COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0825-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER WALKER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Christopher Walker appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide, contrary to § 940.01(1), STATS. He also appeals from an order denying his postconviction motion. He raises three issues for our consideration: (1) whether he received ineffective assistance of trial counsel; (2) whether the evidence was sufficient to support the conviction; and (3) whether the trial court

erred in modifying a standard jury instruction. Because we resolve each contention in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

At the trial, Walker testified to the following facts. On April 28, 1993, Walker was standing on the corner of 17th Street and Fond du Lac Avenue in the City of Milwaukee smoking cocaine. The victim, Michael Sneed, who was driving an automobile, pulled up near Walker and the two engaged in conversation. Walker entered the car and Sneed invited Walker to his [Sneed's] apartment to listen to music. Walker agreed.

At Sneed's apartment, the two engaged in some conversation, listened to some music and then Sneed asked Walker for a hug. Walker consented. After that, Sneed fell asleep in his bedroom and Walker sat on the couch listening to more music. Walker eventually laid down on the couch to rest. Some time later, Sneed came out of the bedroom naked, straddled Walker on the couch, pinning Walker down. Sneed said to Walker, "Are you gonna make me rape you?" Walker asked to use the bathroom and Sneed consented. Walker found a double-edged razor, which he took and concealed in his shirt. When Walker came out of the bathroom, Sneed directed him into the bedroom and tried to pull Walker towards him.

Walker struck Sneed across the neck with the razor blade. Sneed grabbed Walker's genitals. Walker grabbed Sneed in a headlock. The two struggled. Walker grabbed a knife from the kitchen. Sneed held Walker in a "bear hug." Walker stabbed at Sneed's back with the knife. When they slipped and fell, the knife went across Sneed's neck. Sneed grabbed Walker's leg. Walker kicked and punched Sneed, who loosened his grip around Walker's leg. Walker thrust the knife into Sneed's chest and it stuck. Sneed stopped moving. Walker put a pillow over Sneed's face, and went into the bathroom to wash the blood off of himself. After the shower, Walker decided to take everything that had his fingerprints on it. He took a suit, a coat, several articles from a dresser drawer, the phone and the knife. Walker also took Sneed's keys and drove to his girlfriend's home in Sneed's car. The following day, Walker gave a statement to the police.

Jeffrey Jentzen, the Milwaukee County Medical Examiner, testified at trial that Sneed died as a result of "hemorrhage and exsanguination from the stab wound to the heart, associated with manual strangulation." The medical examiner could not determine whether the fatal strangulation or the fatal stab wound to the chest occurred first, but opined that Sneed "died from lack of oxygen due to both obstruction of air to the brain and loss of blood." Jentzen also testified that the strangulating hold was applied with sufficient force to cut off both the flow of air and blood to the brain and that it was severe enough to cause death. He indicated that the process, when fatal, would take four-to-six minutes. Jentzen also described the numerous stab wounds present: five stab wounds to the neck area, one stab wound to the abdomen, and one stab wound to the chest.

According to the police, a laundry basket was recovered from Walker's apartment that contained the following items taken from Sneed's apartment: a cordless telephone, a leather key case containing a set of ten keys, Sneed's checkbook, a flashlight, a canvas bag containing grooming items, a vinyl case containing a pair of binoculars, a radio, a man's leather jacket, a man's suit, a wrist watch, a camera, a packet of checks, a ring binder containing personal papers of Sneed, a black leather pouch with a miniature tape player, a telephone, credit cards, an ATM card and Sneed's driver's license.

Walker asserted that he acted in self-defense. The jury was instructed on first-degree intentional homicide, second-degree intentional homicide and self-defense. The jury returned a guilty verdict on first-degree intentional homicide. Walker filed a postconviction motion, alleging ineffective assistance of trial counsel. The motion was denied. He now appeals.

II. DISCUSSION

Walker claims that he received ineffective assistance, that the evidence does not support the conviction, and that the trial court erred in modifying a jury instruction. We address each claim *seriatim*.

A. Ineffective Assistance Claim.

Walker claims that his trial counsel was ineffective because he did not pursue evidence of the victim's violent character. His basis for this claim arises from the State's representation just before trial that in 1979 Sneed was convicted of carrying a concealed weapon, with a dismissed charge of fourth-degree sexual assault read-in at sentencing. The State represented that this was the only information that it had with respect to the conviction because the files on the matter no longer existed.

