COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2285-CR **Cir. Ct. No. 96CF965819**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT C. LEWIS,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Vincent C. Lewis appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide while armed and armed robbery, contrary to WIS. STAT. §§ 940.01(1), 939.63 and 943.32(1)(a) and (2) (1995-96). He also appeals from an order denying his motion for a new trial. Lewis claims that his trial counsel provided ineffective assistance, that the trial

court erroneously exercised its discretion when it failed to instruct the jury on the "while armed with a dangerous weapon" element of the homicide, and that the trial court erred in ruling that his confession was voluntary. Because trial counsel's performance was not ineffective, because the trial court did not erroneously exercise its discretion when instructing the jury, and because under the totality of the circumstances Lewis's statements were voluntary, we affirm.

I. BACKGROUND

¶2 On November 10, 1996, Lewis burglarized the Great Lakes Biochemical Company. During the burglary, Lewis encountered the night janitor, Charles Stujenski. When Stujenski tried to stop Lewis, Lewis beat Stujenski over the head with a metal pipe. Lewis's repeated assault on Stujenski caused Stujenski's death. On November 13, 1996, Lewis confessed to the murder of Stujenski.

¶3 Lewis was charged with first-degree intentional homicide, while armed, armed robbery and burglary. Subsequently, Lewis filed a motion to suppress. After conducting a ***Miranda-Goodchild***[1] hearing, the trial court denied the motion. Lewis pled guilty to the burglary charge and the other two charges were tried to a jury. The jury found Lewis guilty on both charges and he was sentenced to life imprisonment on the homicide count, forty years in prison, consecutive, on the robbery count, and ten years in prison, consecutive, on the burglary count. Judgment was entered. Lewis filed a postconviction motion alleging that his trial counsel provided ineffective assistance and that the trial court

[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

should have granted his suppression motion. The trial court denied the motion. Lewis now appeals.

II. DISCUSSION

A. Ineffective Assistance of Trial Counsel.

¶4 Lewis claims that trial counsel was ineffective in eight ways: (1) advising him to plead guilty to the burglary and then failing to ask for a felony murder instruction; (2) failing to request an instruction on felony murder, which he argues would have been a lesser included offense; (3) failing to request that the court instruct the jury on the "while armed" enhancer of the homicide; (4) failing to request criminal records of the State's witnesses; (5) failing to raise his "drunken" state of mind as a defense; (6) failing to object to or move to exclude evidence related to blood found on a hammer that police discovered at his girlfriend's house; (7) failing to object to or file a motion regarding his warrantless arrest; and (8) attempting to present a self-defense theory without offering any basis for it. We reject each contention in turn.

¶5 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a "strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

¶6 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. ***Strickland***, 466 U.S. 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.

¶7 Our standard for reviewing this claim involves a mixed question of law and fact. ***Johnson***, 153 Wis. 2d at 127. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present a question of law, which we review *de novo*. ***Id.*** at 128. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶8 Lewis first alleges that trial counsel was ineffective for advising him to plead guilty to the burglary charge. The State responds that this decision was clearly a strategic choice. Lewis argues that he would agree with the State if the jury was actually advised of the guilty plea. He contends, however, that "the plea of guilty was specifically kept from the jury," and therefore, resulted in ineffective assistance of counsel. We reject this allegation. The record cite provided by Lewis in support of his contention differs substantially from his suggestion that this strategy was never communicated to the jury. The record reflects that Lewis's counsel did not want the court to *specifically instruct* the jury that he entered a guilty plea to the burglary charge. However, defense counsel had already advised the jury that Lewis was not contesting the burglary charge, and the State was permitted to make this argument as well.

¶9 Thus, the jury was advised that Lewis was not contesting the burglary charge. The fact that the jury was not specifically instructed that he pled guilty is inconsequential. The jury could reasonably conclude that Lewis would not contest charges, where he was, in fact, guilty. This strategy would help bolster his credibility in denying the armed robbery and intentional homicide charges. Even if trial counsel's conduct constituted deficient performance, Lewis has failed to demonstrate that he suffered any prejudice as a result of the plea.

¶10 Second, Lewis contends that trial counsel should have requested a felony murder instruction. He argues that because the jury failed to make a finding as to the underlying felony of burglary, the jury could not make a finding of felony murder. The record demonstrates, however, that there was no basis for a felony murder instruction to be given to the jury. Burglary, under WIS. STAT. § 943.10(1)(a), is not one of the crimes that can form the basis for a charge of felony murder. *See* WIS. STAT. § 940.03. Further, a lesser-included offense instruction can only be given when there exists reasonable grounds in the evidence both for the acquittal on the greater charge and conviction on the lesser charge. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989); ***State v. Borrell***, 167 Wis. 2d 749, 779, 482 N.W.2d 883 (1992). That was not the case here. Therefore, trial counsel was not ineffective for failing to request an instruction on felony murder.

¶11 Third, Lewis argues that trial counsel was ineffective because she failed to request a separate "while armed" instruction for the charge of first-degree intentional homicide. We cannot agree. Lewis failed to object to the jury instructions and, therefore, he has waived any objection to the instructions. ***State v. Booth***, 147 Wis. 2d 208, 211, 432 N.W.2d 681 (Ct. App. 1988).

