COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP81-CR **Cir. Ct. No. 2004CF181**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYLES C. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tyles Jackson appeals a judgment of conviction for first-degree intentional homicide and an order denying his motion for postconviction relief. He argues his trial counsel was ineffective and he is entitled to a new trial in the interest of justice. He also contends the circuit court

erroneously exercised its discretion in sentencing him and his sentence is unduly harsh and excessive. We reject his arguments and affirm.

BACKGROUND

¶2 In March 2004, Jackson was charged with one count of first-degree intentional homicide. The complaint alleged Jackson stabbed a person named Keith Hauschel during a fight involving approximately ten people. An Information was filed containing the single first-degree intentional homicide charge.

¶3 Jackson's first trial took place in September 2004. The defense argued for acquittal based on self-defense. The State focused on the first-degree intentional charge, although the jury was also instructed on several lesser-included offenses. The jury ultimately deadlocked, and the court declared a mistrial.

¶4 The case was tried a second time beginning on March 7, 2004. The State's theory of the case was that a fight broke out in front of a house where two of Jackson's friends lived. The fight pitted Jackson and two of his friends against three other individuals. The three other individuals were part of a group of eight people who stopped to discuss a dispute with Jackson and one of the residents of the house.

¶5 According to the State's theory of the case, Hauschel was a member of the group of eight that arrived at the scene, but was a spectator when the other people at the scene began fighting. After a few minutes of fighting, Jackson retrieved a butcher knife from the house and returned to the fight. Hauschel ran away, and Jackson chased him down the street and stabbed him. The knife wound was nine inches deep, and had two distinct wound paths. According to expert

testimony, the two wound paths indicated Hauschel was stabbed a first time, the knife was partially withdrawn, and then pressure was applied a second time.

¶6 Jackson's defense was that most of the group of eight—including Hauschel—participated in the fight, and Jackson retrieved the knife only after being punched, knocked down, and kicked by two or three assailants. When Jackson came back outside with the knife, he headed toward the area where three men were stomping on and kicking one of Jackson's friends. The beating continued even after Jackson threatened them with the knife, and when two men confronted him, Jackson stabbed one of them in self-defense.

¶7 The jury found Jackson guilty of first-degree intentional homicide. The court sentenced him to life in prison, with eligibility for extended supervision on May 2, 2040. Jackson filed a postconviction motion arguing he was entitled to a new trial in the interest of justice and because of ineffective assistance of counsel. He also argued the sentence imposed was unduly harsh and excessive.

¶8 Jackson's claim of ineffective assistance, as relevant here, was based on counsel's decision to pursue a self-defense strategy rather than argue for a lesser-included offense. The motion also suggested counsel should have done more to investigate why the first jury deadlocked, and noted the jury sent a note to the judge about halfway through deliberations. The note gave the jury's votes at the time, but was sealed by the court, and neither side attempted to view it in preparation for the second trial.[1]

[1] When the court received the note, the court told the parties the note included the jurors' vote, but it would not reveal that information. Copies of the note were given to the parties after the ***Machner*** hearing. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶9 At the ***Machner*** hearing, Jackson's trial counsel indicated he chose to focus on self-defense because he believed the facts fit self-defense as well or better than recklessness or any other lesser-included offense. Counsel saw no reason to argue for conviction on a lesser-included offense when outright acquittal on a self-defense theory was at least as likely of an outcome. He indicated he did not specifically argue the lesser-included offenses in his closing argument because he believed doing so would break up his closing argument and damage his credibility. Counsel noted Jackson preferred a self-defense strategy as well.

¶10 Finally, counsel indicated his investigator attempted to discover the jurors' votes in the first trial, and was told that "more than half" voted for conviction on first-degree intentional homicide. Counsel was not asked about the jury's note giving its vote halfway through the first trial. Counsel said he considered his investigator's report about the jurors' votes in the first trial, among other things, before deciding to pursue a self-defense strategy in the second trial. He said information about the first jury was of some utility, but was not enough to force a complete change in strategy because a second jury would not necessarily view the evidence in the same way as the first one.

¶11 The court concluded counsel's failure to argue for a conviction on a lesser-included offense was deficient performance. However, the court concluded this deficiency did not prejudice Jackson because the jury instructions indicated the jury was to consider all charges, and it was presumed to have done so. The court therefore denied Jackson's motion.

DISCUSSION

¶12 Jackson first argues his trial counsel was ineffective. Claims of ineffective assistance are reviewed in a two-step process. ***State v. Johnson***, 2004

WI 94, ¶11, 273 Wis. 2d 626, 681 N.W.2d 901. First, we will uphold the circuit court's findings of historical fact unless clearly erroneous. ***State v. Wright***, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386. Second, whether those facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. ***Id.***

¶13 To prove ineffective assistance, a defendant must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Counsel's performance is deficient only if counsel's actions fall outside the "wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" as deficient. ***Id.*** at 690. Choices not to investigate are not deficient performance so long as "reasonable professional judgments support the limitations on investigation." ***Id.*** at 691.

¶14 Here, Jackson's counsel testified he decided the best trial strategy would be to focus on self-defense rather than argue for conviction on a lesser-included offense. Counsel made this decision based on the evidence at the first trial, a report from his investigator on the jury vote in the first trial, and his client's wishes. Counsel's decision was therefore a strategic choice made after a thorough investigation, and did not constitute deficient performance. *See* ***id.*** at 690.

