COURT OF APPEALS
DECISION
DATED AND RELEASED

August 29, 1995

No. 94-2999-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOUISSANT LARONE HARLEY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Sullivan, Fine and Schudson, JJ.

SCHUDSON, J. Touissant Larone Harley appeals from the judgment of conviction for first-degree intentional homicide while armed with a dangerous weapon, for the killing of Christopher Sallis, and first-degree reckless injury while armed with a dangerous weapon, for the wounding of Aaron Evans. Harley also appeals from the trial court order denying his postconviction motions. He seeks a new trial on the homicide count,

contending that the trial court erred in not instructing the jury on voluntary intoxication in response to the jury's question during deliberations. He also seeks a new trial on both counts, contending that his trial attorney had a conflict of interest. We conclude that the trial court correctly responded to the jury's question. We also conclude that the trial court erred in denying Harley an evidentiary hearing on his allegation of conflict of interest.

On the night of August 15, 1991, in an apparently unprovoked attack, Harley walked up to Sallis and Evans near a concession stand at Bradford Beach on Milwaukee's lakefront. Harley fired four or five shots at close range, killing Sallis and wounding Evans. In his statement to the police, introduced at the trial, Harley said that he intended to shoot Sallis in the leg, not kill him. At the trial, however, Harley denied any intent to shoot either man. He claimed that the gun fired accidentally as he pulled it from his waistband to hand it to a companion.

Although Harley testified that he had been drinking heavily during the hours preceding the shooting, defense counsel emphasized that Harley was not asserting intoxication as a defense. Following the State's case-in-chief, defense counsel presented his opening statement, explaining:

> There are some questions we can't give you answers to, and one of those questions is why did this happen. Touissant Harley will tell you he doesn't even know why it happened. The evidence that we are going to be showing is that on August 15, 1991, during the day, Touissant Harley and a number of his friends had been drinking. At this time, Touissant Harley had two broken hands, which were set by pins. He was taking Tylenol with codeine. *He was a little high, but knew what he was doing. And that's not an excuse, and we're not using it as an excuse or a cop-out.*

(Emphasis added.) In his closing argument, counsel emphasized that "[i]t's our position that Mr. Harley was reckless from the beginning to the end of the whole situation," but that he did not intend the shootings. He reiterated that

Harley did not know why the shootings occurred; counsel's closing argument never referred to intoxication.

Counsel's opening statement and closing argument corresponded to Harley's testimony. Harley testified that in committing the shootings he acted recklessly, negligently, carelessly, and foolishly, but he denied any intent to kill Sallis. Although he testified about the alcohol he had consumed and the Tylenol 3 he had been taking, and although Harley said that he was "drunk" and that one of his companions had told him that he was "sloppy drunk," he never claimed any impairment from intoxication. Harley did not request an instruction on voluntary intoxication and the trial court did not give one.[1]

The State's evidence of Harley's intent was strong. Among the witnesses was Tammy Dronso who testified that she observed Harley holding the gun out at "[a]bout arms reach" to within a "couple inches" of Sallis's back when the shots fired. Monty Lutz, a firearms expert from the state crime laboratory, testified that the gun was a semi-automatic requiring a separate trigger pull for each shot, and that it had a ten pound trigger pull. Dr. James Henry, who performed the autopsy, testified that the shots into Sallis's body were fired from a distance of no more than eighteen to twenty-four inches. Milwaukee Police Detective David Clarke testified that Harley, in the statement he gave following his arrest, said "that this wasn't supposed to be about murder, that he only meant to shoot the guy in the leg." Detective Clarke also testified that Harley exhibited no signs of intoxication and that Harley told him that he was sober.

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[1] Tailored to this case, the intoxication instruction would have read:

> In deciding whether the defendant acted with the intent to kill, you must consider the evidence that he was intoxicated at the time of the alleged offense. If the defendant was so intoxicated that he did not intend to kill Christopher Sallis you must find him not guilty of first degree intentional homicide. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant intended to kill Christopher Sallis.

