COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-1283-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE MURPHY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Antoine Murphy has appealed from a judgment convicting him after a jury trial of attempted first-degree intentional homicide by use of a dangerous weapon in violation of WIS. STAT. §§ 939.32(1)(a), 939.63

and 940.01(1) (1999-2000).[1] He was also convicted of armed robbery in violation of WIS. STAT. § 943.32(1) and (2), and possession of marijuana with intent to deliver in violation of WIS. STAT. § 961.41(1m)(h)1. Both the attempted homicide and armed robbery convictions were as a party to the crime under WIS. STAT. § 939.05.

¶2 In addition to appealing from his judgment of conviction, Murphy has appealed from an order denying postconviction relief. We affirm the judgment and order.

¶3 The first issue raised by Murphy is whether the evidence was sufficient to support his conviction for attempted first-degree intentional homicide. He contends that the evidence was insufficient to permit the jury to conclude that he intended to kill the victim.

¶4 The test on appeal for the sufficiency of the evidence is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be so convinced by evidence that it had a right to believe and accept as true. ***State v. Poellinger***, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). The credibility of the witnesses and the weight of the evidence are for the jury. ***Id.*** at 504. Inconsistencies and contradictions in a witness's testimony are for the jury to consider in determining credibility. ***Kohlhoff v. State***, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978). The jury may consider a witness's motives in weighing credibility. ***Id.*** "A jury, even where a single witness is inconsistent and testifies to diametrically opposed facts, may

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

choose to believe one assertion and disbelieve the other." ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978).

¶5 We must view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***Poellinger***, 153 Wis. 2d at 504. "The jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted).

¶6 To convict a defendant of attempted first-degree intentional homicide, the State must prove that the defendant's actions would have caused the death of another except for the intervention of some extraneous factor. ***State v. Webster***, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995). "To prove the *mens rea* element of attempted first-degree homicide, the State must establish that the defendant 'acted with the intent to kill,' that is, 'the defendant had the mental purpose to take the life of another human being or was aware that his conduct was practically certain to cause the death of another human being.'" ***Id.*** (quoting WIS JI—CRIMINAL 1010). "Intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances." ***State v. Stewart***, 143 Wis. 2d 28, 35, 420 N.W.2d 44 (1988).

¶7 The evidence presented at trial was clearly sufficient to support a finding that Murphy intended to kill the victim, Warren Bergman. Testimony at trial indicated that Murphy, Maurice George, and Devontre Cottingham were driving around on the night of September 11, 1997, when they noticed Bergman, who was described in the testimony as a "lick," or an easy target for a robbery.

Murphy testified that upon seeing Bergman, he and George got out of the car. Murphy testified that he took a sawed-off rifle out of the hatchback and gave it to George. The testimony indicated that George then approached Bergman and pointed the gun at him, at which point Bergman handed his wallet to George. Murphy testified that he walked up as Bergman was in the process of handing his wallet to George, and that he and George then started to run away. Both Murphy and George testified that Bergman then started to yell and run after them.

¶8 Both George and Murphy testified that although George had the gun when they first started to run, Murphy took it from him. In addition, Murphy admitted at trial that he fired two shots at Bergman. In a statement made to police after the shooting and admitted into evidence at trial, Murphy stated that he "turned and fired twice." This was consistent with the testimony of Bergman, who testified that one of the robbers "turned around and shot at [him]," and that he saw the gun pointed at him. A bystander near the scene of the shooting also testified that he observed a drawn gun, and recalled "about three shots aimed at the victim." This witness also testified that before the shooting he observed Murphy walk over to where George was robbing Bergman, and that Murphy was "kind of giggling." This testimony was consistent with a statement made to the police by Cottingham, Murphy's accomplice, who testified that prior to the robbery they were "pumped up" and "excited" about what was to occur.

¶9 Evidence indicated that Bergman was shot in the lower abdomen, that he suffered extensive damage to his large and small intestines, and that when seen at the emergency room his vital signs were unstable and he was deteriorating rapidly. Medical testimony indicated that the injuries were life threatening.

¶10 Testimony by a firearms expert also indicated that the sawed-off rifle which Murphy used to shoot Bergman did not have a "hair trigger," and that the "trigger pull" for this weapon was approximately eight and one-quarter pounds. In addition, each firing required a separate pull on the trigger.

¶11 Based upon this testimony, the jury could find beyond a reasonable doubt that Murphy intended to kill Bergman. The jury could infer that he took the gun from George as they were running for the purpose of killing Bergman, either out of anger or for the purpose of preventing further pursuit. Although Murphy testified at trial that he did not turn around and that he fired the gun backwards to scare Bergman off, the jury was entitled to reject this testimony and to conclude, based upon Bergman's testimony and Murphy's statement to the police, that Murphy turned and pointed the gun at Bergman. In conjunction with the testimony that Murphy fired the gun two times, the evidence regarding the amount of force required to pull the trigger, the testimony regarding Murphy's giddiness and agitated state of mind, and the life-threatening injuries inflicted upon Bergman, the jury could reasonably conclude that when Murphy turned and fired, he intended to kill Bergman. Murphy's testimony that he was thirty feet from Bergman when he fired the shots could have been found incredible by the jurors and, even if believed, did not preclude them from finding that he intended to kill Bergman.

