COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2370-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY J. BODOH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Kelly J. Bodoh appeals from a judgment of conviction of party to the crime of first-degree intentional homicide and from an order denying his motion for postconviction relief. He argues that trial counsel was constitutionally deficient by not investigating additional psychological defenses and by admitting guilt to the jury, and that the trial court violated his

right to due process by approving a sentencing agreement and not following it without ascertaining, by a colloquy, whether he understood that the court was not bound by the agreement. He requests a new trial in the interests of justice. We reject his claims and affirm the judgment and order.

¶2 In the early morning hours of December 18, 1997, Robin Elsinger made homosexual advances on Bodoh. Bodoh believed that Elsinger had molested him a couple of months earlier when he was passed out due to intoxication. Bodoh prevailed upon his friend, Kraig Hoepner, to drive him to his grandmother's house to retrieve a gun. Elsinger went along. Bodoh shot Elsinger at close range while the three were riding in the car. After the first shot, Bodoh shot again because he did not think Elsinger was dead. Bodoh would have fired a third shot, but Hoepner told him to stop.

¶3 At trial, Bodoh pursued a provocation defense. Bodoh testified that when he shot Elsinger he was flashing back to the prior sexual assault by Elsinger. He believed that he was justified in shooting Elsinger because of the risk of another sexual assault.

¶4 Bodoh first argues that trial counsel was ineffective for not adequately investigating and presenting evidence about psychological conditions Bodoh may have experienced relevant to his provocation defense. Bodoh was evaluated by a psychologist to determine if he was competent to stand trial and whether a plea of not guilty by reason of mental disease should be entered. Bodoh faults counsel for not requesting further evaluation and not consulting a second expert. Specifically, Bodoh suggests that had counsel sought a psychosexual and alcohol evaluation of Bodoh, other potential defenses, notably homosexual panic

or posttraumatic stress, would have been apparent. He asserts that counsel did not exercise reasonable professional judgment in not pursuing additional evaluations.

¶5 "There are two components to a claim of ineffective counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *See* ***id.*** However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. ***Id.*** at 236-37.

¶6 Where, as here, a defendant alleges that trial counsel was deficient for failing to investigate certain aspects of the case, the defendant must "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case."[1] ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. More than speculation about what further investigation would have revealed is necessary. ***Id.***

¶7 Bodoh has failed to meet his burden of proof on the prejudice prong. Bodoh has not presented evidence that an additional psychological evaluation

[1] We do not find it necessary to detail the type of evidence necessary to meet this burden. Therefore, we are not, as Bodoh suggests in his reply brief, adopting a new restrictive postconviction procedure requiring proof of the five factors the State identifies as necessary to prove that trial counsel failed to adequately investigate.

would have revealed that he did in fact, at the time of the shooting, suffer from a psychological disorder bearing on his provocation defense. Trial counsel testified that the psychologist he retained was asked to evaluate whether, at the time of the murder, Bodoh had lost complete self-control from a psychological aspect and whether Bodoh was homophobic. This evaluation failed to yield results favorable to Bodoh's defense. Bodoh does not offer any contradictory evidence. Bodoh only offers speculation that he suffered from a mitigating disorder.[2] His claim that counsel was ineffective for inadequate investigation fails.

¶8 Bodoh also claims that trial counsel was ineffective for conceding in opening and closing arguments that Bodoh caused Elsinger's death and intended to kill Elsinger. He characterizes this concession as a risky tactic and a relinquishment of his constitutional right to trial.[3] He equates counsel's conduct with the complete denial of counsel by the failure to subject the prosecution's case to meaningful adversarial testing and therefore, per se ineffective assistance of counsel. *See* ***United States v. Cronic***, 466 U.S. 648, 658-59 (1984) (prejudice presumed if counsel fails to subject the prosecution's case to meaningful adversarial testing).

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[2] Bodoh argues for the first time in his reply brief that trial counsel was required to lay a proper foundation for an intoxication defense by evidence of Bodoh's alcohol intake and its effect. At the postconviction hearing, trial counsel was not asked about an intoxication defense but did mention in his testimony that research had been done on the issue of intoxication and based on information from Bodoh, counsel did not find a sufficient basis to pursue that defense. At the postconviction hearing, Bodoh did not offer any evidence regarding intoxication to suggest that such a defense was possible.

