COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1704-CR **Cir. Ct. No. 2005CF6364**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN L. DEVROY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Brian L. Devroy appeals a judgment of conviction of first-degree intentional homicide for the stabbing death of his roommate, Scott Lewek. Devroy also appeals an order denying his postconviction motion for a new trial based on ineffective assistance of counsel and trial court error. Because

we conclude that Devroy has not satisfied the standard for demonstrating ineffective assistance of counsel, and because the effect of the trial court's error was *de minimis*, we affirm.

BACKGROUND

¶2 In 2009, Devroy was convicted of first-degree intentional homicide for the stabbing death of his roommate, Scott Lewek. According to the complaint, at approximately 3:50 a.m. on the morning of November 7, 2005, police discovered Lewek's body in his residence, the lower-level of a duplex in the City of Milwaukee. When police arrived at the duplex, they were told by the building's landlord, Bruce Laumann, that Laumann noticed blood splattered on Lewek's bedroom wall and observed a body lying on Lewek's bedroom floor, prompting Laumann to call the police. Laumann stated that at 3:30 a.m. that morning, he awoke to take his dogs out for a walk, when he observed from the outside window that the television was on in Lewek and Devroy's residence. The complaint states that Laumann noticed the body and blood after looking through Lewek's bedroom window. Laumann, who lived in the upper unit of the duplex, also told police that on the morning of November 6, 2005, at approximately 1:30 a.m., he heard an argument in the lower level. The complaint states that Laumann heard "thumps" and a struggle coming from below. He further told police that after the struggle, he heard the front door of the lower level slam shut, at which point he looked out his window and saw Devroy get into a car. Devroy was subsequently arrested and charged.

¶3 Prior to trial, Devroy entered a plea of not guilty by reason of mental disease or defect (NGI). He later withdrew the plea and proceeded to a jury trial. At trial, the State presented multiple witnesses, including Officer Carl Buschmann,

who interrogated Devroy after his arrest. Buschmann testified that Devroy confessed to Lewek's murder and that Devroy signed a confession. Devroy's defense counsel requested the opportunity to cross-examine Buschmann regarding high-pressure interrogation tactics, arguing that Devroy was pressured into signing a false confession and that Buschmann had previously elicited false information leading to a wrongful conviction in the case of Chaunte Ott, a conviction we overturned.[1] The trial court denied defense counsel's request.

¶4 The State also called: (1) Laumann, who testified in detail as to his observations leading up to his discovery of Lewek's body; (2) Detective Scott Gastrow, who also testified that Devroy confessed to Lewek's murder; (3) Jonathan Hogans, a jailhouse inmate; (4) Detective Louis Johnson, who testified that Hogans told him (Johnson) that Devroy admitted to murdering his roommate while the two were incarcerated together; and (5) Dr. Richard Rawski, the psychiatrist who evaluated Devroy pursuant to Devroy's initial NGI plea, who testified as to Devroy's claim of opiate use on the day of the murder and Dr. Rawski's belief that the claim was not true. Devroy testified on his own behalf.

¶5 After a five-day jury trial, Devroy was found guilty of first-degree intentional homicide. Devroy filed a postconviction motion, alleging multiple instances of ineffective assistance of counsel. After an evidentiary hearing, the trial court issued an oral ruling denying Devroy's motion. This appeal follows. Additional facts are included as relevant to the discussion.

[1] *See* ***State v. Ott***, No. 2008AP34, unpublished slip op. (WI App Dec. 23, 2008).

DISCUSSION

¶6 On appeal Devroy alleges several instances of ineffective assistance of counsel. Specifically, Devroy contends that his defense counsel: (1) offered a factually and legally deficient explanation to the trial court as to his need to cross-examine Buschmann about his involvement in the Ott case, prompting the trial court to deny defense counsel permission to do so; (2) failed to call Michelynn Meloy, a friend of Lewek's, to testify about confrontations she witnessed between Lewek and Laumann, which Devroy claims would have bolstered a defense theory that Laumann actually killed Lewek; (3) failed to make a hearsay objection to Johnson's testimony regarding information obtained about Devroy from Hogans; and (4) failed to object to Dr. Rawski's testimony pertaining to Devroy's opiate use. Devroy also contends that the trial court erroneously denied his request to cross-examine Hogans about concessions Hogans may have received for providing information to Johnson.

