COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-3076-CR **Cir. Ct. No. 00-CF-877**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD W. WOLFE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Ronald W. Wolfe appeals from a judgment of conviction of first-degree intentional homicide and misdemeanor bail jumping and theft, all as a habitual offender. He also appeals from an order denying his motion for a new trial. He argues that he was denied the effective assistance of trial counsel, that the trial court failed to procure his personal waiver of his

constitutional right to confrontation when an evidentiary objection was withdrawn, and that the evidence was insufficient to convict him of misdemeanor theft. We reject his claims and affirm the judgment and order.

¶2 Ronald Carter was found stabbed to death in his home on September 18, 2000. Wolfe was linked to the death by the discovery of a bloody imprint of his hand found in Carter's kitchen sink, his fingerprint on a soda bottle near Carter's body, two bloody footprints at the home with a pattern consistent with the soles of his shoes, and his jacket stained with Carter's blood found in a field near Carter's home. Weeks before his death, Carter had bailed Wolfe out of jail and Wolfe had stayed at Carter's home off and on. Just days before his death, by a letter dated September 13, 2000, Carter asked three circuit court judges to revoke Wolfe's bond because Wolfe had used cocaine and Carter was afraid of him.

¶3 Wolfe's theory of defense was self-defense. He told police that he had informed Carter that they could not have a sexual relationship and later Carter came at him with a steak knife proclaiming that "[i]f I can't have you, no one else can." Wolfe said he wrestled the knife from Carter and stabbed him in the neck several times. Although bleeding profusely, Carter assured Wolfe he would be okay. Wolfe helped Carter to the bathroom and later the family room where Carter sat in a chair with a towel applied to the wounds. Wolfe then passed out and when he awoke twelve hours later he discovered that Carter was dead. He grabbed Carter's wallet or credit cards and fled. Wolfe's theory of defense portrayed Carter as a jealous, drunk, suicidal, raging man. Wolfe also presented evidence that Carter had helped another man obtain release on bail and that when the man refused to engage in sexual contact, Carter came at the man with a knife saying, "[I]f I can't have you no one is going to have you."

¶4 ***Strickland v. Washington***, 466 U.S. 668, 687, 692 (1984), sets out the two pronged test for deciding whether there has been ineffective assistance of counsel: deficient performance and prejudice to the defense. A claim of ineffective assistance presents a mixed question of law and fact. ***State v. Thiel***, 2003 WI 111, ¶21, ___ Wis. 2d ___, 665 N.W.2d 305. The findings of fact about what counsel did or did not do will not be overturned unless they are clearly erroneous. ***Id.*** The legal conclusions as to whether counsel's performance was deficient and prejudicial are questions of law we review de novo. ***Id.*** This court need not address both prongs of the ineffective assistance test if the defendant fails to meet his or her burden of proof on either prong. ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992).

¶5 Wolfe first argues that trial counsel was ineffective because counsel only visited Wolfe in jail for a total of forty-five minutes, that the visits all happened before counsel received discovery material, and that counsel failed to schedule a telephone conference with Wolfe prior to trial. Counsel disputed Wolfe's quantitative assessment of jail visitation and billing records and testified that he spent far more than forty-five minutes with Wolfe. However, we need not concern ourselves with the amount of time spent because whether it was adequate or not must be assessed on a case-by-case basis. The quantity of time cannot be objectively mandated. We first consider whether Wolfe has demonstrated that he was prejudiced by inadequate consultation time.

¶6 The test for prejudice is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. A defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. We will reverse only if our confidence in the outcome is so

undermined that the conviction is fundamentally unfair or unreliable. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994).

¶7 Like an allegation that counsel has failed to investigate, Wolfe must indicate what further consultation with counsel would have revealed or how it would have changed the course of the defense. *See* ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. "A criminal defendant who claims ineffective assistance of counsel cannot ask the reviewing court to speculate whether counsel's deficient performance resulted in prejudice to the defendant's defense. The defendant must affirmatively prove prejudice." ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993). Wolfe has not demonstrated one piece of information that he would have imparted to counsel during more frequent or confidential consultations that would have altered the outcome of the trial. There is no suggestion that trial counsel was uninformed about Wolfe's version of the offense or other circumstances bearing on relevant issues at trial. We conclude that Wolfe was not prejudiced by alleged inadequate consultation time.

¶8 Wolfe contends that trial counsel failed to elicit from the defense expert that Wolfe suffers from depression and a delusional disorder. This alleged deficiency was a reasonable strategy decision. We do not second-guess counsel's choice of strategy. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Rather, we examine whether counsel's strategic choices are deliberate and based on rationality founded on the facts and applicable law. ***Id.*** at 502-03.

¶9 Wolfe contends that if the defense expert had testified about his diagnosis of Wolfe's mental disorders, the jury would have been charged to assess the reasonableness of his self-defense claim in light of a person with his particular

mental illnesses. Counsel indicated that he did not elicit such diagnosis as it would have detracted from the self-defense theory. He explained that if the jury heard that Wolfe had such disorders or was high on cocaine or drunk, it would give an alternative reason for Wolfe's attack. Such information could undermine Wolfe's theory of defense that he merely responded to Carter's attack. Counsel is not required to offer evidence which contradicts the theory of defense. ***Hubanks***, 173 Wis. 2d at 28.

