COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2621

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FLOYD CARTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and JOHN J. DiMOTTO, Judges.[1] *Affirmed.*

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

[1] The Honorable Diane S. Sykes presided over the jury trial. The Honorable John J. DiMotto presided over the postconviction motion.

¶1 PER CURIAM. Floyd Carter appeals *pro se* from a judgment of conviction entered on a jury verdict finding him guilty of first-degree intentional homicide and first-degree sexual assault, in violation of WIS. STAT. §§ 940.01(1) & 940.225(1)(a) (1995-96),[2] and from an order denying his postconviction motion. Carter claims that the trial court erred by: (1) denying his request for a different lawyer; (2) concluding that he received effective assistance of counsel; (3) failing to instruct the jury on felony murder; and (4) allowing the trial to continue without Carter present. We affirm.

I. BACKGROUND

¶2 Before trial, Carter informed the court that his appointed attorney was not representing him "right" and was trying to "railroad" him. Carter requested a substitution of counsel because his family told him that they had hired a new lawyer who would be appearing for him "within this week sometime." The trial court denied Carter's request, stating "With nothing more specific than that, I can't allow a substitution of counsel." After the court ruled against him, Carter left the courtroom in protest and remained in the bullpen during the trial. As noted, the jury convicted Carter of first-degree intentional homicide and first-degree sexual assault. The postconviction court found that Carter "was not deprived of a fair trial and that Judge Sykes did not erroneously exercise her discretion."

[2] All references to the Wisconsin Statutes are to the 1997–98 version unless otherwise noted.

II. DISCUSSION

A. Request for Substitution of Counsel

¶3 Carter claims that the trial court improperly denied his last-minute request for a different lawyer. When a defendant asks for a different attorney, the trial court must exercise its discretion to determine whether substitution is warranted. *See* ***State v. Clifton***, 150 Wis. 2d 673, 684, 443 N.W.2d 26, 30 (Ct. App. 1989); ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89, 90 (1988). In exercising its discretion, the court should balance the defendant's constitutional right to counsel against society's interest in the prompt and efficient administration of justice. *See* ***State v. Wanta***, 224 Wis. 2d 679, 703, 592 N.W.2d 645, 656 (Ct. App. 1999). This balancing must start with a showing by the defendant of good cause for the substitution. *See* ***Clifton***, 150 Wis. 2d at 684, 443 N.W.2d at 30. In addition, to properly exercise its discretion, the trial court must inquire into the reasons for the defendant's request. *See* ***Lomax***, 146 Wis. 2d at 361, 432 N.W.2d at 91.

¶4 Here, the trial court made an adequate inquiry into the reasons behind Carter's request for substitution of counsel. Despite the court's efforts to gain more information about the new lawyer, Carter offered nothing more than his belief that his current lawyer was not representing him "right." Mere disagreement over trial strategy, however, does not constitute good cause. *See* ***Wanta***, 224 Wis. 2d at 703, 592 N.W.2d at 656 ("[T]o warrant substitution of appointed counsel, a defendant must show good cause, such as conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict."). As a consequence of Carter's failure to give a cogent reason to get a new lawyer, the trial court did not erroneously exercise its

discretion in refusing to delay the jury trial to give Carter more time based on his less-than-concrete plans to hire a new lawyer. The trial court properly weighed the efficient administration of justice against Carter's request when it noted: "There is no reason to delay this matter on the very vague representation that the family may be hiring a new lawyer whose identity nobody knows and who may or may not be available to try this case."

B. Ineffective Assistance of Counsel

¶5 A defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient, and, as a result, the defendant suffered prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216–217, 395 N.W.2d 176, 181 (1986). To prove deficient performance by his or her lawyer, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id.*** To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. *See* ***id.***, 466 U.S. at 687. If a defendant fails on either aspect – deficient performance or prejudice – the ineffective-assistance-of-counsel claim fails. *See* ***id.***, 466 U.S. at 697.

