

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 7, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

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**Appeal No. 2004AP1694-CR**

**Cir. Ct. No. 2002CF570**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DERRICK A. STEVENS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Derrick Stevens appeals from a judgment, entered after a jury trial, convicting him of one count of first-degree recklessly endangering safety, while armed, in violation of WIS. STAT. §§ 941.30(1) and

939.63 (2001-02).<sup>1</sup> He also appeals from an order denying his motion for postconviction relief. Stevens contends that he was denied the effective assistance of counsel because his trial counsel failed to properly and effectively cross-examine the State's witnesses so as to highlight the inconsistencies in their testimony. He also argues that the trial court erroneously exercised its discretion in imposing sentence when it concluded that Stevens' actions could not, under any circumstances, be explained or justified by his stated motive, because that conclusion was not supported by the record. Because Stevens was not denied the effective assistance of counsel and the trial court did not erroneously exercise its sentencing discretion, we affirm.

### **I. BACKGROUND.**

¶2 On January 26, 2002, after a fight involving a number of neighborhood children, including some of Stevens' children, a second fight broke out amongst the family members of both Stevens and Christopher Gilmore, on the 5600 block of North 95th Street. During the second altercation, Stevens shot Gilmore. There were conflicting accounts, however, of the facts surrounding the altercations. Stevens was eventually tried on one count of attempted first-degree intentional homicide, while armed.<sup>2</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Stevens was initially charged with one count of first-degree reckless injury, while armed, but the information was amended prior to trial.

¶3 At the trial, as indicated above, conflicting testimony was presented regarding the facts and circumstances surrounding the altercations.<sup>3</sup> Gilmore testified that during the early evening hours of January 26, 2002, there was an argument in his neighborhood, between a few neighborhood kids between the ages of eleven and seventeen. He testified that members of Stevens' family and his neighbor's family were involved, and that Stevens and his family lived a couple of doors down from him. The argument, which took place near the back door of Stevens' residence, eventually dissolved.

¶4 Soon thereafter, another argument eventually started, close to Stevens' back door, involving members of Gilmore's family, Stevens' family, and the neighbor's family. Gilmore testified that the second argument was over the same issue as the first—Stevens' son "tryin' to jump" Gilmore's next-door neighbor. This time, however, there were approximately twenty or more adults and children involved, including Gilmore's sister, Cilethia, and Stevens. Gilmore testified that at some point Stevens went inside his house, and when he returned, he had a gun, though Gilmore did not notice it at first. He testified that Stevens was "a little bit out of [his] reach"<sup>4</sup> when he noticed that Stevens had a gun. Gilmore testified that Stevens was saying something to the effect of, "who did it?" in regard to a porch light that was broken when Stevens' daughter slammed the door after following him inside. At the same time he asked the question, Stevens

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<sup>3</sup> As Stevens' arguments only refer to the testimony of Gilmore and Gilmore's sister, Cilethia, in addition to his own testimony, we will limit our discussion accordingly.

<sup>4</sup> It was later established, during Gilmore's testimony, that Gilmore and Stevens were approximately twenty-four feet apart when Gilmore was shot.

raised his gun and shot Gilmore in the chest.<sup>5</sup> Gilmore testified that while he was carrying nail clippers, he did not have a knife, contrary to Stevens' claim. He also admitted that he had threatened Stevens' oldest son earlier, saying he was going to beat him up. He also indicated that his neighbor's son was carrying a stick during the first incident. And finally, as relevant to Stevens' arguments, Gilmore testified that during the second altercation, Stevens shoved Cilethia, who was pregnant at the time, and she slapped him in return.

¶5 Cilethia testified that none of the children involved in the first argument had any weapons in their hands during the altercation. She also testified that she did not see her brother carrying fingernail clippers, or, presumably, a knife. While Cilethia testified that Stevens did push her at one point, she denied hitting him, indicating that she "was goin[g] towards him, but somebody grabbed [her]." She also testified that after Stevens' daughter slammed the door causing the light to break, Stevens emerged from the house with two guns, firing one at her brother, and the other in the air twice.

