OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 10, 2014

To:

Hon. Allan B. Torhorst
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Rose Lee
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

W. Richard Chiapete
District Attorney
730 Wisconsin Avenue
Racine, WI 53403

Matt Last
Gamino Law Offices
1746 S. Muskego Avenue
Milwaukee, WI 53204

Tiffany M. Winter
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2014AP691-CR State of Wisconsin v. Kenneth L. Roberson (L.C. # 2012CF506)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Kenneth L. Roberson appeals from a judgment of conviction and an order denying his motion for postconviction relief. He contends that there was insufficient evidence to support one of his convictions and that his trial counsel was ineffective. Based on our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the judgment and order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

Roberson was convicted following a jury trial of one count of possession of a firearm by a felon, as a repeater, and one count of attempted first-degree intentional homicide, as a repeater. The charges stemmed from allegations that Roberson unlawfully possessed a firearm and threw an ex-girlfriend out of a second story window at her home.[2] The circuit court sentenced Roberson to a total of thirty-six years of initial confinement and sixteen years of extended supervision.

Roberson subsequently filed a motion for postconviction relief, arguing that there was insufficient evidence to support his conviction of attempted first-degree intentional homicide and that his trial counsel was ineffective for failing to call a witness at trial. Following a hearing on the matter, the circuit court denied the motion. This appeal follows.

On appeal, Roberson first contends that there was insufficient evidence to support his conviction of attempted first-degree intentional homicide. He asserts that the State failed to prove that he had the mental purpose to take the victim's life or was aware that his conduct was practically certain to cause death. *See* WIS JI—CRIMINAL 1070.

In reviewing the sufficiency of the evidence to support a conviction, this court may not substitute its judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate 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." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury "could have drawn the

[2] As a result of the fall, the victim sustained multiple broken bones and lacerations and lost part of her liver and spleen.

appropriate inferences from the evidence adduced at trial to find the requisite guilt," this court may not overturn a verdict even if we believe that the jury should not have found guilt based on the evidence before it. ***Id.***

At trial, the victim testified that Roberson was angry with her on the day of the incident, in part, because she had declined to perform a sex act. She further testified that Roberson awoke her that night by lifting her from the couch by her hair and forcing her up the stairway and into an upstairs bedroom. According to the victim, Roberson told her "When I'm done with you, Bitch, you goin' out this window." Although the victim did not remember going out the window, she testified that she would not have jumped and had never considered attempting suicide. Her testimony was supported by a first responder, who testified that he found her lying on her belly outside the home saying, "He's trying to kill me." It was also supported by a threatening text message that Roberson had sent her earlier that day. Viewing this evidence in a light most favorable to the State and the conviction, we are satisfied that a jury, acting reasonably, could have found that Roberson had the mental purpose to take the victim's life or was aware that his conduct was practically certain to cause death.

Roberson next contends that his trial counsel was ineffective for failing to call a witness at trial. Specifically, he maintains that counsel should have called Dr. Larry Blum, a forensic pathologist who the defense had retained to help piece together what had happened and come up with an idea of how the victim might have gone out the window.

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate review of an ineffective

assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.*** at 634.

At the postconviction motion hearing, trial counsel testified that he had considered calling Blum as a witness but concluded that his testimony would contradict the defense theory that the victim jumped out the window in a failed suicide attempt. Counsel explained that Blum did not believe that the victim went out the window voluntarily. Counsel further explained that after discussions with Roberson, they concluded it was best to stay with the suicide theory, as it was consistent with Roberson's statement to police.[3] Given trial counsel's explanation for his action, we cannot say that he performed deficiently in failing to call Blum as a witness. *See* ***State v. Libecki***, 2013 WI App 49, ¶25, 347 Wis. 2d 511, 830 N.W.2d 271 (a valid strategy is not deficient performance). Accordingly, we reject Roberson's claim of ineffective assistance of counsel.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Roberson told police that he saw the victim dive headfirst out of the window after making statements about how nobody loved her.