

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-3554-CR

Cir. Ct. No. 99-CF-255

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW R. MOLZAHN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ

¶1 PER CURIAM. Andrew Molzahn appeals from a judgment convicting him of first-degree reckless homicide with the use of a dangerous weapon. Molzahn also appeals from the trial court's order denying his motion for postconviction relief. He argues that there was insufficient evidence to support the verdict and that he received ineffective assistance of trial counsel. He also raises a

host of other issues that we do not consider in detail either because he has inadequately developed the argument in support of them or because he has waived his right to bring them. Accordingly, we affirm.

¶2 Molzahn first argues that the evidence was insufficient to support the jury's verdict finding him guilty of first-degree reckless homicide with a weapon. A person is guilty of first-degree reckless homicide if he or she causes the death of another person by reckless conduct under circumstances that show utter disregard for human life. WIS. STAT. § 940.02(1) (1999-2000).¹ We will reverse a verdict only if the evidence, "viewed most favorably to the state 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).

¶3 Many eyewitnesses testified as to exactly what Molzahn did and its effect on Richard Martin, the victim. Molzahn threw two full beer bottles at Martin that hit him on the head crushing his skull, severing arteries and causing significant bleeding and damage to Martin's brain. The jury viewed a video taken by a camera in the store where the attack occurred that showed, among other things, the force with which Martin was struck. A doctor testified that the right side of Martin's brain was pushed in where Martin had been hit. From this evidence, a reasonable jury could conclude that Molzahn caused Martin's death by

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

criminally reckless conduct under circumstances that show utter disregard for human life.²

¶4 Molzahn next argues that he was denied effective assistance of trial counsel. A defendant is denied the effective assistance of counsel when his or her attorney's performance is deficient and that deficient performance prejudices the defense. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To show deficient performance, the defendant must “overcome a strong presumption that his or her counsel acted reasonably within professional norms.” *See State v. DeKeyser*, 221 Wis. 2d 435, 442, 585 N.W.2d 668 (Ct. App. 1998). Counsel's deficient performance prejudices the defense when the acts or omissions are so prejudicial that they deprive the defendant of a trial “whose result is reliable.” *Id.*

¶5 Molzahn argues that his counsel's performance was deficient because he: (1) did not move for a change in venue; (2) did not move to sequester the jury or request individual *voir dire*; (3) did not hire a professional pathologist and a projectiles expert; (4) did not have Molzahn evaluated by a physiologist, neurologist or psychologist; (5) did not object to the prosecutor's statement that Molzahn was the victim's “executioner” and that Molzahn was a “punk;” (6) failed to move to suppress Molzahn's statements; and (7) withdrew a motion regarding Molzahn's intoxication that would have been favorable to him.

² Molzahn contends that the jury overlooked factors that may have played a role in Martin's death, such as Martin's weak heart and the fact that Martin was intoxicated. Regardless of whether Martin had an underlying health condition that made him more vulnerable after being hit in the head with the bottles—and our review of the record shows no concrete evidence of this—we conclude that there was sufficient evidence to support the jury's conclusion that Molzahn's actions caused Martin's death by criminally reckless conduct under circumstances that show utter disregard for human life. *See State v. Martinez*, 210 Wis. 2d 396, 410, 563 N.W.2d 922 (Ct. App. 1997) (“Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference drawn by the jury.”)

¶6 After reviewing the transcript of the postconviction hearing on the issue of ineffective assistance of counsel and the trial court's oral decision denying the motion, we reject Molzahn's claim. Molzahn presents a laundry list of alleged deficiencies, but a review of trial counsel's testimony regarding the various acts and omissions shows that counsel made reasoned determinations, often based on strategy, and charted a thoughtful and reasonable course he believed would be most favorable to Molzahn. Moreover, we agree with the trial court that Molzahn has failed to show prejudice. Given the overwhelming evidence of Molzahn's guilt, had trial counsel done or, as the case may be, not done the acts of which Molzahn complains, we conclude that the result of the trial would have been the same.

¶7 Molzahn next argues that the trial court erred in allowing the victim's mother, Connie Hicks, to testify because "[w]hat she testified to was highly prejudicial in that it was all of her emotive response about her son." Based on our review of Connie Hicks's testimony, we conclude that Molzahn's argument is without merit. Hicks testified very briefly, identifying her son for the jury, answering a few questions about his history and telling the jury about events that occurred the night of his death. Her testimony was succinct and factual. There was no error.

¶8 Molzahn next argues that the State withheld exculpatory evidence from him. He contends that the State should have provided him with an emergency room report about the victim dated December 20, 1998, that would have shown the victim had a problem with alcohol. He also contends the report contained other exculpatory evidence, but Molzahn does not describe what that exculpatory evidence was. We agree with the State that Molzahn has failed "to cite record evidence that he timely requested [the emergency room report] from

the state, that the state possessed it, and that the state failed to timely disclose it.” Therefore, we reject this argument.

¶9 Molzahn next contends that the trial court erroneously exercised its discretion when it “misstated [the] law,” denied his motions for a mistrial and instructed the jury on the duty to retreat. He also contends that his bail of \$200,000 was excessive. Molzahn has failed to adequately develop any of these arguments. Therefore, we will not consider them. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (the court of appeals may decline to review issues that are inadequately briefed).

¶10 Finally, Molzahn argues that his right to a speedy trial was violated. He did not raise this claim by postconviction motion to the trial court. Therefore, we will not consider it. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (we will generally not review issues raised for the first time on appeal).

By the Court.—Judgment and order affirmed.

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

