COURT OF APPEALS
DECISION
DATED AND RELEASED

May 7, 1996

NOTICE

No. 95-1837-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JARUTHH M. GATHINGS,

Defendant-Appellant.

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

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

PER CURIAM. Jaruthh Gathings appeals from a judgment of conviction for first-degree reckless homicide and from an order denying his motion for postconviction relief.[1] Gathings argues that: (1) the trial court erred

[1] Gathings was charged with first-degree intentional homicide, but a jury convicted him of the lesser-included offense of first-degree reckless homicide.

by denying his ineffective assistance of counsel motion without a hearing; (2) his statement made to police was taken in violation of his ***Miranda*** rights; (3) the trial court erroneously exercised its discretion in admitting photographs of the victim's body; (4) the trial court's imposition of the maximum sentence was excessive; and (5) a reversal is required, pursuant to § 752.35, STATS. We reject Gathings's arguments and affirm.

I. BACKGROUND.

In November of 1993, Gathings, his brother J.C., and James Jackson went to a local tavern in the City of Milwaukee. There, the Gathingses group met the victim, Frank Marlow, his brother Robert, and two of their cousins. The two groups drank for a period of time, until the defendant wished to visit his sister's home. The Gathingses group traveled in Marlow's car while the other members of the Marlow contingent followed.

The car was stopped by police and Marlow was advised by the detaining officer not to drive the car. The officer was forced to leave when he received a higher priority call and Jackson became the driver. Marlow was upset by this and an argument ensued. Jackson pulled the car into an alley where the occupants left the car and proceeded to fight. While Marlow and J.C. Gathings were fighting, Jaruthh Gathings threw a bottle at Marlow. Unsuccessful in his first attempt to stop the fight, the defendant then picked up a cinder block with two hands and struck Marlow in the head twice with the block. The defendant and his brother fled the scene and were arrested later.

After his arrest, the defendant gave a statement to Detective Kenneth Morrow in which he admitted to hitting Marlow in the head with a cinder block, but claimed the act was done in self-defense and the defense-of-another, his brother J.C. Before the questioning, Gathings was read his ***Miranda*** rights. At the ***Miranda-Goodchild*** hearing, the trial court concluded that Gathings knowingly and voluntarily waived his ***Miranda*** rights and that his confessional statements should be admitted into evidence.

At trial, the State presented the expert testimony of Dr. John Teggatz, a forensic pathologist, and Deputy Chief Medical Examiner for

Milwaukee County. Dr. Teggatz testified that the injuries Marlow suffered resulted from the impact of two blows against the head. Dr. Teggatz opined that the first blow from the cinder block rendered Marlow unconscious and the second blow was administered while Marlow's head was in a supported position against the sidewalk.

In addition to the testimony of Dr. Teggatz, the State presented eight "3x5" photographs of the victim depicting his location in the alley and the position of his body on the sidewalk. The trial court admitted these photographs into evidence, concluding that they would help the jury to comprehend the nature of the injuries suffered by Marlow.

Following Gathings's conviction for first-degree reckless homicide, the trial court sentenced him to the maximum term of twenty years.

II. ANALYSIS.

Gathings first argues he should have been granted a new trial because he received ineffective assistance of trial counsel. The trial court denied his new trial motion without a ***Machner*** hearing. Gathings argues that the trial court should have held an evidentiary hearing before deciding his motion. We disagree.

Before a trial court must grant an evidentiary hearing on an ineffective assistance of counsel claim, a defendant must raise factual allegations in the motion and affidavits that raise a question of fact for the court. *See* ***State v. Washington,*** 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver,*** 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). We review a trial court's denial of a motion for a ***Machner*** hearing *de novo*. ***State v. Tatum,*** 191 Wis.2d 547, 551, 530 N.W.2d 407, 408 (Ct. App. 1995). We must review the defendant's motion to determine whether it contains factual allegations to support the dual-pronged ineffective assistance of counsel standard set forth in ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). *See* ***State v. Saunders,*** 196 Wis.2d 45, 51, 538 N.W.2d 546, 549

(Ct. App. 1995). The first prong requires that the defendant show that counsel's performance was deficient. ***State v. Johnson,*** 126 Wis.2d 8, 10, 374 N.W.2d 637, 638 (Ct. App. 1985), *rev'd on other grounds*, 133 Wis.2d 207, 395 N.W.2d 176 (1986). That is, the defendant must show that counsel's conduct was "`unreasonable and contrary to the actions of an ordinarily prudent lawyer.'" ***Id***. at 11, 374 N.W.2d at 638 (citation omitted). The second prong requires that the defendant show that the deficient performance was prejudicial. ***Id***. at 10, 374 N.W.2d at 638. To be considered prejudicial, 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"—i.e., "a probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. at 694. Further, if the defendant fails to adequately show one prong, we need not address the second. ***Id***. at 697.

