COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2796-CR **Cir. Ct. No. 2004CF1277**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH EDMAN BACH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN and JEFFREY A. WAGNER, Judges.[1] *Affirmed.*

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

[1] The Honorable Jeffrey A. Conen presided over the jury trial and sentencing. The Honorable Jeffrey A. Wagner issued the order denying the postconviction motion.

¶1 CURLEY, P.J. Joseph Bach appeals an amended judgment entered after a jury convicted him of first-degree intentional homicide while using a dangerous weapon, *see* WIS. STAT. §§ 940.01(1)(a) & 939.63 (2003-04), and an order denying his motion for postconviction relief.[2] Bach claims that he was denied the effective assistance of counsel due to his trial counsel's failure to investigate, consult with, and call experts during his trial to support his defense of inadvertent or accidental discharge of a firearm and to offer opinions regarding his intoxication at the time of the shooting and its impact on his ability to form the requisite intent and to safely handle a firearm. Because Bach's version of the events that transpired was at odds with the explanation offered by the independent firearms analyst he retained for purposes of the postconviction proceedings, Bach has not established that he suffered prejudice as a result of his trial counsel's decision not to consult with and call a firearms expert at trial. In addition, because Bach failed to show with specificity what a consultation with or the testimony of a psychological expert would have revealed and how the outcome of the proceeding would have been different, his claim for ineffective assistance on this basis also fails. Accordingly, we affirm.

I. BACKGROUND.

¶2 This appeal arises out of an incident that occurred late in the evening on March 6, 2004. According to the allegations in the criminal complaint, on that date, Bach shot his girlfriend in the head and told police, "I shot her. It was an

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

accident. I don't feel well. I can't believe it. I shot her. It was all an accident. How is she? Is she alright? Is she going to be alright?"

¶3 The case proceeded to a jury trial. The defense theory at trial was that Bach's gun went off accidentally when his girlfriend grabbed his arm as he tried to commit suicide. Bach was the only person to testify for the defense. Bach testified that he was an alcoholic and detailed his excessive consumption of alcohol leading up to the incident. Prior to the shooting, Bach testified that he contemplated suicide while looking at himself in a mirror and holding a loaded gun to his head in the bathroom of the apartment he shared with his girlfriend and her elderly father. During his direct examination, he explained the events that transpired before his girlfriend was shot, stating:

> A … I walked out of the bathroom with the gun into the kitchen area.
>
> Q And when you walked into the kitchen area, did you just point [the gun] straightaway at [the victim]?
>
> A I had it by my side and [sic] my right hand, and when I walked up to her –
>
> ….
>
> Q Do you know if she even saw the gun?
>
> A I'm – I'm not sure. I can't say. I had it on my right side and my arms straight down, and I went up to her, and I faced her, and I was looking right at her, and I told her that I loved her, and I put the gun up to my temple.
>
> I'm sorry. I first – I first cocked the action back, and then I put the gun to my temple, and I squeezed the trigger and nothing happened.
>
> Q You had your finger on the trigger, and did you then point it at [the victim] and shoot her?
>
> A No, I slapped the gun. I turned it like this, and I slapped the gun, I don't know, about as hard as,

> like, you want to fix a TV set to come back in clear again, I don't know, something about that hard. I thought that would make it work. I didn't know what was wrong with it.
>
> Q It wouldn't operate. It wouldn't discharge?
>
> A It wasn't working, no, and I kept focusing on the gun like this, and I hit it. I think I hit it one more time, and just then I heard somebody say, "don't" and an arm, a hand grabbed my forearm right there, and I pushed her away. It was [the victim], of course, and I pushed her away.
>
> And then the next thing I knew there was an explosion of the gun and the smell of the gunpowder going off and seeing [the victim] sitting in the chair with blood coming from her mouth….

Although Bach admitted that he had his finger on the trigger, he did not testify that he pulled it, offering only: "The gun went off." This happened when Bach was approximately one foot from his girlfriend.

