COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2913-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KELLEY D. AVERY,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Kelley D. Avery appeals from a judgment of conviction after a jury found him guilty of two counts of first-degree intentional homicide while armed, contrary to § 940.01(1), STATS., and § 939.63, STATS., and from an order denying his postconviction motion requesting a new trial. Avery claims: (1) the jury verdict was not supported by sufficient evidence; (2) the trial

court's amendment of the standard jury instruction on intoxication misstated the law and misdirected the jury, denying Avery due process of law; and (3) the trial court erred in denying his postconviction motion without an evidentiary hearing. We affirm.

I. BACKGROUND.

The facts are not disputed. On November 13, 1995, Kelley Avery, joined by Antoinette Nash ("Boo") and Arthur Morrow, went to the home of Murray Sample, an alleged drug house in the city of Milwaukee. They were in the attic of the house with two other people, Sample and Cindy Morgan, smoking crack cocaine. After a short while, Avery and Morrow left the house. After they left, Morgan went outside to urinate. On her way back inside, she encountered Avery and Morrow and Avery told her that he wanted to talk to her. Up to this point, Morgan had never talked to Avery before.

The three of them went inside and up to the attic. As they went up each flight, Morgan locked the doors behind them. As Morgan was locking the last door to the attic, Avery produced a gun and told everyone to step back. All present were begging Avery to put the gun down and asked him what he was doing. Sample came out from the back bedroom and Avery hid the gun so that Sample could not see it upon entering the room. Avery then pulled the gun out and held it to Sample's head. Avery then had Boo, Morgan, Sample and Morrow on one side of the room. He told them all to get undressed and everyone, except Morrow, complied. While they were undressing, Avery told Morrow he was going to kill him because Morrow got Avery hooked on cocaine. He told Morgan and Sample he was going to kill them because they were in the wrong place. Avery also asked Sample if he used drugs and Sample replied "no." Avery put the

gun to Sample's head and asked him again. Sample replied affirmatively, and Avery told him he did not deserve to live.

Avery then told everyone to lie on the floor. While they were on the floor, Avery took out a pack of cigarettes and told them to each smoke their last cigarette. Morgan lit a cigarette but Avery did not allow her to smoke it in its entirety. Avery then made them get up and line up with their hands around the waist of the person in front of them, so that nobody's hands were free except for the person in the front of the line. Avery then rearranged the order of the line. He positioned it so that Morgan was first in line, closest to the door, Sample was second, Boo was third and Morrow was last. Avery told them to quietly walk down the stairs toward the door and said that if they tried to run he would kill them. When they got to the door, Morgan began unlocking the door, which had three locks.

Morgan testified that as soon as she finished unlocking the last lock, she heard two shots. She ran down the stairs and heard another shot as she reached the bottom floor. Sample followed. When Morgan got outside, she hid behind a van parked in front of the house. Once behind the van, she heard another shot. She then saw Sample, who told her "I think he just killed Boo." Sample and Morgan ran away and finally received help from someone who called the police.

When the police arrived at the scene, they found a female, later identified as Antoinette Nash ("Boo") on the stairs leading from the first floor door to the first floor landing. Boo was then still alive and bloodied around the neck and head area, yelling that she had been shot. She told the officers she had been shot by "Kelley." She died later. The officers also found Morrow slumped

on the stairs leading to the attic, with a fatal gunshot wound to his head. The officers did not find Avery at the scene.

Avery was later found in Pine Bluff, Arkansas, where he was arrested and returned to Milwaukee. He was charged with two counts of first-degree intentional homicide, pursuant to § 940.01, STATS. After a jury trial, Avery was convicted of both counts of homicide. Avery filed a postconviction motion which was denied. He now appeals.

II. ANALYSIS.

A. Sufficiency of the Evidence

We will not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). That is not the case here.

Avery claims that "[i]f ever there was a case that cried out for a dismissal of the first degree intentional homicide charge and submission of only the reckless homicide charge, this was the one." Avery contends that his bizarre behavior, due to his cocaine ingestion, evidences his inability to form intent. Avery presented this same theory at trial, and the jury rejected it. Substantial evidence of Avery's intent was presented to the jury. Two eye witnesses, Morgan and Sample, both testified similarly about the behavior of Avery and the evening's events. The jury heard testimony that Avery told the group to undress, that he articulated what he was doing and why he was going to kill them, and that he

made them line up in a particular fashion and order, eventually killing the two that he placed closest to him. The police officer who took Avery's statement also testified. All of this testimony was sufficient to prove that Avery intended to commit the crimes. Although Avery testified that he was unable to recall details of the incident, he did admit to the shooting. Avery claimed that the reason he went "berserk" and shot two people was because he was suffering from cocaine intoxication, but the jury did not believe him, finding the State's witnesses more credible.

