COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3091-CR **Cir. Ct. No. 94CF943095**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUEGENE ANTOINE HAMPTON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Luegene Antoine Hampton appeals from the judgment of conviction entered after a jury convicted him of first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1) and 939.05 (1993-94), attempted first-degree intentional homicide, party to a crime, contrary to WIS. STAT. §§ 940.01(1), 939.32 and 939.05 (1993-94), and armed

robbery, party to a crime, contrary to WIS. STAT. §§ 943.32(1)(a) and 939.05 (1993-94).[1] Hampton contends: (1) the jury instructions were erroneous; (2) his trial counsel was ineffective for failing to object to the erroneous jury instructions at trial; and (3) his conviction should be reversed in the interest of justice pursuant to WIS. STAT. § 752.35 because the real controversy has not been fully tried. We disagree and affirm.

I. BACKGROUND.

¶2 On August 13, 1994, at approximately 2:30 a.m., three individuals exited a nightclub on the north side of Milwaukee. The three men, who were later identified as Michael Moore, Walter Parker and Harry Roberts, entered Roberts's four-door Cadillac, which was parked down the street. Roberts sat in the front driver's seat, Moore in the front-passenger's seat, and Parker in the rear-passenger's seat.

¶3 After Roberts started the vehicle, the two passengers rolled down their windows. As they rolled down the windows, they heard shouting and saw Moore exit the vehicle. Gunfire immediately rang out. Moore was shot three times in the arm, once in the upper chest and once in the wrist. He was also robbed of $380 as he lay bleeding. Parker was shot once in the neck and once in the shoulder. Roberts's dead body was found lying behind his Cadillac. He had been shot five times – in the arm, shoulder, thigh, and twice in the chest. The bullets that entered his chest fatally struck his liver, pancreas and heart. Two

[1] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

bullets were recovered from Roberts's dead body and identified as nine-millimeter. Two nine-millimeter bullets were also recovered from Moore's body.

¶4 At trial, Parker testified that after he was shot he saw people outside of the car holding handguns and wearing ski masks. Moore also testified that he was shot and robbed by the same individuals wearing ski masks.

¶5 A bystander, Thomas Howard, stated that as Roberts was collapsing in the street, a police cruiser drove around the corner. When the shooters spotted the police vehicle, they quickly ran down the block. The police officers called for backup assistance and immediately pursued the fleeing suspects. The officers arrested Hampton and his half-brother, Alonzo Perry, a few blocks from the scene of the crime. In the general area where Hampton was arrested, the police also recovered the following items: a black-knit ski mask, a loaded nine-millimeter magazine clip, and a .45-caliber semi-automatic handgun. Hampton and Perry were later brought back to the scene of the shooting where Howard identified them as the shooters by their clothing. Officers Walsh and July, the first two officers on the scene, also identified them as the shooters. Hampton gave a statement to police admitting that he had been at the scene, panicked, and began running towards Roberts while shooting a nine-millimeter weapon. He stated that he didn't know how many shots he had fired.

¶6 On August 17, 1994, Hampton was charged with one count of first-degree intentional homicide for killing Roberts, two counts of attempted first-degree intentional homicide for shooting Moore and Parker, and one count of armed robbery for robbing Moore at gunpoint. A jury found Hampton guilty of one count of first-degree intentional homicide, but only one count of attempted

first-degree intentional homicide, as well as one count of armed robbery. Hampton was sentenced to life in prison.

II. ANALYSIS.

A. Hampton waived any objection to the jury instructions.

¶7 Hampton contends that the trial court's erroneous use of jury instruction WIS JI—CRIMINAL 580 (1995)[2] rather than WIS JI—CRIMINAL 1070 (1990)[3] led to a directed finding of guilt on the counts of first-degree intentional homicide and attempted first-degree intentional homicide.[4] He claims that

[2] All references to WIS JI—CRIMINAL 580 are to the 1995 version.

[3] All references to WIS JI—CRIMINAL 1070 are to the 1990 version.

[4] WISCONSIN JI—CRIMINAL 580, the general criminal pattern jury instruction for attempt, states in relevant part:

> **580 ATTEMPT: GENERAL FORM: COMPLETED CRIME NOT SUBMITTED**
>
> The defendant is charged with attempted (name intended crime).
>
> The crime of attempted (name intended crime), as defined in § 939.32 and § _____ of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name intended crime), does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements … were present.
>
> First, that the defendant intended to commit the crime of (name intended crime).
>
> Second, that the defendant did acts which demonstrate unequivocally, under all of the circumstances, that he intended to and would have committed the crime of (name intended crime) except for the intervention of another person or some other extraneous factor.