¶6 Stevens testified that during the first incident, one of the kids grabbed a stick or a pipe, but Stevens took it from him and threw it in the dumpster. He also testified that he saw Gilmore holding a knife that was about six inches long, though he could not recognize what type of knife it was because all he saw was a silver portion sticking out of Gilmore's hand. He testified that Cilethia slapped him, but denied pushing her. Stevens testified that he tried to keep an eye on Gilmore because he had a knife, and when he lost sight of him, he feared for

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<sup>5</sup> Gilmore's testimony indicates that when Stevens' daughter slammed the door, the porch light broke, and people began to disperse. Gilmore testified that he was walking away, but when Stevens came back outside, he stopped, turned around, and was shot.

his family and ran inside to grab his wife's gun. When he came back out of the house, he saw Gilmore swinging at his son with the knife, and his wife pushing his son out of the way. He explained: "After he is coming with the knife motion like that, I'm coming right there because he's right in front of the porch. He could have got me. I closed my eyes and raised the gun and shot him, pow." He testified that at first he did not know that he hit Gilmore, but knew that Gilmore was close when he shot the gun with his eyes closed.

¶7 Although Stevens was tried on the charge of attempted first-degree intentional homicide, while armed, the jury was also instructed on the lesser-included offense of first-degree recklessly endangering safety, while armed. The jury returned a guilty verdict on the lesser charge.

¶8 At sentencing, the trial court evaluated the crime:

This was a horrible crime. It really did not matter to me whether this crime was committed according to the theory that the prosecution presented to the jury or according to the theory that you presented to the jury. The prosecution's theory was that Christopher Gilmore really got to you. He was just irritating you to no end. And it was plausible to believe that he might have hurt your son by his anger, by your belief that he had something sharp that he could use against your son, by the feeling that the tide of emotion in this mob outside your house would have led him to hurt somebody in your family. And that the prosecution tried to persuade the jury that you were so mad at him that you intentionally shot him or intentionally shot at him not caring what the consequences would be.

The theory you presented to the jury was adequately summed up in just one sentence you delivered here from the witness stand. You kind of shrugged your shoulders and said, "I just closed my eyes and shot." To me in these circumstances taking everything into consideration it doesn't matter one bit which theory was true. You're the only one who knows what is in your heart, and you're the only one who will ever be able to say what was in your heart at the time you stepped out the door and leveled that gun at the crowd.

But for my purposes in deciding what the community thinks about this, and speaking for the community it doesn't make any difference which theory it was. Because I think the community has an equal right to be irate about your conduct. No matter whether you closed your eyes and shot into the crowd or whether you intentionally tried to shoot Christopher Gilmore, neither crime was justified. There was absolutely no justification for the gun. This mob was not a good thing, and people were not acting appropriately. They were out of bounds. But your response to them was so far further out of bounds that it makes it criminal.

....

Even if I was in a mind set like you were where I think there was a need to get a gun I'm going to tell my wife to get the gun.... I'm going to tell the crowd, "Hey, I got a gun inside." And then to come back out into this very dangerous very emotional situation and bring out this gun, that was like setting the match to the gasoline.

I don't know what could have happened here because I don't know all these people, but I agree with [the assistant district attorney]. This was a sheer act of grace of God that only one person was hit. And that one person was hit in such a way that these bullets could pass through all of the organs or pass by all the organs of his body and not kill him. As tragic as it is that we're all gathered here today for this incident, this is nothing compared to what it would be if we were gathered around you charged with reckless homicide.

After also considering the positive aspects of Stevens' background and character, the trial court sentenced him to five years of initial confinement and five years of extended supervision.