Given the testimony of the witnesses and Avery himself, the jury could have reasonably found Avery guilty of first degree intentional homicide beyond a reasonable doubt. "The test is not whether this court … [is] convinced of the defendant's guilt beyond a reasonable doubt, but whether this court can conclude [that] the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true …." ***Poellinger***, 153 Wis.2d at 503-04, 451 N.W.2d at 756 (citation omitted). We are satisfied that the evidence supports the jury's finding.

B. Amendment of the Jury Instruction on Intoxication Defense

Avery next claims that the amendment of the instruction on intoxication misstated the law and misdirected the jury, denying him due process of law. Whether jury instructions violate a defendant's right to due process is a question of law we review *de novo*. *See* ***State v. Pettit***, 171 Wis.2d 627, 639, 492 N.W.2d 633, 639 (Ct. App. 1992). The jury instruction given in this case reads:

> Now, evidence has been presented in this case which, if believed by you, tends to show that the defendant was intoxicated by one or more substances at the time of the alleged offense[s]. *Intoxication by itself, even severe intoxication, does not relieve the defendant of responsibility*

> *for a crime.* You must, however, consider this evidence in deciding whether the defendant acted with the intent to kill required by the second element of this offense.
>
> If the defendant was so intoxicated that the defendant did not intend to kill, you must find the defendant not guilty of first degree intentional homicide. Of course, the burden is on the state to prove by evidence that satisfies you beyond a reasonable doubt that the defendant intended to kill.

The italicized portion of the instruction was the amendment made by the court. The instruction otherwise conforms to the standard jury instruction on voluntary intoxication. *See* WIS J I—CRIMINAL 765; § 939.42(2), STATS.

A trial court has wide discretion in developing the specific language it will use when giving jury instructions. As we explained in ***State v. Foster***, 191 Wis.2d 14, 26-27, 528 N.W.2d 22, 27 (Ct. App. 1995):

> [T]he trial court's instructions do not have to conform exactly to the standard jury instructions. Nevertheless, the work of the Criminal Jury Instructions Committee is persuasive and, generally, it is recommended that trial courts use the standard instructions because they do represent a painstaking effort to accurately state the law and provide statewide uniformity. Because the standard instructions are not infallible, it is appropriate for a trial court to modify them when necessary to fully and fairly state the law.

Id. (citations omitted).

In this case, the trial court explained its modification to the parties before the instruction went to the jury:

> Now, I have added that second sentence for the purpose of trying to make it clear to the jury that this reference to intoxication does not create some other defense or some other issue. It is only when [sic] an issue with respect to the extent to which the jury might find it vitiates or mitigates intent.

The trial court stated in its decision and order denying postconviction relief, that the second sentence accurately states the law in Wisconsin. We agree. Intoxication alone is not a defense to first-degree intentional homicide. Section 939.42(2), STATS., allows intoxication as a defense only if it "[n]egatives the existence of a state of mind essential to the crime." Further, it is not enough for the defendant to show that he was intoxicated, "[h]e must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged." ***State v. Guiden***, 46 Wis.2d 328, 331, 174 N.W.2d 488, 490 (1970). Avery acknowledges in his brief that: "It is true that mere evidence of intoxication does not relieve the defendant of responsibility," but he goes on to say that the statement made by the court that "even severe intoxication does not relieve a defendant of responsibility" is not true, without explaining why. As explained by the court in ***State v. Strege***, 116 Wis.2d 477, 343 N.W.2d 100 (1984):

> The "intoxicated or drugged condition" to which the statute refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime. To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

Id. at 483-84, 343 N.W.2d at 104 (quoting ***State v. Guiden***, 46 Wis.2d 328, 331, 174 N.W.2d 488, 490 (1970)). Thus, the trial court's addition to the jury instruction was correct as severe intoxication without proof that the person was

utterly incapable of forming the necessary intent does not relieve one of responsibility.

Avery further asserts that the trial court erred because it did not consider intoxication as an affirmative defense. The trial court explained that intoxication is not an affirmative defense—a defense which relieves the defendant of guilt even though all of the elements of the crime are met—but rather, it is "merely *evidence* arguably pertinent to the issue of intent." Thus, intoxication is not an affirmative defense in cases where it is raised and intent is an element of the crime. *See* ***Barrera v. State***, 109 Wis.2d 324, 329, 325 N.W.2d 722, 725 (1982) ("Since intent or knowledge is an element of the crimes of which the defendant was convicted, his intoxicated condition is a negative, rather than an affirmative, defense."). If intoxication acted as an affirmative defense, as does self-defense, as Avery contends, a jury could find all of the elements met but relieve Avery for responsibility of first-degree intentional homicide. However, this is not the law in Wisconsin. Avery is only relieved of responsibility for the crime if the element of intent is not met because the jury determined he was so intoxicated that he was unable to form the requisite intent. Thus, the trial court's analysis pertaining to the defense of intoxication is an accurate statement of the law.[1]