I. Ineffective Assistance of Counsel.

Standard of Review.

¶7 In order to demonstrate ineffective assistance of counsel, the defendant must prove that his defense counsel's performance was deficient, and that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The issues of deficient performance and prejudice constitute mixed questions of law and fact. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will not upset findings of fact unless they are clearly erroneous, but whether counsel's performance was deficient and whether the deficient performance prejudiced the defendant are legal questions we decide *de novo*. *See* ***id.*** at 236-37. An attorney's performance is deficient if the

attorney "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Stated differently, performance is deficient if it falls outside the range of professionally competent representation. ***State v. Pitsch***, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). We indulge in a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 637. To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoting ***Strickland***, 466 U.S. at 694). If the defendant fails to adequately show one prong of the ***Strickland*** test, we need not address the second. ***Strickland***, 466 U.S. at 697.

A. The Ott Case.

¶8 Devroy contends that his defense counsel failed to offer sufficient information pertaining to "Buschmann's role in eliciting false information that led to a wrongful conviction" in the case of Chaunte Ott. If defense counsel had provided a sufficient proffer, Devroy contends, defense counsel would have been permitted to bolster his defense theory that Devroy signed a false confession after succumbing to Buschmann's inappropriate interrogation techniques. We disagree.

¶9 Both Devroy and Buschmann testified at trial. Devroy testified that he never orally confessed to killing Lewek during his interrogation with

Buschmann, but that he did sign a confession prepared by Buschmann. The signature was obtained, according to Devroy, after a lengthy and confrontational interrogation, during which Devroy was undergoing opiate withdrawal. Buschmann, on the contrary, testified that Devroy confessed to killing Lewek, stating that voices in his head instructed him to commit the murder. The signed confession, Buschmann stated, was prepared by Buschmann based on statements made by Devroy.

¶10 At trial, but outside of the presence of the jury, defense counsel requested permission from the trial court to question Buschmann about his involvement in the interrogations leading up to Ott's wrongful conviction. In that case, we reversed a trial court order denying Ott's motion for a new trial following his conviction for first-degree intentional homicide. *See* ***State v. Ott***, No. 2008AP34, unpublished slip op. (WI App Dec. 23, 2008). Ott was convicted for the 1995 murder of Jessica Payne. ***Id.***, ¶¶1-2. The State relied primarily on two witnesses at trial—Sam Hadaway and Richard Gwin—both of whom implicated Ott in Payne's murder. ***Id.***, ¶¶3-4. In 2002, the Wisconsin Innocence Project requested new DNA testing of the vaginal swabs conducted on Payne. ***Id.***, ¶6. Ott, Hadaway and Gwin were all excluded as the source of the DNA found on Payne. ***Id.*** The charges against Ott were eventually dropped after the DNA was found to match that of Walter Ellis. After the charges against Ott were dropped, Hadaway confessed that he falsely incriminated Ott during police interrogations because of pressure from Buschmann. According to a statement from Hadaway, Buschmann fed Hadaway the details of Payne's murder and told Hadaway that he (Hadaway) would be blamed for the murder unless he implicated Ott.

¶11 Devroy's defense counsel did not provide the trial court with all of the facts of the case, but did state that the State's witnesses in the Ott case were

questioned by Buschmann and that Buschmann was aware that both witnesses wished to recant their statements prior to Ott's trial. The trial court denied defense counsel's request, stating "I don't see the fact that someone may or may not have been innocent of a crime that they were convicted of, how it's relevant to this particular case." On appeal, Devroy contends that defense counsel failed to introduce Hadaway's statement recanting his implication of Ott, and that defense counsel failed to explain that Buschmann's allegedly high pressure interrogation techniques were other acts evidence establishing his motive to pressure Devroy to sign a false confession. We conclude that Devroy has not satisfied the ***Strickland*** standard.

¶12 Both Devroy and the State acknowledge that evidence pertaining to Buschmann's interrogation techniques in previous cases constitute other acts evidence. While Devroy argues that such evidence is admissible to prove Buschmann's motive to solve cases, the State contends that such evidence is inadmissible propensity evidence, or in the alternative, fails to satisfy the three-prong "other acts" test put forth by ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We agree that under ***Sullivan***, evidence of Buschmann's involvement in the Ott case would not have been admissible.

