COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1316-CR **Cir. Ct. No. 2006CF6397**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS A. HICKS,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Marcus A. Hicks appeals the judgment entered after a jury convicted him of two counts of first-degree intentional homicide, while armed, as a party to the crimes, and one count of attempted first-degree intentional homicide, while armed, as a party to the crime. *See* WIS. STAT. §§ 940.01(1)(a),

939.63, 939.32, 939.05. Hicks also appeals the order denying his motion for postconviction relief. He argues that his trial lawyers gave him constitutionally deficient representation: (1) by not objecting to the testimony of the interim director of the Milwaukee County Medical Examiner's Office regarding the cause of the victims' deaths; and (2) by not objecting to a detective's testimony about a victim's prior statement. We disagree and affirm.

BACKGROUND

¶2 The charges against Hicks stem from a fight that took place outside of a Milwaukee bar. According to the complaint, witnesses saw Hicks pull out a gun and fire numerous shots. A jury found Hicks guilty of two counts of first-degree intentional homicide, while armed, as a party to the crimes, and one count of attempted first-degree intentional homicide, while armed, as a party to the crime.

¶3 The trial court sentenced Hicks to life in prison with no possibility of extended supervision on each of the two counts of first-degree intentional homicide, with the sentences to run consecutively. On the count of attempted first-degree intentional homicide, the court sentenced Hicks to forty years' initial confinement and twenty years' extended supervision, to run concurrent to the life-imprisonment sentences.

¶4 Hicks filed a motion for postconviction relief, alleging that his trial lawyers were ineffective. The trial court denied his motion, and Hicks appeals.

ANALYSIS

¶5 As stated, Hicks claims that his trial lawyers gave him constitutionally deficient representation in two regards: (1) by not objecting to the

testimony of the interim director of the Milwaukee County Medical Examiner's Office regarding the cause of the victims' deaths; and (2) by not objecting to a detective's testimony about a victim's prior statement.

¶6 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific "acts or omissions" by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. As ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997), tells us, this "is not an outcome-determinative test." Rather, "the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***Ibid.*** (citation omitted).

¶7 We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697. Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions—whether the

lawyer's performance was deficient and, if so, prejudicial—present questions of law we review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848.

A. *Failure to object to alleged Confrontation Clause violation.*

¶8 Hicks claims that he was denied the effective assistance of his trial lawyers when they did not object to the testimony of Dr. Russell Alexander, the interim director of the Milwaukee County Medical Examiner's Office at the time of Hicks's trial. Dr. Alexander testified that both victims died as a result of gunshot wounds. Because Dr. Alexander's testimony was based on reports that he did not personally prepare, Hicks contends that Dr. Alexander acted as a mere conduit for the individual who did prepare the reports. Because that individual did not testify, Hicks asserts that his Sixth Amendment right to confront the witnesses against him has been violated. We disagree.

¶9 Even if Hicks's trial lawyers were deficient in failing to object to Dr. Alexander's testimony, we conclude that Hicks has not demonstrated prejudice. Citing ***Davis v. Alaska***, 415 U.S. 308, 318 (1974), Hicks argues that he does not need to demonstrate prejudice because "[a] denial of cross-examination, and hence the confrontation clause, is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Hicks is mistaken. First, Hicks raises an ineffective-assistance-of-counsel claim, and not a confrontation-clause claim; therefore, he must make a showing of prejudice. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 678, 683 N.W.2d 31, 41–42 (in the absence of an objection we address issues under the ineffective-assistance-of-counsel rubric); ***State v. Ellington***, 2005 WI App 243, ¶14, 288 Wis. 2d 264, 278, 707 N.W.2d 907, 913–914 (confrontation). Second, the United States Supreme Court has clarified that while some constitutional errors are so

compelling that a showing of prejudice is not required, "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 682 (1986).

¶10 The Record reveals that the cause of death was not a disputed issue at trial; instead, the trial centered on whether Hicks was responsible for firing the fatal gunshots. Hicks has not shown a reasonable probability that had his trial lawyers objected and had the trial court precluded Dr. Alexander from testifying, the result of his trial would have been different. He has not, therefore, shown ***Strickland*** prejudice.

B. *Failure to object to detective's testimony.*

¶11 Hicks also claims that he was denied the effective assistance of his trial lawyers when they did not object to the testimony of Detective Louis Johnson. Detective Johnson testified that Antonio Hardnett, the victim of the attempted first-degree intentional homicide charge, gave a statement identifying Hicks as the person who shot him. According to Hicks, this testimony was inadmissible hearsay.

¶12 During trial, Hardnett testified twice that he did not know who shot him. He also testified that he did not remember telling Detective Johnson that he knew who shot him. The State subsequently elicited testimony from Detective Johnson that Hardnett told him Hicks had shot him.

¶13 WISCONSIN STAT. RULE 908.01(4) provides: "A statement is not hearsay if: (a) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the

statement is: 1. Inconsistent with the declarant's testimony." (Formatting altered.) Hardnett's prior statement to Detective Johnson that Hicks shot him was inconsistent with his trial testimony that he did not know who shot him. Accordingly, Detective Johnson's testimony that Hardnett gave a statement identifying Hicks as the person who shot him was not inadmissible hearsay and could be used not only to impeach Hardnett's trial testimony, but also as substantive evidence. *See* ***State v. Horenberger***, 119 Wis. 2d 237, 247, 349 N.W.2d 692, 697 (1984).

¶14 A lawyer does not act outside the scope of professionally competent assistance by not objecting to evidence that is not objectionable. *See* ***State v. Ewing***, 2005 WI App 206, ¶18, 287 Wis. 2d 327, 336, 704 N.W.2d 405, 410 (where defendant fails to establish that evidence was inadmissible, the lawyer does not perform deficiently for failing to object). Consequently, Hicks has failed to show that his lawyers performed deficiently by not objecting to Detective Johnson's testimony regarding Hardnett's prior inconsistent statement.

By the Court.—Judgment and order affirmed.

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