COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 1996

No. 96-1141-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE STEINBACH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Dale Steinbach appeals a judgment of conviction and an order denying postconviction relief. On December 7, 1994, a jury convicted Steinbach of first-degree intentional homicide, contrary to § 940.01(1), STATS., and carrying a concealed weapon, contrary to § 941.23, STATS. On April 9, 1996, the court denied Steinbach's motion for postconviction relief.

On appeal, Steinbach argues that the trial court erred when it failed to poll the jurors after the verdict and admitted his inculpatory

statements. He also contends that he was denied effective assistance of counsel, the prosecutor's remarks in closing argument constituted plain and reversible error, and there was insufficient evidence to support the jury's verdict. Because we are not persuaded by Steinbach's arguments, we affirm the judgment and order.

On May 19, 1994, police and firefighters were dispatched to the Steinbach farm because there had been an explosion in a garage on the property. The explosion occurred after Steinbach left a homemade air compressor running in the garage.

Deputy Jeffrey Sheets was the first to arrive on the scene. He radioed to the dispatcher that there was no fire but that there was a person (Steinbach) by the garage who refused to leave the area. Sheets told dispatch that he was retreating to his squad as the man refused to leave the scene and was hooking up garden hoses. Steinbach later explained that he was attempting to remove his geese from the garage area. The dispatcher advised Sheets to go back and remove Steinbach from the area for his own safety.

When firefighters arrived, they observed Sheets engaged in a conversation with Steinbach just south of the house and garage. As the firefighters approached the garage, they heard two gunshots, and the firefighter closest to the scene saw Sheets fall to the ground.

Shortly thereafter, deputy David Rudie arrived and radioed for an ambulance and backup. Steinbach came down the driveway toward the squad and motioned by waving his hand for Rudie to come into the house. Rudie told Steinbach to come to his squad, but Steinbach returned instead to the area where Sheets lay.

When several other officers and an ambulance arrived, Sheets was transported to the hospital with wounds to his right forearm and head from bullets discharged from Steinbach's .22 caliber Derringer. Sheets subsequently died from the gunshot wound to his head.

The police handcuffed Steinbach and escorted him to a nearby squad car. He waived his ***Miranda***[1] rights in the squad car. Steinbach made inculpatory statements to the police as he was handcuffed, while he was seated in the back seat of the squad, and at the police station. The court denied Steinbach's motion to suppress the statements.

First, Steinbach asserts that reversal is mandated because the court did not properly poll the jury when it returned its verdict. Polling is the procedure used to determine that the verdict is an accurate reflection of the decision of each individual juror. ***State v. Coulthard***, 171 Wis.2d 573, 580-81, 492 N.W.2d 329, 333 (Ct. App. 1992). "A defendant has the right, when timely asserted, to have the jurors individually polled on their verdict." ***Id.*** at 581, 492 N.W.2d at 333.

The transcript clearly indicates that the court polled the jurors after they returned guilty verdicts of both counts.[2] In addition, Steinbach's trial

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[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[2] The polling dialog occurred as follows:

[THE COURT:] It is my job now to poll the jury to make sure that what you did is unanimous, that all of you agree, and I will not call you by name. I will just, as I go down the row here, Mr. DeValk, you are the foreman. Did all of you agree?

THE FOREPERSON: Yes.

THE COURT: Did you agree?

A JUROR: Yes.

THE COURT: Did you agree?

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

counsel testified at the postconviction hearing that had the jury not been polled upon their return of the verdicts, he would have objected. We reject Steinbach's argument on this issue because the jury was polled.

Next, Steinbach argues that the court erroneously admitted his inculpatory statements to police. We are bound by the court's findings of historical facts unless they are clearly erroneous. *See* ***State v. Kramar***, 149 Wis.2d 767, 784, 440 N.W.2d 317, 324 (1989). The issue of whether the police violated Steinbach's ***Miranda*** rights is a constitutional fact which we decide

(..continued)

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

A JUROR: Yes.

THE COURT: Okay. Anything further?

MR. GRAU: Well, Judge, I would just like the record to reflect that the Court did inquire of each and every juror and each did reply yes to the Court's question.

THE COURT: I didn't ask you. I read both verdicts. I would assume that everybody was going to tell me that you all agree on both verdicts as presented. Is that correct?

JUROR: Yes.

THE COURT: Anybody have any disagreement with that? (No response). Anything further?

MR. GRAU: Not from the State, Your Honor.

MR. KRUEGER: Not from the defense, Judge.

