COURT OF APPEALS
DECISION
DATED AND RELEASED

August 5, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1381-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL SMITH,

DEFENDANT-APPELLANT.

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

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Daniel Smith appeals from a judgment of conviction after a jury found him guilty of first-degree intentional homicide and armed robbery, both as a party to a crime. He also appeals from an order denying his motion for postconviction relief. He raises four issues for review—whether the trial court: (1) erred when it failed to give a lesser-included offense jury

instruction for felony murder; (2) erroneously exercised its discretion by utilizing a modified jury instruction; (3) erred when it denied his ineffective assistance of counsel motion; and (4) erroneously exercised its discretion by denying Smith's request for a continuance based on his discovery of new information. We affirm.

I.

On December 2, 1993, City of Milwaukee police responded to a shooting on the city's near north side. They found Burnett Reed lying on the sidewalk, he had been shot several times and numerous 9 mm casings lay next to his body. He later died. During the autopsy, the medical examiner observed multiple gunshot wounds, some of which the medical examiner concluded were contact wounds—the result of a gun being fired at extremely close range.

The police investigation uncovered witnesses who stated that they saw two individuals standing over Burnett while one of the individuals fired three or four gunshots at Burnett's prone body. Smith and Christopher Sykes were brought in for questioning. Sykes gave a statement implicating both him and Smith in the shooting and armed robbery of Burnett. The State subsequently charged Smith with the crimes—he received a jury trial and was convicted of both offenses. Smith later filed a postconviction motion seeking a new trial. After an evidentiary hearing, the trial court denied the motion. Further facts will be discussed with the relevant issue below.

II.

Smith first argues that the trial court erred by failing to give a lesser-included jury instruction for felony murder. We disagree.

Whether the evidence at trial supports submission of a lesser-included offense is a question of law that we review *de novo*. ***State v. Kramar,*** 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). In determining the appropriateness of submitting a lesser-included offense instruction, we must apply a two-step test. ***State v. Morgan,*** 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App.1995). First, we must determine whether the lesser offense is, as a matter of law, a lesser-included offense of the crime charged. ***Id.*** at 434, 536 N.W.2d at 442. Second, we must determine whether the instruction is justified—that is, whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. ***Id.*** Thus, an alternative instruction should be submitted only if there is some basis in the evidence for a reasonable doubt as to an element necessary for conviction of the charged offense. ***State v. Foster,*** 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App.1995). Finally, the reviewing court must view all the relevant evidence in a light most favorable to the defendant and the requested instruction. ***State v. Davis,*** 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988).

Here, there is no question that felony murder is a lesser-included offense of first-degree intentional homicide. "First-degree intentional homicide is the only form of homicide punishable by a class A penalty; thus, all other forms of homicide are 'less serious' types of criminal homicide and are thereby lesser-included offenses of first-degree intentional homicide." ***Morgan,*** 195 Wis.2d at 436 n.24, 536 N.W.2d at 443 n.24 (citation omitted); *see* § 939.66(2), STATS.

We next address Smith's contention that there is a reasonable basis in the evidence submitted at trial for acquittal on the greater offense of first-degree intentional homicide and conviction on the lesser offense of felony murder. There is *no* reasonable basis in the evidence for acquittal of first-degree intentional

homicide. First, the medical examiner testified that several of the gunshots were fired from point blank range, evidence, which under Wisconsin law, leads to the presumption that the shooter had the requisite intent to kill. *See* ***Morgan,*** 195 Wis.2d at 441, 536 N.W.2d at 445 (Ct. App. 1995) ("[T]he propinquity of the intentionally pointed gun to a vital area of [the victim's] body raises the presumption of [the defendant's] intent to kill."); ***State v. Webster,*** 196 Wis.2d 308, 322, 538 N.W.2d 810, 815 (Ct. App. 1995) ("When one intentionally points a loaded gun at the vital part of the body of another and discharges it, it cannot be said that [that person] did not intend the natural, usual, and ordinary consequences." (citations and internal quote marks omitted)).

Second, one witness saw the shooter fire a handgun several times from point blank range at Reed's prone body. Finally, Sykes, Smith's co-defendant, who separately pleaded guilty to a charge of felony murder, testified that, among other things, he heard shots, went to Smith's location, saw Reed lying on the ground, and saw Smith stand over and fire the gun at Reed's prone body. Given this evidence, the trial court did not err by refusing to give the requested lesser-included offense jury instruction for felony murder.

Smith next argues that the trial court erroneously exercised its discretion when it gave a modified instruction to the jury. We disagree.

"A trial court has *wide* discretion in presenting instructions to the jury." ***Morgan,*** 195 Wis.2d at 448, 536 N.W.2d at 448. (Emphasis added.) We will not reverse such a determination absent an erroneous exercise of discretion. ***Id.*** "'This discretion extends to both choice of language and emphasis.'" ***State v. Schambow,*** 176 Wis.2d 286, 299, 500 N.W.2d 362, 367 (Ct. App. 1993) (citation omitted). Thus, the trial court "'should exercise discretion in order to fully and

fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.***

The trial court provided the following jury instructions:

> I am going to read to you now what the elements of first degree intentional homicide, party to a crime, and armed robbery, … also party to a crime. In this case the defendant, Daniel Smith, is charged with first degree intentional homicide, party to a crime, and armed robbery, party to a crime. Since this case is charged under the party to a crime section of the Wisconsin Statutes, before you can find the defendant guilty, you must find beyond a reasonable doubt that the defendant, Daniel Smith, either directly committed the crimes, or that he aided and abetted the commission of the crimes, or that he was a party to a conspiracy with another to commit the crimes.