¶13 In ***Sullivan***, the supreme court discussed a three-step framework for determining the admissibility of other acts evidence. *See* ***id.*** The first step in the analysis is to determine whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2) (2009-10),[2] such as to establish motive, opportunity, plan, knowledge, or identity. ***Sullivan***, 216 Wis. 2d at 783.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

In the second step, a court must assess whether the evidence has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence or, in other words, whether it has probative value. *See* ***State v. Payano***, 2009 WI 86, ¶¶67-68, 320 Wis. 2d 348, 768 N.W.2d. 832. If the other acts evidence is relevant and offered for a proper purpose, under the third step it is admissible under ***Sullivan*** unless the opponent demonstrates that "'its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" ***Payano***, 320 Wis. 2d 348, ¶80 (citation omitted; emphasis in ***Payano***).

¶14 Assuming that evidence pertaining to Buschmann's involvement in the Ott investigation falls under a permissible purpose and has probative value, the final prong of the ***Sullivan*** test is not satisfied because the probative value is substantially outweighed by various other factors. First, Buschmann's involvement in the Ott case occurred ten years prior to his involvement in Devroy's investigation. "The probative value of other-acts evidence depends partially upon its nearness in time, place, and circumstance to the alleged crime or element sought to be proved." ***State v. Fishnick***, 127 Wis. 2d 247, 261, 378 N.W.2d 272 (1985). That Buschmann conducted the interrogations in both the Ott case and the case at bar does not, by itself, offset the ten year gap in time between the interrogations. Further, in order for the jury to have the opportunity to draw similarities between Buschmann's interrogation methods in the Ott case and in the case at bar, the jury would have to hear from the primary witnesses in the Ott case—Hadaway and Gwin—and Buschmann himself would have to testify as to his methods. Not only would such testimony involve the witnesses' attempts at

recalling events from 1995, a time when interrogations were not recorded, it would also create a trial within a trial as the defense would have to show that Hadaway was both pressured and that his statement was false. Proving that Hadaway's statement was false would require introducing proof of Ott's innocence and Ellis's guilt. Essentially, multiple aspects of the Ott case would have to be relitigated within Devroy's case, running the risk of confusing the jury. Additionally, at this point, only Hadaway would potentially be available to testify, assuming he is found, as Gwin has since died.

¶15 We therefore conclude that even if other acts evidence of Buschmann's interrogation methods satisfied a permissible purpose, the evidence would have been inadmissible because the probative value was substantially outweighed by other factors. Therefore, Devroy has not demonstrated that he was prejudiced as a result of defense counsel's proffer of evidence. *See* ***Strickland***, 466 U.S. at 694.

B. Testimony of Michelynn Meloy.

¶16 Devroy also argues that his defense counsel was ineffective for not calling Meloy to testify about the volatile relationship between Lewek and Laumann. Testimony from Meloy, Devroy contends, would have bolstered the defense theory that Laumann actually murdered Lewek.

¶17 At trial, the defense put forth evidence suggesting that Laumann had the motive, means and opportunity to kill Lewek. The evidence did not include the testimony of Meloy, however, who told postconviction investigators during a recorded interview that she observed suspicious and threatening behavior by Laumann towards Lewek in the days leading up to Lewek's death. In the recorded interview, Meloy stated that she was with Lewek in his bedroom days before

Lewek's death, when they heard a noise from outside the bedroom window. Meloy stated that they looked outside and saw Laumann peering into the window, at which point Lewek went outside and confronted Laumann. Meloy stated that Lewek and Laumann had a loud, angry confrontation. Meloy also stated that on another occasion, while on the phone with Lewek, he paused the conversation and confronted Laumann for entering his apartment without permission. According to Meloy, Laumann responded "you [Lewek] better watch your ass because when you least expect it."

¶18 Meloy was present at Devroy's trial, but was not called to testify. However, the jury heard testimony that Laumann lived in the same duplex as Lewek, was the landlord of the duplex, was home the night of the murder, and that Laumann's bottle of prescription pain medications was found in Lewek's apartment at the crime scene. Devroy's defense counsel questioned Laumann about whether he and Lewek ever had a confrontation regarding Laumann's peering into Lewek's window. Laumann answered in the negative. Defense counsel also pointed to multiple inconsistencies in Laumann's testimony. Specifically, through defense counsel's cross-examination, the jury heard testimony that Laumann contacted police at 3:30 a.m. *the day after* Laumann stated he heard a loud thud coming from the downstairs apartment and then saw Devroy fleeing the scene. The jury heard about inconsistencies regarding Laumann's description of Lewek's body to 911 operators, Laumann's testimony about whether he had a key to the apartment's deadbolt lock, and Laumann's testimony that he heard the shower running in the downstairs apartment after hearing the thud, which Laumann did not mention to the police. Because the jury was aware of multiple inconsistencies in Laumann's testimony, and assuming Meloy's testimony would have been consistent with her recorded interview, we

cannot conclude that counsel performed deficiently by failing to call Meloy. *See* ***Strickland***, 466 U.S. at 687.