Gathings's motion alleges that his trial counsel should have presented expert testimony to rebut the State's expert witness. Gathings's motions, however, only raise conclusory allegations as to how expert testimony would have supported his defense. Gathings offers no factual evidence to indicate that another forensic pathologist would have reached a different conclusion than that of Dr. Teggatz. Gathings's allegations are no more than speculation, and, without explaining how trial counsel's performance fell below an objective standard of reasonableness, this court cannot find counsel's performance deficient. ***State v. Teynor***, 141 Wis.2d 187, 210-211, 414 N.W.2d 76, 85 (Ct. App. 1987).

Gathings also alleges that trial counsel was ineffective because he should have presented evidence of Marlow's "violent tendencies and conduct," and defendant's knowledge of these facts in support of defendant's claim of self-defense. Again, these allegations are conclusory and mere speculation as Gathings set forth no evidence showing that Marlow had violent tendencies and that the defendant knew of them. "More is needed." ***Saunders,*** 196 Wis.2d at 52, 538 N.W.2d at 549.

Our *de novo* review supports the trial court's decision to deny Gathings's ineffective assistance of counsel motion without a ***Machner*** hearing.

Gathings next argues that the trial court improperly admitted the photographs of Marlow's body lying in the alley. He claims that the photographs were both prejudicial and cumulative in light of the testimony of Dr. Teggatz, who used charts and three-dimensional models to explain the effect of the cinder block striking the victim's head to support his opinion that the victim's head was struck by a second blow in a supported position.

The trial court has wide discretion in determining whether photographs are to be allowed into evidence. ***Hayzes v. State***, 64 Wis.2d 189, 198, 218 N.W.2d 717, 722 (1974). It is within the purview of the trial court to decide whether to admit photographs because they better illustrate the situation than does the testimony of the witness or to exclude the photographs because they are not substantially necessary to show material facts or conditions, and might arouse sympathy, or divert the minds of the jury to improper considerations. ***Neuenfeldt v. State***, 29 Wis.2d 20, 32-33, 138 N.W.2d 252, 259 (1965), *cert. denied*, 384 U.S. 1025 (1966). Unless the record does not reflect the reasons for the trial court's decision or the only purpose for the photographs is to inflame and prejudice the jury, the trial court's discretion will be upheld. ***Hayzes***, 64 Wis.2d at 200, 218 N.W.2d at 723.

Because the defendant chose to pursue a defense of self-defense, whether excessive force was utilized by the defendant necessarily was an issue for the jury to decide. Thus, the nature and severity of the injuries suffered by the victim were paramount in resolving the question of excessive force. The trial court explained the reasoning for admitting the photographs, stating:

> This is different from many homicides. This is not a case where we have no dispute as to how the victim died, such as someone who is found with a bullet wound and there is no dispute that that gunshot caused the death of the individual. This is a case whether or not excessive force was used in self-defense.

We have viewed the photographs in question and find that they are probative in determining the issue of whether excessive force was employed by Gathings. While the photographs may be somewhat cumulative, in light of the testimony of Dr. Teggatz, they are nonetheless helpful in aiding the jurors' understanding

of his testimony. We find that the reasoning applied by the trial court was proper, and while reasonable minds may differ as to whether the photographs were prejudicial, that is not the appropriate standard of review. The record contains evidence supporting the trial court's decision—accordingly, there was no erroneous exercise of discretion.

Gathings next argues that his statement admitting guilt and his waiver of ***Miranda*** rights were not voluntary. To support this claim, Gathings points to his learning disability and his limited educational background. These factors, Gathings claims, precluded him from understanding the full import of the ***Miranda*** rights as they were read. In addition, Gathings argues these factors contributed to his confusion during the interrogation by police detectives and subsequent confession.

The trial court concluded at the ***Miranda*** hearing that there was no evidence of threat or coercion on the part of the police detectives. Having decided such, the trial court focused on the remaining issue, whether the defendant was given his ***Miranda*** rights. At the hearing, Gathings testified that he could not remember being read his ***Miranda*** rights, while Detective Morrow testified to the contrary. The trial court found Detective Morrow's testimony to be more credible and concluded that the defendant had been read his ***Miranda*** rights.

