COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1791-CRNM **Cir. Ct. No. 99-CF-168**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEJANDRO RIVERA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: JOSEPH A. MCDONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alejandro Rivera appeals a judgment convicting him of first-degree intentional homicide as party to a crime, contrary to WIS. STAT. §§ 940.01 and 939.05. He also appeals an order denying postconviction relief. Rivera was sentenced to a life term in prison with no eligibility for parole. Appellate counsel has filed a no merit report pursuant to WIS. STAT. RULE 809.32

and ***Anders v. California***, 386 U.S. 738 (1967). Upon receiving a copy of the report, Rivera has filed a response.

¶2 The no merit report addresses whether there is any arguable merit to challenge Rivera's conviction based upon ineffective assistance of counsel. In the context of this issue, the report discusses: (1) the admissibility of Rivera's statements to law enforcement officers and a witness; (2) the trial court's allegedly inappropriate comments in the presence of the jury; (3) whether Rivera was present during in-chambers individual voir dire; and (4) defense counsel's allegedly deficient cross-examination of a witness.

¶3 Rivera's response challenges counsel's effectiveness, the trial court's comments, Rivera's alleged absence during voir dire, references to his gang associations, and the effectiveness of cross-examination of a prosecution's witness. Although not addressed, we also review the sufficiency of the evidence, the court's ruling on suppression motions, Rivera's mental health evaluations and the sentencing court's discretion. Based upon our independent review of the record, together with the no merit report and response, we conclude that there exists no issue of arguable merit. Therefore, we discharge counsel of any further obligation to represent Rivera and affirm the judgment and order.

BACKGROUND

¶4 In March 1999, Rivera was stopped for speeding in Barron County. During the stop, officers found $10,000 in cash on his person and a 9mm semiautomatic firearm in his car. Rivera admitted the gun was his. A small

amount of marijuana and a bottle of Vitablend, a compound apparently used by cocaine dealers to cut their product, were also obtained from the car.[1]

¶5 Following this traffic stop, a search warrant was issued for the search of drugs at Rivera's apartment. During the execution of the search warrant in the early morning hours of July 4, 1999, Rivera was found in his bedroom and arrested on an outstanding warrant from Barron County. The officers' search of the bedroom uncovered a loaded semiautomatic pistol between Rivera's mattress and box spring. A wallet that was identified as belonging to Carl Peterson was discovered in an attic area of the apartment. The officers seized the wallet because it did not belong to anyone living in the apartment and the officers believed it was stolen.

¶6 Rivera was taken to jail. While in jail, Rivera asked to speak to officers. He advised the officers that he could lead them to two dead bodies in exchange for release from jail. After the officers read Rivera his ***Miranda***[2] rights, he led them to Carl Peterson's residence in Douglas County. Rivera advised the officers that the small gray car parked at the residence had a body in the trunk. The officers observed the gray car pulling a fishing boat leave Peterson's residence. The officers stopped the vehicle, which was occupied by Patrick Peterson and another male. In the boat, wrapped in a tarp with chains and weights attached was the murder victim, Patrick's father, Carl.

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[1] The record is unclear as to further proceedings in Barron County or the issuance of the search and arrest warrants.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶7 On or about July 3, 1999, Patrick had shot his father in the head while his father was sleeping on his couch at home. A spent 9mm bullet casing was found on Patrick's bedroom dresser in his father's residence. Bullet fragments were discovered in Carl's skull. David Williams, Patrick's accomplice, told officers that he had been living with Patrick and Carl, and that Patrick had murdered his father using Rivera's 9mm gun.[3] After Patrick shot his father, Williams telephoned Rivera, and told him to come over. Rivera arrived and saw Patrick and Williams cleaning blood-soaked carpeting. After Williams and Patrick carried the body to the trunk of Carl's car, Rivera returned home.

¶8 After leading the officers to Carl's body, Rivera was returned to jail and later released pursuant to his agreement with the officers. Rivera spent the night in his own home. The following day, Rivera agreed to return to the police department to answer questions. After being advised of his ***Miranda*** rights, Rivera told the officers that he was higher ranking than Patrick and Williams in the Imperial Gangsters in the Superior area and in Chicago. He told officers that he was a drug dealer, not a murderer. He advised them that he had heard discussions between Williams and Patrick to murder Carl in order to gain gang status and to obtain Carl's property.