¶12 Moreover, Lewis fails to convince us that counsel's failure to request such instruction constituted ineffective assistance of counsel. As the State points out, there is an important distinction between a flawed jury instruction and a complete absence of an essential instruction. Here, the court did instruct the jurors regarding the definition of "dangerous weapon" when it instructed them on the armed robbery charge. Thus, even though the definition was not repeated during the instruction as to the homicide, the trial court did ask the jurors to return a finding on whether Lewis was armed when he committed the homicide. Accordingly, the jury was instructed as to the meaning of "while armed," which rendered the overall instructions a correct statement of the law. *See* ***State v. Glenn***, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). Based on the foregoing, we conclude that the failure to instruct the jury on the "while armed" enhancer of the homicide charge constituted harmless error. ***State v. Howard***, 211 Wis. 2d 269, 293, 564 N.W.2d 753 (1997). Because the error was harmless, Lewis cannot establish that he was prejudiced as a result of counsel's failure to request the instruction and his ineffective assistance claim on this basis fails.

¶13 Fourth, Lewis contends that trial counsel was ineffective for failing to request the criminal records of the State's witnesses and impeach them with such records. One of the State's witnesses, Curtis Harris, had a criminal record that was not disclosed. However, Harris's testimony was cumulative to the testimony of another State witness. Thus, trial counsel's failure to inform the jury of Harris's criminal record was not prejudicial because it is unlikely that such information, had it been given the jury, would have affected the verdict. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 640-41, 369 N.W. 2d 711 (1985).

¶14 Fifth, Lewis argues that trial counsel was ineffective for failing to raise a state of mind defense. Lewis claims that he was drunk at the time of the

homicide and that it was the anniversary of his mother's death. Therefore, he believes that, had these factors been presented by trial counsel, prosecutors may have agreed to a plea or a lesser charge. We reject this contention. Lewis has shown nothing to support this claim and there is nothing in the record to suggest that presenting these facts would have resulted in a different outcome.

¶15 Sixth, Lewis claims that trial counsel was ineffective for failing to object to, or seeking to exclude, testimony regarding blood on a hammer found at Lewis's girlfriend's house. We do not agree. The medical examiner testified that the base of the victim's head had semi-circular indentations "such as would be caused by the head of a hammer." Therefore, even absent expert testimony tying the blood to the victim, the fact that it was found at Lewis's girlfriend's house shortly after the murder, and the fact that it had traces of blood on it, and the fact that Lewis confessed that he obtained a hammer from a maintenance shop and used the hammer to knock a hole in the wall at the scene of the crime, established the relevance and admissibility of the hammer. Any objection would have been rejected and, as a result, Lewis has not established prejudice.

¶16 Seventh, Lewis claims that trial counsel was ineffective for failing to challenge the legality of his warrantless arrest. We reject this claim because the record clearly demonstrates that the police officers had probable cause to arrest Lewis. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992). On the night of the murder, there is evidence that Lewis went to a friend's house with items taken during the burglary, attempted to sell those items to his friends, washed his hands, tried to clean his boots in his friend's bathroom, and made a telephone call on the victim's cellular phone. Therefore, any attempt to challenge his arrest would have been unsuccessful. Accordingly, Lewis has failed to show any prejudice as a result of counsel's failure to challenge the legality of his arrest.

¶17 Finally, Lewis argues that trial counsel was ineffective for presenting a self-defense defense when it was not warranted. We disagree. Lewis has not suggested what other defense option counsel might have pursued. In his confession, Lewis states that he was surprised by the janitor and reacted by hitting him on the head. Lewis failed to testify, and confessed to the burglary, homicide, and armed robbery. Because Lewis confessed to everything, trial counsel was left with no better options than the self-defense claim. Thus, Lewis has failed to establish that trial counsel's unsuccessful self-defense theory was deficient or prejudicial.

¶18 For all of these reasons, we agree with the trial court and conclude that Lewis failed to establish that his trial counsel's performance was deficient and prejudicial.

B. Jury Instruction on Penalty Enhancer.

¶19 Lewis claims that the trial court did not properly instruct the jury on the definition of "while armed with a dangerous weapon" with respect to the first-degree intentional homicide charge. According to this court, the penalty enhancement under WIS. STAT. § 939.63 (2001-02)[2] may only be imposed if the State proves each element of the statute beyond a reasonable doubt. *See* ***Howard***, 211 Wis. 2d at 277-79; ***State v. Peete***, 185 Wis. 2d 4, 19, 517 N.W.2d 149 (1994). Therefore, Lewis argues that the jury was not properly instructed on the "while armed" question regarding first-degree intentional homicide. We disagree.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶20 The ***Howard*** court found that the jury was never asked to find whether the defendant possessed a dangerous weapon and that, upon reviewing the jury instruction as a whole, it was proper grounds for reversal because it deprives the accused of a jury determination that the accused engaged in the conduct. ***Howard***, 211 Wis. 2d at 290-92. In contrast, the jury in Lewis's trial was indirectly given the definition of a dangerous weapon in the instruction on armed robbery. The verdict form given to the jurors instructed them that if they found Lewis guilty of first-degree intentional homicide, then they must determine if he possessed a dangerous weapon during the commission of the first-degree intentional homicide. Accordingly, Lewis was given a jury determination that he engaged in the prohibited conduct.

