

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2009

David R. Schanker
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. 2008AP1608-CR

Cir. Ct. No. 2005CF149

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY A. SIDOFF,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Mary A. Sidoff appeals from a judgment of conviction for first-degree intentional homicide and an order denying her motion for postconviction relief. Sidoff argues that she received ineffective assistance of trial counsel, or in the alternative, she is entitled to a new trial in the interests of

justice. Sidoff argues that her trial counsel failed to object to erroneous jury instructions and failed to request an instruction on a different lesser-included offense. We conclude that Sidoff did not receive ineffective assistance of counsel, and is not entitled to a new trial in the interests of justice. Consequently, we affirm.

¶2 After a jury trial, Sidoff was convicted of one count of first-degree intentional homicide by use of a dangerous weapon, and one count each of hiding a corpse and theft from a corpse. Only the homicide is at issue in this appeal. Sidoff was charged with shooting an eighty-eight-year-old woman named Ardelle Sturznegger. The police found Sturznegger's body wrapped in a tarpaulin in the horse pasture of the home of Sidoff and her husband, David. Sturznegger had been shot in the head.

¶3 The trial testimony suggested three different versions of the events leading to Sturznegger's death. One involved a pre-arrest statement Sidoff made to police in which she claimed that she unintentionally shot Sturznegger to defend Sidoff's infant son, because Sturznegger was struggling with the boy, and Sidoff was afraid that Sturznegger was going to hurt him. A second version depended on Sidoff's trial testimony that she did not shoot Sturznegger, but that Sidoff's husband, David, was somehow involved in Sturznegger's death. The State's version was that Sidoff shot Sturznegger "execution style" to get Sturznegger's money.

¶4 In all three scenarios, the evidence showed that Sidoff, who worked as a certified nursing assistant, met Sturznegger when Sturznegger was admitted to the University of Wisconsin hospital psychiatric unit for "emergency detention."

When Sturznegger was admitted, she had a canvas bag containing \$57,000. Sidoff knew about this money.

¶5 Sidoff told two different versions of what happened next. In the statement she made to the police before she was arrested, Sidoff said that sometime after Sturznegger had been discharged from the hospital, Sidoff offered to help Sturznegger look for an apartment, and arranged to meet with Sturznegger in Monroe on October 11, 2005. They met, and Sidoff said that Sturznegger was “kind of relentless” about wanting to talk about her estranged daughter, Mary Jo. Sturznegger eventually came to Sidoff’s home, looking for Mary Jo. Sidoff tried to explain that Mary Jo was not there. Sidoff said that Sturznegger became agitated, grabbed Sidoff’s infant son, and was struggling with him. Sidoff got her husband’s pistol, placed the pistol at the back of Sturznegger’s head, and unintentionally pulled the trigger, killing Sturznegger.¹

¶6 At trial, Sidoff testified that this version of the events was not true. She testified that at the time she met Sturznegger, Sidoff and her husband were having severe financial difficulties, for which David blamed her.² David suggested that she contact Sturznegger to see if she would loan them money. Sidoff then called Sturznegger at a motel in Janesville, where Sturznegger was staying.

¹ One of the issues at trial was the actual date that Sturznegger was killed. In the pre-arrest statement, Sidoff said she killed Sturznegger on October 11. In her trial testimony, Sidoff said Sturznegger was killed some days later. The State argued that Sturznegger was killed by Sidoff on October 11.

² David’s motorcycle had been repossessed, and it appeared his truck might be repossessed, too.

¶7 Sidoff met with Sturznegger on October 11, and brought Sturznegger to Sidoff's home. Sidoff told Sturznegger that she needed to borrow money, and Sturznegger agreed to loan Sidoff \$25,000, and gave her the money. On that same day, Sidoff paid off some debts using large amounts of cash. Soon afterward, Sidoff went away for a weekend, and when she got back, Sturznegger was not there. David said that he had gotten into an argument with Sturznegger and that she had left.

¶8 At the end of that week, Sidoff got a phone call from a police detective, inquiring about Sturznegger, because the call logs of the motel where Sturznegger had been staying showed that Sidoff had called Sturznegger there on October 11. David overheard the conversation, and told Sidoff to stop talking. She eventually agreed to go to the police station to make a statement, and got off the phone. David then told her that Sturznegger had "gotten shot." David asked Sidoff to tell the police that she had shot Sturznegger while trying to protect their son because she would not get into trouble for that. Sidoff eventually went to the police with a lawyer to give the statement in which she said that she was acting in defense of her son when she shot Sturznegger.

¶9 The State offered a different version of the events. The State argued that Sidoff killed Sturznegger on the afternoon of October 11, because she wanted Sturznegger's money to pay off debts. The State's case was based on circumstantial evidence. The State argued that this evidence showed that Sturznegger could be a difficult person who was very protective of her money, which she carried with her in a canvas bag, and that Sturznegger would not have given Sidoff, someone she hardly knew, a \$25,000 interest free loan. The State further argued that on October 11, Sidoff pretended to be Sturznegger's daughter, or a friend of her daughter's, and lured Sturznegger to Monroe, where Sidoff shot

Sturznegger. Sidoff hid Sturznegger's body. Sidoff then paid off some debts, and rented a rug cleaning machine to clean the blood spatter in the house. Over the next couple of days, Sidoff and her husband spent large sums of money, using \$100 bills.