¶19 Further, even if defense counsel's failure to call Meloy was deficient, Devroy has not demonstrated prejudice as a result. According to Gastrow's testimony, Devroy confessed, independent of his confession to Buschmann, that he heard voices telling him to kill Lewek. Buschmann testified that Devroy had scratches on the back of his hand, which Buschmann stated was consistent with the possibility of a struggle between Devroy and Lewek, given the violent nature of the crime. The signed confession prepared by Gastrow states that voices told Devroy to kill Lewek. Both of the confessions—the one prepared by Gastrow and the one prepared by Buschmann—also are marked with Devroy's initials in places where the officers stated Devroy wanted changes made, establishing that Devroy reviewed both statements. Buschmann testified that Devroy requested the inclusion of a statement of apology in his confession. Finally, Detective Shannon Jones testified that he observed blood on the sink and bathtub of Lewek's apartment, consistent with Laumann's testimony that he heard the shower running the night of Lewek's death. Because the addition of Meloy's statement would not make it reasonably probable that the jury would have reached a different result, we cannot find that Devroy was prejudiced by defense counsel's failure to have Meloy testify.

C. Hearsay Objection.

¶20 Devroy argues that defense counsel was ineffective for not objecting to the testimony of Detective Louis Johnson, who testified that Hogans told him (Johnson) that Devroy admitted to killing his roommate while Hogans and Devroy

were incarcerated together at the city jail in 2005. Devroy contends that Johnson's testimony was inadmissible hearsay. We disagree.

¶21 At trial, the State called Hogans to testify about a confession he claimed Devroy made while the two were incarcerated together; however, when Hogans testified, he said he remembered Devroy saying "something along the lines of doing something to his best friend." Hogans further testified that he remembered speaking to a detective about his conversation with Devroy.

¶22 The State then called Detective Johnson. Johnson testified that Hogans told him (Johnson) that Devroy confessed to stabbing his best friend because he was mad at him and because voices told him to do it. Johnson also testified that Hogans said that Devroy confessed that he moved Lewek's body in an attempt to put it in his car and drive it to Green Bay. Defense counsel did not object.

¶23 Johnson's testimony was admissible as a prior inconsistent statement hearsay exception. *See* WIS. STAT. § 908.01(4)(a)1.[3] Hogans testified that he did not recall his conversation with Devroy, but that he did recall speaking to Johnson after speaking with Devroy. Because Hogans statements to Johnson were properly admissible as prior inconsistent statements, and because Hogans was available for cross-examination, Devroy's trial counsel was not ineffective for failing to object to Johnson's testimony.

[3] WISCONSIN STAT. § 908.01(4)(a) provides, in pertinent part, that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: … [i]nconsistent with the declarant's testimony."

D. Testimony of Dr. Rawski.

¶24 Devroy also contends that his defense counsel was ineffective for failing to object to the testimony of Dr. Robert Rawski. Prior to trial, Devroy entered an NGI plea and had been examined by Dr. Rawski pursuant to the plea. Devroy eventually withdrew his NGI plea. At trial, Devroy testified that he was abusing opiates at the time of Lewek's murder. Devroy further testified that, after his arrest and during his police interrogation, he was suffering from opiate withdrawal, which contributed to his signing the confession prepared by Buschmann. The State called Dr. Rawski to impeach Devroy's testimony about opiate withdrawal, and thus challenge Devroy's claim that he falsely confessed. Dr. Rawski testified that during his examination of Devroy pursuant to the NGI plea, Devroy stated that he (Devroy) was *not* using opiates at the time of Lewek's murder.

