

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2009AP2995-CR

Cir. Ct. No. 2006CF2750

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ADRIAN A. STARKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Adrian Starks appeals a judgment of conviction for two counts of first-degree reckless homicide by delivery of drugs and one count of delivery of heroin. WIS. STAT. §§ 940.02(2)(a) and 961.41(1)(d)4. (2003-04). He also appeals the order denying his motion for postconviction relief. Starks argues

that he received ineffective assistance of trial counsel for a variety of reasons, that the prosecutor engaged in prosecutorial misconduct by making certain statements during closing argument, and that the circuit court erred when it allowed Starks to stipulate that heroin was a substantial factor in the death of one of the two victims. We conclude that these arguments lack merit, and affirm the judgment and order of the circuit court.

¶2 The facts in this case are not complicated. Starks sold heroin to a woman named Lavinia Mull. Mull then sold the heroin to other people. These people sold or gave the heroin to others, and two people who used the heroin, Sarah Stellner and Michael Ace, died. Stellner was twenty years old when she died, and Ace was thirty-one years old.

¶3 Starks was represented at trial by Attorney Randall Skiles. The jury found Starks guilty on all counts. Postconviction counsel was appointed to represent Starks, but Starks decided to represent himself. Starks brought a motion for postconviction relief, and the court held a hearing on the motion. Attorney Skiles, Starks, and others testified. The court denied the motion. Starks, again representing himself, appeals.

¶4 We first address Starks' ineffective assistance argument concerning the stipulation that heroin was a substantial factor in Ace's death. Starks' first claim is that his trial counsel was ineffective by not informing Starks that Ace's death had been ruled accidental by the coroner, and by allowing Starks to enter into the stipulation. Starks argues that the coroner's report indicated that Ace's death was accidental, and that, if he had known this, he would not have stipulated that heroin was a substantial factor in Ace's death. Starks also argues that counsel should have presented this evidence to the jury.

¶5 To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court's factual findings unless those findings are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel's performance independently as a question of law. *Id.* at 128. We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

¶6 The record shows that the coroner's report on Ace was prepared by the deputy coroner, who was neither a medical doctor nor the pathologist who performed the autopsy, Dr. Robert Huntington. At the postconviction motion hearing, one of the detectives involved in the investigation testified that Dr. Huntington said that heroin was a substantial contributor to Ace's death and that Huntington planned to testify to that at trial. Attorney Skiles testified that he was familiar with Dr. Huntington, had seen him as a witness, knew what kind of witness Dr. Huntington would be, believed him to be "quite an advocate," and did not want Dr. Huntington to testify at trial. Consequently, Attorney Skiles recommended to Starks that he agree to the stipulation. Attorney Skiles said it

was a strategic decision he made, knowing “the power of the testimony about someone dying,” and that he made the decision in consultation with Starks.

¶7 We agree with the circuit court that Attorney Skiles made a reasonable strategic decision to have Starks stipulate that heroin was a substantial factor in Ace’s death. The evidence that the deputy coroner’s report said the cause of death was accidental would have been overshadowed by the opinion of the pathologist, Dr. Huntington. Given counsel’s familiarity with Dr. Huntington as a witness, it was reasonable, and prudent, for counsel to pursue a stipulation. Starks did not receive ineffective assistance of trial counsel on this basis.

¶8 In a closely related argument, Starks contends that the circuit court erred by failing to adequately explain to him the ramifications of stipulating that heroin was a substantial factor in Ace’s death, and that the State was required to prove all of the elements of the offense even though he entered into a stipulation.

¶9 “When both the defendant and the district attorney agree that a fact is proven, the parties can stipulate to the existence of that fact. The stipulation dispenses with the need for further proof of the fact and is presented to the jury.” *State v. Warbelton*, 2009 WI 6, ¶49 n.20, 315 Wis. 2d 253, 759 N.W.2d 557. Consequently, the State was not required to provide evidence, in addition to the stipulation, that heroin was a substantial factor in Ace’s death. The circuit court also was not required to do any more than it did when it accepted the stipulation. A defendant need not make an express personal waiver to make a stipulation valid. *State v. Benoit*, 229 Wis. 2d 630, 638, 600 N.W.2d 193 (Ct. App. 1999). Moreover, in this case, Starks did make such a waiver. The record shows that the circuit court conducted an extensive colloquy with Starks before accepting the stipulation.

¶10 Starks also argues that trial counsel was ineffective for failing to investigate or introduce evidence that would have contradicted parts of Mull's testimony. Starks argues that Attorney Skiles should have introduced evidence of Mull's telephone records to impeach her testimony that she called Starks on April 26, and should also have called Starks' mother as an alibi witness.

¶11 Starks contends that the only fact connecting him to Stellner's death was Mull's testimony that Mull called Starks on April 26. Starks points out that Mull said she received a phone call from a man named Ryan Daley asking for heroin. Mull then called Starks to get heroin from him so that she could sell it to Daley, and Starks brought the heroin to Mull's residence. Mull then took the heroin to a gas station where she sold it to Daley. The meeting was recorded by a video camera, and took place around 2:15 a.m. on April 26, 2005. Daley then took the heroin back and gave it to Stellner's roommate, the roommate injected Stellner, and Stellner died.

¶12 Starks argues that counsel should have introduced Mull's phone records to show that Mull did not call Starks in the early morning of April 26, and that this evidence could have been used to impeach Mull's testimony that Mull obtained the deadly heroin from Starks.¹ Starks calls this evidence "critical," and argues that "[t]his significant revelation breaks the only viable nexus between Starks" and the heroin.

