COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2850 **Cir. Ct. No. 98-CF-365**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL ADAM WATTS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Michael Adam Watts has appealed from an order denying his motion for postconviction relief pursuant to WIS. STAT. § 974.06

(2001-02).[1] In his motion, Watts sought relief from a judgment entered in 1999 after a jury trial, convicting him of first-degree intentional homicide while armed with a dangerous weapon. He was convicted as a party to the crime under WIS. STAT. § 939.05.

¶2 In his postconviction motion, Watts contended that his trial counsel rendered ineffective assistance when he failed to unconditionally request a lesser-included offense instruction on reckless homicide. After a ***Machner***[2] hearing at which Watts' trial counsel testified, the trial court determined that counsel's performance was not deficient. We agree with the trial court's conclusion, and affirm its order denying postconviction relief.

¶3 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant 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. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "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." ***Strickland***, 466 U.S. at 694.

---

[1] All references to the Wisconsin Statutes are to the 2001-02 version.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶4 Determining whether there has been ineffective assistance of counsel 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). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). 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. ***Id.*** If a defendant fails to adequately establish one prong of the ***Strickland*** test, we need not address the other. ***State v. Elm***, 201 Wis. 2d 452, 462, 549 N.W.2d 471 (Ct. App. 1996).

¶5 Watts was convicted of first-degree intentional homicide based upon the shooting death of a police officer, Dale TenHaken. Although Watts was present at the time of the shooting, it was undisputed that his companion, Jason Halda, was the lone shooter. At trial, the State proceeded on the theory that Watts was guilty as a party to the crime of first-degree intentional homicide, either because he aided and abetted Halda or because he conspired with him to commit the crime.

¶6 The only charge submitted to the jury was the first-degree intentional homicide charge. In his postconviction motion and on appeal, Watts contends that his trial counsel was deficient for failing to request an instruction on

reckless homicide.[3] He contends that the evidence at trial was sufficient to warrant an instruction on reckless homicide both as a party to the crime and as a principal.

¶7 At the ***Machner*** hearing, Watts' trial counsel testified that he had considered an instruction on reckless homicide, but decided not to request it for two reasons: first, because he did not believe the evidence supported the instruction; and second, because it clashed with and was inconsistent with the defense. Trial counsel testified that his theory of defense was that Watts was in the wrong place at the wrong time, and that requesting a reckless homicide instruction would to some extent clash with the defense theory that Watts was not a party to the shooting. He noted that there was no evidence that Watts made any overt attempts to assist in the shooting, and that the State's theory that Watts was guilty of first-degree intentional homicide as a party to the crime depended upon one statement made by Watts just before the shooting, which could be interpreted in a number of different ways. He indicated that he believed Watts had a good case for acquittal, and adopted an all-or-nothing trial strategy.

¶8 In rejecting Watts' attack on trial counsel's performance, the trial court found that the decision not to request a lesser-included instruction was objectively reasonable as a matter of trial strategy. It also found that the reckless

[3] The jury instructions given in this case were discussed in this court's decision affirming Watts' judgment of conviction in ***State v. Watts***, No. 00-0203-CR, unpublished slip op. (WI App Feb. 7, 2001). Watts' trial counsel requested an instruction on second-degree reckless homicide only if the trial court granted the State's motion for an instruction on first-degree reckless homicide, and did not join in the State's request. The trial court denied the State's request for an instruction on first-degree reckless homicide, and the conditional request for a second-degree reckless homicide instruction was never reached.

homicide instruction was unwarranted and would not have been granted if it had been requested by the defense.

¶9 Because the record supports the trial court's determination that trial counsel's decision not to request a reckless homicide instruction was a reasonable trial strategy, we agree with the trial court that counsel's performance was not deficient. A trial attorney may select a particular defense from the available alternative defenses. ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). There is a strong presumption that an attorney's choice is sound trial strategy. ***State v. Marty***, 137 Wis. 2d 352, 360, 404 N.W.2d 120 (Ct. App. 1987), *overruled on other grounds by* ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). This court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. ***Elm***, 201 Wis. 2d at 464. A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65.

¶10 A decision as to whether to request a lesser-included offense instruction is a complicated one involving legal expertise and trial strategy. ***State v. Eckert***, 203 Wis. 2d 497, 509, 553 N.W.2d 539 (Ct. App. 1996). A defendant does not receive ineffective assistance when defense counsel has discussed with the client the general theory of defense, and when based on that theory trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense. ***Id.*** at 510. Moreover, if the evidence renders an all-or-nothing strategy viable, it is not unreasonable for an attorney to go for acquittal rather than risk conviction of a lesser-included reckless homicide. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶32, 246 Wis. 2d 648, 630 N.W.2d 752.

¶11 As determined by the trial court, trial counsel's strategy of foregoing a request for a reckless homicide instruction in favor of an all-or-nothing defense was objectively reasonable. The evidence at trial indicated that Watts and Halda, who were both seventeen years old at the time of this offense, were long-time friends. On the evening of the shooting, they had stolen gas and beer, and gone driving around Manitowoc county, hanging out and listening to music. Halda possessed a handgun, and while they drove around the countryside, Halda shot it out the window at fences and trees. The evidence indicated that after emptying the gun, Halda handed it to Watts, who was in the passenger seat, and told him to reload it, which he did.