¶9 Rivera was initially arrested on drug charges. He was later charged with first-degree intentional homicide, party to a crime. He pled not guilty and not guilty by reason of insanity. Counsel raised the issue of Rivera's competency to stand trial. Rivera was examined by two mental health professionals, and based

[3] Other testimony suggested that Williams took credit for the shooting.

on evaluations, Rivera was determined to be competent to stand trial. In addition, Rivera withdrew his insanity plea.

¶10 Defense counsel brought a number of suppression motions. Counsel challenged the seizure of the gun and the wallet during the execution of the search warrant. The court noted that the validity of the warrant itself had not been challenged and ruled that the gun and wallet were lawfully seized during the execution of the search warrant.

¶11 Rivera's counsel also moved to suppress the admissibility of portions of Rivera's videotaped statement to officers on the ground that Rivera had requested counsel during the questioning. The trial court granted his motion and suppressed all statements made after Rivera indicated a desire to meet with a public defender. In addition, Rivera's counsel objected to the admission of a witness's testimony that Rivera had suggested murdering another gang member's parent to obtain property. The court sustained the objection and disallowed the testimony in the State's case-in-chief. It ruled that the State would be permitted to renew the motion on rebuttal.

¶12 The trial court also granted defense counsel's venue motion and ruled that the jury be chosen from a different county. An Eau Claire County jury was impaneled. Because of concerns with publicity, a lengthy voir dire was conducted before the court and counsel were satisfied that none of the jurors chosen had been exposed to any inflammatory publicity.

¶13 At trial, videotaped portions of Rivera's interview with police officers were played for the jury. Against defense counsel's advice, Rivera chose to absent himself from the courtroom during the video. The video depicted Rivera telling officers that he, Williams and Patrick were gang members, and that Patrick

shot his father in the head to gain gang status. Rivera stated that he was not present during the shooting. Although he heard talk of the murder, he figured it was just talk.

¶14 Williams testified at trial that Rivera told Patrick that they should kill Patrick's father in order to obtain his Corvette, his pension and his house. Williams stated that Rivera provided Patrick with the 9mm semiautomatic firearm identified by forensic experts at trial as the murder weapon. Williams testified that Rivera instructed him that he was supposed to do the shooting near the fourth of July so that people would think the gunshots were firecrackers going off.

¶15 Williams further testified that Rivera called Williams and Patrick in the morning on the day of the murder to ask whether it had been "done yet" and "do you want me to come over and do it, because if I have to come over and do it, then … I'll kill one of you guys, too." Williams stated that later in the day Patrick shot his father in the head while he was sleeping on his living room couch.

¶16 Williams testified that after the shooting, he called Rivera, who told him to calm down and "[t]hat's how people get caught." Williams said that Rivera told him to put the body in the trunk of the gray car and bring it over to Rivera's house. Williams stated that he followed these directions, and when they arrived at Rivera's house, they opened the trunk, showed Rivera the dead body, and that Patrick gave Rivera the gun back after cleaning it off with his shirt. Williams testified that all three went back to the Petersons' house to clean up the blood. All three carried the couch outside because it could not be cleaned. After returning to Rivera's apartment, Williams and Patrick took the gray car back to the Petersons. They returned to Rivera's apartment and had pizza, "smoked some weed" and watched movies.

¶17 On cross-examination, Williams agreed that Rivera was scaling back his gang activities and spending more time at home with his wife. Defense counsel brought out that Williams did not believe Rivera was serious when he talked of the murder and that it was "just talk." Williams also testified that Rivera did not order the murder.

¶18 The jury returned a guilty verdict. Rivera brought postconviction motions on the ground that trial counsel was ineffective. After an evidentiary hearing, the court denied his motions and Rivera appealed.