THE COURT: The jury is excused ....

independently of the trial court. *See* ***Kramar,*** 149 Wis.2d at 784, 440 N.W.2d at 324. We agree with the court that Steinbach's statements were not obtained in violation of ***Miranda***.

The Fifth Amendment to the United States Constitution guarantees that no "person ... shall be compelled in any criminal case to be a witness against himself." ***State v. Cunningham***, 144 Wis.2d 272, 276, 423 N.W.2d 862, 863 (1988). The Fourteenth Amendment requires the states to honor this guarantee. ***Id.***

Miranda v. Arizona, 384 U.S. 436 (1966), established that in order to use a suspect's statements stemming from a custodial interrogation, the State must advise the suspect of the ***Miranda*** warnings and adhere to various other procedural safeguards to ensure the suspect's right against self-incrimination. ***Cunningham***, 144 Wis.2d at 276, 423 N.W.2d at 863. If the suspect tells the police that he wishes to remain silent, the interrogation must cease. ***Miranda***, 384 U.S. at 474. If the suspect requests an attorney, the interrogation must cease until an attorney is present. ***Id.*** As summarized by our Supreme Court, "an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to the accused, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Kramar***, 149 Wis.2d at 785-86, 440 N.W.2d at 324 (citing ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981)).

The police handcuffed Steinbach at the scene as he lay on the ground on his stomach. When Steinbach asked the officer why his wrists were handcuffed behind his back, the officer responded, "You know why. You know why you're handcuffed in the back." Steinbach then stated, "No, I don't. The son of a bitch pulled a gun on me, so I shot him."[3] Steinbach contends that the officer's comments constituted an interrogation before he had been read his ***Miranda*** rights. We are not persuaded.

[3] It was later determined that Sheets's gun had one chambered cartridge, the safety was still on, and that no shots had been fired. Steinbach admitted in his statement that after he shot Sheets, he removed Sheets's handgun from his utility belt and threw the gun away from him.

In ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980), the Court decided that "interrogation" for ***Miranda*** purposes refers not only to the direct questioning of a suspect in custody, but also to police conduct that is the "functional equivalent" of direct questioning. ***Cunningham***, 144 Wis.2d at 277, 423 N.W.2d at 864. The ***Innis*** test is summarized as follows:

> [I]f an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words constitute interrogation.

Id. at 278-79, 423 N.W.2d at 864.

The officer's comment was in response to Steinbach's question about the handcuffs. The officer's comment was not likely to elicit an incriminating response from Steinbach, nor did it have the force of a question put to Steinbach. Instead, Steinbach voluntarily made the statement to the officer. We conclude that the officer's remark did not constitute the "functional equivalent" of a custodial interrogation, and that the statement was admissible.

While seated in the back seat of the squad car, Steinbach was advised by detective Stephen Rust of his ***Miranda*** rights. Steinbach said he understood the rights, waived them, and agreed to talk with the officers. He described the events that led to the shooting and stated that he shot Sheets twice in self-defense with a handgun that had been concealed in his front right pants pocket. Steinbach accurately told the police where he hid the handgun, and police retrieved it. As he was led to the squad car, Steinbach contends that he shouted, "Get me a good lawyer" loudly to his wife, and that this constituted an invocation of his right to counsel. Steinbach also testified that he told the police in the squad car that he wanted an attorney. However, the trial court determined that the testimony from three officers and from Steinbach's wife that Steinbach did not make this request was more credible than Steinbach's testimony. We defer to the trial court because the determination of the credibility of the witnesses, including the defendant's, is exclusively for the trier

of fact. *See* ***In re Estate of Dejmal***, 95 Wis.2d 141, 152, 289 N.W.2d 813, 818 (1980).

The officers transported Steinbach to the police station, and he signed the waiver of rights form to indicate that he understood his rights. Steinbach refused to make a written statement without an attorney present, but stated that he was willing to continue to talk with the officers because they had "treated him so nice." Steinbach refused the officers' request to tape-record the statement. Steinbach described and reenacted the shooting, and again admitted that he shot Sheets.

Steinbach's decision to make an oral statement, but not to give a written or taped statement, does not undermine the constitutional validity of the oral statement or the admissibility of the inculpatory statements he made during the subsequent oral interview. *See* ***Connecticut v. Barrett***, 479 U.S. 523, 526-28 (1987). Steinbach was read his rights, he said he understood them, and he waived them. On these facts, we conclude that his statements were admissible.

