

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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

No. 99-2845-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EUGENE THOMAS, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: JAMES L. BOLGERT, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Eugene Thomas II has appealed from a judgment convicting him of first-degree intentional homicide in violation of WIS. STAT.

§ 940.01(1) (1999-2000)¹ and burglary in violation of WIS. STAT. § 943.10(2)(d). He has also appealed from an order denying his motion for a new trial. We affirm the judgment and the order.

¶2 Thomas was convicted after a jury trial of the first-degree murder of his estranged girlfriend, Betty Ebben. The burglary conviction was based upon the prosecutor's theory that Thomas strangled, stabbed, and struck Ebben after entering her apartment without her permission. The prosecutor theorized that Thomas killed Ebben out of despair over the end of their relationship. Thomas attempted to present a defense showing that he was working out his disagreements with Ebben. He contended that Ebben was killed by someone else, possibly her recent companion, John Weber.

¶3 As he did in his motion for postconviction relief, Thomas argues on appeal that he was deprived of effective assistance of counsel at trial. He contends that his trial counsel rendered ineffective assistance when, on cross-examination, counsel elicited testimony from Ebben's daughter, Melinda Rowan, indicating that prior to the murder Ebben told Rowan that Thomas had told her that he was going to "break in and hide and kill her." In pretrial proceedings, the trial court had ruled that this hearsay statement was inadmissible at trial.

¶4 Thomas contends that his trial counsel also rendered ineffective assistance by failing to make a hearsay objection when Rowan, who lived with Ebben, testified that her mother had previously told her not to let Thomas into the apartment. In addition, Thomas alleges that trial counsel rendered ineffective assistance when, on cross-examination of a detective who questioned Thomas at

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

the police station, he elicited testimony that Thomas had asked for an attorney. Thomas's final claim is that trial counsel rendered ineffective assistance when he failed to display or submit to the jury photographs of Ebben's apartment which had been utilized in questioning witnesses on direct and cross-examination.

¶5 To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See id.* The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. *See State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶6 Even if a defendant establishes that his or her counsel's performance was deficient, the judgment of conviction will not be reversed unless he or she proves that the deficiency prejudiced his or her defense. *See id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶7 Whether counsel rendered ineffective assistance presents a mixed question of law and fact. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). This court will not overturn the trial court's findings of fact

concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See id.*

¶8 We need not analyze counsel's performance absent a showing that any alleged deficiencies prejudiced the case. *See State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Strickland*, 466 U.S. at 697.

¶9 We decline to address the deficient performance prong of the ineffectiveness test because we conclude, as did the trial court, that Thomas was not prejudiced by the alleged deficiencies in counsel's performance. The evidence against Thomas was overwhelming.

¶10 Evidence at trial indicated that Thomas and Ebben had dated for several years. At trial, Rowan testified that Ebben and Thomas had broken up two weeks before Ebben's death, but that Thomas continued to come over even though Ebben did not want him to. Rowan testified that Thomas told her during one of these visits that he was going to hurt her mother "in a way that couldn't be repaired." John Weber testified that he overheard Thomas say "I'm going to kill you" during an argument with Ebben. A witness who lived in Ebben's apartment building testified that he observed Thomas and Ebben arguing a few days before her death, and another witness testified that Thomas told him the week before Ebben's death that he was upset because his girlfriend was sleeping with another man.

¶11 Ebben was killed on the morning of August 1, 1997. Weber testified that he and Ebben stopped at a tavern at about 7:30 a.m. that morning after getting off work. He testified that when they arrived at the bar, Thomas was out in front on the sidewalk and told Ebben that they needed to talk. Weber testified that Thomas was there again when they came out of the bar at about 9:00 a.m., at which time Weber walked home.

¶12 Most damaging to Thomas were his own statements to police. The police were dispatched to Ebben's apartment in the late morning of August 1, 1997, after the J. L. French Corporation, which employed both Ebben and Rowan, received a telephone call from an unidentified man who stated that he needed to get a message to "Belinda" Rowan concerning her mother. The caller reported that Rowan's mother was dead, and requested that Clifford Babak, the J. L. French employee who answered the call, tell Rowan to call 911 to notify the police because the caller did not want Rowan to be the one to find her mother dead. Babak testified that the caller said "just leave a message with her and tell her I'm sorry." When asked to identify himself, the caller responded, "She'll know who it is."

¶13 Paramedics and the police were dispatched to Ebben's apartment. After being buzzed into the secured building, the police entered Ebben's locked apartment by using a key located on the ledge above the door. Ebben was found on the floor, covered with a quilt. She had been strangled with an electrical cord, had a two-inch deep stab wound in her back, and had a blunt force injury to her abdomen. Investigating officers found two notes written by Thomas on the quilt covering Ebben's body. One was a handwritten note using the pet names Thomas and Ebben had for each other and said, "I gave you all from the start. You didn't

have to crush me to prove your strength.” The other was addressed to “Betty” and talked about being unable to live without her.

¶14 Approximately one hour after the police and paramedics arrived at Ebben’s apartment, Thomas was observed driving up in Ebben’s red Pontiac Fiero. Officer Brian Koch, who was one of the officers maintaining the crime scene, testified that he then observed Thomas crawling up the stairs to the apartment, saying, “Tell me she’s not dead.” Koch testified that when Thomas was informed by a detective on the scene that Ebbens was dead, Thomas stated: “I know I murdered her. You don’t have to investigate.” Koch testified that while being handcuffed, Thomas made statements such as, “The only woman I ever loved and I took her life.” Koch testified that Thomas also said, “She had a heartbeat when I left. I tried calling five times.” Koch further testified that Thomas was kept at the top of the stairs, and that no one told him how Ebben died.