TRIAL COUNSEL'S EFFECTIVENESS

¶19 In order to demonstrate a claim for ineffective assistance of counsel, there must be a showing of counsel's deficient performance and prejudice to the defendant. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). To prove deficient performance, a defendant must show specific acts or omissions that were outside the range of professional competence. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant has the burden to overcome a strong presumption that counsel rendered adequate assistance. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); ***State v. Adams***, 221 Wis. 2d 1, 11-14, 584 N.W.2d 695 (Ct. App. 1998). The attorney's decisions are given great deference, and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***Johnson***, 153 Wis. 2d at 127. Our independent review of the record fails to uncover a rational basis to attack the effective assistance of trial counsel.

A. Rivera's Statements

¶20 Rivera challenges counsel's effectiveness for failing to object to Rivera's statement to investigating officers that he could direct them to the location of two bodies. At trial, however, there was no evidence of a second murder or suggestion that Rivera committed one. The statement itself did not indicate that Rivera was involved in the commission of another murder. Rivera followed up the statement that he offered to make a deal in exchange for providing police the location of one murdered body. The reference to a second murder was not repeated, and no further reference was mentioned at any other time during the trial.

¶21 Rivera complains that his statement could be interpreted to mean that he had been involved in two murders. Defense counsel disagreed. At the postconviction hearing, defense counsel explained that when considered in context, Rivera's statement indicated that he could give the officers information about murders committed by other individuals, not his own involvement or complicity with them. Counsel testified that it was consistent with his defense that Rivera knew of gang type activities by other people and it was Rivera's desire to assist law enforcement and cooperate with the police department by giving them information of criminal activities by others.

¶22 If counsel explains a reasonable basis for his decisions, the appellate court may not find counsel's performance deficient. ***Strickland***, 466 U.S. at 688. We agree with the conclusion of the no merit report that counsel provided a reasonable explanation for his strategic decision not to object to the evidence.

¶23 Rivera also contends that counsel was ineffective for failing to obtain a mistrial due to Williams' unsolicited response that Rivera had made

threats against other parents. The record demonstrates that the State had made a pretrial motion, over defense counsel's objection, to admit statements that Rivera had attempted to solicit the murder of another gang member's parent. The trial court held that the testimony could not be produced in the State's case-in-chief, but that the State may renew its motion in rebuttal.

¶24 Counsel explained that he did not move for a mistrial because he used it as part of the defense. Counsel believed that the statement was not prejudicial because it was not acted on and consistent with his defense theory that no one took this kind of talk seriously. The statement was designed to show that, generally, Williams and Patrick did not take this kind of discussion seriously and, therefore, Rivera could not have expected them to act on it. Because counsel's decision was based upon a reasonable defensive strategy, it is not an arguable basis for a claim of ineffective assistance.

B. Voir Dire

¶25 The record uncovers no arguable merit based upon trial counsel's decision not to move for a mistrial or for a new jury panel based upon the trial court's referring to the prosecutor as "Dan" rather than "Daniel, " and its remarks about excused jurors. Both comments were made after the juror to whom they referred had been excused. The court made the first comment in response to a juror who stated that he would not follow jury instructions. The second comment was made in the framework of a discussion regarding freedom of association.[4]

[4] The court stated: "I didn't really believe that gentleman, that he'd be so blockheaded, but he did get off for his employer I guess. He's not fooling anybody." Later, the court commented, "I'm just really disturbed at our young people, that I thought that she would be a little more broad-minded than that."

¶26 At the postconviction hearing, defense counsel explained that the voir dire process was informal and comfortable and the judge's comments were more like "a bantering-type remark." The court was advising the jury that "his mind set was that they ought to be broad-minded about the issues in the case" and not evince any prejudice toward Rivera simply because he was a gang member. Counsel believed that the court's reference to the prosecutor by his first name was merely indicative of the type of informality of the atmosphere.

¶27 Defense counsel explained that he would much rather have an informal process than a "stiff and stodgy" jury selection that is more inhibiting to a juror's willingness to answer questions. Defense counsel stated that when read out of context, the statements may seem offensive, but they were spoken in a lighthearted tone, so that the comments "didn't hurt us."

¶28 We agree with the no merit report's analysis that defense counsel's interpretation of the court's comments is reasonable. If counsel explains a reasonable basis for his or her actions, the appellate court may not find counsel's performance deficient. ***Strickland***, 466 U.S. at 688. Counsel later explained that the court's isolated use of the prosecutor's name, "Dan," and its comments were made in a lighthearted tone, evincing a relaxed and informal process that counsel believed imbued to his client's benefit. Counsel's decision not to move for a mistrial or a new jury panel due to the comments is not an arguable basis for an appeal based upon ineffective assistance.