¶10 The circuit court gave jury instructions on first-degree intentional homicide, and the lesser-included offenses of second-degree intentional homicide, and first- and second-degree reckless homicide. The jury found Sidoff guilty of first-degree intentional homicide.

¶11 Sidoff moved for postconviction relief asking for a new trial on the homicide count, arguing that she received ineffective assistance of trial counsel because her attorney did not object to the jury instructions for the lesser-included offense. Sidoff also moved for a new trial in the interests of justice, asserting that her counsel had not requested a jury instruction for the proper lesser-included offense, negligent handling of a dangerous weapon.

¶12 The circuit court heard and denied Sidoff's postconviction motion. The court found that Sidoff's defense attorney had, with Sidoff's agreement, decided to "go for broke" and pursue a defense that Sidoff did not kill Sturznegger, suggesting instead that Sidoff's husband, David, had committed the crime. The circuit court concluded that the evidence supported this, as well as several other theories, and that "a reasonable attorney might decide that an all-or-nothing strategy was the best option available." The court concluded that Sidoff's attorney was not ineffective, the court did not err when it instructed the jury on the lesser-included offenses, the court did not err when it did not give an instruction on homicide by negligent handling of a dangerous weapon, and Sidoff was not entitled to a new trial in the interests of justice because her trial counsel failed to

request a jury instruction on homicide by negligent handling of a dangerous weapon. The court concluded that “Sidoff knowingly selected her trial strategy. Having lost with that strategy, she does not warrant a new trial to try out another.”

¶13 Sidoff argues here that she received ineffective assistance of trial counsel because her attorney did not object to erroneous jury instructions, and in the alternative, that she is entitled to a new trial in the interests of justice because of the cumulative errors in the jury instructions. To establish an ineffective assistance of counsel claim, a defendant must show both that counsel’s performance was deficient and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Id.* at 697. Consequently, if counsel’s performance was not prejudicial, the claim fails and this court need not examine the performance prong. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). We review the denial of an ineffective assistance claim as a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the circuit court’s factual findings unless they are clearly erroneous. *Id.* However, we review the two-pronged determination of trial counsel’s performance independently as a question of law. *Id.* at 128.

¶14 Sidoff argues that the jury instructions did not take into account the view of the evidence found in her pre-arrest statement that she shot Sturznegger unintentionally. Specifically, she argues that the instructions failed to inform the jury that Sidoff was privileged to threaten to use deadly force in defense of her son, and that the instructions defined Sidoff’s right to defend her son solely in terms of her use of intentional force. Sidoff argues that the instructions

erroneously focused only on the use of force, when under the pre-arrest version of the events, she threatened force, but shot Sturznegger accidentally.

¶15 We conclude that Sidoff did not receive ineffective assistance of counsel. While the evidence established that Sidoff did more than just threaten deadly force, we conclude that Sidoff cannot establish that she was prejudiced, and therefore we need not reach the issue of whether counsel erred by not objecting to the jury instructions or requesting an instruction on homicide by negligent use of a dangerous weapon.

¶16 The court instructed the jury to decide first whether the evidence established first-degree intentional homicide, and only if they were not satisfied that the State had proven every element of that offense beyond a reasonable doubt were they to consider the lesser-included offenses. *See* WIS JI—CRIMINAL 112A. The jury instruction given on first-degree intentional homicide required the State to prove that Sidoff acted with “the intent to kill Ardelle Sturznegger.” The instruction also required the State to prove that Sidoff “did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to herself or another person.” The jury found that the State proved all of the elements to establish first-degree intentional homicide. Because the jury found Sidoff guilty of the principal offense, they did not consider the lesser-included offense. Consequently, any error in the instructions on the lesser-included offenses, including the failure to give an instruction on negligent handling of a dangerous weapon, simply did not matter. Sidoff, therefore, was not prejudiced by any error.

¶17 We also reject Sidoff’s claim that the real controversy was not tried and that she is entitled to a new trial in the interests of justice. WIS. STAT.

§ 752.35 (2007-08).³ In order to grant a new trial in the interests of justice, we must be convinced that there has been a miscarriage of justice or that the controversy has not been fully tried. *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 480, 549 N.W.2d 737 (Ct. App. 1996). If we determine that there has been a miscarriage of justice, we also are required to find “a substantial probability of a different result on retrial.” *Id.*

¶18 First, we are not convinced that there was a miscarriage of justice. Once again, assuming without deciding that the failure to request or give a jury instruction on the negligent handling of a dangerous weapon was error, we are not convinced that there would be a substantial probability of a different result on retrial. The evidence strongly supported the verdict reached by the jury: that Sidoff intentionally killed Sturznegger. Therefore, Sidoff has not established that there was a miscarriage of justice.

¶19 Neither are we convinced that the real controversy was not tried. The issue in this case was whether Sidoff shot Sturznegger intentionally. This is the issue that was argued to and decided by the jury. Consequently, Sidoff is not entitled to a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

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

³ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