¶9 On April 16, 2004, Stevens filed a postconviction motion asserting that he was denied the effective assistance of counsel because his trial counsel failed to properly and effectively cross-examine the State's witnesses, namely Gilmore and Cilethia, "so as to highlight the inconsistencies in their testimony." He insisted that, in the absence of any stated tactical reason for failing to do so, it

was “incumbent upon counsel to ask [Cilethia] whether other witnesses, (specifically, her brother), were lying or [were] mistaken in order to highlight the inconsistencies between her testimony and that given by her brother.” He contended that, had trial counsel asked these questions, the explanations given would have reflected negatively on the witnesses’ credibility. Stevens also argued that the trial court erroneously exercised its sentencing discretion because the sentence imposed reflected the trial court’s conclusion that Stevens’ actions could not be explained or justified by his stated motive, a conclusion that he insists was not supported by the record.

¶10 The trial court concluded that trial counsel was not deficient, and in any event, Stevens failed to establish prejudice. It noted that there was no guarantee that had the witnesses been alerted to the inconsistencies, they would not be able to explain them away, or that an opportunity to reconcile their inconsistencies would not hurt the defense. Further, the trial court concluded that “[b]ecause ... Stevens does not demonstrate what additional information the jury would have gained, [this court] cannot find that he was prejudiced by his attorney’s failure to pursue additional cross-examination.” The court also noted that: (1) the inconsistencies that Stevens “wishes his attorney would have dwelled upon” were nevertheless established during cross-examination and argued by trial counsel in closing arguments; and (2) the centerpiece of the case was self-defense, and thus the inconsistencies may not have been all that pertinent to begin with—“it may not have mattered much to the jury ... whether there was one shot or more than one, whether there was one pistol or more than one, or whether ... Stevens was slapped by someone he didn’t shoot.”

¶11 Finally, the trial court concluded that “there were good reasons to support [its] conclusion that [Stevens] was unjustified in procuring and loading a

gun, bringing it back to the melee at his back door and firing it with eyes closed into the crowd.” First, the jury rejected his claims of self-defense and defense of others, insofar as it was instructed, in connection with the third element of the lesser-included charge, to “consider whether the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person and actually believed that the force used was necessary to prevent imminent death or great bodily harm to himself or another,” yet still returned a guilty verdict. Second, the trial court noted that at the time the crowd “appeared to be storming his back door,” Stevens had the opportunity to gather his family and retreat into the house. Indeed, Stevens even testified that the door was open and he repeatedly encouraged his family to go inside; but “[a]lthough this sensible option was readily available, [Stevens] instead went inside, dug out his gun, loaded it and returned to his back porch and shot into the crowd.” Considering his options, the trial court again concluded, as it had at the original sentencing, that “the option he selected was not justified.” Accordingly, the trial court denied Stevens’ postconviction motion. He now appeals.

## II. ANALYSIS.

### A. *Stevens was not denied the effective assistance of counsel.*

¶12 Stevens contends that he was denied the effective assistance of counsel because his trial counsel failed to effectively cross-examine the State’s witnesses so as to highlight the inconsistencies in their testimony—trial counsel should have asked Cilethia whether Gilmore was lying or mistaken. He insists that “[d]epending on the answer given by the witness, the jury may find the witness’s account to be more or less credible; may find the testimony of the prior witness to be more or less credible, or may decide that neither witness is, in fact,



credible.” Stevens asserts that the postconviction court’s rejection of his claim “was based on what might be called the ‘old school’ perception that cross-examination is intended to mean something or to reveal something.” *State v. Jackson*, 187 Wis. 2d 431, 523 N.W.2d 126 (Ct. App. 1994), he contends, has shown that that is no longer the case.