WIS J I—CRIMINAL 765. *But see* ***State v. Foster***, 191 Wis.2d 14, 26-27, 528 N.W.2d 22, 27 (Ct. App. 1995) (concluding that this standard instruction is not an accurate statement of law).

During deliberations the jury sent a question to the court: "From 'intent to kill ... having mental purpose...,' As far as 'mental purpose' is concerned does the influence of drugs or alcohol enter in to the decision?" (Ellipses in original.) The trial court, defense counsel, and the prosecutor then discussed what the proper response should be. Although defense counsel never asked the court to instruct the jury on the intoxication defense, he did ask that the trial court answer the jury's question by instructing, "'You can consider all the evidence that was allowed' ... and that includes the fact that [Harley] was sloppy drunk." The State objected to such highlighting of any portion of the evidence. The trial court reviewed the committee notes to the jury instructions, considered a number of possible instructions to the jury, and ultimately responded to the question by writing a note back to the jurors stating "that they may consider all of the evidence as to each element of the offense."

Harley first challenges his conviction on the homicide count. He argues that the trial court erred in not instructing the jury on voluntary intoxication to "adequately answer[] the jury's specific question on the interplay between intoxication and intent to kill."[2] We conclude that the trial court correctly declined to provide an additional instruction on voluntary intoxication because the evidence established no basis for the instruction.

Recently we explained:

> Just as the initial jury instructions are within the trial court's discretion, so, too, is the "necessity for, the extent of, and the form of re-instruction" in response to requests or questions from the jury.... [W]hen the court receives an inquiry from the jury, it should "respond ... with sufficient specificity to clarify the jury's problem."

State v. Simplot, 180 Wis.2d 383, 404-405, 509 N.W.2d 338, 346 (Ct. App. 1993) (citations omitted).

[2] Harley does not argue that the trial court should have instructed on voluntary intoxication in its original instructions.

Under § 939.42(2), STATS., "[a]n intoxicated or a drugged condition ... is a defense *only if* such condition ... [n]egatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3) [discussing criminal recklessness]." (Emphasis added.) Here, although Harley refers to evidence of his intoxication, he points to no evidence connecting his condition to lack of intent. Indeed, he never maintained that intoxication caused the shootings or militated against his intent; Harley contended that he did not know why the shootings occurred and that his actions were reckless, negligent, careless, and foolish. As the supreme court explained:

> [T]o qualify for an instruction on the defense of voluntary intoxication, the defendant must produce evidence sufficient *to raise intoxication as an issue*. To do this he must come forward with some evidence of the degree of intoxication which constitutes the defense. An abundance of evidence which does not meet the legal standard for the defense will not suffice. *There must be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime. A bald statement that the defendant had been drinking or was drunk is insufficient*—insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing. In order *to merit an intoxication instruction ..., the defendant must point to some evidence of mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill.*

State v. Strege, 116 Wis.2d 477, 486, 343 N.W.2d 100, 105 (1984) (emphasis added). In this case, Harley offered absolutely no evidence "to raise intoxication as an issue." He offered nothing to suggest that his "mental faculties were so overcome by intoxicants that he was incapable of forming the intent," or that he suffered any "mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill." Thus, there

was no basis for the trial court to respond to the jury's question by instructing the jury on voluntary intoxication.[3]

Harley next challenges his convictions on both counts arguing that he received ineffective assistance of counsel because his "trial lawyer had an impermissible conflict of interest [resulting from his romantic relationship with Harley's mother] and the trial court erred in denying [him] a hearing to prove the existence of the conflict."

In support of the postconviction motion, Harley's counsel argued "[w]e're prepared to make a record with respect to [an actual conflict of interest resulting from Harley's trial attorney's romantic relationship with Harley's mother] and how my client believed that his representation was materially limited by [trial counsel]." The trial court allowed appellate counsel to submit a documentary offer of proof in support of the motion and the request for an evidentiary hearing.

