

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2661-CR

Cir. Ct. No. 2004CF73

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN G. SCHERER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Vilas County: ROBERT E. KINNEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. John Scherer appeals a judgment of conviction for first-degree intentional homicide and concealing a corpse, and an order denying his motion for a new trial, arguing ineffective assistance of counsel. Scherer argues the court applied the incorrect legal standard for determining whether he

was prejudiced by ineffective assistance. We do not decide whether the court erred in its analysis of prejudice because we conclude Scherer's attorney did not perform deficiently. The judgment and order are affirmed.

BACKGROUND

¶2 A jury convicted Scherer of killing his girlfriend Donna Peterson and hiding her body. Scherer admitted to the police he killed Peterson and hid her body in the basement of their residence. The jury was instructed on first-degree intentional homicide and hiding a corpse. The jury was also instructed on first-degree and second-degree reckless homicide as lesser-included offenses. The jury found Scherer guilty of first-degree intentional homicide and hiding a corpse.

¶3 Scherer filed a motion for a new trial, alleging he received ineffective assistance of trial counsel in three respects. Scherer asserted his counsel erred by not challenging on Fourth Amendment grounds his statements to police. Additionally, Scherer asserted his attorney should have requested jury instructions supporting the defense that he killed Peterson because of a mistake. Finally, Scherer asserted his attorney erred by relying on the mistake defense instead of conceding that he killed Peterson recklessly, not intentionally.

¶4 After a hearing, the circuit court denied Scherer's motion. The court concluded Scherer's statements to police were voluntary and, therefore, his attorney was not deficient by failing to challenge his statement's admissibility. The court also concluded that, regardless of whether counsel performed deficiently in not seeking an instruction on mistake, Scherer was not prejudiced because there was no reasonable likelihood of a different result if the jury had been instructed on mistake.

¶5 Regarding Scherer’s alleged third error, the court agreed with Scherer that his attorney performed deficiently “in not more forcefully arguing and developing the argument that this was reckless homicide.” However, the court predicted Scherer would have been convicted of at least first-degree reckless homicide. The court therefore concluded Scherer was not prejudiced because it would have sentenced him the same had he been convicted of first-degree reckless homicide. Scherer appeals the judgment of conviction, and the circuit court order denying his motion for a new trial.

DISCUSSION

¶6 On appeal, Scherer’s sole argument is that although the court correctly concluded his attorney performed deficiently by not adequately arguing his actions were reckless rather than intentional, the court erred by relying on improper factors to conclude the deficiency was not prejudicial. In his brief, Scherer explicitly does not challenge the court’s ruling regarding the voluntariness of his statements or its holding regarding the jury instruction on mistake. On the other hand, the State countered the circuit court erred when it concluded Scherer’s representation was deficient. Therefore, the first issue before us is whether Scherer was denied effective assistance of counsel when his attorney relied upon the mistake defense.

¶7 “[T]he right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The process to evaluate ineffectiveness of counsel is stated in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a claim of ineffective assistance of counsel requires the defendant to show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *State v. Johnson*, 153

Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To prove counsel's performance was deficient, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

¶8 The standard of review for ineffective assistance of counsel claims is a mixed question of law and fact. *Johnson*, 153 Wis.2d at 127. "[T]he 'underlying findings of what happened,' will not be overturned unless clearly erroneous." *Id.* (citation omitted). The ultimate determinations of whether counsel's performance was deficient and was prejudicial to the defense are questions of law which we review independently. *Id.* at 128. In reviewing counsel's performance, we give great deference to the attorney, making every effort to avoid determinations of ineffectiveness based on hindsight. *Id.* at 127. Instead, we review the case from the attorney's perspective at trial. The defendant must overcome the strong presumption that counsel acted reasonably within professional norms. *Id.*

¶9 Scherer was charged with first-degree intentional homicide and first- and second-degree reckless homicide. First-degree intentional homicide contains two elements: (1) causing the death of another human being; and (2) the intent to kill that person or another. WIS. STAT. § 940.01. Both first-degree and second-degree reckless homicide contain the mental element of criminal recklessness. "[C]riminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk...." WIS. STAT. § 939.24(1). Mistake is a defense to criminal liability as set forth in WIS. STAT. § 939.43(1): "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a

state of mind essential to the crime.” See *State v. Hemphill*, 2006 WI App 185, ¶¶7-11, 296 Wis. 2d 198, 722 N.W.2d 393.

¶10 In this case, Scherer and Peterson got into an altercation at their home, after several hours of alcohol and drug use. Scherer told the police that during this altercation, both he and Peterson must have been knocked out because when he came back to consciousness they were both laying next to their bed. It is undisputed that Peterson was still alive at this time. Police then asked Scherer what happened after this initial confrontation. He said:

I woke up. We’re both laying there. Pulled her up onto the bed. Checked her for beats, nothing. I tried the compressions and the mouth to mouth, nothing. And I panicked. I just didn’t know what to do. We must have gotten into it.

Scherer explained he then kicked and hit Peterson and dropped onto her chest and abdomen with his knees. Both the State and the defense agreed the knee drop to Peterson’s abdomen and chest ultimately killed her by severing her pancreas almost in half, causing severe internal bleeding.

¶11 Scherer’s statements to police support his attorney’s presentation of the mistake defense. Scherer stated he “checked her for beats” and “tried the compressions and the mouth to mouth,” but got no response. Scherer also said he mistakenly believed Peterson was dead, irrationally blamed Peterson for her death, and in a rage landed the blows that ultimately killed her. These statements alone provide a sufficient factual basis to argue the mistake defense.

¶12 Additionally, in his motion for a new trial, Scherer continued to assert the basis for the mistake defense, stating:

Mr. Scherer’s video tape confession from August 8, 2004, at the Vilas County Jail, disclosed that, after he “woke up”

and discovered Ms. Peterson's unconscious body, he was so upset that his girlfriend appeared to be dead that he "started yelling" at her and "jerked her up" and, while "holding" her, let her "fall back down" on the "left side" of the bed and, after she fell off, kicked her three times and "dropped" down onto her "with my knees."

Scherer also added,

if the jury believed Mr. Scherer's claim that he kicked and knee dropped Ms. Peterson only after his mistaken perception that she was dead, there was scientific medical support for the defense contention that she was alive and that Mr. Scherer's emotional and violent response to this mistaken perception caused her death.

¶13 The mistake defense counsel advanced was Scherer's "honest error" of believing that the victim was already dead when he inflicted the knee drops. The court concluded the mistake defense was deficient because it was unreasonable for Scherer to have mistakenly thought she was dead. However, "[i]t does not matter ... whether a person's mistake is reasonable, only that it is an honest mistake." *State v. Bougneit*, 97 Wis. 2d 687, 691-92, 294 N.W.2d 675 (Ct. App. 1980).

¶14 If Scherer honestly but mistakenly believed Peterson was dead when he attempted but failed to revive her, he could not have intended to kill her nor could he have been aware of the substantial risk of death or great bodily harm. Thus, the mistake defense could apply, negating the existence of the mental elements.

¶15 The mistake defense, while ultimately unsuccessful, was legally appropriate and consistent with the facts. Therefore, Scherer's attorney's performance was not deficient and Scherer was not denied his constitutional right to effective representation. Therefore, we need not address the prejudice prong of ineffective assistance of counsel.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