Next, Steinbach asserts that he was denied effective assistance of trial counsel. The two-part test for ineffective assistance of counsel was set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Strickland's*** first prong requires the defendant to show, against a "strong presumption that counsel acted reasonably within professional norms," that trial counsel's performance was deficient. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). "This first test requires the defendant to show that his counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 127, 449 N.W.2d at 847 (quoting ***Strickland,*** 466 U.S. at 687). An attorney's performance is not deficient if it is reasonable under prevailing professional norms and considering all the circumstances. ***Id.*** at 129, 449 N.W.2d at 848.

Strickland's second prong requires the defendant to prove that his right to a fair trial was prejudiced. ***Id.*** at 687. "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." ***Johnson,*** 153 Wis.2d at 129, 449 N.W.2d at 848 (quoting ***Strickland,*** 466 U.S. at 694). "Even if deficient

performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***Id.*** at 127, 449 N.W.2d at 848.

The standard of review of the performance and prejudice prongs of ***Strickland*** is a mixed question of law and fact. ***Johnson,*** 153 Wis.2d at 127, 449 N.W.2d at 848. The trial court's findings of fact as to these components will not be overturned unless clearly erroneous. ***Id.*** The ultimate determination of whether the conduct of an attorney constitutes ineffective assistance of counsel is a question of law, reviewed de novo by this court. ***Id.*** We apply the facts of this case to the performance prong of ***Strickland***.

Steinbach contends that his trial counsel's decisions not to object to the admission of several videotapes and not to object to portions of detective Rust's testimony demonstrate ineffective assistance of counsel. We disagree. The State introduced videotaped demonstrations by law enforcement officers showing how they are trained to draw their weapons. At the postconviction hearing, trial counsel testified that he did not object because the videotapes supported the defense theory that things happened so quickly that Steinbach did not have time to form the specific intent to kill Sheets.

The State also elicited testimony from Rust regarding the inculpatory statement given by Steinbach in the squad car. Rust testified about the details of the statement, and also that his impression was that it was an "afterthought" for Steinbach to say that he shot Sheets only after Sheets had drawn his weapon. At the postconviction hearing, counsel testified that although he could have objected to the testimony, he chose not to because Steinbach's statement aided his defense by portraying him as a "careful, deliberate, accurate reporter of events."

In both instances, trial counsel made a strategic decision not to object. "When counsel has made a strategic choice in determining a course of action during a trial, we apply an even greater degree of deference to counsel's exercise of judgment in considering whether the challenged action constitutes ineffective representation." ***State v. Vinson***, 183 Wis.2d 297, 307-08, 515 N.W.2d 314, 318-19 (Ct. App. 1994). Because counsel's strategic decision was reasonable, we conclude that the failure to object was not deficient performance.

Additionally, Steinbach asserts that counsel's presentation of the theory of self-defense constituted ineffective assistance of counsel because it effectively eliminated the jury's opportunity to find Steinbach guilty of a lesser included offense. It is the prerogative of trial counsel to select a particular defense from a number of alternative defenses. ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992) (citing ***State v. Felton***, 110 Wis.2d 485, 501-03, 329 N.W.2d 161, 169 (1983)). "Even if it appears, in hindsight, that another defense would have been more effective, the strategic decision will be upheld as long as it is founded on rationality of fact and law." ***Id.*** Additionally, as was noted in ***Strickland***: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." ***Id.*** at 691. At trial, Steinbach testified that he was entitled to shoot Sheets in self-defense because Sheets drew his gun first. We conclude, as did the trial court, that it was reasonable for counsel to argue self-defense, especially in light of Steinbach's testimony.

Next, Steinbach asserts that counsel's failure to object to or move to strike portions of the prosecutor's closing and rebuttal arguments demonstrates ineffective assistance of counsel, and that the prosecutor's statements constitute plain and reversible error. We disagree. In closing argument, a prosecutor may strike "hard blows," but not "foul ones." ***State v. Neuser***, 191 Wis.2d 131, 139, 528 N.W.2d 49, 52 (Ct. App. 1995). Impermissible argument occurs when the prosecutor urges the jury to arrive at its verdict after considering factors other than the evidence. ***Id.*** at 136, 528 N.W.2d at 51. "Closing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion." ***State v. Draize***, 88 Wis.2d 445, 455-56, 276 N.W.2d 784, 790 (1979).

The disputed portions of the prosecutor's closing argument are the following:

> A colleague of mine once told me that the greatest glory in being a prosecutor is to be able to come into a court of justice and to speak for those who cannot speak for themselves. My job is now done. But I don't get the last word, nor does [defense trial counsel] who

> comes next, nor does the Judge. You have the final word in this case.