(continued)

because the 580 criminal attempt instruction should not be used when the same, but completed, version of the crime is also charged, he is entitled to a new trial. We conclude that because Hampton failed to object to the use of WIS JI—CRIMINAL 580, he waived any challenge to the instruction.

¶8 "A trial court has wide discretion in developing the specific language of jury instructions." ***State v. Foster,*** 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995). Our review is limited to whether the trial court acted within its discretion and we will reverse only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***State v. Randall,*** 222 Wis. 2d 53, 59-60, 586 N.W.2d 318 (Ct. App. 1998). However, the issue of whether a jury instruction fully and fairly explained

---

(Footnotes omitted.) WISCONSIN JI—CRIMINAL 1070, the criminal pattern jury instruction for attempted first-degree intentional homicide, states in relevant part:

> **ATTEMPTED FIRST[-]DEGREE INTENTIONAL HOMICIDE – §§ 939.32, 940.01(1)**
>
> The crime of attempt, as defined in § 939.32 of the Criminal Code of Wisconsin, is committed by one who, with intent to perform acts and attain a result which, if accomplished, would constitute a crime, does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.
>
> The defendant in this case is charged with attempted first[-]degree intentional homicide.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> First, that the defendant intended to kill (name of victim).
>
> Second, that the defendant's acts demonstrated unequivocally, under all the circumstances, that he intended to kill and would have killed (name of victim) except for the intervention of another person or some other extraneous factor.

the relevant law is a question of law, which this court reviews *de novo*. *See* ***County of Kenosha v. C & S Mgmt., Inc.,*** 223 Wis. 2d 373, 395, 588 N.W.2d 236 (1999).

¶9 The comment to WIS JI—CRIMINAL 1070 indicates that 1070 combines the general attempt instruction, WIS JI—CRIMINAL 580, with the instruction for first degree intentional homicide, WIS JI—CRIMINAL 1010. Additionally, the title of WIS JI—CRIMINAL 580 states that 580 is to be used only when the completed crime is not submitted. Therefore, we conclude that because both the completed and attempted charges were submitted to the jury, it would have been preferable if the trial court had used WIS JI—CRIMINAL 1070 rather than WIS JI—CRIMINAL 580 for the charge of attempted first-degree intentional homicide.

¶10 Hampton, however, waived any challenge to the jury instructions. At the jury instruction conference, when asked whether they had an opportunity to review the final jury instructions, both the prosecutor and defense counsel stated that they had and that the instructions met with their approval:

> [STATE'S ATTORNEY]: Then there's two counts of attempt. I think there's an attempt [jury instruction] that you can add to the first[-]degree intentional.
>
> [TRIAL COURT]: Do you know what number that is?
>
> [DEFENSE COUNSEL]: 580. Armed robbery is 1480.
>
> [TRIAL COURT]: You think 580 is attempt?
>
> [DEFENSE COUNSEL]: That's attempt, general form.
>
> ….
>
> [TRIAL COURT]: All right. Has each side had an opportunity to review the final jury instructions in this matter?

[STATE'S ATTORNEY]: Yes, Judge.

[DEFENSE COUNSEL]: Yes, Your Honor.

[TRIAL COURT]: Do they meet with your approval?

[STATE'S ATTORNEY]: Yes.

[DEFENSE COUNSEL]: Yes.

¶11 It is well settled that failure to object to jury instructions results in waiver of any alleged defects in the instructions. ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988). Hampton not only failed to object, but also suggested and approved the instruction. Accordingly, he has waived any objection to the use of WIS JI—CRIMINAL 580. *See* WIS. STAT. § 805.13(3)[5]; *see also* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

B. Hampton's trial counsel was not ineffective.

¶12 Thus, our review is limited to whether the alleged instructional error warrants a new trial due to ineffective assistance of counsel based on defense counsel's failure to object to the use of WIS JI—CRIMINAL 580. The familiar two-

[5] WISCONSIN STAT. § 805.13(3) states:

> At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.)

pronged test for ineffective assistance of counsel claims requires a defendant to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Bentley,*** 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996). In order to prove deficient performance, a defendant must establish specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland,*** 466 U.S. at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687.

