COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP923-CR **Cir. Ct. No. 2003CF6686**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHOMAS T. WINSTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

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

¶1 CURLEY, J. Shomas T. Winston appeals the judgment convicting him of first-degree intentional homicide and armed robbery, contrary to WIS.

STAT. §§ 940.01(1)(a) & 943.32(1)(a) and (2) (2003-04),[1] and the order denying his postconviction motion. On appeal, Winston argues that: (1) his trial attorney was ineffective; (2) the evidence presented at trial was insufficient to convict him; and (3) the trial court erroneously exercised its discretion in sentencing him. We disagree and affirm his convictions.

I. BACKGROUND.

¶2 On November 15, 2003, Milwaukee police officers were dispatched to a "strong armed robbery in progress" on West Vliet Street. In the parking lot of a check cashing store, the police found Cary T. Dace, who was bleeding from gunshot wounds. Dace died en route to the hospital. An autopsy revealed that Dace had been shot four times and that his death was due to multiple gunshot wounds. An eyewitness saw a black man rob Dace in the parking lot, and recognized, but did not know the name of, one of two black men who walked up and joined the robber. The eyewitness entered the check cashing store and told the clerk to call the police. She later picked out J.L.L., a juvenile, as the person she recognized and saw join the robber.

¶3 J.L.L. was arrested and he confessed that he and Winston, whom he knew by the nickname "Webb," along with another person nicknamed "Dank" (later identified as a juvenile, J.G.), had been drinking a bottle of brandy and smoking marijuana, and decided to commit a robbery. Their plan was that Winston, who had a gun, would wait outside for a signal from J.L.L. and J.G. J.L.L. and J.G. went to the check cashing store, where they observed the victim

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

cash what appeared to be a large check. After signaling to Winston that he should rob the man who had just cashed the check and was walking to the parking lot, J.L.L. and J.G. walked around the building and began walking towards Winston, who had also reached the parking lot. As they were walking, they saw Winston rob the man at gunpoint. When they approached Winston, Winston indicated he was going to shoot the victim. Winston then turned back to the victim and shot him. Later, Winston also confessed to robbing and shooting the victim; however, he claimed that he did not know that the gun, which was borrowed, was loaded.

¶4 After Winston was charged, a preliminary hearing was held, at which time Winston was bound over for trial. Winston also filed a ***Miranda-Goodchild*** motion[2] which was heard and denied. Winston did not enter a plea but remained mute, and, as a result, the court entered a plea of not guilty on his behalf, which was treated as a request for a jury trial. During the jury selection, an African American woman was dismissed for cause at the suggestion of the prosecutor. Winston's attorney did not object. After the jury was picked, a former teacher of Winston's, with whom Winston claimed he did not have a good relationship, remained on the jury.

¶5 During the trial, numerous witnesses testified for the State. The eyewitness described the robbery she saw and the clerk testified to calling the police after the eyewitness came into the store and told her a robbery was occurring in the parking lot. Several police officers explained their role in the investigation, including a detective who testified to taking Winston's confession.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Also testifying for the State were J.L.L. and J.G., both juveniles and co-defendants, who told the jury what occurred just prior to the robbery and what happened during it. Both co-defendants also identified themselves and Winston from the check cashing store's surveillance camera photos taken on the day of the robbery. Over an objection lodged by Winston's attorney, a sister of J.G. told the jury that her brother (J.G.) told her that he was present when "Webb" robbed and killed someone. A firearms expert and a member of the medical examiner's office discussed their roles in the case. After Winston elected not to testify, the jury began deliberations. At the State's request, the trial court instructed the jury on first-degree intentional homicide, first-degree reckless homicide and armed robbery. The jury found Winston guilty of first-degree intentional homicide and armed robbery.

¶6 After the jury found Winston guilty, the trial court ordered a presentence investigation report. At sentencing, the trial court heard the recommendations of the State, as well as recommendations from Winston and his attorney. At this time, Winston informed the trial court that a lack of communication had existed between him and his attorney, and that his attorney had failed to subpoena an alibi witness. The trial court sentenced him on the first count to life imprisonment, with eligibility for extended supervision after forty years, and on the second count, the trial court sentenced him to a concurrent sentence of twenty-five years' incarceration and fifteen years' extended supervision. A postconviction motion, claiming his trial attorney was ineffective for failing "to fully investigate this matter," not "keeping his client informed," "not striking a jury member who[m] Mr. Winston knew," and "not subpoenaing a possible alibi witness," was filed. The motion also claimed that the trial court

erroneously exercised its discretion when sentencing him. The motion was denied without a hearing.