¶21 WISCONSIN STAT. § 939.63(1)(b) states, "If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years." The trial court sentenced Lewis to life imprisonment with parole eligibility in the year 2057. However, the jury's verdict provided the trial court with the ability to enhance Lewis's sentence by not more than five years. The trial court chose not to apply the enhancement. This is opposite the situation in ***Peete***. The maximum sentence for the predicate offenses in ***Peete*** was five years, but the penalty enhancer under § 939.63 gave the court the discretion to increase the sentence another four years. As a result, the trial court in ***Peete*** sentenced the defendant to seven years. ***Peete***, 185 Wis. 2d at 13.

¶22 Based on the foregoing, any error in instructing the jury in this case was harmless because the trial court did not enhance Lewis's sentence with the penalty enhancer available on the homicide charge. Lewis was sentenced to life in

prison, not life in prison, plus five years. Accordingly, we reject Lewis's claim that he is entitled to a new trial on this basis.

C. Miranda-Goodchild.

¶23 Lewis also argues that the trial court erroneously decided the ***Miranda-Goodchild*** issue in this case. Lewis claims the court erroneously permitted his confession to be admitted into evidence. He asserts that the confession should have been excluded because it was made involuntarily. Lewis maintains that he provided the statement without adequate sleep or nourishment. We cannot agree.

¶24 We review the voluntariness of statements using a "totality of the circumstances" analysis, which "weigh[s] the [suspect's] personal characteristics … against the [alleged] coercive police conduct." ***State v. Franklin***, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999). We will find a defendant's statement "involuntary" only if it "was compelled by coercive means or improper police practices." ***Id.*** When evidence of coercion is present, a balancing test is applied. ***State v. Tobias***, 196 Wis. 2d 537, 546, 538 N.W.2d 843 (Ct. App. 1995). When balancing the totality of the circumstances, this court has held that some of the factors to be considered are "the confessor's age, education and intelligence, physical and emotional condition and prior experience with the police." ***Id.*** While the State must show voluntariness by a preponderance of the evidence, findings of underlying historical fact will not be set aside unless they are clearly erroneous. *See* ***Lego v. Twomey***, 404 U.S. 477, 489 (1972); ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999); ***Franklin***, 228 Wis. 2d at 413.

¶25 Further, the trial court's resolution of factual disputes surrounding a defendant's confession will not be disturbed unless the trial court's findings of

evidentiary or historical fact are contrary to the great weight and clear preponderance of the evidence. ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). Factual issues, which require the application of constitutional principles, are reviewed *de novo*. ***Id.***

¶26 Lewis was arrested late in the afternoon on November 12, 1996. This was two days after the murder of Stujenski. Detectives at the Criminal Investigation Bureau first met Lewis at approximately 7:00 p.m. Lewis was allowed to sleep from 7:00 p.m. until approximately 10:15 p.m., when the detectives began the interview. From 10:15 p.m. until noon on November 13, 1996, the detectives intermittently interviewed Lewis. In between the interviews, he was allowed to sleep and eat. The record reflects that on that day, he ate at approximately 6:00 a.m. and slept from 7:00 a.m. to 9:30 a.m. During this entire period of time, Lewis never complained about being tired. Throughout the interrogation, Lewis was allowed ten breaks to smoke cigarettes and use the restroom.

¶27 Although the interview here was somewhat lengthy, the length of an interrogation is "insufficient to justify a *per se* finding of involuntariness." ***State v. Turner***, 136 Wis. 2d 333, 364, 401 N.W.2d 827 (1987). Further, "the length of interrogation and custody, while certainly relevant to the discussion of voluntariness, simply is not dispositive in and of itself given the fact that [the defendant's] interrogations were interrupted by frequent accommodations to his personal needs and were not accompanied by any improper police coercion." ***Id.***

¶28 The trial court found that Lewis's statement was voluntarily given based on its finding that Lewis was allowed to sleep and eat, and that there was no evidence of police coercion. There is nothing in the record to support Lewis's

claim of involuntariness. Lewis was in good health, he had some post-secondary education, and there is no suggestion that the police made any promises to Lewis in order to coerce him into making a statement. Lewis was not handcuffed during the interview and was at liberty to move around the room if he wished.

¶29 Further, Lewis was familiar with the criminal process. He had been arrested numerous times in the past, beginning at the age of fifteen. There is no record of mental or physical illness, and the detectives observed no mental or physical ailments during the interrogation. Finally, although the detention of Lewis was lengthy, the sum total of time Lewis was questioned amounts to a total of twelve and one-half hours.

¶30 Under the totality of the circumstances, the trial court's finding that Lewis's statements were voluntarily made was not erroneous. Based on these findings of fact, the legal conclusion that the statement was voluntary and in full compliance with ***Miranda*** was correct.

By the Court.—Judgment and order affirmed.

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