COURT OF APPEALS
DECISION
DATED AND RELEASED

November 5, 1996

NOTICE

No. 95-2895-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALFREDO VEGA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Alfredo Vega appeals from a judgment of conviction, after a bench trial, for first-degree intentional homicide and robbery—use of force. He also appeals from an order denying his motions for postconviction relief. He raises several issues for review: (1) whether the trial court erred when it denied his motion for a new trial based on ineffective assistance of trial counsel; (2) whether the evidence was sufficient to support his

conviction; and (3) whether the trial court failed to consider evidence "which negated intent and erroneously considered evidence of a withdrawn special plea." We reject his arguments on these issues and affirm both the judgment and the order.

I. BACKGROUND.

On November 24, 1993, police found the body of a woman in a home on the north side of Milwaukee. The medical examiner determined the cause of death to be severe head injuries due to blunt force trauma. Police arrested Vega on November 24, and he gave a custodial statement providing the following version of the events leading to the victim's death. Vega met the victim at a tavern the evening before her death. He and the victim returned to her apartment and had sexual intercourse. At some time in the early morning hours, Vega awoke and heard a "voice" tell him the victim had money that he could use to buy his children presents. He searched for the money but was unable to find any. The voice told him to "knock her out so that she wouldn't wake up and remember who [he] was." He found a hammer and the voice told him to hit her in the head with it. He hit her once with the hammer; the voice told him that she wasn't knocked out yet, and that he should hit her again. Vega hit her again in the head. He then stole some of the victim's personal property and then checked on the victim—she was breathing. The voice told him that she would be okay, so he left.

Vega entered pleas of not guilty and not guilty by reason of mental disease or defect. Doctors George Palermo and Frederick Fosdal were appointed to examine Vega with respect to his special plea. Both doctors filed reports indicating that Vega was responsible for the crimes, and that there was no support for the special plea. Vega later withdrew his special plea of not guilty by reason of mental disease or defect. He then waived his right to a jury trial and he received a bench trial.

The evidence presented at Vega's trial included, among other things: his custodial statement; the opinion of the medical examiner on the victim's cause of death; the testimony of the victim's brother who verified the stolen property found at Vega's mother's house; and the testimony of a tavern

owner who acknowledged that Vega and the victim had been in his tavern and that neither was intoxicated.

Vega's counsel also moved the court to consider certain of Vega's mental health records, including hospital records of Vega's treatment the day before the homicide. Counsel also requested a lesser-included offense instruction for first-degree reckless homicide. The trial court found Vega guilty of both first-degree intentional homicide and robbery use of force.

Vega then filed postconviction motions alleging that he received ineffective assistance of counsel because his trial counsel: did not present testimony from Vega's family members dealing with his behavior around the time of the homicide; urged the admission of Doctors Palermo and Fosdal's reports, which Vega alleged were detrimental to his defense that he did not act intentionally; and did not urge for the admission of Vega's mental health records showing a history of command voices. The trial court held a ***Machner***[1] hearing, after which it concluded counsel's performance was not deficient, and that Vega received effective assistance of counsel. The trial court then denied Vega's postconviction motions. This appeal follows.

II. ANALYSIS.

Vega first argues that he received ineffective assistance of trial counsel. His argument focuses on the actions of his counsel with respect to a failure to present mental health evidence that he argues would have shown that his psychiatric condition prevented him from intentionally committing the crimes. The State counters, arguing that the presentation of such evidence would have been nothing more than a diminished capacity defense, a defense to criminal charges not recognized in Wisconsin. We agree with the State on this point. Further, we agree with the trial court that Vega has not met his burden of showing that his counsel's representation was ineffective.

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

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 defendant show 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.

The trial court concluded that counsel had "reasonable, logical strategical reasons" for the contested actions. Thus, the court concluded that counsel's performance was not deficient and, further, that there was no prejudice because there was "no reasonable probability that there would have been a different outcome or result in the trial."

We agree with the trial court that Vega has not shown how any of his trial counsel's actions prejudiced the outcome of the trial within the meaning of ***Strickland***.

None of counsel's contested actions regarding the admission of Vega's medical reports, Doctors Palermo and Fosdal's reports, or failure to admit family lay testimony of Vega's past instances of hearing command voices would have affected the outcome of the trial. This is because, under the circumstances of this case, Vega's acts were intentional, whether he heard voices or not.