Upon review of lower court proceedings involving ***Miranda-Goodchild*** hearings, this court will not upset the findings of fact unless it appears they are against the great weight and clear preponderance of the evidence. ***Norwood v. State***, 74 Wis.2d 343, 361, 246 N.W.2d 801, 811 (1976), *cert. denied*, 430 U.S. 949 (1977). In looking at whether a confession or admission can be called voluntary, we look to the totality of circumstances. ***State v. Schneidewind***, 47 Wis.2d 110, 117, 176 N.W.2d 303, 307 (1970). In order to find Gathings's statement was involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis.2d 222, 239, 401 N.W.2d 759, 767 (1987).

In assessing the totality of circumstances, we must balance the personal characteristics of the defendant against any pressures imposed by the police, such as misleading or not informing the defendant of his right to counsel

and right against self-incrimination. While Gathings's mental capacity is certainly an important factor, we find no convincing evidence presented that indicates his ability to waive his ***Miranda*** rights was impaired. The trial court concluded that although learning-disabled, Gathings understood the rationale underlying the Miranda warnings, notably the concept of hiring a lawyer or having one appointed, the concept of attorneys, and the concept of remaining silent. This, in conjunction with the testimony of Detective Morrow, led the trial court to conclude there had been a voluntary waiver. We recognize that the trial court in this case is the ultimate arbiter of credibility of witnesses. Additionally, the trial court noted that Gathings signed the statement and wrote in his own writing the word "true" at the end of the statement. The trial court's findings on this matter are given great deference, and any conflicts in the testimony regarding circumstances surrounding the statements must be resolved in favor of the trial court's findings. ***McAdoo v. State***, 65 Wis.2d 596, 608, 223 N.W.2d 521, 528 (1974). We, therefore, affirm the trial court's findings that Gathings knowingly, intelligently, and voluntarily waived his ***Miranda*** rights.

Gathings next argues that a reversal is warranted pursuant to § 752.35, STATS., which provides in part:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from.

Hence, this court may order a new trial in the interests of justice only "where the real controversy has not been fully tried or there is a substantial degree of probability that a new trial will likely produce a different result." ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995). However, we have rejected the defendant's previous claims of trial court error in the discussion above. As these claims are without merit, we deny the defendant's attempt to combine a final catch-all plea for reversal in the interests of justice with arguments that have already been rejected. ***State v. Echols***, 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989).

Finally, Gathings argues that the trial court's imposition of the maximum sentence of twenty years was improper. Gathings alleges that the sentencing places too much emphasis on the defendant's character, especially the trial court's belief that the defendant was not sufficiently remorseful.

The factors to be considered by the trial court in sentencing include: (1) the gravity of the offense; (2) the character and rehabilitative need of the defendant; and (3) the need to protect the public. ***State v. Jones***, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989). The weight to be attributed to each factor is within the discretion of the sentencing judge. ***State v. Paske***, 163 Wis.2d 52, 63-64 n.6, 471 N.W.2d 55, 59 n.6 (1991). An erroneous exercise of discretion in the sentencing process will only be found where the sentence is so excessive and so disproportionate to the offense as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper. ***State v. Killory***, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976). Our review is limited to the determination of whether the trial court has erroneously exercised its discretion. If the record contains evidence that discretion was properly used, we must affirm. ***State v. Cooper***, 117 Wis.2d 30, 40, 344 N.W.2d 194, 199 (Ct. App. 1983).

The trial court in this case properly explained its reasoning for imposing the maximum sentence and properly considered the three factors, the gravity of the offense, the defendant's personal characteristics, and the need to protect the community, to be considered in the deliberation of any sentence. The trial court evaluated the gravity of the offense and found Gathings's conduct after the offense to be inexcusable, stating:

> By your own testimony, you smashed Mr. Marlow in the head with that chunk of concrete and left him to die in the alley, and you were a person that he thought was a friend.

In considering the defendant's personal characteristics, the trial court noted his alcohol problem and need for treatment. In addition, the trial court pointed to the fact that a presentence report reflected Gathings's lack of remorse and apparent sorrow for himself. The trial court also posited that this lack of remorse and lack of appreciation for the seriousness of the crime posed a

danger to the community as a whole. Simply because Gathings feels the trial court improperly focused on his personal character, is not reason enough to overturn his sentence. In actuality, this lack of remorse relates, to a large extent, to all three factors considered in sentencing.

Additionally, to say that the trial court simply looked to Gathings's lack of remorse is inconsistent with the record. According to the record, the court looked to Gathings's alcohol problem and need for rehabilitation, the presentence report prepared by one who spent time with Gathings, statements presented by the victim's family, and the statements offered by defendant and his counsel in which the mitigating circumstances for the crime were submitted for the trial court's consideration.

The record is replete with evidence that the trial court properly exercised its discretion. The trial court's extensive discussion of the reasons why Gathings should receive the maximum sentence is evidence that this discretion was not erroneously exercised.

By the Court.—Judgment and order affirmed.

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