[3] Bodoh claims that a record should have been made of his knowing and voluntary consent to waive the prosecution's burden of proof on those two elements. He urges this court to adopt a rule followed by other state courts that requires the trial judge to sua sponte question the defendant about consent when the trial judge suspects that counsel's strategy concedes guilt. *See* ***Nixon v. Singletary***, 758 So. 2d 618 (Fla.), *cert. denied*, ***Florida v. Nixon***, 531 U.S. 980 (Nov. 6, 2000) (No. 00-396); ***State v. House***, 456 S.E.2d 292 (N.C. 1995).

¶9 Bodoh's defense was that adequate provocation existed. This would have reduced the crime to second-degree intentional homicide. With the provocation defense in place, the prosecution, in addition to proving that Bodoh caused Elsinger's death and intended to kill him, had the burden of proving that adequate provocation did not exist. WIS. STAT. § 940.01(3). Trial counsel testified that his concession that the undisputed evidence proved causation and intent was a strategy decision to gain credibility with the jury and to focus the jury on the issue of provocation.[4]

¶10 We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). However, we will examine counsel's conduct to be sure it is more than just acting upon a whim; there must be deliberateness, caution, and circumspection. ***Id.***

¶11 Bodoh does not challenge counsel's choice as a product of inadequate deliberateness or circumspection. Rather, he simply argues that the concession on the elements was not necessary. It is not enough that Bodoh's expert attorney witness opined that conceding intent was not necessary to establish the provocation defense. Nor is it dispositive that trial counsel admitted that he could have focused the jury on the provocation issue without conceding causation

[4] In his opening statement, trial counsel told the jury:

> [O]n December 13, 1997, Kelly Bodoh caused the death of Robin Elsinger and he intended to do so. No witness will testify on the part of the defense that Kelly Bodoh did not do that and that he did not—that he did not intend to cause that death. That is not an issue in this case. The issue is this: Was Kelly Bodoh adequately provoked at the time he caused the death of Robin Elsinger? That's what this is about, adequate provocation.

and intent. "Even if it appears, in hindsight, that another defense would have been more effective, the strategic decision will be upheld as long as it is founded on rationality of fact and law." ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). ***Hubanks*** recognizes that counsel may reasonably choose not to challenge the sufficiency of evidence on a certain element to avoid undermining the defense. *See* ***id.*** Similarly, in ***State v. Harris***, 133 Wis. 2d 74, 81-83, 393 N.W.2d 127 (Ct. App. 1986), counsel's conduct to further a strategy that conceded that sexual encounters had occurred but that they were consensual was held not to be ineffective. As trial strategy, the concession does not amount to a confession of guilt and does not require a record of the defendant's consent. *See* ***Underwood v. Clark***, 939 F.2d 473, 474 (7th Cir. 1991); ***McNeal v. Wainwright***, 722 F.2d 674, 675-77 (11th Cir. 1984); ***People v. Siverly***, 551 N.E.2d 1040, 1044-47 (Ill. App. Ct. 1990). The concession of certain elements while vigorously arguing a defense is not a complete abandonment of the adversarial testing of the prosecution's case. *See* ***Alexander v. State***, 782 S.W.2d 472, 474 (Mo. Ct. App. 1990). This is not a ***Cronic*** case.

¶12 That counsel's strategic decision was reasonable is illustrated by the fact that it led the prosecution to focus on the burden to prove that adequate provocation did not exist. This had the effect of drawing emphasis and the jury's attention away from those acts Bodoh undertook in preparation of the murder, such as calling Hoepner for the specific purpose of getting a ride to retrieve the gun and playing along with Elsinger's advances. These two facts, if emphasized by the prosecution in an effort to prove intent, would have dissipated Bodoh's position that the shooting was nothing more than a reaction to adequate provocation. Further, evidence of causation and intent was overwhelming. Counsel's attempt to gain credibility with the jury about what really occurred was

rationally based. *See* ***Underwood***, 939 F.2d at 474 (counsel's concession that evidence is overwhelming on some elements is reasonable to enhance the defense's credibility with the jury and focus on the weakest part of the State's case); ***Faraga v. State***, 514 So. 2d 295, 307-08 (Miss. 1987) (counsel's candor by concession of certain facts may help the defense in front of the jury). Trial counsel was not deficient for strategically conceding the causation and intent elements.[5]

¶13 Before turning to the sentencing issue, we address Bodoh's request for a new trial in the interests of justice. WIS. STAT. § 752.35. He argues that the real controversy was not fully tried because the jury was precluded from hearing important testimony. ***State v. Ward***, 228 Wis. 2d 301, 306, 596 N.W.2d 887 (Ct. App. 1999), *review denied*, 230 Wis. 2d 274, 604 N.W.2d 572 (Wis. Sept. 28, 1999) (No. 98-2530-CR). Bodoh attributes the omission of critical evidence to trial counsel's failure to investigate potential psychological defenses and an inadequate defense strategy.[6] We have concluded that trial counsel was not deficient. No grounds exist to conclude that the real controversy was not fully tried. Nor are we persuaded that the fundamental reliability of the trial was impugned such that justice miscarried or that there is a substantial probability that a new trial would produce a different result. *See* ***State v. Darcy N. K.***, 218 Wis. 2d