¶25 Devroy argues that his defense counsel should have objected to this testimony pursuant to WIS. STAT. § 971.18, which states that "[a] statement made by a person subjected to psychiatric examination or treatment … for the purposes of such examination or treatment shall not be admissible in evidence against the person in any criminal proceeding on any issue other than that of the person's mental condition." However, Devroy did not object when the State called Dr. Rawski and limited Dr. Rawski's testimony to Devroy's statement about his opiate use. At trial, outside of the presence of the jury, defense counsel stated:

> … Mr. Devroy wants me to place on the record that … if, in fact, [the State] does call Dr. Rawski, Dr. Rawski is only going to testify as to what Mr. Devroy told him about the opiates and that there would be absolutely no doors open regarding the circumstances surrounding that interview. And I do believe that Mr. Devroy wants me to be available or able to ask Dr. Rawski if, in fact, his position regarding the truthfulness of Mr. Devroy's statements regarding the

> opiates would he, in fact, have any reason to doubt the truthfulness of that representation to him[.]

The trial court then instructed the State:

> Make sure, and tell [Dr. Rawski] the questions you are asking him, and that is all he is allowed to talk about is opianyl use or withdrawal from.
>
> ….
>
> Nothing about what he saw [Devroy] for, nothing, no indication about any mental issues or history or NGI, or anything like that.

Dr. Rawski's testimony stayed within the limitations requested by Devroy and his defense counsel. Dr. Rawski did not testify that his interaction with Devroy was as a result of a mental health consultation; rather, he testified as to what Devroy told him about opiate use, the symptoms of opiate withdrawal, and, in response to Devroy's question, that he did not believe Devroy was honest about his history of opiate use.

¶26 Devroy waived the opportunity to object to Dr. Rawski's testimony, since Devroy himself requested the limitation on the testimony, which the trial court granted. *See* ***State v. Pote***, 2003 WI App 31, ¶37, 260 Wis. 2d 426, 659 N.W.2d 82 (counsel cannot be deemed ineffective for following the instructions of a client). Devroy's request suggests that Devroy actually thought Dr. Rawski's testimony would be helpful because Dr. Rawski's testimony about opiate withdrawal symptoms and not believing Devroy's account of his drug history would bolster Devroy's contention that he signed a false confession as a result of the withdrawal symptoms. Therefore, defense counsel was not ineffective for failing to object to Dr. Rawski's testimony.

II. Trial Court Error.

¶27 Finally, Devroy contends that the trial court erroneously denied his motion to cross-examine Hogans regarding concessions he may have received for his testimony against Devroy. Defense counsel stated that Hogans had multiple charges that were either dismissed or "no-processed." The trial court denied the motion stating that absent a showing that Hogans received explicit consideration for his testimony, testimony pertaining to Hogans's prior charges would constitute "prior acts" evidence. The trial court barred questions about the charges which were not prosecuted in the absence of specific evidence that failure to prosecute was intended by the State to reward Hogans for his testimony.

¶28 "Limiting cross-examination is limiting the introduction of evidence." ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. "[A] defendant, through cross-examination, has the right to bring out the motives of state witnesses." ***State v. Balistreri***, 106 Wis. 2d 741, 753, 317 N.W.2d 493 (1982). It is the witness's perception of benefit that is the relevant inquiry. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 446-47, 247 N.W.2d 80 (1976) (When a witness has an agreement with the prosecution to testify as part of a plea agreement, the witness's understanding of any potential benefits that the witness may gain from the agreement is grounds for impeachment by the defense.). "A defendant, as an ingredient of meaningful cross-examination, must have the right to explore the subjective motives for the witness' testimony." ***Id.*** at 448.

¶29 The trial court's ruling was in error. However, we conclude that the error was *de minimis*. There is sufficient evidence on the record supporting the jury's verdict. Even if the jury had heard evidence of the no prosecutorial action and completely disregarded Hogans's testimony, the record contains two

confessions signed by Devroy stating that he killed Lewek because he was instructed by voices in his head. We cannot conclude that the jury would have reached a different verdict.

III. Interest of Justice.

¶30 Devroy argues that the cumulative effect of the errors at his trial requires that we grant a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. Under this statute, we possess discretionary reversal authority if the real controversy was not full tried or if for any reason justice has been miscarried. *See* ***id.*** This standard has not been met. We conclude that defense counsel was not ineffective and that the trial court's error was *de minimis*. Thus, we cannot conclude that Devroy is entitled to a new trial in the interest of justice.

¶31 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.