COURT OF APPEALS DECISION DATED AND FILED

February 29, 2012

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. 2010AP3027-CR

Cir. Ct. No. 2008CF682

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZACHARY B. REID,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Zachary B. Reid appeals from a judgment convicting him of first-degree intentional homicide and from the order denying his motion for postconviction relief. We reject his arguments that his trial counsel

was ineffective, that the trial court made erroneous evidentiary rulings and that he merits a new trial in the interest of justice because the real controversy was not tried. We therefore affirm the judgment and order.

¶2 Sixteen-year-old Zachary killed his father, Brett. It is undisputed that Brett drank heavily and became "mean" when drinking. He physically abused Zachary for years but turned mainly to emotional and verbal abuse when Zachary outgrew him. Zachary told police that, on this occasion, Brett came at him with a knife. Zachary said he put Brett in a chokehold meaning only to disable him, but when he released his hold he realized Brett was dead. However, Zachary then put a plastic bag over Brett's head, secured the bag with a belt, wrapped the body in a blanket, put it in the trunk of Brett's car and abandoned the car in the parking lot of a local elementary school. Zachary then went out with friends.

¶3 Zachary was charged with first-degree intentional homicide and was waived into adult court. His theory of defense was self-defense; the State argued that he seized the opportunity to carry out a killing he had contemplated for some time. After a five-day trial, the jury rejected Zachary's self-defense claim and found him guilty. He was sentenced to life imprisonment, his postconviction motion was denied, and he appeals.

Ineffective Assistance of Counsel Claims

¶4 Zachary first contends that his trial counsel was constitutionally ineffective in several respects. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***State v. Thiel***¸ 2003

WI 111, ¶¶18-19, 264 Wis. 2d 571, 665 N.W.2d 305. To prove prejudice, "the 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.***, ¶20 (quoting ***Strickland***, 466 U.S. at 694). The critical focus is not on the outcome of the trial but on "the reliability of the proceedings." ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). If we determine that Zachary has failed to satisfy either prong of the ***Strickland*** test, we need not consider the other one. *See* ***Strickland***, 466 U.S. at 697.

¶5 Appellate review of an ineffective-assistance claim presents a mixed question of law and fact. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We will not disturb the trial court's findings of fact unless they are clearly erroneous, but the determination of whether counsel's performance was ineffective presents a question of law. ***Id.*** In reviewing trial counsel's performance, we presume that counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We review the case from counsel's perspective at the time of trial and make every effort to avoid determinations of ineffectiveness based on hindsight. ***Id.***

1. Failure to Consider Intoxication Defense

¶6 The first challenge Zachary raises to trial counsel's performance stems from counsel's acknowledged failure to consider a voluntary intoxication defense. Zachary testified at the postconviction motion hearing that he actually was "trashed" when he killed Brett. He claimed that, in the five hours preceding the incident, he had consumed six hydrocodone pills and an inch-and-a-half of vodka from a half-gallon bottle, and smoked a marijuana "blunt," but that he lied

to everyone, including the police, and did not inform his counsel because he thought it would not "look good for [his] self-defense." Zachary claims counsel should have investigated his history of alcohol and drug use, explored whether he possibly was intoxicated at the time he killed Brett, and advised him about a voluntary intoxication defense. This argument goes nowhere.

¶7 An actor's voluntary "intoxicated or a drugged condition" is a defense only if it negates a state of mind essential to the crime. *See* WIS. STAT. § 939.42(2). First-degree intentional homicide requires the intent to kill. WIS. STAT. § 940.01(1)(a). Therefore, Zachary would have had to establish that he was intoxicated to a degree that he was "utterly incapable of forming the intent requisite to the commission of the crime charged." ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

¶8 Trial counsel acknowledged at the ***Machner***[1] hearing that he was aware that Zachary had used marijuana in the past, had been accused of stealing opiates from a friend's father and had pills and a clean urine sample on him when arrested. Counsel testified that he never considered an intoxication defense, however, for a number of reasons—the main one being that Zachary's consistent position was that he insisted that he feared for his life and, in self-defense, used only the amount of force he believed necessary.