[5] We decline to address Bodoh's proposed rule requiring an on-the-record colloquy about a defendant's agreement to the concession of elements of the offense. Not only did the concessions here not rise to the level of an admission of guilt, but the postconviction record demonstrates that Bodoh, albeit reluctantly, agreed to counsel's strategy.

[6] In his appellant's brief, Bodoh hints that the real controversy was not fully tried because of the trial court's decision to exclude testimony from the defense psychologist. The issue is not adequately briefed for consideration. *See* ***Estrada v. State***, 228 Wis. 2d 459, 465 n.2, 596 N.W.2d 496 (Ct. App. 1999). We look at the issue as defined in the reply brief.

640, 667, 581 N.W.2d 567 (Ct. App. 1998) (to prevail on the ground of a miscarriage of justice, the defendant must convince us that there is a substantial degree of probability that a new trial would produce a different result).

¶14 The remaining issue is whether, in the absence of any warning to Bodoh that the court was not bound by the agreement, the trial court violated an approved sentencing agreement.[7] In the sentencing agreement, Bodoh agreed to testify truthfully at Hoepner's trial. The prosecution agreed not to object at sentencing to Bodoh's request for a sentence with parole eligibility and that it would not present argument, evidence, statements, or other information that a sentence be imposed without parole or with an extended parole eligibility date. The trial court affixed its signature to the agreement following this proviso: "The Court having reviewed the aforementioned agreement, noting the terms and conditions contained therein, does approve said agreement." On October 28, 1998, the court sentenced Bodoh to life in prison with a parole eligibility date of November 1, 2037.

¶15 Bodoh claims that he reasonably believed that the trial court would comply with the sentencing agreement. He argues that the court's failure to comply with the agreement violates notions of fundamental fairness and his right

[7] The State addresses this claim as a claim that trial counsel was ineffective for not objecting to a violation of the sentencing agreement. Bodoh only makes a passing reference to trial counsel's failure to object to specific performance of the agreement. Bodoh's brief also states: "By allowing several witnesses to make statements recommending no parole or an extended eligibility date, the prosecutor's agreement to make no sentence recommendation was materially breached." This claim is not further developed. We agree with the State's argument that the prosecution did not violate the agreement. Those people who spoke at sentencing had the right to be heard and what they said cannot be attributed to the prosecution. ***State v. Voss***, 205 Wis. 2d 586, 595-96, 556 N.W.2d 433 (Ct. App. 1996). The real issue Bodoh raises is that the court was either obligated to follow the sentencing agreement or conduct a record colloquy demonstrating Bodoh's understanding that the court was not bound by the agreement.

to due process. Finally, Bodoh suggests that the sentencing agreement is the functional equivalent of a plea negotiation and, therefore, attendant to its acceptance is a requirement that the trial court conduct a colloquy to ascertain the defendant's knowing and voluntary consent to the agreement, and knowledge that the court is not bound by the agreement.

¶16 We reject Bodoh's contention that he was entitled to be sentenced to life in prison with statutory parole eligibility.[8] The trial court's approval of the agreement was nothing more than an acknowledgement of its existence. The agreement provided that Bodoh's sentencing would be delayed until after Hoepner's trial. The trial court's acknowledgement was necessary so that the sentencing hearing would be set for an appropriate extended deadline.

¶17 More importantly, on a separate page, Bodoh acknowledged that he had been advised that "the attached agreement, although approved by the Court, is not binding upon the Court and the Court is free to sentence me as it believes proper." Trial counsel testified that he explained to Bodoh that the trial court was free to sentence him as it saw fit. The record establishes that Bodoh received the advice that he claims the trial court was required to provide.

¶18 Finally, nowhere in the sentencing agreement does it say that a certain sentence will be imposed. The terms of the agreement only restrict the prosecution from making certain arguments at sentencing. The agreement was performed to that end. The trial court's approval did not bind it to give a particular sentence. There was no violation of Bodoh's right to due process.

[8] WISCONSIN STAT. § 973.014(1)(a) permits the trial court to state that the defendant is eligible for parole under WIS. STAT. § 304.06(1).

By the Court.—Judgment and order affirmed.

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