¶12 The remaining issues raised by Murphy relate to the prosecutor's closing argument. Murphy contends that his trial counsel rendered ineffective assistance by failing to object when the prosecutor stated: "I would submit to you, ladies and gentlemen, the only purpose to this sawed-off weapon is to kill and to maim and that is what Antoine Murphy did with it." Murphy contends that the statement was improper because at trial the State's expert witness testified that the

main purpose of sawing off the barrel and butt stock area of a rifle is to make it easy to conceal.

¶13 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See* ***id.*** It is not ineffective assistance to fail to make a motion or an objection which would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶14 No basis exists to conclude that trial counsel was deficient for failing to object to the prosecutor's statement regarding the sawed-off rifle. An attorney is allowed latitude in his or her closing argument, and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). A prosecutor may comment on the evidence, detail the evidence, and argue from it to a conclusion. ***Embry v. State***, 46 Wis. 2d 151, 160, 174 N.W.2d 521 (1970). A prosecutor may give a personal opinion based on the evidence, provided it is limited to the evidence actually adduced at trial. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 694-95, 211 N.W.2d 421 (1973). However, "[t]he line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning

from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***Neuser***, 191 Wis. 2d at 136. Argument based on facts which are not in evidence is improper. *See* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980).

¶15 Initially, we note that the prosecutor's statement regarding the sawed-off rifle was made in the context of arguing that Murphy injured Bergman with a "dangerous weapon," as required to convict him under the weapons enhancer set forth in WIS. STAT. § 939.63(1)(a)2. Most importantly, the prosecutor's comment constituted a reasonable inference from the evidence presented to the jury. The evidence indicated that both the barrel and the butt stock were sawed off of the rifle Murphy used to shoot Bergman. A firearms expert from the Wisconsin State Crime Laboratory testified that the sawing off was done to make the rifle more concealable. It is reasonable to infer that the purpose of making a rifle more concealable is to make it easier to use it to shoot someone. The prosecutor's statement that "I would submit to you … the only purpose to this sawed-off weapon is to kill and to maim" permissibly expressed his opinion that this was the proper inference to draw from the evidence.

¶16 In his supplemental brief, Murphy also challenges the prosecutor's comment on the lesser-included offense instruction given to the jury. The record indicates that in addition to instructing the jury on attempted first-degree intentional homicide, the trial court instructed the jury on the lesser-included offense of first-degree recklessly engendering safety. The lesser-included instruction was requested by the defense and opposed by the State. In his closing argument, the prosecutor commented: "Now I can tell you what the defendant is going to argue. The defendant is the one that asked for this second instruction to be given; not the State, the defendant requested it."

¶17 Murphy argues that the prosecutor's comment constituted plain error entitling him to a new trial under ***Neuser***. We disagree.

¶18 In closing argument in ***Neuser***, the prosecutor stated: "As to the lesser-included offense, the court did not submit that. The defense requested that and the court granted the request. It's not the court ordering that it be done." ***Neuser***, 191 Wis. 2d at 137. This court held that the prosecutor's argument was improper because it misstated the law, implying that the lesser-included instruction was given not because the trial court believed it was proper, but merely because the defendant requested it. *See* ***id.*** at 137-38. We noted that the situation was further aggravated because the prosecutor presumed to speak for the trial court, implying that the lesser-included offense instruction was given only because it was requested by the defense, and that only the greater charge had received judicial approval. *See* ***id.***

¶19 The prosecutor in this case merely informed the jury that Murphy had requested the instruction on recklessly endangering safety, and proceeded to argue that the evidence supported a finding of attempted first-degree intentional homicide rather than a finding that Murphy recklessly endangered Bergman's safety. Unlike the situation in ***Neuser***, the prosecutor in this case never stated or implied that the trial court had not approved the lesser-included offense instruction, or that it was given merely because the defendant requested it. Moreover, the prosecutor did not disparage the decision to give the instruction. Because the prosecutor did not misstate the law or presume to speak for the trial court, the improprieties that led to the reversal in ***Neuser*** are not present here.

¶20 We thus conclude that the prosecutor's comment does not justify reversing Murphy's conviction, and could leave the matter there. However, we

further note that in her closing argument, defense counsel pointed out to the jury that the instruction on recklessly endangering safety was not given merely because she requested it. She stated that "[t]he judge is the one who decides whether or not there is testimony that makes it appropriate for that instruction to be given.… I'm not the one who makes the decision on whether or not you get that jury instruction on that charge. The judge is." No basis therefore exists to believe that the jury deliberated under any misunderstanding as to why both the greater and lesser offenses were before it.[2]

By the Court.—Judgment and order affirmed.

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

[2] Although we reject Murphy's contention that the prosecutor's comment on his request for a lesser-included offense instruction constituted reversible error, we caution the prosecutor that it would be advisable not to enter into such territory. As noted in ***State v. Neuser***, 191 Wis. 2d 131, 138, 528 N.W.2d 49 (Ct. App. 1995), "[t]he question of whether a lesser-included offense is to be submitted is a legal issue which is resolved between the court and counsel. It does not involve the jury, and the proceedings relative to the question are not played out before the jury." It is thus advisable that a prosecutor refrain from commenting on why a lesser-included offense instruction is given, or from stating that it was requested by the defendant.