¹ Starks asserts that Mull testified that she did not use her landline to call Starks. He argues that the phone records that should have been introduced are the records of the phone "the State established Mull was using on April 26, 2005." By this, we assume he means records of a phone other than her landline.

¶13 At the postconviction hearing, Attorney Skiles testified that he did not pursue this line of inquiry because, in his experience, an inconsistency in a date is not an effective basis for impeachment. In effect, Attorney Skiles explained that proving Mull was wrong about the date would not prove that she lied about talking with Starks around that general time about heroin. Attorney Skiles testified that he believes it is more effective to show that the witness had lied. The record shows that, when Attorney Skiles cross-examined Mull, he focused on statements that he claimed were more clearly lies.

¶14 We conclude that counsel was not ineffective for failing to pursue this line of inquiry. Starks asserts that the phone records were exculpatory. The argument, as Starks frames it, assumes that the date Mull called him is an essential fact for a conviction. The State, however, was not required to prove that Starks sold the heroin to Mull on a particular date. Mull testified repeatedly at trial that she obtained the heroin from Starks, who is also called “Big Homey.”² Based on this evidence, trial counsel did not perform deficiently by failing to impeach Mull with the phone records because the phone records would not have proven that Starks was innocent. Even assuming that counsel performed deficiently by not pursuing this evidence, Starks was not prejudiced by it given Mull’s testimony that Starks was her source for the heroin.

¶15 Starks also argues that trial counsel was ineffective for failing to call Starks’ mother as an alibi witness. Starks asserts that his mother would have testified that Starks was home in bed in the early morning hours of April 26, 2005.

² Although Mull initially told investigators that she obtained the heroin from others, she testified at trial that she did this only because she was afraid that Starks would hurt her and her family.

Attorney Skiles testified that he did not call Starks' mother because close relatives are generally not good alibi witnesses. Given Mull's repeated assertions that she got the heroin from Starks, we conclude that this evidence would not have helped Starks. Starks did not receive ineffective assistance of trial counsel on this basis either.

¶16 Starks makes two arguments based on his assertion that Mull had other sources for heroin. Starks argues that trial counsel was ineffective for failing to obtain phone records because those records also would have shown that Mull had other possible contacts for heroin. Starks argues that the records would have shown that Mull called one of her other possible sources for heroin twice in the weeks prior to Stellner's death. The State responds that the phone records showed that Mull called the other number twice in March of 2005, and called Starks three times in the days surrounding Stellner's death. This evidence, however, would not have negated Mull's testimony that Starks supplied her with the heroin that led to the two deaths in late April and early May. Trial counsel was not ineffective for failing to obtain or introduce these records.

¶17 Starks also asserts that there were witnesses who would have testified that Mull had other sources for heroin. Starks, however, did not call these witnesses at the postconviction hearing, so his assertions are speculative.³ Attorney Skiles testified that he had subpoenaed one of the witnesses for trial, but decided not to call the witness. Attorney Skiles testified that the witness's counsel said that the witness had identified Starks as his heroin supplier. Based on this

³ Starks claims in his reply brief that he does not know the identity of these potential witnesses, and thus could not call them to testify at the postconviction hearing. This assertion only reinforces our conclusion that his argument on this basis is mere speculation.

record, we conclude that Attorney Skiles' decision not to call this witness was a reasonable strategic decision.

¶18 Starks makes two arguments involving comments made by the prosecutor. During closing argument, the prosecutor said that Starks did not have a job, and let his girlfriends pay his expenses. The prosecutor commented that Starks was still able to pay his rent and move into a more expensive apartment. The prosecutor then said: "We know he's got a residence according to Dickinson in Chicago. How's he afford that if he's not dealing drugs?" In his closing, Attorney Skiles suggested that the prosecutor's remark about a house in Chicago was speculation.⁴ During rebuttal, the prosecutor said: "[Starks has] got a place in Chicago according to Dickinson. Attorney Skiles said that [it] belonged to somebody else. I don't believe there's any evidence in the record that it belonged to somebody else, Dickinson said that's his place." Starks asserts that the prosecutor engaged in prosecutorial misconduct by making the comments because there was no evidence that Starks owned the house in Chicago. Starks also argues that his trial counsel was ineffective for failing to object to the comments.

¶19 Starks is correct that there was nothing in the record to support the prosecutor's argument that drug dealers typically purchase houses in other places and have those houses titled in someone else's name. We will assume that the

⁴ Attorney Skiles said:

The District Attorney gets up here and speculates that [Starks is] this big heroin dealer making all this money, but where's the evidence of this? That allegedly he has three or four cell phones, that you've heard of an old purple minivan and a Buick in someone else's name. That there's a house that someone else owns [in Chicago]. Everything else is pure speculation

statements the prosecutor made about the Chicago house were improper. We also conclude, however, that the comments were harmless. An error is harmless if the record establishes beyond a reasonable doubt that a rational jury would have reached the same verdict without the error. *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. The evidence that Starks supplied the heroin that killed Stellner and Ace was strong, and was not dependent on any facts related to the house in Chicago. We are convinced that these comments did not affect the outcome of the trial. For the same reason, we conclude that Starks cannot establish that he was prejudiced by such comments. Because Starks cannot establish prejudice, trial counsel was not ineffective for failing to object to these comments. For the reasons stated, we affirm the judgment and order of the circuit court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