¶15 Other officers at the scene testified that they heard the same or similar statements from Thomas. Officer John Winter testified that he observed Thomas crawling up the stairs, saying, “Tell me she isn’t dead,” and when told of Ebben’s death heard him say, “There’s no need to investigate anything. I killed her and you can charge me with first degree murder.” Like Koch, Winter testified that Thomas could not see Ebben’s body in the apartment, and that no one at the scene told Thomas the cause of Ebben’s death.

¶16 Officer Chad Ramos, who assisted in transporting Thomas to the police department, testified that he heard Thomas say, “I’m sorry I killed you” and “I made a mistake. She stripped me of my manhood. I wanted to kill myself. Instead I killed you.” Officer Jeffrey Johnston testified to the same statements. Like Koch, Winter and Ramos, Johnston and Detective James Hoppe, who was

also at the scene, testified that while they were with Thomas, no one told Thomas the cause of Ebben's death. At trial, the parties also stipulated that the cause of Ebben's death was never the subject of police department radio transmissions receivable by the public.

¶17 Detectives Donald Sorenson and Robert Wojs testified concerning statements Thomas made at the police station. Sorenson testified that Thomas made statements such as, "She told me about the others and how much better they were.... She said I was garbage, trash." Sorenson testified that when he entered the room where Thomas was waiting, Thomas asked him if Ebben was alive and then said, "Oh, God. I killed her. I strangled her, didn't I? I need help. Betty's dead and I killed her." Wojs testified that Thomas asked him if Ebben's daughter knew and he said yes, at which point Thomas said, "I strangled her. I killed her. I killed her mom."

¶18 Thomas's admission to the police that he killed Ebben by strangling her was powerful evidence against him, particularly in light of the repeated testimony that Thomas did not observe Ebben's dead body and was not told the cause of death by the police. Also powerful was Babak's testimony concerning the telephone call to the J. L. French Corporation, particularly when combined with testimony at trial which indicated that when the police observed Thomas on the day of the murder, he had a series of numbers written on the palm of his hand. The numbers were the telephone numbers for the J. L. French Corporation.

¶19 Other evidence against Thomas corroborated his guilt of both first-degree intentional homicide and burglary. In addition to arriving at the murder scene in Ebben's car, Thomas had her work I.D. card on him. A witness testified that he served Thomas with a document at 9:40 a.m. on the morning Ebben was

killed, and observed that Thomas was carrying a dark colored duffel or gym bag. A similar looking bag containing a steel pipe was found by the police in the upstairs bedroom of Ebben's apartment. Rowan testified that she did not remember previously seeing the bag or pipe in the apartment. Thomas subsequently admitted that the bag and pipe were his, as were the notes and drawing found on Ebben's body. While he offered innocent explanations of how those items got into Ebben's apartment, viewed with the other evidence in this case, they point to Thomas's guilt.

¶20 Upon entry into the apartment, the police also discovered a north window open in the upstairs bedroom, and venetian blinds from the window broken and scattered on the floor. One officer testified that he examined the window and it looked like it had been forcibly entered from the outside because there were fragments of the screen and shade inside the room. The window was accessible from the roof. Rowan testified that her mother kept her room very clean, and that she never observed blinds on the floor or the screen in disrepair. In addition, a bed was located approximately four feet from the window. Evidence from the state crime lab indicated that shoe prints found on the comforter of the bed could have been made by the shoes Thomas was wearing.

¶21 One theory suggested by the prosecutor for how Thomas got onto the roof was that he climbed a nearby utility pole. Thomas argues that it would have been extremely difficult for him to have climbed the pole and that material from the pole would have been on his clothes. However, the prosecutor also offered other possible explanations for how Thomas got onto the roof, including the possibility that he entered through the building entrance and then entered the apartment of another building resident, Sherry Houdek. Houdek testified that she had let Thomas into her apartment on a couple of occasions. She also testified that

she left her door unlocked on the morning of Ebben's murder, and that when she returned it appeared to her that someone had pushed out a screen on an upstairs bedroom window, and then tried to put it back in place.

¶22 In contending that trial counsel's alleged deficiencies in performance were prejudicial to him, Thomas relies on evidence that he was seen accompanying Ebben on an errand at about 9:15 a.m. after she left the bar, and his own testimony that they were getting along and that she agreed to go on a "road trip" with him later that morning. Thomas also argues that his statements to police must be deemed unreliable because he was intoxicated, and that a jury could therefore have believed that his incriminatory statements were the result of an irrational emotional state rather than guilt. However, while the evidence indicates that Thomas was intoxicated and emotional, it does not indicate that he was incoherent. In fact, he was able to drive a car to and from Manitowoc before returning to Ebben's Sheboygan apartment. Neither his intoxicated state nor the uncertainty as to how he entered the apartment therefore undermines our confidence in the jury's verdict.

¶23 In light of Thomas's repeated admissions of guilt, his knowledge of how Ebben died, the telephone call to the J. L. French Corporation, and the threats made by Thomas which were heard by Rowan and Weber, no basis exists to conclude that the homicide verdict would have been different absent the testimony challenged on appeal. In light of this evidence and the evidence of forced entry into Ebben's apartment, there is also no reasonable probability that Thomas would have been acquitted of the burglary charge if the testimony had been excluded or the photographs had been displayed to the jury. Because Thomas has failed to satisfy the prejudice prong of the test for ineffective assistance of counsel, the judgment and the order are affirmed.

By the Court.—Judgment and order affirmed.

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