II. ANALYSIS.

A. Winston's trial attorney was not ineffective.

¶7 Winston submits that his trial attorney was ineffective for "failing to fully investigate the matter, [not] keeping his client informed, not striking a jury member who[m] Mr. Winston knew and supporting striking a juror of the same race, and not subpoenaing a possible alibi witness." We disagree.

¶8 The Sixth Amendment guarantees a criminal defendant a right to effective assistance of counsel. U.S. CONST. amend. VI. In order to prevail on a claim of ineffective assistance of counsel, a defendant must prove both that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To prove deficient performance, the defendant must show specific acts or omissions of his attorney that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 687. To show prejudice, the defendant must demonstrate that the result of the proceeding was unreliable. ***Id.*** at 687. If the defendant fails on either prong—deficient performance or prejudice—his ineffective assistance of counsel claim fails. ***Id.*** at 697. There is a "strong presumption" that counsel has rendered adequate assistance. ***Id.*** at 690.

¶9 An ineffective assistance of counsel claim presents a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The trial court's findings of fact will not be disturbed unless they are clearly

erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance resulted in a violation of defendant's right to effective assistance is a question of law that this court reviews independently. ***Id.***

¶10 We first address Winston's claim that his trial attorney did not conduct a proper investigation. At sentencing, he maintained that he was innocent and told the trial court that he did not testify because the witness who was with him on the day of the robbery when he heard the gunshots was not subpoenaed. In denying the postconviction motion, the trial court stated, among other things, that his attorney was not ineffective because Winston failed to name the witness, failed to give his attorney the address of the witness, and provided no details of what this unknown witness would have said. Given the dearth of information about this alleged alibi witness, his trial attorney was not ineffective for failing to investigate or subpoena this person.

¶11 Next, Winston complains that his trial attorney failed to keep him adequately informed about the progress of the case and was unavailable to answer his questions. While this may or may not be true, Winston has failed to explain how this deficiency prejudiced him. In other words, Winston does not tell us how his attorney's better communication style or question answering would have made a difference in the result of the trial.

¶12 Winston also faults his attorney for failing to strike a juror who had been a substitute teacher at Winston's high school. At his sentencing, Winston told the trial court that while the teacher claimed not to know Winston, he would have wanted the teacher off of the jury because he knew the teacher. The fact that Winston expressed a desire not to have a particular person on the jury, and his attorney failed to strike this person, does not equate to deficient performance on

the attorney's part. Winston was entitled to a fair and impartial jury, and he received such a jury. Thus, his contention that his attorney was ineffective for failing to strike this juror was properly denied by the trial court.

¶13 Next, Winston submits that his attorney "support[ed] the striking of one of the few African American jurors." As the State points out in its brief, this argument should be rejected out of hand because Winston failed to raise this issue in his postconviction motion. Moreover, the attorney's acquiescing to the striking of this witness was not improper. This is so because the juror in question, Juror 37, revealed that her mother had been killed and that her sister had witnessed her death. She also said that someone had been arrested for the murder, but no one was ever convicted of the crime. She also indicated that she once lived in the neighborhood where the robbery and murder in this case occurred. Following these statements, the prosecutor suggested that she be struck for cause and Winston's attorney reluctantly agreed. The trial court granted the prosecutor's request. Winston is unable to point to any improper reason for the striking of this juror by the trial court, except to say that she was one of the few minority members of the jury panel. Given Juror 37's life experiences, it was appropriate for the trial court to strike her for cause. Thus, Winston's attorney's reluctant agreement to strike Juror 37 did not constitute ineffective assistance of counsel. *See* ***Batson v. Kentucky***, 476 U.S. 79, 96 (1986).