¶9 Neither the physical facts nor the testimony provide a basis for a finding that Zachary was utterly incapable of forming an intent to kill. A police report indicated that an officer asked Zachary whether he was "using any type of

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[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

drugs or alcohol" before the incident; Zachary unequivocally replied that he was "completely sober" and had not used marijuana for nearly a month. A surveillance camera from a gas station Zachary and his friends stopped at about two hours after the killing showed Zachary walking a line in the parking lot without noticeable difficulty. Zachary's friends testified that he appeared "sober" and "normal." Zachary did not sound intoxicated on two voicemails he left for his mother around the time of the killing. The "intoxicated or … drugged condition" to which WIS. STAT. § 939.42(2) refers is "that degree of complete [intoxication] which makes a person incapable of forming intent to perform an act or commit a crime." ***Guiden***, 46 Wis. 2d at 331. Nothing except Zachary's postconviction claim indicates that he was in such a condition.

¶10 Furthermore, Zachary gave police a fact-rich account of the crime and the hours surrounding it. At trial he again described the altercation and how he disposed of the body. A defendant's vivid and detailed memories of his crime undermine a voluntary intoxication defense. *See* ***State v. Nash***, 123 Wis. 2d 154, 166, 366 N.W.2d 146 (Ct. App. 1985).

¶11 Given Zachary's recollection of events, the series of acts performed, the clarity of his voicemails, the surveillance camera footage, his statement to police and the testimony of those who were with him after the killing, trial counsel was not deficient for failing to pursue a claim that drug and alcohol consumption rendered Zachary utterly incapable of forming the intent requisite to the commission of the crimes charged. Moreover, asserting that he actually was "trashed," in the face of significant contrary evidence, would have seriously undermined Zachary's credibility. The evidence shows that an intoxication defense would have been highly unlikely to succeed. Accordingly, counsel was not deficient for failing to pursue that defense. *See* ***State v. Wheat***, 2002 WI App

153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel not ineffective for failing to raise meritless claim).

2. Presentation of "Hybrid" Defense

¶12 Besides arguing that trial counsel failed to raise the intoxication defense, Zachary also contends that counsel was ineffective for presenting the defense that he did. He claims counsel advanced an unavailable "hybrid" defense of self-defense-as-a-battered-child. We agree with Zachary that Wisconsin does not recognize a battered-child defense in a single-phase trial or in the guilt phase of a bifurcated trial. Psychiatric opinion testimony about whether the defendant had the capacity to form criminal intent is inadmissible when based on the defendant's mental health history. *See* ***Steele v. State***, 97 Wis. 2d 72, 97, 294 N.W.2d 2 (1980), *limitation of holding recognized,* ***State v. Flattum***, 122 Wis. 2d 282, 302, 361 N.W.2d 705 (1985); *see also* ***State v. Morgan***, 195 Wis. 2d 388, 416-17, 536 N.W.2d 425 (Ct. App. 1995) (agreeing that evidence of teen's alleged post-traumatic stress disorder (PTSD) not relevant in guilt phase of trial). Like the trial court, however, we disagree with Zachary that counsel took that route.

¶13 Zachary testified to the following. Brett came at him with a knife in a threatening manner, said, "Who's the macho man now?" and "Either kill yourself or kill me," and lowered his arm as though about to thrust the knife toward Zachary's chest. "[A]fraid for [his] life at that point," Zachary sidestepped Brett, got behind him and put him in a chokehold. He testified that Brett dropped the knife but then tried to "smash my testicles," so Zachary strengthened the chokehold and they both fell to the floor against a chair, Brett on top of Zachary. Zachary said he maintained the chokehold because the knife was "right there" and he thought Brett would reach for the knife and try to stab him. Zachary said he let

go when Brett's legs "kind of kicked" and he thought he had "done enough that, when I laid him down, he would just be passed out." Zachary discovered that Brett had soiled himself and was not breathing.