¶13 Rather, Stevens argues that “an equally legitimate purpose of cross-examination is simply to place the witness in the position of calling someone else a liar[,]” and that “has nothing to do with whether the witness can explain away the inconsistencies.” Thus, he contends that the trial court’s “concern for the potential alleged negative consequences to the defendant in such a case is not justified.” Following a list of hypothetical questions that he insists could have been asked, Stevens contends that the fact that the attorney does not know the answers the witness may give is irrelevant—“this type of cross-examination is not intended to develop information that the jury can use to decide the case. That is, the questions are not designed or intended to test the witness’s ability to observe, recall or recollect.” He admits that the sole purpose is to make the testifying witness “look bad,” and insists that trial counsel had the opportunity to employ this tactic and “expose the State’s witnesses as people with a grudge who would take any opportunity and insert any details, no matter how fantastical, if those details would make ... Stevens look worse – look more like a cold-blooded, deliberate killer.” In failing to do so, he insists that counsel’s performance was both deficient and prejudicial.

¶14 Under *Strickland v. Washington*, 466 U.S. 668 (1984), in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and that the defendant was prejudiced as a result of this deficient conduct. *See id.* at 687; *see also State v. Pitsch*, 124

Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must identify specific acts or omissions of counsel that fall “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. However, “every effort is made to avoid determinations of ineffectiveness based on hindsight” and “the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Moreover, “strategic choices made after thorough investigation of law and facts ... are virtually unchallengeable[.]” *Strickland*, 466 U.S. at 690. To show prejudice, the defendant must demonstrate that the errors were so serious that the result of the proceeding was unreliable. *Id.* at 687.

¶15 Both prongs of the *Strickland* test involve mixed questions of law and fact. *Pitsch*, 124 Wis. 2d at 633-34. ““An appellate court will not overturn a trial court’s findings of fact concerning the circumstances of the case and the counsel’s conduct and strategy unless the findings are clearly erroneous.”” *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (citation omitted). However, “[t]he questions of whether counsel’s behavior was deficient and whether it was prejudicial to the defendant are questions of law, and we do not give deference to the decision of the [trial] court.” *Pitsch*, 124 Wis. 2d at 634. Finally, if the defendant fails to meet either prong—deficient performance or prejudice—the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 697.

¶16 We too cannot conclude that Stevens’ trial counsel was ineffective. First, Stevens’ argument is largely based on speculation. For example, though he seems to be convinced that had trial counsel thoroughly questioned Cilethia about the inconsistencies her answers would have inevitably had a negative impact on

her or her brother's credibility, that is entirely speculative. Any prediction as to what could have happened had the questions been asked and answered is simply a guess. Second, Stevens' trial counsel did not ignore the inconsistencies, and even appears to have used their lack of explanation as part of his strategy in closing argument: "The D.A. indicated a phantom knife. Failed to mention the phantom second gun and the phantom second and third shots that we heard testimony about today." After emphasizing that the case was about self-defense, trial counsel went on to argue:

According to Christopher Gilmore his sister slapped Mr. Stevens. Cilethia Gilmore, she sat right there and told you she didn't slap him, "no, I didn't." Cilethia Gilmore says she saw not – I think she said she saw two pistols and heard three shots. Nobody else said that. They found five bullets left in that gun after he fired one round. Christopher says he didn't have a weapon, Mr. Stevens just ran out of the house, picked him out for whatever reason, because he wasn't doing anything. Picked him out for whatever reason and shot him.

Common sense. Please use your common sense when determining this trial. It does not make sense. It just does not add up. And there [are] too many inconsistencies for you to think otherwise.

We cannot second-guess trial counsel's strategy here. We cannot conclude that by failing to cross-examine the witnesses in a way that, in hindsight, Stevens perhaps may have preferred, trial counsel's performance was deficient, or "outside the wide range of professionally competent assistance." Indeed, the supreme court "has often stated that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics[.]" *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Stevens' arguments do not overcome the strong presumption that trial counsel acted reasonably within professional norms.