¶29 Rivera contends that the jury panel was conclusively prejudiced because the members who were called blockheaded and narrow-minded remained on the panel. The record shows otherwise. Because the comments were made

after each juror to whom the comments were directed was excused, the record provides no arguable basis for Rivera's contention.

¶30 Next, Rivera contends that although he was present during the general questioning of the jurors, he was not present in the judge's chambers for individual voir dire. He argues that his absence prejudiced his defense and that counsel was deficient for failing to move for a mistrial on this basis. The record contradicts his claim. The court's minutes state: "Judge's chambers with attorneys and defendant. Each juror was questioned separately about pretrial publicity." The trial court found as a fact that Rivera was present and the record supports the court's finding. Consequently, the record provides no arguable basis for Rivera's contention.

C. Cross-examination

¶31 We further conclude that the record discloses no arguable basis for an appeal based upon deficient cross-examination of David Williams. When asked about inconsistencies in Williams' testimony, defense counsel responded that he cross-examined Williams for about two hours and that half of that time was devoted to pointing out inconsistencies. Defense counsel indicated that he was somewhat selective in the portions of testimony he attacked, and did not believe that the one or two inconsistencies that he did not cross-examine on would have made any difference in the outcome.

¶32 We agree with the no merit report's analysis that any failure on the part of defense counsel to address every inconsistency would have caused no prejudice. For example, Rivera points to Williams' statement that he was standing near the scene, saw Patrick with the gun and heard the shot when Patrick fired the gun, but from his vantage point he did not see Patrick pull the trigger. Rivera

contrasts this statement with Williams' testimony that he saw Patrick shoot his father. As the no merit report indicates, in either scenario it was undisputed that Rivera was not present and did not fire the gun. As a result, counsel's failure to point out this specific inconsistency did not prejudice the defense. The purpose of showing inconsistencies was to impeach Williams' credibility in general, and counsel used other portions of Williams' statements in furtherance of that goal. We conclude that the record fails to support an arguable claim of prejudice.

D. Gang membership

¶33 Rivera argues that trial counsel was ineffective for failing to object to evidence regarding Rivera's gang membership. This issue was not raised on postconviction motions as a basis for finding counsel ineffective. In any event, we are satisfied that it does not provide an arguable basis for an appeal. While evidence of gang membership may be damaging in the eyes of a jury, it has been held to be admissible to present the complete picture of a murder and conspiracy. ***United States v. McKinney***, 954 F.2d 471, 479 (7th Cir. 1992) ("To present the complete picture of the murder and conspiracy, the government was entitled to introduce some evidence of what the Aryan Brotherhood did and how the group operated.").[5] Here, Rivera was charged as party to the crime of murder committed

[5] In ***United States v. Butler***, 71 F.3d 243, 251 (7th Cir. 1995), the Seventh Circuit Court of Appeals stated:

(continued)

by other gang members. Because the evidence was admissible to present to the jury a complete picture, counsel's lack of objection is not grounds for a claim of ineffective assistance.