¶6 Whether a lawyer gives a defendant ineffective assistance of counsel is a mixed question of law and fact. *See* ***Johnson***, 133 Wis. 2d at 216, 395 N.W.2d at 181. 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 whether proof satisfies either the deficiency or the prejudice prong is a question of law that this court reviews *de novo*. *See* ***id.***, 124 Wis. 2d at

634, 369 N.W.2d at 715. If a defendant files a postconviction motion and alleges facts that, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309, 548 N.W.2d 50, 53 (1996). Whether the motion alleges sufficient facts that, if true, would entitle the defendant to relief is a question of law, which we review *de novo*. *See* ***id***., 201 Wis. 2d at 310, 548 N.W.2d at 53.

¶7 Here, Carter alleges many instances of ineffective assistance of counsel. The postconviction court correctly characterized these allegations as "wholly conclusory and without support," and properly denied an evidentiary hearing in this case. *See* ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53 (circuit court has discretion to deny claim without a hearing if defendant only makes conclusory allegations, or if the record conclusively demonstrates that defendant is not entitled to relief). Carter has not shown, in light of the overwhelming evidence of his guilt, including his own confession and strong physical evidence connecting him to the crimes, that he was prejudiced in any way by counsel's performance. We address each claim in turn.

¶8 First, Carter claims ineffectiveness because his lawyer failed to put a motion to dismiss in writing. Although not in writing, the trial court nevertheless considered the motion and denied it on the merits. Thus, Carter has failed to show prejudice. *See* ***Strickland***, 466 U.S. at 694.

¶9 Second, Carter claims that trial counsel was ineffective because counsel did not discuss pretrial motions with the court. Carter, however, does not explain what motions should have been discussed, nor does he explain how he was prejudiced. Trial counsel did, in fact, bring pretrial motions before the court, including a motion to dismiss, a motion to suppress evidence, as well as a

discovery demand. Carter has not shown that what his lawyer did or did not do was either deficient or prejudicial.

¶10 Third, Carter asserts that trial counsel was ineffective for requesting an adjournment. Counsel was merely reiterating, however, for purposes of the record, the request for an adjournment that Carter himself had made only minutes earlier.

¶11 Fourth, Carter claims that counsel was ineffective because he failed to object to the trial court's denial of Carter's motion for substitution of counsel. The record reflects that counsel requested leave to withdraw from Carter's case, and, as noted, formally reiterated Carter's request for an adjournment.

¶12 Fifth, Carter claims that trial counsel was ineffective for telling the jury that Carter wanted to testify. In his opening statement, counsel told the jury: "He may come out to testify. I don't know." The trial court, however, gave a cautionary instruction to the jury, indicating: "The defendant's decision not to come into the courtroom during the trial is not an evidentiary matter. It's not evidence in this case and you should not factor that into your deliberations at all." We presume that the jury followed the court's instruction and did not draw any inference from Carter's absence. *See* ***State v. Chambers***, 173 Wis. 2d 237, 259, 496 N.W.2d 191, 199 (Ct. App. 1992).

¶13 Sixth, Carter claims that trial counsel was ineffective because, during voir dire, counsel asked the potential jurors, "Does the fact that my client is black, does anybody have any problems with that," and because counsel told the jury that Carter might participate in the trial. Again, Carter makes only conclusory averments and fails to explain how counsel's representation prejudiced him.

¶14 Seventh, Carter claims that trial counsel's representation was ineffective because counsel did not object when the State admitted two exhibits into evidence: a diagram and a hat. Carter does not explain how the admission of such exhibits prejudiced him.

¶15 Eighth, Carter claims that trial counsel was ineffective because he did not object to the prosecution witnesses' identification of Carter in the bullpen. Carter does not explain how he was prejudiced by this failure, especially since Carter decided to stay in the bullpen rather than attend his trial.

¶16 Finally, Carter maintains that trial counsel was ineffective for intentionally failing to call JoeAnn Finley as a witness. Although Carter claimed in his postconviction motion to the trial court that "Finley would have told the jury that her boyfriend killed the deceased victim," he did not submit to the trial court a sworn statement by Finley that she would have, in fact, testified that way, and, accordingly, his assertion is merely conclusory without any evidentiary basis. *See* ***Bentley***, 201 Wis. 2d at 309–310, 548 N.W.2d at 53.