By affidavit, trial counsel stated that he did not pursue the matter because he believed the victim's violent character is only admissible if the defendant is aware of it. The trial court, in its postconviction motion decision, rejected Walker's claim reasoning that the evidence offered here is "so remote, so lacking in probative value, and so vague" that the trial court would not have admitted it into evidence. As a result, Walker's ineffective assistance claim fails because he cannot prove that trial counsel's failure to pursue the conviction was prejudicial. That is, if the trial court would have excluded the evidence, he could not have been prejudiced by his counsel's failure to pursue it.[1]

The United States Supreme Court set out the two-part test for ineffective assistance of counsel under the Sixth Amendment in ***Strickland v. Washington***, 466 U.S. 668 (1984). The first prong of ***Strickland*** requires that the defendant show that counsel's performance was deficient. ***Id.*** at 687. This demonstration must be accomplished against the "strong presumption that

[1] Because we choose to address the prejudicial prong of ***Strickland v. Washington***, 466 U.S. 688 (1984), it is not necessary for us to address whether failing to pursue Sneed's conviction constituted deficient performance. ***Id.*** at 697.

counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). The second ***Strickland*** prong requires that the defendant show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***Johnson***, 153 Wis.2d at 127-28, 449 N.W.2d at 848.

We agree with the trial court that Walker cannot prove the prejudicial prong of the ***Strickland*** test and, therefore, we must reject his ineffective assistance claim. In order to satisfy his burden of proving that trial counsel's conduct prejudiced him, Walker must show that but for counsel's failure to further investigate Sneed's conviction, there is a reasonable probability that the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. There is nothing in Walker's brief or the record which convinces us that, if trial counsel would have further pursued the Sneed conviction, the outcome of the trial would have been any different. Walker fails to demonstrate how this fourteen-year-old conviction would even be relevant, especially where no information is available regarding the specific circumstances of the incident. Further, based on our review of the record, the trial court's determination that this conviction would not have been admitted is not clearly erroneous. Accordingly, we cannot conclude that trial counsel's failure to further investigate this evidence and/or his failure to attempt to introduce this evidence prejudiced the outcome.[2]

B. Sufficiency of the Evidence.

[2] Walker also contends that the trial court erred in denying his postconviction motion without holding an evidentiary hearing. We review this issue *de novo*. *See* ***State v. Toliver***, 187 Wis.2d 346, 359, 523 N.W.2d 113, 118 (Ct. App. 1994). Although Walker's postconviction motion alleged that trial counsel should have further "pursued" Sneed's prior conviction and should have demanded the State's file on the conviction, Walker failed to show the effect of either allegation. That is, Walker did not allege what information, if any, would have resulted if trial counsel had pursued the matter. Accordingly, both contentions fall into the category of conclusory allegations, and an evidentiary hearing was not required. ***Id.***

Next Walker claims that the evidence was insufficient to support a conviction for first-degree intentional homicide. We disagree.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted). Based on this standard, we review the evidence in a light most favorable to the conviction to determine whether any reasonable jury could have found guilt beyond a reasonable doubt. If our review reveals that a reasonable jury could convict on the evidence, we must affirm the conviction.

The evidence in this case demonstrates that Walker caused Sneed's death. This element is undisputed. There is also evidence from which a reasonable jury could infer that Walker formed the requisite intent to kill. He thrust a deadly weapon into the chest of another human being. He took no action to attempt life-saving procedures. If strangulation was the cause of death, Walker must have been choking Sneed for four-to-five minutes. Finally, there is evidence from which a reasonable jury could infer that Walker did not act in self-defense, particularly that the deadly force inflicted was not necessary. Walker could have told Sneed he was not interested in a homosexual encounter. The jury could have inferred that Walker had an opportunity to leave Sneed's apartment or that Walker could have inflicted a lesser force to enable him to get away, without killing Sneed. In addition, a jury may have inferred that Walker killed Sneed in order to steal from him, based on the numerous items Walker took from the apartment.

Based on the totality of the evidence contained in this record, we cannot say that no reasonable jury could have convicted Walker of first-degree intentional homicide. Accordingly, we must reject his sufficiency of the evidence argument.

C. Jury Instruction.

Walker also claims the trial court erred in modifying the standard instruction on first-degree intentional homicide. We decline to address this contention, however, because Walker raises this issue for the first time on appeal. *See* § 805.13(3), STATS.; ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980).

By the Court.—Judgment and order affirmed.

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