] believed would be problematic for the defense[.]"

¶16 We conclude that the postconviction court properly determined that trial counsel's performance was not deficient. The court's findings of fact as to the theory of defense and trial counsel's strategy are not clearly erroneous. *See* ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695 ("Findings of fact include the circumstances of the case and the counsel's conduct and strategy.") (internal quotes and citation omitted). The postconviction court's finding that trial counsel made a reasonable strategic decision not to pursue an adequate provocation defense is supported by the record. Trial counsel testified that the theory of defense was that Starkman wanted to hurt the victims, not to kill them, and agreed that adequate provocation could potentially undercut that theory by "negat[ing], certainly, in the jury's mind that he had—never intended to [kill] in the first place."[7]

¶17 Focusing on trial counsel's testimony that he wanted to limit the jury's exposure to certain facts, Starkman argues that the potential upside of an

[7] Additionally, the same judge presided over Starkman's trial and postconviction proceedings. In determining that trial counsel made a strategic decision, "[i]t is significant that the trial court had the opportunity to both see and hear counsel's presentation and evaluate its purpose in conjunction with [trial] counsel's testimony." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. In these circumstances, the postconviction court's determination that trial counsel acted pursuant to a reasonable trial strategy is "virtually unassailable[.]" *See* ***id.***

adequate provocation instruction far outweighed the downside of the jury hearing "limited bad facts about [his] relationship with K.P." This is precisely the type of second-guessing that ***Strickland*** instructs reviewing courts to avoid. *See* ***Strickland***, 466 U.S. at 689. Furthermore, trial counsel testified that he decided against pursuing an adequate provocation defense after considering it and in light of myriad factors, such as Starkman's anticipated testimony, a determination that the defense would not ultimately persuade the jury, and that it was inconsistent with the central theory that Starkman lacked the requisite intent to kill. Starkman has failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *See* ***Strickland***, 466 U.S. at 689 (quoting ***Michel v. Louisiana***, 350 U.S. 91, 101).

By the Court.—Judgment and order affirmed.

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