COURT OF APPEALS
DECISION
DATED AND RELEASED

July 2, 1996

NOTICE

No. 95-2206-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE M. PIRTLE,

Defendant-Appellant.

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

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

PER CURIAM. Andre M. Pirtle appeals from a judgment of conviction, after a bench trial, for first-degree reckless homicide while armed with a dangerous weapon, contrary to §§ 940.02(1) and 939.63(1)(a)(2), STATS. Pirtle also appeals from an order denying his postconviction motion for a new trial. Pirtle raises two main issues on appeal. First, that he received ineffective assistance of counsel. He claims that his counsel's failure to inform him of the

possibility of an ***Alford*** plea deprived him of his right to make a reasonably informed decision regarding a mid-trial plea offer made by the prosecutor. Second, that there was insufficient evidence to convict because most of the evidence was inherently incredible. We affirm.

I. BACKGROUND.

The following facts were presented at trial. On the evening of November 5, 1993, Walter Lee Hawkins, also known as "June" or "Junior," was murdered during an altercation. Hawkins was shot at 10:40 p.m. No bullet was ever recovered from his body or from the crime scene. The altercation occurred in the street in front of a home where a party was taking place. It first involved females fighting in the street, but soon broadened to include males. Pirtle went into the street and apparently tried to stop the dispute. Pirtle then fired some shots from his .25-caliber handgun in the direction of the victim in what he claimed was an attempt to end the altercation. Pirtle told police that he observed Walter Hawkins continue to argue after he fired his gun. Pirtle then left the area of the shooting.

Other witnesses provided testimony relevant to this appeal. Kevin McCraney testified that he saw Pirtle shoot the victim with a small black gun, from about a foot away. Evelyn Hawkins, the victim's sister, testified that Pirtle was the person who did the shooting. She also testified that after the shooting, the victim walked down the street saying, "I've been shot."

Dr. Jeffrey M. Jentzen performed the autopsy on the victim, and testified about the wounds. He testified that the wound on the victim was more likely to be caused by a .38-caliber bullet than by a .25-caliber bullet. He did testify, however, that a .25-caliber weapon could also have caused the wound, depending upon the ammunition used.

II. ANALYSIS.

A. Ineffective assistance of counsel claim.

Pirtle bases his claim of ineffective assistance of counsel on the failure of his trial counsel to inform him of the option of an ***Alford*** plea. *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970). Pirtle contends that had he known of this option, he would not have proceeded to trial. Pirtle asserts that the failure of his counsel to discuss an ***Alford*** plea with him constituted deficient performance. He also claims that the trial court found that his counsel's failure to discuss the ***Alford*** plea with him to be deficient performance. Pirtle further argues that his counsel's failure to discuss the ***Alford*** plea has caused him prejudice. Pirtle claims that he would have accepted the plea because it would have allowed him to avoid a trial without admitting that he was the one who killed his friend. Pirtle also points out that the state has presented no evidence that it would not have accepted the ***Alford*** plea if his counsel had suggested it.

A defendant's right to counsel includes the effective assistance of counsel in choosing whether to accept a plea agreement. ***Johnson v. Duckworth***, 793 F.2d 898, 902 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986). There are two necessary elements for an ineffective assistance of counsel claim, "deficient performance by counsel and prejudice to the defendant." ***State v. Hubert***, 181 Wis.2d 333, 339, 510 N.W.2d 799, 801 (Ct. App. 1993). The burden of establishing these two elements is on the defendant. ***State v. Sanchez***, No. 94-0208, slip op. at 12 (Wis. May 22, 1996). When reviewing an ineffective assistance of counsel claim, this court pays deference to the trial court's findings of fact. ***State v. Schambow***, 176 Wis.2d 286, 301, 500 N.W.2d 362, 368 (Ct. App. 1993). With respect to the performance elements, we operate with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689. The final determination of whether counsel's performance was deficient and whether there was prejudice are questions of law that we will review independently. ***Schambow***, 176 Wis.2d at 301, 500 N.W.2d at 368. If we conclude that the defendant was not prejudiced, we need not address whether the performance of trial counsel was deficient. ***State v. Kuhn***, 178 Wis.2d 428, 438, 504 N.W.2d 405, 410 (Ct. App. 1993).