¶13 However, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Id.*** at 691. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶14 Ineffective assistance of counsel claims present mixed questions of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). A trial court's factual findings must be upheld unless they are clearly erroneous. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defendant are questions of law, which we review *de novo*. ***Pitsch***, 124 Wis. 2d at 634. The defendant has the burden of persuasion on both prongs of the test. *See* ***Strickland***, 466 U.S. at 687.

¶15 Here, Hampton has failed to prove that he was deprived of a fair trial and a reliable outcome or that the result of the proceeding would have been

different if his trial counsel had objected to the jury instruction. Hampton claims that the trial court's use of WIS JI—CRIMINAL 580 had the effect of instructing the jury to analyze each count in terms of only one victim, Roberts. We disagree and conclude that any error was harmless because the instructions submitted to the jury, taken as a whole, adequately informed the jury of the applicable law.

¶16 There is an important distinction between a flawed jury instruction and the complete absence of an essential instruction. In ***State v. Howard***, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), the supreme court highlighted this distinction:

> [I]f the circuit court fails to instruct a jury about an essential element of the crime and the jury must find that element beyond a reasonable doubt, there is an automatic reversal of the verdict. If, however, there is some instruction on that element, albeit erroneous, and the jury is told that the element must be proven beyond a reasonable doubt, then the analysis is one of harmless error.

Id. at 293. Thus, we must determine whether defense counsel's failure to object to the use of WIS JI—CRIMINAL 580 "entirely precluded" the jury from properly considering the charges with respect to each victim. *See* ***id.*** at 292.

¶17 Here, any error was harmless because the instructions contained the essential elements of both attempted first-degree intentional homicide and first-degree intentional homicide, and correctly identified the victim of each crime respectively:

> The first count of the information in this case charges that … Hampton did cause the death of another human being, Harry D. Roberts, with intent to kill that person contrary to Wisconsin Statutes.
>
> ….

> The second count of the information in this case charges that … Hampton did attempt to cause the death of another human being, Walter Parker, with intent to kill that person contrary to Wisconsin Statutes.
>
> ….
>
> The third count of the information in this case charges that … Hampton did attempt to cause the death of another human being, Michael Moore, with intent to kill that person contrary to Wisconsin Statutes.
>
> ….
>
> The crime of attempt, as defined in 939.32 of the Criminal Code of Wisconsin, is committed by one who, with intent to perform acts and attain a result which, if accomplished, would constitute a crime which demonstrates unequivocally, under all the circumstances, that he had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.
>
> The defendant in this case is charged with attempted first[-]degree intentional homicide. Before the defendant may be found guilty of attempted first[-]degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.
>
> First, that the defendant intended to commit the crime of first[-]degree intentional homicide.
>
> Second, that the defendant did acts which demonstrate unequivocally, under all the circumstances, that he intended to and would have committed the crime of first[-]degree intentional homicide except for the intervention of another person or some other extraneous factor.
>
> ….
>
> The crime of first[-]degree intentional homicide is committed by one who causes the death of another human being with intent to kill that person or another.
>
> Before the defendant may be found guilty of first[-]degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

> First, that the defendant caused the death of Harry Roberts.
>
> Second, that the defendant intended to kill Harry Roberts.

Thus, because the overall meaning communicated by the instruction was a correct statement of the law, we conclude that any error was harmless. *See* ***State v. Glenn***, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). Thus, Hampton was not prejudiced by defense counsel's failure to object to WIS JI—CRIMINAL 580 and there are no grounds for reversal based on that error.

C. Hampton is not entitled to a new trial in the interest of justice.

¶18 Finally, Hampton contends that he is entitled to a new trial pursuant to WIS. STAT. § 752.35, because the real issue was not fully tried and, therefore, we should exercise our discretionary powers of reversal.[6] However, in ***State v. Schumacher***, 144 Wis. 2d 388, 424 N.W.2d 672 (1988), the supreme court stated:

> The court of appeals does not have the power to find that unobjected-to errors go to the integrity of the fact-finding process, and therefore may properly be reviewed by the court of appeals. This is incompatible with the court of appeals error-correcting function. Further, in the context of that error-correcting function, such an exception to the waiver rule of sec. 805.13(3) would amount to a repudiation of the idea underlying sec. 805.13(3).

---

[6] WISCONSIN STAT. § 752.35 states:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Id. at 409. Accordingly, outside of the realm of Hampton's ineffective assistance of counsel claim, we are unable to exercise our power to discretionarily review instructions that are waived. *See* ***id.*** at 408-09 n.14.

¶19 Based on the foregoing, the trial court is affirmed.

By the Court.—Judgment and order affirmed.

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