COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 27, 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. 95-2418-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER J. DOTZ,

Defendant-Appellant.

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

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

PER CURIAM. Counsel for Roger Dotz has filed a no merit report pursuant to RULE 809.32, STATS. Dotz has filed two responses alleging that the stabbing of his live-in girlfriend was not intentional, that he was too intoxicated to form intent, that he was ineffectively represented by trial counsel and that his intoxication constitutes a new factor justifying a sentence reduction. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S.

738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

The no merit report raises questions of trial court error, prosecutorial misconduct, sufficiency of the evidence, competency of trial counsel and sentence modification.[1] In his responses, Dotz appears to contend that he was intoxicated and that his intoxication either provides a basis for challenging the sufficiency of the evidence because he was too intoxicated to form intent to kill or constitutes a "new factor" justifying a reduction of his sentence. He appears to argue that his trial counsel was ineffective for not pursuing an intoxication defense or arguing that intoxication was a mitigating circumstance justifying an earlier parole eligibility date.

A jury convicted Dotz of first-degree intentional homicide while armed. The State presented evidence that his live-in girlfriend, Karen Kennedy, was stabbed seven times in the bathroom of their home and died between 6:00 p.m. and 10:00 p.m. Dotz presented an alibi defense. The State's witnesses established that Kennedy left work between 8:00 p.m. and 8:30 p.m. and that she lived approximately one-half hour from her work site. Another witness saw Dotz assist Kennedy in parking her car at approximately 8:30 or 8:45 p.m.

Dotz's alibi defense does not foreclose the possibility that he was the perpetrator. A video surveillance camera at a neighborhood convenience store established that Dotz was in the vicinity at 9:47 p.m. Because the stabbing could have occurred in a relatively short time span, the jury could reasonably find that Dotz had ample opportunity to commit the crime.

The State also presented evidence that Dotz had battered Kennedy two months before the killing. At that time, an officer advised her that he should lock herself in the bathroom if Dotz attacked her again and she was unable to flee the apartment. Kennedy's body was found in the bathroom. A part of Dotz's broken key was found on the floor outside the bathroom, the rest of the key was still on his key chain. The mirror on the outside of the bathroom

[1] The no merit report raises questions and disposes of them in a cursory manner, providing no factual information, legal authority or analysis.

door was broken and blood consistent with Dotz's blood was found on the mirror.

When Dotz was interviewed by the police, he had swollen knuckles on his right hand and scrapes on his left wrist and right elbow. The police found a broken metal watchband on the floor outside the bathroom. Dotz initially denied it was his. A surveillance camera at a neighborhood convenience store showed him wearing a watch with a metal wrist band at 7:23 p.m. that evening. At trial, Dotz admitted the watchband was his. The State contends that the scrape on Dotz's wrist occurred when Kennedy grabbed the watch and broke it during the struggle.

Dotz testified on his own behalf. His testimony was impeached with numerous instances of inconsistent statements given to the police and contradictions with the testimony of neighbors who had no obvious motive to falsify. Dotz denied moving Kennedy's car although two witnesses saw him drive her car. He denied arguing with Kennedy on the day of her death although three witnesses testified that they heard arguments between them. The prosecutor succeeded in portraying Dotz's numerous stops at business establishments as an effort to create an alibi.

A reviewing court must construe the evidence in the light most favorable to the verdict and affirm the conviction unless it can be said as a matter of law that no trier of fact acting reasonably could be convinced of guilt beyond a reasonable doubt. *See* ***State v. Koller***, 87 Wis.2d 253, 266, 274 N.W.2d 651, 658 (1979). The evidence presented by the State was sufficient to establish beyond a reasonable doubt that Dotz intentionally killed Kennedy.

The trial court properly exercised its sentencing discretion when it sentenced Dotz to life imprisonment with parole eligibility on July 21, 2035. The court specifically considered the brutality of the crime, Dotz's past history of domestic violence and unstable behavior, and the risk Dotz posed to women in the community. There is no basis for challenging the exercise of the sentencing court's discretion. *See* ***State v. Saribia***, 118 Wis.2d 655, 673, 384 N.W.2d 527, 537 (1984).

Dotz's trial counsel was not ineffective for presenting an alibi defense rather than an intoxication defense. To establish an intoxication defense, Dotz would have had to be so intoxicated that he was unable to distinguish right and wrong or to form the intent to kill. *See* § 939.42, STATS. It would not be enough for Dotz to show that he was under the influence of alcohol. Rather, he must show that degree of intoxication that means that he was utterly incapable of forming the intent to kill. *See* ***State v. Guiden***, 46 Wis.2d 328, 331, 174 N.W.2d 488, 490 (1970). The witnesses who observed Dotz near the time the crime was committed and the physical evidence do not support an intoxication defense. Trial counsel's strategic decision to pursue an alibi defense instead is not subject to challenge on appeal. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). It is not reasonable to present both an alibi and an intoxication defense, in effect telling the jury "I didn't kill her, I wasn't even there, and even if I killed her I was too drunk to form intent at that time."

Dotz's intoxication does not constitute a new factor justifying a sentence modification. A "new factor" is a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties. *See* ***State v. Ambrose***, 181 Wis.2d 234, 240, 510 N.W.2d 758, 761 (Ct. App. 1993). A new factor must be one that frustrates the purpose of the original sentence, something that strikes at the very purpose of the sentence. ***State v. Michels***, 150 Wis.2d 94, 99, 441 N.W.2d 278, 280 (Ct. App. 1989). The record does not establish that Dotz's intoxication was unknowingly overlooked by the parties at the time of sentence or that it was highly relevant to the sentencing decision or frustrates the purpose of the original sentence. His intoxicated condition does not reduce the brutality of the crime, improve an assessment of his character or reduce the risk he poses for society. Dotz exercised his right of allocution by continuing to deny his guilt. His counsel could not have credibly argued that intoxication mitigated the offense under these circumstances.

Our independent review of the record discloses no other potential issues for appeal. Therefore, we relieve Attorney Thomas E. Hayes of further representing Dotz in this matter and affirm the judgment of conviction.

By the Court.—Judgment affirmed.