According to the offer of proof, Harley's mother knew Harley's trial attorney because he had previously represented her in a child-support matter. When she contacted counsel to represent her son in this case, counsel told her that he would need a substantial retainer to do so. Harley's mother told counsel that she had no money to retain his services. After subsequent discussions, he agreed to accept her son's case at no charge. In the months that followed, Harley's lawyer became romantically involved with his mother. Counsel spent considerable sums of money for gifts, jewelry, and other items for her, and their relationship lasted throughout the period of Harley's trial preparation and trial. When Harley's mother asked counsel if a psychological evaluation of her son, or services of an investigator would be helpful, he "told her that she did not have the funds required for such an evaluation or an investigator and that it was not worth pursuing in any event." During the period of trial preparation Harley "felt that [counsel] was more interested in talking about his mother and other members of the family than he was in talking about the case." Further, "[h]e also asked [counsel] about someone to

[3] Our conclusion obviates the need to further address Harley's arguments raising essentially the same issue in the context of: (1) ineffective assistance of counsel for not specifically requesting an intoxication instruction in response to the jury's question; and (2) new trial in the interest of justice.

interview witnesses. He was told by his lawyer and mother that there was no money for these services." Neither Harley's mother nor lawyer told Harley about their romantic relationship until well after Harley's sentencing. Had he known about the relationship between his mother and lawyer, Harley would have wanted another lawyer.

After reviewing the offer of proof, the trial court denied the request for an evidentiary hearing concluding:

> [Counsel's] relationship with the defendant's mother ... had no effect whatsoever on the case.
>
> If she was indigent, he wouldn't have been able to retain an investigator or do the other things that were suggested might have been done, whatever his relationship with the defendant's mother was.[4]
>
> And so I don't see where that makes any difference.
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> ...[I]t appears to me that [counsel] represented Mr. Harley to the best of his ability, whatever his relationship with the defendant's mother was; and I am satisfied that, on the basis of the offer of proof, there is no indication that the defendant was prejudiced in any way or that the representation was compromised in any way, or that the defendant received any less defense than he would have under any other circumstances.
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> ...I don't see where a hearing is necessary or required, and I am satisfied that there is no basis to believe that [counsel] was compromised in any way in his representation of Mr. Harley or that Mr. Harley's defense was affected in any way.

[4] We note the apparent inaccuracy of this comment; an indigent defendant often is entitled to appointment of investigators and mental health professionals.

We conclude that Harley's offer of proof provided a sufficient basis on which to grant his request for an evidentiary hearing on the alleged conflict of interest. As we recently explained:

> An allegation that counsel was ineffective because of conflicting interests does not require analysis under the performance and prejudice tests established in ***Strickland v. Washington***. Rather, the analysis begins with the proposition that an actual conflict of interest adversely affects a lawyer's performance. Specific prejudice need not be shown if the defendant demonstrates by clear and convincing evidence that trial counsel actively represented a conflicting interest.

State v. Dadas, 190 Wis.2d 340, 344-345, 526 N.W.2d 818, 820 (Ct. App. 1994) (citations omitted). To establish "an actual conflict," it is not sufficient to "show that a mere possibility or suspicion of a conflict could arise under hypothetical circumstances." ***State v. Medrano***, 84 Wis.2d 11, 28, 267 N.W.2d 586, 593 (1978). Here, however, the offer of proof specified far more than "hypothetical circumstances" and provided more than "a mere possibility."

A defendant "does not have to show actual prejudice; once he shows an actual conflict he is entitled to relief." ***Id.*** This standard applies not only when examining a possible conflict of interest involving a lawyer's representation of two co-defendants, but also when examining a possible conflict of interest involving an attorney's representation of one defendant and the attorney's relationship with a third party connected to the case. *See* ***Gates v. State***, 91 Wis.2d 512, 523-524, 283 N.W.2d 474, 479 (Ct. App. 1979).[5] A lawyer's

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[5] *See also* SCR 20:1.7, STATS., which, in part, provides:

Conflict of interest: general rule.

....