The trial court gave a modified "party to a crime" instruction to provide all three of the possible "party to a crime" bases under Wisconsin law:

> As applicable in this case, a person is concerned in the commission of a crime if he, (a), directly commits the crime, or (b), intentionally aids and abets the commission of it, or (c), is a party to a conspiracy with another to commit it or advises, hires, counsels, or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in the pursuance of the intended crime and which under the circumstances [is] the natural and probable consequence of the intended crime.

The trial court then defined aider and abettor, explained conspiracy, and concluded with the standard instruction for first-degree intentional homicide.

Smith argues that with these modified instructions, the jury "could have been easily confused and, therefore, misdirected by the vague references" to "the crimes" and "guilty." We reject Smith's argument. The modified jury

instruction, when read in the context of the overall instructions given to the jury, adequately and properly informed the jury of "party to a crime" liability as it applied in this case. The trial court did not erroneously exercise its discretion.

Smith next argues that the trial court erred when it denied his motion for a new trial based on his ineffective assistance of counsel claim. He argues that his trial counsel's "failure to obtain readily available information concerning Smith's ingestion of intoxicants on the night Reed was killed was deficient and prejudiced him." We disagree.

For a defendant to succeed in an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington,*** 466 U.S. 668 (1984), must be satisfied. A defendant must show that counsel's performance was both deficient and prejudicial. ***Id.*** at 687. If a defendant fails to show one prong, this court need not address the other prong. *See* ***State v. Sanchez,*** 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). To show that counsel's performance was deficient, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland,*** 466 U.S. at 687.

> 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.

Id. at 689. 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 judgment." ***Id***. at 690.

To show prejudice under ***Strickland***, "[t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. "[T]he touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith,*** 207 Wis.2d 259, 277, 558 N.W.2d 379, 387 (1997) (citation omitted). 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).

In his ineffective assistance of counsel motion and memorandum, Smith alleged that one week prior to trial he received new discovery materials from the police that included, among other things, a witness's statement that shortly before the shooting, Smith used cocaine and that he was a "heavy user of alcohol and drugs." Trial counsel testified at the postconviction evidentiary hearing that after he received the discovery materials, he discussed with Smith whether he had used drugs or alcohol the day of the shooting. Trial counsel also testified that earlier in the case he had also discussed the intoxication issue to determine whether it was a likely defense to the offenses. Trial counsel testified that at this initial discussion, Smith admitted to smoking marijuana and drinking alcohol, but counsel concluded that "based on [his] conversations with him and based on just [his] general understanding of … what happened, [he] did not believe that there was enough to raise the issue of an intoxication defense." Further, counsel testified that once he received the additional discovery, he

attempted to develop an intoxication defense—but in the end could not locate the witness mentioned in the discovery materials and that in his legal opinion he did not believe a legitimate intoxication defense could be advanced.

Finally, counsel testified that he had interviewed the witness in the discovery materials prior to receiving those materials and had discussed the intoxication issue at that time. He also noted that for other trial strategy reasons, the witness would have made a "very bad witness" for Smith's defense.

The trial court found that, at the time of trial, trial counsel was "going nowhere … with the alcohol defense," and was "grasping at straws." Accordingly, the court concluded that there was no prejudice within the meaning of ***Strickland***, "by counsel's failure to pursue it further, and that he didn't pursue it further even during the trial because he knew it was going to go nowhere."

We agree with the trial court that Smith failed to show the necessary prejudice. A defendant "'who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." ***State v. Flynn,***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994) (quoting ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989)), *cert. denied*, 514 U.S. 1030 (1995).

Nothing in the postconviction submissions shows how further investigations on the part of Smith's counsel on the intoxication defense would have altered the outcome of his trial. To the contrary, as the trial court found—there was no intoxication defense available. Accordingly, we conclude the trial court properly rejected Smith's ineffective assistance of counsel claim because Smith did not show the requisite prejudice under ***Strickland***.

Finally, Smith contends that the trial court erroneously exercised its discretion in denying his motion for a continuance when the defense received thirty-five pages of discovery from the State one week before trial.

The decision to grant or deny a motion for a continuance is a matter within the discretion of the trial court. ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). When a party has been denied a continuance after claiming surprise, three factors must be met before we will conclude that the trial court erroneously exercised its discretion:

> (1) There must have been actually surprise which could not have been foreseen; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence could probably be obtained within a reasonable time; and (3) the denial of the continuance must have been, in fact, prejudicial to the party who sought it.

Id. at 339-40, 536 N.W.2d at 404.

While the State does not dispute that Smith was surprised by the witness's statement that appeared in the discovery materials about Smith's drug use on the night of the shooting, it argues that Smith has not shown the remaining two prongs of the ***Fink*** test. We agree. Smith has not shown what evidence supportive of an intoxication defense could have been obtained had a continuance been granted. Smith's defense team had already interviewed all of the witnesses. He made no showing that, other than the witness in the discovery materials, any one else could be obtained in support of the intoxication defense within a reasonable time. Finally, and most importantly, Smith did not show the necessary prejudice. As the trial court found after the postconviction motion, there really was no intoxication evidence available with the facts of this case. Smith has

presented nothing to this court from which we can conclude that this assessment was incorrect. The trial court did not erroneously exercise its discretion in denying Smith's motion for a continuance.

In sum, we reject the argument Smith raises in this appeal. The judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

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