¶12 At about 11:30 p.m. on the night of the shooting, Watts, Halda, and Halda's girlfriend picked up Watts' girlfriend, Valerie Mueller. In response to Mueller's statement that someone named Mike was looking for them, Halda pulled the gun from beneath the driver's seat, waved it in the air, and said, "Does this look like I'm fucking scared?" Both Mueller and Watts testified that they were not concerned by this incident because Halda frequently "talked trash," threatening to do things but never doing them.

¶13 Shortly after this incident, an oncoming squad car turned to follow them. When the squad car turned, Halda turned into an apartment parking lot and turned off the car and its lights. Watts testified that he told Halda to lose the squad car because he believed there was a warrant out for him related to a disorderly conduct and he did not want to get arrested. The squad car nevertheless parked behind them, and Officer TenHaken got out.

¶14 The testimony at trial indicated that the two girls got out of the car to speak to the officer, while Halda and Watts slid down in the front seats. Testimony indicated that Halda and Watts then had a brief conversation, which formed the crux

of the State's case against Watts. At trial, a police officer testified that in a statement given by Watts to the police, Watts stated that Halda said, "I'll kill a motherfucker before I go to prison," and Watts replied, "Straight up, we're not going to prison," with "straight up" signifying agreement and support. Police testimony at trial also indicated that in another interview with the police, Watts stated that Halda said, "We're not going to prison," to which Watts replied, "[S]traight up." In that interview, Watts indicated that it was only after this exchange that Halda said, "I'll kill the motherfucker." Police testimony also indicated that in a third statement, Watts told the police that Halda said, "I'll kill the motherfucker before I go to prison," to which Watts replied, "Yeah, but we're not going to prison, straight up."

¶15 At trial, Watts testified that when they were slouched down, Halda said to him, "I'll kill a motherfucker before I go to prison," and that he replied, "Straight up, but we are not going to jail." He testified that the words "straight up" simply meant "I agree with you, or "you have a point." He testified that when he replied to Halda, he meant that he knew Halda did not want to go to prison, but that they were not going to prison anyway. He further indicated that he had heard rumors that Halda "had gotten something for battery," but did not think he was facing any kind of prison time.

¶16 Watts testified that when Officer TenHaken directed them to get out of the car, he got out of the passenger door, and Halda got out of the driver's door. Watts testified that he thought the gun was under the seat in the car, which was the last place he had seen Halda put it. He testified that it did not cross his mind that Halda was going to shoot the officer. He testified that he first realized Halda was going to shoot TenHaken when the officer asked Halda what was behind his back, and Watts saw the gun, at which point Halda shot the officer. Watts testified that he immediately ran because he was scared.

¶17 Watts testified that before Halda shot TenHaken, he had no idea that Halda was going to shoot anyone, and thought he was just talking trash, as he did frequently. He testified that he had never seen Halda threaten anyone with his gun, and that he did not think Halda was serious or that he was going to shoot anyone. Watts testified that Halda never asked him for help in any way in the shooting, and that he never agreed to help.

¶18 To convict Watts as an aider and abettor to first-degree intentional homicide, the State was required to prove that Watts acted with the knowledge or belief that Halda was intending to shoot and kill TenHaken, and that Watts knowingly either assisted Halda or was ready and willing to assist him in the homicide, and that Halda knew of his willingness to assist. *See* WIS JI—CRIMINAL 401 (2002). To convict Watts of conspiring to commit first-degree intentional homicide, the State was required to prove that Watts agreed with or joined with Halda for the purpose of killing TenHaken, with the intent that the crime be committed. *See* ***id.*** At Watts' trial, the jury was also instructed that a person does not aid and abet if he or she is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist the commission of the crime. *See* ***id.***

¶19 In light of the burden of proof that the State had to meet to establish that Watts aided and abetted or conspired to commit murder, trial counsel could reasonably conclude that there was a strong chance that Watts would be acquitted of first-degree intentional homicide as a party to the crime, and that requesting a lesser-included offense instruction on reckless homicide would weaken Watts' claim that he was not involved in the shooting in any manner and did not expect it to occur. The State presented no evidence of any overt acts on the part of Watts to assist in the shooting. While the State relied on Watts' statement to Halda immediately prior to the shooting as indicating his agreement that Halda should

shoot TenHaken, the precise words used by Watts were disputed, and their meaning could be deemed ambiguous. A strong argument could be made that Watts agreed only that they were not going to prison, and did not expect or intend that Halda would shoot the officer.

¶20 Based on the evidence, the jury could have found that Watts did not agree to the shooting of TenHaken and did not believe that Halda intended to shoot him. Trial counsel could reasonably conclude that Watts' chances of acquittal were good if the jury was instructed only on first-degree intentional homicide. He could also reasonably conclude that introducing a reckless homicide defense would undermine Watts' claim that he was merely an innocent bystander. No basis therefore exists to conclude that counsel's performance was ineffective. The fact that the strategy failed does not render his representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979).

By the Court.—Order affirmed.

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