Your word comes through your verdict and I asked that your verdict respond to those two shots that broke the silence of that beautiful spring day out in Ringle on May 19, 1994. And I ask that your verdict respond to the silence of death that this defendant visited upon Jeffrey Sheets.

....

Mr. Krueger suggests that because Dale Steinbach tells the police a half hour after he shoots Deputy Sheets that it was Deputy Sheets who initiated the situation, that that means that his story is true. Let me tell you, based upon working in the criminal justice system for a decade, people come up with stories faster than that. And I can assure you that it doesn't take a lot of time in a situation such as this for someone to blame the other person.

It doesn't take them a lot of time to say that that person went first. Most homicides that go to trial find the defendant saying something just like that. You see, ladies and gentlemen, it is very easy to blame someone who cannot stand up and defend themselves. It is easy to say that it was their fault and they went first. It happens all the time.

Steinbach also directs our attention to the prosecutor's rebuttal argument:

I have responded to some of the points that Mr. Krueger brought up during his closing, but the final thing I want to touch upon is something that Mr. Krueger never mentioned. Something that I started my opening statement with and I think he never mentioned it because the defense has no answer to it. Why didn't Deputy Sheets [ever] fire his gun if the events

> unfolded out in that plowed field as this defendant told you they did? And they provide no explanation because there is no explanation.

Trial counsel testified at the postconviction hearing that although he could have objected to the prosecutor's closing remarks, he did not object because the remarks neither hurt nor harmed Steinbach. He also testified that he did not object to the rebuttal because the prosecutor referred to evidence in the record that he had rebutted in his closing argument. The prosecutor may question the validity of the position taken by the defense in order to highlight its weaknesses. *See* ***State v. Camacho***, 176 Wis.2d 860, 886, 501 N.W.2d 380, 390 (1993); ***State v. Patino***, 177 Wis.2d 348, 379-80, 502 N.W.2d 601, 613-14 (Ct. App. 1993).

We agree with Steinbach that a small portion of the prosecutor's rebuttal argument was improper because it reflected the personal opinions of the prosecutor, and trial counsel should have objected. When the prosecutor stated, "Let me tell you, based upon working in the criminal justice system for a decade, people come up with stories faster than that," he testified before the jury as an unsworn witness. *See* ***United States v. DiLoreto***, 888 F.2d 996 (3d Cir. 1989). However, when we consider this remark in the context of the entire trial, we conclude that it did not affect the fairness of the trial. *See* ***Neuser***, 191 Wis.2d at 136, 528 N.W.2d at 51. Therefore, counsel's failure to object did not result in prejudice for purposes of Steinbach's claim of ineffective assistance of counsel.

Next, Steinbach argues that the prosecutor's remarks in closing and during rebuttal constituted plain and reversible error. As noted above, Steinbach did not object to any of these remarks. The failure to object or to move for a mistrial in the trial court generally waives the issue for appeal purposes. ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). We therefore need not address this argument. Even if we were to consider the merits of the argument, we would conclude, similarly to our discussion, *supra*, that the comments did not prejudice Steinbach's right to a fair trial. *See* ***Neuser,*** 191 Wis.2d at 137, 140, 528 N.W.2d at 51, 53.

Finally, Steinbach claims that there was insufficient evidence to support the verdict. Our review of this issue is limited as follows: "[A]n appellate court may not reverse a conviction unless the evidence, viewed most

favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

In this case, firefighters testified that they heard two shots and saw Sheets fall to the ground. Police officers testified that Steinbach admitted to them at the scene, in the squad, and at the police station that he shot Sheets with the .22 Derringer he carried in his pants pocket. The forensic pathologist who conducted the autopsy testified that the .22 caliber bullet wound to Sheets's head took his life. Crime lab evidence demonstrated that the bullets had been discharged from Steinbach's .22 Derringer. Steinbach took the stand and testified that he shot Sheets in self-defense.

The State presented sufficient evidence to prove Steinbach's guilt beyond a reasonable doubt. The jury could reasonably infer specific intent from Steinbach's conduct. *See* ***State v. Webster***, 196 Wis.2d 308, 322, 538 N.W.2d 810, 815 (Ct. App. 1995). We therefore reject Steinbach's argument and affirm the conviction.

Steinbach has failed to persuade us that the trial court erred, Steinbach received ineffective assistance of counsel, the prosecutor's error in closing argument prejudiced Steinbach and there was insufficient evidence to support the verdict. We affirm the judgment and order of the court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.