¶14 Defense counsel retained child psychiatrist Dr. Wade Myers as an expert witness. The court permitted Dr. Myers to testify that Zachary suffered from PTSD, dysthymia and physical abuse of a child because it was relevant to explain some of his acts after the incident.[2] *See* ***Flattum***, 122 Wis. 2d at 288-89 (mental health history evidence is admissible if relevant). At the end of Dr. Myers' direct examination, counsel expressly asked him if he was "offering any opinions today regarding Zachary's intent to commit this offense." Dr. Myers answered, "No, I'm not." We agree with the trial court that postconviction counsel tossed out a red herring in characterizing trial counsel's defense theory as a quasi-battered-child defense. While the jury heard evidence of the father's history of abuse, the record is clear that the defense theory was self-defense.

3. Stipulation to Untruthful Answers

¶15 As another example of allegedly deficient performance, Zachary contends that counsel stipulated that he lied, demolishing his credibility, which was the heart of his case. Put in context, this claim must fail.

¶16 As part of his forensic evaluation, Zachary self-reported on a questionnaire that he never wanted to hurt people and never got into fights. Partly

[2] For instance, Zachary explained that he had put the bag on Brett's head to prevent leakage of fluids onto the carpet and ruining it. Dr. Myers testified that, even though Brett was dead, PTSD could explain that Zachary still operated out of an "emotional or psychological habit of trying to appease the parent and stay out of trouble."

based on those responses, Dr. Myers testified that Zachary's PTSD could explain some of his actions.

¶17 Pretrial, the State had moved to be allowed to introduce evidence of six incidents of violence involving Zachary in the months preceding the killing. The court permitted only the two that involved Zachary and Brett. When the State learned about Zachary's self-report, it moved for reconsideration of the evidentiary rulings on two of the incidents. In one, Zachary threw a soda can out his car window at two boys on bikes. When one of them hollered, "Nice throw," Zachary stopped, approached them with a knife and said, "How funny would it be if I slit your throat so you couldn't talk crap anymore?" The other incident took place just two days before he killed Brett. Zachary drove past a pedestrian, yelled, "Hey, faggot, I'm going to kill you," turned his car around, jumped out and punched and head-butted the person.

¶18 Trial counsel argued against allowing that evidence in because it would divert the jury's attention from the real issue of self-defense. The court proposed a compromise: if counsel stipulated that Zachary answered the two questions untruthfully, the State could ask Dr. Myers if it would change his diagnosis if he learned that those answers were untruthful. Counsel agreed.

¶19 Although Dr. Myers testified that the falsehoods would not alter his diagnosis, counsel acknowledged at the ***Machner*** hearing that the stipulation damaged both Zachary's and Dr. Myers' credibility. Zachary claims that counsel's concession proves deficient performance and that the resulting guilty verdict shows the deficiency was prejudicial. We disagree. It would have been far more damaging to allow the State to probe two incidents of unprovoked

aggression, the one occurring just two days before Zachary choked Brett. We agree with trial counsel that stipulating was the better alternative.

4. Violation of Confrontation Rights

¶20 Zachary next complains that counsel failed to object to the admission of irrelevant, damaging evidence, thus violating his right to confrontation. Brett's sister was allowed to testify that Brett dropped off a shotgun at her house a week before he died and told her he was afraid Zachary was either going to kill him or kill himself.

¶21 Zachary's right to confront witnesses was not abridged. The Confrontation Clause applies only to testimonial statements. *See* ***State v. Jensen***, 2011 WI App 3, ¶26, 331 Wis. 2d 440, 794 N.W.2d 482 (Ct. App. 2010). Brett's statement was not testimonial. *See* ***State v. Doss***, 2008 WI 93, ¶43, 312 Wis. 2d 570, 754 N.W.2d 150. Statements made to others about intimidation are excludable, if at all, only by hearsay rules. ***Jensen***, 331 Wis. 2d 440, ¶22. Brett's statement to his sister falls well within the broad forfeiture-by-wrongdoing exception to the hearsay rule, under which an absent witness' statement is admissible against a defendant who the trial court determines by a preponderance of the evidence caused the witness' absence. *See* ***id.***, ¶¶23, 28.