¶10 Additionally, such evidence would not have required an alteration of the second-degree intentional homicide instruction to incorporate a subjective, actual belief as to an unlawful interference and the amount of force necessary to prevent or terminate it. At the time of trial, ***State v. Camacho***, 176 Wis. 2d 860, 865, 870-72, 501 N.W.2d 380 (1993), reflected the state of the law that first-degree homicide is not mitigated to imperfect self-defense homicide (second-degree) unless the defendant had a reasonable belief that he or she was preventing or terminating an unlawful interference, even if the defendant actually believed so. The subjective belief was not found applicable to second-degree homicide until the decision in ***State v. Head***, 2002 WI 99, ¶¶91, 103-104, 255 Wis. 2d 194, 648 N.W.2d 413, modifying ***Camacho*** and decided after Wolfe's trial. Counsel's strategy decision is not unreasonable when based on the present state of the law. *See* ***McMahon***, 186 Wis. 2d at 84-85 (no ineffective assistance of counsel where the area of law is murky because ineffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue).

¶11 Counsel was allegedly deficient for not seeking the admission of letters recovered from Carter's house or using those letters in cross-examination. The letters were authored by Carter to various people, including Wolfe, Carter's

mother, the other inmate Carter bailed from jail and threatened, another inmate Carter offered to help, and Carter's daughter and neighbors. Some of the letters apparently used vile language and wished certain persons dead. The letters to Wolfe reflected how Carter became acquainted with Wolfe and the relationship he wanted to establish with him. Wolfe contends that the letters would have served to reflect Carter's moods and capacity for anger and threats.

¶12 Counsel assessed the vast number of letters as inadmissible. This was an accurate assessment in that many of the "hate" letters were written more than a month before Carter's death and therefore not related to Carter's state of mind on the day of the stabbing or with regard to his relationship with Wolfe. Evidence was presented that Carter threatened another inmate with a knife when sex was rejected. Further, the evidence was that Wolfe was aware of that behavior. In contrast, there was no suggestion that Wolfe was aware of the numerous letters and their content such that it would have impacted on his interpretation of Carter's behavior the day of the stabbing. There was also some evidence that Carter had written threatening letters with vile language. The jury knew the information Wolfe contends the letters would have imparted. The letters would have served nothing more than prejudicial piling on of extraneous information. No legal basis for admission of the evidence has been advanced. Our confidence in the outcome is not undermined by counsel's failure to utilize the letters at trial.

¶13 The final claim of ineffective assistance of counsel is that counsel failed to call Carter's friend to testify about jewelry Carter typically wore. There was testimony that Carter had a white tan-line on his pinky finger suggesting that he normally wore a ring on that finger which was missing when his body was discovered. Another witness testified that Wolfe admitted to her that he took three

diamond rings from Carter. Wolfe showed the rings to his friend. Wolfe contends the testimony from Carter's friend would have resulted in an acquittal on the misdemeanor theft charge because the friend would have indicated that Carter did not wear rings described by other persons as possibly having been stolen.

¶14 Counsel testified that he did not consider presenting the friend's testimony because that witness had a criminal record and there was direct testimony that Wolfe admitted to taking rings from Carter. Counsel did not want to present testimony with so little probative value and detract from evidence presented in defense of the homicide charge. Not only was a reasonable strategy decision made, but no prejudice is demonstrated. The testimony from Carter's friend was not definite enough to make a different result reasonably probable had the testimony been presented. Moreover, there were Wolfe's own statements that he had taken credit cards and rings from Carter. Wolfe was not denied the effective assistance of trial counsel.

¶15 The letter Carter wrote to the circuit court on September 13, 2000, seeking to have Wolfe's bond revoked was admitted into evidence. In a pretrial hearing, the defense objected to the admission of the letter and the trial court ruled that it would not be admitted unless some witness corroborated Wolfe's knowledge of the letter and that it was authored by Carter. At trial one witness testified that Carter told her he had written to the court and was afraid of Wolfe. Other witnesses verified that Carter said Wolfe was using cocaine, that Wolfe had stolen money from him, and that Carter had written letters to have Wolfe's bond revoked. Wolfe made a statement to a friend that Carter wanted to get Wolfe's bond revoked because Wolfe had stolen money from Carter and Carter was scared for his life. When the prosecution renewed its motion to admit the letter, the defense withdrew its objection.

¶16 Wolfe characterizes the withdrawal of the objection as a waiver of his constitutional right to confrontation. He argues that the trial court erred by not engaging in a colloquy with him to assure that the waiver was made personally and not merely by counsel. We disagree that such a colloquy was required.

¶17 Admission of the letter did not violate Wolfe's right to confrontation because it was not hearsay evidence. The letter was admissible for the purpose of showing Carter's state of mind and not for the truth of the matters asserted within the letter. *See* WIS. STAT. § 908.01(3) (2001-02). It was also admissible to show Wolfe's knowledge of the request that bond be revoked and consequently a motive for the murder. The truth of the matters contained in the letter was inconsequential. Thus, Wolfe's confrontation rights were not implicated and no personal waiver required.

¶18 Finally, Wolfe challenges the sufficiency of the evidence to sustain the misdemeanor theft conviction. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the prosecution and the conviction, is so insufficient in probative value and force 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. Ray***, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992).

¶19 Here one witness testified that Wolfe showed her three rings he admitted stealing from Carter after the stabbing. Wolfe characterizes this witness as a "crack-head" and suggests the police did not believe her. The credibility of the witness was for the jury to determine. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Nothing suggests that the witness's testimony was incredible as a matter of law. Additionally, there was Wolfe's statement to police

that he had taken credit cards from Carter. The credit cards were recovered when Wolfe pointed out where he had stashed them. The evidence was sufficient to convict Wolfe of theft.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).