¶15 Jackson argues counsel's choice was so unreasonable as to be deficient performance because Jackson's own testimony was not consistent with self-defense. Jackson testified that at the start of the altercation, Will Ray, who was one of the group of eight people, hit him and knocked him down. Ray and

one or two others then continued to kick Jackson while he was on the ground. According to Jackson's testimony, he escaped and retrieved a knife from the house. When he emerged from the house, Ray confronted him again with a stick. Jackson chased Ray across the street, swinging the knife at him. Ray then retrieved two metal bars from the garbage and swung the bars at Jackson. Jackson swung the knife at Ray again.

¶16 At that point, according to Jackson, Hauschel ran up to him and got in a "fighting stance with his fists." Hauschel took a swing at Jackson, and Jackson swung the knife at Hauschel. Ray then threw one of the metal bars at Jackson, and Jackson swung the knife back at Ray. Hauschel approached again, and Jackson swung the knife at Hauschel again. Hauschel then took off running. Jackson testified he did not intend to kill anyone; he just wanted them to back away from him. He also said he did not know at the time that his knife had made contact with anyone.

¶17 The jury was instructed on self-defense as follows:

> [A] person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his person by the other person. However, he may intentionally use only such force as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death unless he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself.
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> ….
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> The law allows Mr. Jackson to act in defense of others only if he believed that there was an actual or imminent unlawful interference with the person of others, believed that those persons were entitled to use or to threaten to use force in self-defense, and believed that the amount of force used or threatened by Mr. Jackson was necessary for the

> protection of others. Tyles Jackson may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if he believed that such force was necessary to prevent imminent death or great bodily harm to others.

¶18 Jackson's testimony was consistent with this instruction. Jackson testified he and his companions were outnumbered, ambushed and beaten, the attack continued after he retrieved the knife, and at the time of the stabbing he was being attacked by two people, one armed with metal bars. If the jury accepted this testimony as true, it could have concluded Jackson reasonably believed using or threatening to use the knife was necessary to defend himself or his companions from great bodily harm.[2]

¶19 Jackson next argues his testimony was "contradictory" and "implausible," and counsel should therefore have argued the lesser-included offenses in order to give the jury an alternative to his story. However, while Jackson's story was not consistent with much of the State's evidence, it was not inherently contradictory or obviously unbelievable. Several witnesses placed Hauschel across the street from the melee, the general location Jackson claimed he had come from. Ray testified he knocked Jackson down and kicked him before Jackson retrieved the knife. Ray also admitted he confronted Jackson after Jackson retrieved the knife, although Ray disputed most of Jackson's account of what happened after that. And while Jackson's testimony that Hauschel attacked him with his fists while Jackson was swinging a knife perhaps stretches credulity,

[2] Jackson argues perfect self-defense was inconsistent with his testimony because it "required evidence establishing that Jackson intentionally took Hauschel's life to save his own or another's." Nothing in the jury instructions or WIS. STAT. § 939.48 creates such a requirement.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Jackson did produce evidence that Hauschel had cocaine in his system at the time and therefore was more likely to engage in aggressive behavior. In view of these facts, counsel's decision to urge the jury to accept his client's account of the fight was well within the "wide range of reasonable professional assistance." *See* ***Strickland***, 466 U.S. at 689.

¶20 We also see no deficient performance in counsel's decision to rely on information from his investigator about the jury's vote in the first trial. Counsel indicated his decision to use a self-defense strategy again in the second trial was based on numerous facts and considerations, of which the jury vote in the first trial was only one. While the note from the first jury might have provided better information on this one point, nothing in the record indicates counsel had any reason to doubt the veracity of his investigator's report.[3] Counsel therefore made a reasonable professional judgment on the scope of his investigation. *See* ***id.*** at 691.

¶21 Jackson next challenges his sentence. He first contends the court "failed to give proportionate consideration" to mitigating evidence, including his own account of the crime and the victim's culpability. However, the weight to be given each sentencing factor is committed to the court's discretion. ***State v. Steele***, 2001 WI App 160, ¶10, 246 Wis. 2d 744, 632 N.W.2d 112. The court did consider mitigating evidence, including the circumstances under which the crime took place. The court concluded, despite the mitigating evidence, that the

[3] Jackson's investigator reported that "over half" of the jury had voted for conviction on first-degree intentional homicide. The note indicated most of the votes halfway through deliberations had been for second-degree intentional homicide, with the remaining jurors undecided or in favor of a reckless murder charge.

minimum sentence would be inappropriate due to Jackson's history of violence and the court's belief that he posed a significant risk to reoffend. To the extent the court's sentence indicates it gave more weight to aggravating factors than mitigating factors, it acted within its discretion when it did so. *See* ***id.***

¶22 Jackson next argues his sentence is unduly harsh and excessive. However, the court could have imposed a sentence of life without eligibility for extended supervision, and instead imposed a sentence that made Jackson eligible for extended supervision on May 2, 2040, when he will be sixty-four years old. *See* WIS. STAT. § 973.014(1g)(a). This is not, as Jackson argues, a death sentence.[4] Instead, the sentence is well within the maximum allowable by law, and therefore is not so harsh or excessive as to shock public sentiment. *See* ***State v. Stenzel***, 2004 WI App 181, ¶22, 276 Wis. 2d 224, 688 N.W.2d 20.

¶23 Finally, Jackson claims he is entitled to a new trial in the interest of justice. This argument is based on his contention that counsel should have focused on lesser-included offenses rather than self-defense. As discussed above, the real controversy was whether Jackson had in fact acted in self-defense, as he claimed. That controversy was fully tried. *See* WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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

[4] Jackson misrepresents the record when he argues the court acknowledged it was imposing a death sentence. The court did express doubt that Jackson would be released, but only because Jackson seemed unlikely to be able to earn extended supervision due to his "almost automatic" tendency to solve problems violently.