B. Substantial evidence was presented to convict Winston of the two counts.

¶14 Winston next argues that insufficient evidence was presented at trial to convict him. He claims that because the two co-defendants gave conflicting reports to the police, and one of the reports given by J.G. said that a black man with a darker complexion nicknamed "Wallstreet" shot the victim, and this

description is the same as that given to police by the eyewitness of the robber, that his conviction should be overturned. He also submits that if, indeed, ample evidence exists to demonstrate that Winston was the shooter, no evidence was presented to support the required intent to kill element needed to convict him of first-degree intentional homicide. *See* WIS. STAT. § 940.01(1)(a). We reject his arguments.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶15 Further, with respect to credibility, it is the jury, not this court, who determines credibility. We give deference to the jury's paramount role in judging the weight and credibility of the evidence presented at trial, especially when the verdict is upheld by the trial court over a postconviction challenge, and we may not substitute our view of the evidence for the jury's. *See, e.g.*, ***Morden v. Continental AG***, 2000 WI 51, ¶¶38-40, 235 Wis. 2d 325, 611 N.W.2d 659 ("We afford special deference to a jury determination in those situations in which the trial court approves the finding of a jury."). Here, the evidence of Winston's guilt is overwhelming. This evidence includes: Winston's own statement in which he admitted robbing the victim and shooting him, the testimony of both co-defendants who identified themselves and Winston on surveillance camera photos and who

told the jury that Winston planned the robbery, executed it and shot the victim after robbing the victim, and finally, one of the co-defendant's sisters testified that she was told by her brother that Winston robbed and shot the victim.

¶16 Winston's claim that the evidence was insufficient to support the intent to kill element of first-degree intentional homicide is also unpersuasive. First, the autopsy report indicates that the victim was shot four times at close range, twice in the abdomen, and that several of the shots would have been fatal. A trier of fact "may infer intent from the circumstances surrounding one's acts since direct proof of intent is rare." ***State v. Weeks***, 165 Wis. 2d 200, 210, 477 N.W.2d 642 (Ct. App. 1991). Further, the facts support a reasonable conclusion "that the shooter was aware that shooting at such a close range was 'practically certain' to cause [the victim's] death." ***Id.***; *see also* ***State v. Webster***, 196 Wis. 2d 308, 324, 538 N.W.2d 810 (Ct. App. 1995) (stating defendant's firing of a gun at victim from "close range" supports reasonable jury's conclusion of intent to kill victim). In addition, the firearms expert testified that the trigger on the gun used to rob and kill the victim needed to be pulled each time for the four shots to be fired. Finally, one of the co-defendants told the jury that Winston said he was going to kill the victim. Consequently, substantial evidence was presented to the jury to support its verdict of first-degree intentional homicide and armed robbery.

C. The trial court properly exercised its discretion in sentencing Winston.

¶17 Winston's last argument is that the trial court erroneously exercised its discretion at sentencing because the trial court "did not appear to give Mr. Winston credit for having a minimal record," and the trial court "appeared to find fault that [sic] Mr. Winston did not show remorse for his actions." We remain unpersuaded.

¶18 The three primary factors the trial court must consider at sentencing are: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. *See* ***State v. Thompson***, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). The weight to be given to each of the primary sentencing factors is particularly within the wide discretion of the trial court. ***State v. Curbello-Rodriquez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (1984). The transcripts of the trial court's sentencing remarks clearly state that the trial court gave Winston credit for having a minimal record: "You're 18 years old. You have no prior record. You just have a disorderly conduct forfeiture. That's a substantially mitigating factor."

¶19 Winston faced a mandatory sentence of life imprisonment for count one, and a maximum sentence of forty years' imprisonment for count two. The trial court made Winston eligible for extended supervision after serving forty years. The trial court also elected to give Winston a concurrent sentence for the armed robbery. Given the sentences' structure, Winston was given credit for his minimal record.

¶20 The trial court was also permitted to take into account the fact that Winston showed no remorse for the crime, and that, as a consequence, he was more likely to commit a crime again. Lack of remorse is a legitimate sentencing consideration. While we can feel sorry about what others do, we can have remorse only for our own actions. Winston is therefore correct that his continued denial of guilt precludes an expression of remorse, but is not correct to suggest that remorse as a sentencing factor is limited to those who admit guilt. *See* ***State v. Baldwin***, 101 Wis. 2d 441, 456-59, 304 N.W.2d 742 (1981). Thus, the trial court's comments comport with proper sentencing factors.

¶21 Accordingly, we affirm the judgment and the order denying the postconviction motion.

By the Court.—Judgment and order affirmed.

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