COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1995

No. 95-0039-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM JAMES, JR.,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. William James, Jr., appeals from an order denying his motion for a new trial based on an ineffective-assistance-of-trial-counsel challenge. He was convicted, after a jury trial, of first-degree intentional homicide, while armed; attempted first-degree intentional homicide, while armed; and first-degree recklessly endangering safety, while armed—all as a party to a crime. We previously remanded the case to the trial court for a

Machner hearing.[1] *See* ***State v. James,*** No. 93-2485-CR (Wis. Ct. App. July 26, 1994) (unpublished per curiam). The trial court held evidentiary hearings and then denied James's motion for a new trial.

James advances one argument for our review—he contends his trial counsel was ineffective for allowing him to testify on his own behalf because counsel possessed no reasonable trial strategy for doing so. We reject his argument and affirm the order.

On July 14, 1991, James and three companions were patronizing a gas station adjacent to Tony Watson's home. They engaged in a verbal dispute with Watson, and then James and the others left to retrieve firearms. Upon their return to Watson's home, the foursome fired a myriad of shots through the residence's front door and windows. As a result, a two-year-old child was fatally wounded, while another child sustained injuries to her head. Four days after the shooting, James gave detailed and self-incriminating accounts of the incident to Milwaukee police detectives. He was charged and received a jury trial.

At trial, James testified on his own behalf. He made several admissions on the stand that he now asserts were prejudicial. He admitted: (1) giving gang signs to one of the other individuals involved in the shooting; (2) getting firearms for the shoot-out, including the sawed-off shotgun he used; (3) pointing and firing his gun at the Watson house; (4) knowing that the shooting was going to take place; and (5) lying to police.

In his motion for a new trial he argued that he received ineffective assistance of trial counsel because his counsel had no reasonable trial strategy to have him testify on his own behalf. At the ***Machner*** hearing, the following testimony was solicited. Bernard Goldstein, James's counsel, justified the defense strategy in that he was "concerned with the matter of intent and ... believe[d] that [James] could have been found guilty of reckless conduct as opposed to intentional conduct." Goldstein testified that he and James agreed that James's testimony was the only evidence which might convince a jury to

[1] ***State v. Machner,*** 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

convict on the lesser-included offense of reckless homicide. James testified that Goldstein told him that if he (James) did not testify, the State could call him to the stand. James asserted that this was the only reason he testified and that he told Goldstein he did not want to testify. The trial court subsequently ruled that Goldstein's strategic decision was reasonable and, as such, his performance was not deficient. James now appeals from the order denying his motion for a new trial.

Strickland v. Washington, 466 U.S. 668, 687 (1984), the seminal case by which ineffective assistance of counsel claims are adjudicated, articulates a two-pronged test in reviewing the reasonableness of an attorney's performance at trial. The first prong requires that the defendant show that counsel's performance was deficient. ***State v. Johnson,*** 126 Wis.2d 8, 10, 374 N.W.2d 637, 638 (Ct. App. 1985), *rev'd on other grounds*, 133 Wis.2d 207, 395 N.W.2d 176 (1986). That is, the defendant must show that counsel's conduct was "`unreasonable and contrary to the actions of an ordinarily prudent lawyer.'" ***Id***. at 11, 374 N.W.2d at 638 (citation omitted).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. Thus, because of the difficulties in making such a post hoc evaluation, "the court should recognize that counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." ***Id***. at 690.

The second prong requires that the deficient performance was prejudicial. ***Johnson,*** 126 Wis.2d at 10, 374 N.W.2d at 638. To be considered prejudicial, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"—i.e., "a probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. at 694. In

reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990). Further, if the defendant fails to adequately show one prong, we need not address the second. ***Strickland,*** 466 U.S. at 697.

James contends that because Goldstein advised him to testify at trial with allegedly no apparent strategy for doing so, James was unfairly prejudiced and his sentence was greater than it otherwise might have been. We disagree. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, while those made after less than complete investigation are deemed reasonable. ***Strickland***, 466 U.S. at 690-91. At a minimum, Goldstein's tactic falls within that second category.

Goldstein's testimony at the ***Machner*** hearing revealed that he believed the sole vehicle by which to mitigate James's potential exposure was via a lesser-included-offense defense; that is, to show that James did not intend to cause a death. Indeed, the self-incriminating statements James made to detectives only days following the crime had already been submitted into evidence; thus, James's possible defense options were severely limited. Moreover, one of James's co-defendants had successfully pursued an identical defense strategy. In Goldstein's professional opinion, no other source existed outside of James's testimony to lessen his client's culpability; that is, from intentional to reckless conduct. The trial court apparently accepted the validity of Goldstein's strategy, for it delivered a lesser-included-offense instruction on recklessly endangering safety and first-degree reckless homicide. Further, the trial court found that Goldstein did not advise James that he had to testify at trial; that the state could compel his testimony; and that James's decision to take the stand was his alone. These factual findings are based on credibility assessments left to the trial court, ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985); they are not clearly erroneous. ***Johnson***, 153 Wis.2d at 127-28, 449 N.W.2d at 848. Thus, upon "reconstruct[ing] the circumstances of counsel's challenged conduct, and ... evaluat[ing] the conduct from counsel's perspective at the time," ***Strickland,*** 466 U.S. at 689, it is clear that Goldstein's performance was not constitutionally deficient. Additionally, when a defendant, like James, fails to prove that counsel's performance was deficient, we need not address the prejudice prong of the ***Strickland*** test. ***Id***. at 697.

By the Court.—Order affirmed.

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