We recognize that evidence of gang membership is likely to be "damaging to a defendant in the eyes of the jury," and we therefore demand careful consideration by district judges in determining its admissibility. ***Rodriguez***, 925 F.2d at 1053. However, even given this recognition, we have consistently held that under appropriate circumstances gang membership evidence has probative value that can outweigh claims of undue prejudice. *See* ***id.*** (gang membership admissible to show motive for robbery and reason for participation in criminal activity); ***Lewis***, 910 F.2d at 1372 (gang membership admissible to prove joint constructive ownership of firearms); ***United States ex rel. Hairston v. Warden***, 597 F.2d 604, 607-08 (7th Cir.), *cert. denied*, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979) (gang membership admissible to show motive for murder); *see also* ***United States v. McKinney***, 954 F.2d 471, 479 (7th Cir.), *cert. denied*, 506 U.S. 1023, 113 S.Ct. 662, 121 L.Ed.2d 587 (1992) (evidence of Aryan Brotherhood activities admissible "to present the complete picture of the murder and conspiracy"); ***United States v. Hattaway***, 740 F.2d 1419, 1425 (7th Cir.), *cert. denied*, 469 U.S. 1089, 105 S.Ct. 599, 83 L.Ed.2d 708 (1984) (evidence of motorcycle gang's lifestyle admissible to provide accurate description of kidnapping victim's "ordeal"). Other circuits have reached similar conclusions. *See, e.g.*, ***United States v. Sloan***, 65 F.3d 149, 150-51 (10th Cir. 1995) (gang membership admissible to prove existence of conspiracy and relationship between witnesses); ***United States v. Robinson***, 978 F.2d 1554, 1562-63 (10th Cir. 1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1855, 123 L.Ed.2d 478 (1993) (gang affiliation admissible to establish conspiracy agreement and purpose and to show knowledge of conspiracy); ***United States v. Johnson***, 28 F.3d 1487, 1497 (8th Cir. 1994), *cert. denied*, 513 U.S. 1098, 115 S.Ct. 768, 130 L.Ed.2d 664 (1995) (gang association admissible to prove conspiracy existed).

SUPPRESSION MOTIONS

¶34 We conclude that the record fails to support a potential appellate argument that the trial court erroneously ruled on suppression motions. The court granted Rivera's motion to suppress certain statements he made to officers after a statement that the court interpreted as an invocation of his right to counsel. However, there exists no basis to suppress the other portions of Rivera's statements. The record demonstrates "[f]irst, ... that the defendant was informed of his ***Miranda*** rights, understood them and intelligently waived them. Second, ... that the defendant's statement was voluntary." ***State v. Lee***, 175 Wis. 2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993) (citations and footnote omitted).

¶35 The officers' testimony supports the court's finding that Rivera was read his ***Miranda*** rights, understood them and intelligently waived them. Rivera initiated the questioning when he asked to speak with officers after he was arrested on a warrant. The record shows that Rivera was provided food, beverages and breaks during the questioning. Additionally, it shows that there was no sign of threats or coercion. We conclude that a challenge to the court's rulings on the motion to suppress Rivera's statements on constitutional grounds would lack arguable merit.

¶36 In addition, there would be no arguable merit to a challenge to the trial court's ruling that the wallet and weapon were seized pursuant to the execution of a valid search warrant. Therefore, any challenge to the court's ruling admitting the weapon, wallet and portions of Rivera's statements would be frivolous within the meaning of ***Anders***.

SUFFICIENCY OF THE EVIDENCE

¶37 The record discloses no arguable merit to a challenge to the sufficiency of the evidence. An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value 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. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Matters of weight and credibility of evidence are left to jury. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996).

¶38 Here, the jury was entitled to accept as true Williams' testimony. Williams testified that Rivera planned the murder to obtain Carl's car and provided the murder weapon. This testimony, along with additional corroborating evidence, establishes that an appellate argument that the record is insufficient to prove first-degree intentional homicide as party to a crime lacks arguable merit.

COMPETENCY AND INSANITY DEFENSE

¶39 Based upon evaluations of two mental health professionals, Rivera was found competent to stand trial and withdrew his insanity plea. The mental health evaluations support the court's ruling and Rivera's decision. There is nothing in the record that would suggest that there is any issue of arguable merit with respect to Rivera's competence to stand trial or his decision to withdraw his plea based upon an insanity defense.

SENTENCING

¶40 The court sentenced Rivera to life in prison without parole. The only issue at sentencing was parole eligibility. The record shows that the court took into consideration the seriousness of the offense, the character of the defendant and protection of the public. These are appropriate factors. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). Because the court sentenced Rivera according to its authority under WIS. STAT. §§ 939.50 and 940.01 and relied on appropriate factors, any challenge to the court's discretion would lack arguable merit.

CONCLUSION

¶41 The record fails to disclose any other potential appellate issues. Consequently, based upon our independent review of the record before us, we conclude that any appeal would be without arguable merit and frivolous within the meaning of ***Anders***. Therefore, attorney Timothy Gaskell is discharged of further obligation to represent Rivera.

By the Court.—Judgment and order affirmed.