The "defense" of intoxication serves as evidence towards the element of intent, and it is for the trier of fact to determine how to weigh this evidence. The trier of fact decides whether a defendant has shown that the

[1] Avery quotes case law, though outside of this jurisdiction, which supports this, saying: "drunkenness may be a proper subject for the consideration of the jury, not to excuse or mitigate the offense but to show that it was not committed." ***People v. Robinson***, 2 Park. Crim. 235, 306 (N.Y. Sup. Ct. 1855). Avery is not claiming that he was so intoxicated that he could not commit the crime. Thus, this citation supports the judge's amended jury instruction that severe intoxication does not relieve a defendant of responsibility.

intoxication rose to the level of negating intent. Here, the jury determined that Avery was not so intoxicated to be unable to form the necessary intent.

Avery also contends that the instruction confused the jury. In reviewing a jury instruction, this court does not view the challenged portion in isolation, but rather, in the full context of the instructions and the trial. *See* ***Pettit***, 171 Wis.2d at 637, 492 N.W.2d at 638. The full instruction informed the jury that the intoxication evidence "must be considered in deciding whether the defendant acted with the intent to kill …," and that

> [i]f the defendant was so intoxicated that the defendant did not intend to kill, you must find of [sic] the defendant not guilty of first degree intentional homicide. Of course, the burden is on the state to prove by evidence that satisfies you beyond a reasonable doubt that the defendant intended to kill.

A reading of the entire instruction demonstrates that the jury was reminded of the State's burden and told that it does not change because of the intoxication defense. The jury instruction further advised the jury that they must consider the intoxication evidence. The instruction read as a whole eliminated any confusion the jury may have had about the burden of proof when there is an intoxication defense as it required them to consider such evidence when looking at the "intent" issue. Avery claims that the instruction "deprived the defendant of the jury's consideration of a critical category of defense evidence—intoxication." We disagree. As noted, the instruction immediately following the statement explains to the jury that they *must* consider the intoxication evidence.

Thus, we conclude that the jury instruction on the intoxication defense, taken as a whole, informed the jury of the appropriate burden and

correctly stated the law. We, therefore, conclude that Avery was not deprived of due process of law.

C. Trial Court Denial of Postconviction Motion

Finally, Avery claims that the trial court erred in denying his postconviction motion without holding an evidentiary hearing. This court reviews a trial court's denial of a motion for an evidentiary hearing *de novo*. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). In his postconviction motion, Avery claimed he was denied effective assistance of counsel because counsel failed to make a "clear" objection to the trial court's addition to the standard jury instruction. We disagree.

The familiar two-pronged test for ineffective assistance of counsel claims requires defendants to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis.2d 207, 216-17, 395 N.W.2d 176, 181 (1986); *see also* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (holding ***Strickland*** analysis applies equally to ineffectiveness claims under state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel which were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.*** We will "strongly presume" counsel to have rendered adequate assistance. *See* ***id.***

To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *See* ***id.*** at 687. In order to succeed, "[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. If this court concludes that the defendant has not proven one prong, we need not address the other prong. *See* ***id.*** at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See* ***id.*** at 634, 369 N.W.2d at 715.

Frequently, when a postconviction motion raises an ineffective assistance of counsel claim, an evidentiary hearing is required. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). However, the trial court may deny the hearing if the motion fails to allege sufficient facts, or if it presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Because the record demonstrates that counsel did object to the amended jury instruction, and additionally, that counsel's performance was not deficient, we conclude that the trial court did not err in denying an evidentiary hearing on this issue.

Evidence in the record reflects that trial counsel objected to the added sentence in the jury instruction—"Intoxication by itself, even severe intoxication, does not relieve a defendant of responsibility for a crime." Although defense counsel thought the statement to be accurate, he suggested it be moved to a different position in the instructions so as not to "send mixed messages." The trial court specifically overruled defense counsel's objection stating, "I believe it [the added statement] accurately states the law, and the defendant's objection to it is overruled." Clearly, the trial court interpreted defense counsel's objection as

one claiming the jury instruction was inaccurate and the trial court overruled the objection, finding that the jury instruction correctly stated the law. Consequently, Avery's request for an evidentiary hearing on this matter was without merit as the trial court responded as if a "clear" objection had been made.

However, even if the specific objection that the jury instruction incorrectly stated the law was not raised, as Avery contends, counsel's performance was not deficient under ***Strickland*** because, as noted earlier, the trial court's addition to the jury instruction stated the law correctly. Any specific objection by counsel to the statement as misstating the law would have been fruitless, since there was no viable objection to the instruction. Thus, we reject Avery's argument that counsel was ineffective for failing to clearly object to the instruction.

For the reasons stated above, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

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