Prior to Pirtle's trial, the prosecutor offered a recommendation of a fifteen-year sentence in return for a guilty plea by Pirtle to a homicide charge. Pirtle claims that he did not accept this deal because he did not want to admit to a homicide charge. Pirtle insisted that he did not fire the fatal shot, but stated he would plead to a non-homicide charge and did not want a sentence over ten years. A mid-trial plea discussion involved an offer by the prosecutor to amend

the first-degree reckless homicide charge to a homicide charge which carried a maximum penalty of ten years. After consulting with his trial counsel, Pirtle declined the offer. The parties have established that the court would have accepted the agreement.

At Pirtle's postconviction hearing on the ineffective assistance of counsel claim, the trial court found that Pirtle was unable to establish any prejudice. Pirtle claims that the trial court did find deficient performance, however. After reviewing the trial court's ruling, we do not agree that a finding of deficient performance was made. The trial court found no evidence that the State ever offered to reduce or amend the charge in exchange for an ***Alford*** plea. Rather, the prosecutor insisted that Pirtle plead guilty to homicide. The trial court found that it was wholly speculative whether the State would have agreed to an ***Alford*** plea to a reduced charge. The trial court also determined that had the issue of an ***Alford*** plea been raised during plea negotiations, trial counsel would have been remiss in not discussing it with Pirtle. Therefore, we do not agree that the trial court found deficient performance.

Additionally, Pirtle has not met his burden on the prejudice element of his ineffective assistance of counsel claim. "In order to show prejudice, `[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Sanchez***, No. 94-0208, slip op. at 16 (quoting ***Strickland***, 466 U.S. at 694). He has stated that he believes he would have accepted a plea where he could have maintained his innocence. Yet such an offer was never made by the prosecutor. Even if trial counsel had suggested the option of an ***Alford*** plea, it is entirely speculative whether the prosecutor would have agreed to such a plea. We agree with the trial court that Pirtle's prejudice claim lacks merit because there is no evidence that the defendant would have received a lesser sentence if his trial counsel had raised the possibility of an ***Alford*** plea.

B. Sufficiency of the evidence.

Pirtle also argues that the evidence was insufficient to convict him of first-degree reckless homicide. Pirtle claims that most of the evidence was

inherently incredible or contrary to accepted forensic testimony. To substantiate his claim, Pirtle offers examples of testimony which he argues renders the evidence used to convict him inherently incredible.

Upon a challenge of a conviction based on a claim of insufficient evidence to convict, we will affirm if the trier of fact could be "convinced to the required degree of certitude by the evidence which it has a right to believe and accept as true." ***State v. Daniels***, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). The trier of fact has the duty to determine the weight and credibility of inconsistent or conflicting testimony. We will only substitute our judgment for that of the trier of fact when inherently incredible evidence, such as evidence which conflicts with nature or fully established facts, was relied upon by the fact finder. ***Id***. at 17, 343 N.W.2d at 415-16.

Pirtle was convicted of first-degree reckless homicide.[1] The elements of first-degree reckless homicide are: (1) that the defendant caused the death of the victim; (2) that the defendant caused the death by criminally reckless conduct; and (3) that the circumstances of the defendant's conduct show an utter disregard for life. *See* § 940.02(1), STATS.

Among the alleged inconsistencies raised by Pirtle are the following. Pirtle points out that his statement to police that he admitted firing a .25-caliber handgun from five or six feet away from the victim was relied upon by the trial court in reaching a guilty verdict. Forensic expert Dr. Jeffrey Jentzen testified that the wound on the victim was more likely to have been caused by a .38-caliber rather than a .25-caliber gun. Both Pirtle and Evelyn Hawkins claimed that the victim walked away after Pirtle fired his gun in the victim's direction. Pirtle claims that this is inconsistent with the victim having been shot. Pirtle also alleges that Kevin McCraney's testimony that he witnessed Pirtle shoot the victim is inconsistent with Dr. Jentzen's testimony that there were no powder burns on the victim.

[1] Section 940.02(1), STATS., provides: "Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony."

We reject Pirtle's argument that the trier of fact relied upon inherently inconsistent evidence, and agree with the trial court that all three elements of the offense have been established. Dr. Jentzen specifically testified that the wound on the victim could have been caused by a .25-caliber handgun, depending on the type of ammunition used. Pirtle told police he fired a .25-caliber handgun in the direction of the victim. There is also no evidence in the record that the testimony regarding the victim's ability to walk after being shot is inherently incredible. The fact that a witness's testimony may contradict the testimony of Dr. Jentzen does not render it inherently incredible, but rather, places the inconsistent statements before the trier of fact to determine their weight. We conclude that the testimony presented at trial was sufficient for the court to find that Pirtle, by recklessly firing a gun, caused the death of Walter Hawkins under circumstances that showed an utter disregard for life. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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