*B. The trial court did not erroneously exercise its sentencing discretion.*

¶17 Finally, Stevens contends that the trial court erroneously exercised its sentencing discretion because the sentence imposed reflected the trial court's conclusion that Stevens' actions could not be explained or justified by his stated motive, a conclusion that he insists was not supported by the record. Stevens contends that he was not convicted of attempted first-degree intentional homicide, but instead of first-degree recklessly endangering safety, while armed—a difference that he contends is “critical” with regard to his sentencing. Stevens insists that “[t]he jury's decision to return a verdict of guilty to the lesser included offense necessarily implies that the jury was unable to conclude that the State had met its burden of proving that ... Stevens possessed the intent to kill” Gilmore. “By the same token,” Stevens argues, “the jury's verdict does not, in and of itself, require the conclusion that the jury rejected [his] claim that he was acting in self-defense out of hand.” Instead, Stevens contends that “the jury could have found ... that [he] was justified in defending himself or other [sic] with regard to ... Gilmore, but that his actions in closing his eyes and opening fire recklessly endangered the safety of other bystanders and members of the angry mob[.]” Accordingly, Stevens contends that “the trial court's apparent conclusion that the jury's verdict constitutes a rejection of [his] claim of self-defense is not supported by the record.”

¶18 Stevens insists that, moreover, the trial court's analysis of what Stevens should have done under the circumstances is flawed. He contends that he did not turn his back on an imminent threat, but that the imminent threat did not develop until after he returned with the gun. He also argues that the trial court's statements regarding who should have retrieved the gun, had it been necessary,

ignored the reality of the situation and the fact that the person carrying the gun would have become the target of the mob.

¶19 It is well settled that a trial court exercises discretion at sentencing, *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, and “[t]he trial court has great latitude in passing sentence[,]” *State v. J.E.B.*, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). Our review “is limited to determining whether there was an [erroneous exercise] of discretion.” *State v. Larsen*, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987) (citation omitted). Further, there is a “strong public policy against interference with the sentencing discretion of the trial court and sentences are afforded the presumption that the trial court acted reasonably.” *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

¶20 The trial court is to consider three primary factors in passing sentence: (1) the gravity of the offense; (2) the defendant’s character; and (3) the need for protection of the public. *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). The weight to be attributed to each factor “is a determination which appears to be particularly within the wide discretion of the sentencing judge.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, “[i]f the facts are fairly inferable from the record, and the reasons indicate the consideration of legally relevant factors, the sentence should ordinarily be affirmed.” *McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971).

¶21 Stevens argues that there is no support in the record for the trial court’s “apparent” conclusion that the jury rejected his self-defense claim and that there was no justification for Stevens’ actions, and accordingly, the trial court erroneously exercised its discretion in relying on those conclusions. We are

unpersuaded. The trial court concluded that Stevens' actions could not be justified regardless of whether one considered the State's or Stevens' theory of the case. The essence of the trial court's remarks can almost be summed up by one sentence: "There was absolutely no justification for the gun." The trial court recognized that the situation was tense, and that the "mob" was out of line, but nonetheless concluded that there was no justification for shooting into the crowd. That was a reasonable conclusion that is not rendered unfounded by Stevens' speculation that the jury may have concluded that Stevens was justified in shooting Gilmore, but not in endangering the safety of the bystanders, or by Stevens' assertions that the trial court's analyses of the situation were "flawed." The jury convicted Stevens of first-degree recklessly endangering safety, while armed. The trial court concluded, during sentencing, that there was no justification for the gun or for shooting into the crowd—that is completely consistent with the jury's verdict. Stevens takes issue with the trial court's explanations as to why it did not think Stevens' actions were justified, but the fact of the matter is, by convicting Stevens of recklessly endangering safety, the jury also seemingly did not think Stevens' brandishing a gun and shooting into the crowd were justified. The trial court considered all of the relevant sentencing factors, and specifically considered Stevens' positive character and lack of a violent past, before imposing a sentence well within the maximum. We cannot conclude that the trial court erroneously exercised its discretion. Accordingly, we affirm.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.