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client *or a third person*, or by the lawyer's own interests, unless:

personal and financial interests in the strategy of litigation can establish the basis of a conflict of interest. ***State v. Franklin***, 111 Wis.2d 681, 331 N.W.2d 633 (Ct. App. 1983).

Appellate counsel raises a number of questions. Did counsel fail to provide Harley and his mother accurate information about the availability of an investigator and a psychologist provided through the public defender's office in order to conceal his relationship with her? Was his advice about the affordability of privately retaining such services compromised by his personal and financial relationship with Harley's mother? *See* ***Gates v. State***, 91 Wis.2d 512, 524, 283 N.W.2d 474, 479 (Ct. App. 1979) ("in a case of ... conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing ...") (quoting ***Holloway v. Arkansas***, 435 U.S. 475, 490 (1978); emphasis in ***Holloway***)). Such questions can only be explored in a hearing that would include the testimony of trial counsel.

In this case, the trial court, noting the very sensitive nature of the allegations, proceeded with commendable caution in considering whether an evidentiary hearing was required.[6] In reviewing the non-testimonial offer of

(..continued)

> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents in writing after consultation.

(Emphasis added.) The comment to this rule further explains:

> The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Harley's motion, argument, and submissions to the trial court suggested just such an interference with counsel's "independent professional judgment in considering alternatives or foreclos[ing] courses of action that reasonably should be pursued."

[6] The trial court, before ordering the documentary offer of proof, commented, "You know, ordinarily ... we would just put the defendant on the stand and let him say what he wants to .... [B]ut ... these kinds of allegations are the kind that are ... potentially career-threatening, and I don't think we should treat them lightly or casually."

proof, however, the trial court erroneously measured the sufficiency of the submissions according to whether they established that "the defendant was prejudiced in any way or that the representation was compromised in any way." Instead, the issue is whether Mr. Goldstein "actively represented a conflicting interest" by virtue of his relationship with Harley's mother. *See* ***Dadas***, 190 Wis.2d at 344-345, 526 N.W.2d at 820. As we have emphasized:

> [T]he reason courts examine the underlying fact situation is to determine whether there is an intolerable risk that the attorney might sacrifice the goals of his client to serve selfish ends or the interests of another. When the interests of the client and another to whom the attorney owes allegiance are actually divergent, the risk that the advocate will find himself "compelled to refrain" from doing something on behalf of his client exceeds tolerable limits if representation continues and divergency remains.

Franklin, 111 Wis.2d at 687-688, 331 N.W.2d at 637 (footnote omitted). Thus, for the determination of whether Mr. Goldstein "actively represented a conflicting interest," an evidentiary hearing will be required.

By the Court. – Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

SULLIVAN, J. (*concurring in part; dissenting in part*). I agree with the majority's analysis and conclusion with respect to the jury instruction issue. I write separately, however, because I do not agree with the majority's analysis or conclusion with respect to the conflict of interest issue.

Harley claims that the trial court erred in denying his postconviction motions alleging ineffective assistance, without holding an evidentiary hearing. The postconviction motions alleged that Harley's trial counsel was ineffective based on a conflict of interest because he [trial counsel] was engaged in a romantic relationship with Harley's mother. I would uphold the trial court's decision not to hold an evidentiary hearing on this ground because Harley's motion did not allege sufficient facts to require a hearing. ***Nelson v. State***, 54 Wis.2d 489, 497, 195 N.W.2d 629, 633-34 (1972) (trial court need not hold an evidentiary hearing if defendant fails to allege sufficient facts in his motion to raise a question of fact, if he presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief).

After reviewing the record, I conclude that Harley failed to present any factual allegations that would support an inference that trial counsel's advocacy was adversely affected by the relationship with Harley's mother. *See* ***State v. Kaye***, 106 Wis.2d 1, 7-9, 315 N.W.2d 337, 340-41 (1982) (defendant must show that actual conflict of interest existed to be entitled to a hearing). Accordingly, I would uphold the trial court's refusal to hold an evidentiary hearing on this issue, and I respectfully dissent from that portion of the majority opinion.