In ***State v. Morgan***, 195 Wis.2d 388, 536 N.W.2d 425 (Ct. App. 1995), we presented the following rule with respect to the effect of psychiatric evidence on the issue of specific intent to commit a crime:

> "Now suppose, instead, that [the defendant], though realizing that [the victim] was a human being whom he was not licensed to kill—knowing, in other words, that he was committing murder—murdered [the victim] because he heard voices inside his head commanding him to do so and could not resist their importunings ... or for any other reason, rooted in insanity which overbore [the defendant's] will to resist committing a criminal act. *In all of these cases [the defendant] would intend to do a killing he knew to be without authorization in law, and thus would have the required intent for first-degree murder*, but he would have a plausible insanity defense."

Id. at 521-22, 536 N.W.2d at 437 (quoting ***Morgan v. Israel***, 735 F.2d 1033, 1035-36 (1984), *cert. denied*, 469 U.S. 1162 (1985)) (emphasis and bracketed material in original).

Given this analysis in ***Morgan***, even if counsel had presented the evidence in the way now argued by Vega, it would not have had any impact on the outcome of his bench trial. Whether voices commanded him to hit the victim, under Wisconsin law he had the necessary intent for first-degree homicide. Accordingly, Vega has failed to show that his counsel's actions caused him prejudice within the meaning of ***Strickland***.[2]

Vega next argues that there was insufficient evidence to support his conviction. He argues that, given the evidence of his mental health problems as presented in the reports of Doctors Palermo and Fosdal, plus other corroborating evidence, he could only be convicted of first-degree reckless homicide, not first-degree intentional homicide or robbery—use of force. We disagree.

> The burden of proof in a criminal case is on the State to prove every essential element of the crime charged beyond a reasonable doubt. The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In order for the court to reverse, the evidence must be in conflict with "fully established or conceded facts."

[2] In his reply brief, Vega argues that if we conclude that his counsel was pursuing a diminished capacity defense, then that was ineffective assistance of counsel because he was pursuing a defense that was not recognized in Wisconsin. He does not show, however, how this prejudiced the outcome of his bench trial. Even if we were to conclude that this was deficient performance, Vega does not meet the prejudice prong of ***Strickland v. Washington***, 466 U.S. 668 (1984). Hence, his ineffective assistance of counsel claim fails on this alternative argument as well.

State v. Rushing, 197 Wis.2d 631, 641-42, 541 N.W.2d 155, 159 (Ct. App. 1995) (citations omitted).

Vega concedes the evidence supports the *actus reus* elements of the charged crimes beyond a reasonable doubt; he only challenges whether the evidence is sufficient to support a finding of criminal intent. The trial court noted that the evidence showed that Vega repeatedly hit the victim in the head with a hammer and that this evinced the necessary intent to commit first-degree homicide. We agree. The autopsy evidence showed that the victim had been struck at least seven times in the head, fracturing the skull and causing the victim's death from severe brain injury. This is sufficient evidence from which a trier of fact can infer intent to kill. *See, e.g.,* ***Boyer v. State,*** 91 Wis.2d 647, 672-73, 284 N.W.2d 30, 40-41 (1979).

Further, the evidence clearly showed Vega's intent to steal. He admitted searching the victim's house, looking for things to steal, and then taking the victim's property.

Additionally, none of the psychiatric evidence that Vega introduced, which chronicled his argument that "he was driven by command, auditory hallucinations," would effect his intent under Wisconsin law. Wisconsin does not recognize a diminished capacity defense. *See, e.g.,* ***Steele v. State,*** 97 Wis.2d 72, 89-92, 294 N.W.2d 2, 9-11 (1980). In short, the evidence presented at Vega's bench trial was sufficient to support his conviction.

Finally, Vega argues that the record does not sufficiently reflect whether the trial court considered the mental health evidence in reaching its finding of guilt. As we stated above, however, none of the mental health evidence that Vega presented could have affected the trial court's findings on Vega's intent to kill. *See* ***id***. If Vega had continued with his plea of not guilty by reason of mental disease or defect, such evidence might have impacted a trier of fact's determination of whether Vega was criminally responsible for his actions, *see* ***Morgan,*** 195 Wis.2d at 416, 536 N.W.2d at 435, but without a bifurcated trial none of this evidence was relevant to the trial court's findings.

Accordingly, for the above reasons, we reject all of Vega's arguments on appeal. The judgment of conviction and order denying postconviction relief are affirmed.

By the Court.—Judgment and order affirmed.

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