5. Failure to Correct/Object to Presentence Investigation Report

¶22 Zachary next argues that trial counsel failed to prevent "suicide by pre-sentence" by not objecting or offering corrections to the PSI. The PSI contained some undeniably shocking references to text messages and statements attributed to Zachary about being "put on this planet to kill," wanting to become a serial killer, being a necrophiliac and drinking blood. This claim also fails.

¶23 Trial counsel had no basis on which to claim that the statements were not correct. To date, Zachary does not dispute that he made them.[3] After preparing the report, the PSI writer had Zachary review it and asked him, "Is this right? Are these your words?" to which he answered, "It's close enough." Accordingly, rather than seeking a continuance to obtain an independent PSI, as he first considered, counsel adopted the strategy of arguing that Zachary had so given up on a system he believed had given up on him that he did not think it mattered if he told the truth or made outrageous claims. Under the circumstances, counsel cannot be faulted.

¶24 The trial court ultimately determined that counsel undertook a reasonable trial strategy on each of Zachary's claims of error. That determination is "virtually unassailable." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620. Zachary's ineffectiveness claims fail.

Evidentiary Rulings

¶25 Zachary next contends that the trial court erroneously exercised its discretion when it barred evidence of Brett's violent acts toward Zachary's mother and sister and of some acts of violence toward him. He argues that he should have been allowed to establish what he believed to be Brett's violent character by proving prior specific instances of violence within his knowledge at the time of the incident. *See* ***McMorris v. State***, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973).

[3] Zachary now claims that, since he was going to an adult prison, he was trying to make himself appear tougher.

¶26 Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or needless presentation of cumulative evidence. WIS. STAT. § 904.03. A trial court has broad discretion in determining the relevance and admissibility of proffered evidence. ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). We will uphold the trial court's determination where the court exercised its discretion according to accepted legal standards and in accordance with the facts of record. ***State v. Fishnick***, 127 Wis. 2d 247, 257, 378 N.W.2d 272 (1985). If a reasonable basis exists for the trial court's determination, we will not find an erroneous exercise of discretion. ***Id.***

¶27 The court did allow Zachary to testify that Brett once had threatened him with a shotgun and had waved knives at him on several occasions. It also permitted Dr. Myers to testify about Brett's general abuse when Zachary was in middle school and high school. Other witnesses testified to Brett's general reputation as a violent person. The court reasoned, however, that some of the acts were too dissimilar or too remote in time, were likely to cause jury confusion, or that their probative value was substantially outweighed by the danger of unfair prejudice.

¶28 The trial court explained why it put limits on the amount of character evidence it would allow in. Remoteness and similarity are proper considerations in determining probative value. *See* ***State v. Hunt***, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771. Some were too general. *See* ***McMorris***, 58 Wis. 2d at 152 (a court may allow proof of prior *specific* instances of violence). The court also determined that some of the evidence of Brett's character faults and prior acts, although relevant, was unfairly prejudicial. The issue was not whether Brett deserved to die. It was the reasonableness of Zachary's fear for his own safety and

of his belief that deadly force was necessary. *See* ***id.*** at 151. The jury had such evidence before it. The court's rulings had a reasonable basis.

New Trial in the Interest of Justice

¶29 Alternatively, Zachary seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶30 Here, Zachary asserts that trial counsel's ineffectiveness and the trial court's erroneous evidentiary rulings kept material, crucial evidence from the jury, thwarting its search for truth. *See* ***id.*** at 142. We already have considered and rejected those arguments. Therefore, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Zachary a new trial.

By the Court.—Judgment and order affirmed.

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