C. Felony Murder Instruction

¶17 Carter argues that the trial court should have instructed the jury on felony murder. *See* WIS JI—CRIMINAL 1030. Carter, however, never requested this instruction. Thus, the issue was not properly preserved for appeal and consideration of this error has been waived. *See* WIS. STAT. § 805.13(3) (failure to object during instruction conference constitutes waiver of any error in the proposed jury instructions).

¶18 Carter also claims that trial counsel was ineffective for failing to request the felony murder instruction. A defendant is not entitled to an instruction

on a lesser-included offense unless "there are reasonable grounds in the evidence to acquit on the greater charge and convict on the lesser." ***State v. Jones***, 228 Wis. 2d 593, 598, 598 N.W.2d 259, 261 (Ct. App. 1999). Felony murder is a lesser-included offense of first-degree intentional homicide. *See* ***State v. Morgan***, 195 Wis. 2d 388, 436 n.24, 536 N.W.2d 425, 443 n.24 (Ct. App. 1995). First-degree intentional homicide requires that: (1) the defendant cause the death of another human being; and (2) the defendant intended to kill another human being. *See* WIS JI—CRIMINAL 1010. In contrast, the crime of felony murder requires that: (1) the defendant committed or attempted to commit a felony; and (2) the death of another human being was caused by the commission of or attempt to commit a felony. *See* WIS JI—CRIMINAL 1030.

¶19 Here, there is no reasonable likelihood that, in light of Carter's confession that he strangled the victim because he was afraid she would tell someone he had nonconsensual sex with her, a jury would have found him innocent of first-degree intentional homicide and guilty of felony murder. Indeed, Carter also confessed that "he'd choke her, he'd stop, he'd continue to choke her again, he'd stop and he'd continue to choke her again off and on." Thus, the jury convicted Carter of first-degree intentional homicide even though it was also instructed on the lesser-included offense of first-degree reckless homicide. Accordingly, he suffered no prejudice.[3]

[3] In its brief, the State, citing ***State v. Ambuehl***, 145 Wis. 2d 343, 355, 425 N.W.2d 649, 654 (Ct. App. 1988), claims that "whether to request an instruction on a lesser-included offense is a decision which must be made by the defendant himself." The ***Ambuehl*** court, however, explicitly rejected this proposition. *See* ***id.***, 145 Wis. 2d at 356, 425 N.W.2d at 654. We admonish the State for this misrepresentation. *See* ***In re Balkus***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985) (we will not make arguments for the appellants).

D. Right to be Present in Courtroom

¶20 Carter next claims that the trial court improperly allowed his trial to continue while he remained in the bullpen, thus denying him of his right to be present during trial. He claims that he did not waive his right to be present in the courtroom. "The Confrontation Clause and the Fourteenth Amendment grant an accused the right to be present in the courtroom at every stage of his or her trial." ***State v. Divanovic***, 200 Wis. 2d 210, 219, 546 N.W.2d 501, 504–505 (Ct. App. 1996). A defendant, however, may waive this right. *See* ***id.***, 200 Wis. 2d at 220, 546 N.W.2d at 505. "A waiver occurs when there is 'an intentional relinquishment or abandonment of a known right or privilege.'" ***Id***. (citation omitted). Whether Carter was denied his constitutional right to be present raises an issue of constitutional fact that we review *de novo*. *See* ***id.***

¶21 After the trial court denied Carter's motion for a new lawyer, he told the court, "I have nothing else to say," and left the courtroom. The trial court, noting Carter's departure, stated: "I can only construe that as a voluntary absenting of these proceedings." Carter admits that he "chosen [*sic*] to remain inside the bullpen during the … trial that was held without him." "[W]hen a defendant is voluntarily absent from the trial proceedings, a defendant's failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential." ***Id.*** Thus, we conclude that Carter waived his right to be present during trial.[4]

[4] Carter also alleges that the audio-visual equipment, set up in the bullpen so he could watch his trial, was not sufficient to satisfy his right to be present in the courtroom. Since we have already concluded that Carter waived his right to be present in the courtroom, we decline to address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

By the Court.—Judgment and order affirmed.

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