¶4 Among other witnesses, the State called Reginald Templin, a firearms examiner from the State Crime Laboratory. During the State's rebuttal, Templin testified in response to the following questions posed:

> Q Now assuming that at some point pulling that trigger that bullet that just went in there fires, what's the scenario before that happens, could the trigger be locked? In other words, that somebody rounds, pulls that trigger, you got 20,000 pounds of pressure, whatever it is, and it just won't pull?
>
> A It cannot.
>
> Q What do you mean it cannot?
>
> A It will pull all the time. The only thing that will prevent the trigger from being pulled or the gun to be fired is if the slide is partially back. The trigger can still, still be pulled, but it won't fire.

> Q Can you have that scenario, Mr. Templin, where the gun or trigger won't pull, so I hit it with my hand a couple of times then all of a sudden it fires?
>
> A No.
>
> Q Is that a possibility with a functional weapon like this?
>
> A No.
>
> ….
>
> Q If I'm holding that gun to my head and the trigger will not pull for whatever reason, what is the theory, the possibility of what is going on there?
>
> A There is no, no possibility where the, you know, the trigger could not be pulled or the gun wouldn't fire.
>
> Q And there's nothing – what about I bang it a couple of times in my hand and low and behold it fires?
>
> A No.

Templin conceded, however, that no studies were conducted to attempt to re-create the allegedly jammed mechanism of the gun.

¶5 During his closing argument, the prosecutor referenced both Bach's and Templin's testimony:

> Now you heard [Bach's] story about the gun being jammed, and you heard Mr. Templin says [sic] that there's no way, there's no way the gun is jammed.
>
> But what [Bach] doesn't want to do, what he doesn't do even when he was testifying was tell you, I pulled the trigger. He doesn't say that. He wouldn't say it. It went off. Well, guns don't go off, you pull the trigger. And there's no jam on that gun.

¶6 The trial court instructed the jury on the elements of first-degree intentional homicide and the lesser-included offenses of first- and second-degree reckless homicide. Bach was subsequently convicted of first-degree intentional

homicide while using a dangerous weapon and sentenced to life in prison, with eligibility for release to extended supervision after he serves thirty-five years.

¶7 Bach then retained new counsel to represent him in postconviction proceedings. Postconviction counsel requested and obtained orders releasing the firearm and ammunition evidence for re-examination by an independent firearms expert. Bach filed a motion for postconviction relief alleging that his trial counsel provided ineffective assistance by failing to consult with a firearms expert regarding whether the firearm that caused the death of the victim could have been inadvertently discharged. In addition, Bach asserted that his trial counsel was ineffective for failing to consult with psychological experts regarding his state of intoxication on the night of the incident and whether that, either on its own or coupled with his suicidal mental state, may have constituted grounds for presenting an intoxication defense and provided a mitigating circumstance with regard to the specific intent element of first-degree intentional homicide.

¶8 A ***Machner*** hearing was held, and testimony was taken from Bach's trial counsel and Lester Roane, an independent firearms analyst retained by postconviction counsel to examine the firearm and ammunition used on the night of the victim's death.[3]

¶9 Roane testified regarding his examination and test firing of the gun involved in the shooting. He described his test firing of the gun using ammunition that had been taken from the scene and removed from the weapon following the incident. When Roane fired the gun using the evidence ammunition, the gun

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

jammed. In the expert report he submitted and substantiated when he testified, he opined:

> It was the type of stoppage that a shooter might instinctively attempt to "clear" by hitting or slapping the slide [of the gun] to make it feed the top round into the chamber. At that point, if the trigger were pulled, deliberately, reflexively or by accident, the pistol would fire.

¶10 With respect to clearing a jam by striking the gun, Roane acknowledged during his testimony that he had heard of such a practice and further stated:

> Q Okay. And would it be an appropriate procedure, when trying to clear this double-feed, to do so, whether the gun's pointed down or away or straight ahead, to have your finger near or on the trigger?
>
> A No.
>
> Q Okay. Why?
>
> A Because you should always, you know, keep your finger off the trigger unless you're intending to shoot, but in particular when you're doing something like that, you basically are going to be jarring the gun and you might jar it so that you – your finger pulled the trigger.
>
> Q And if the slide came – If the jam[] came free and the slide came loose and went forward, would that also cause movement of the weapon?
>
> A There would be some, you know, bouncing around.
>
> Q And if your finger was near the trigger, an accident could happen or it could go off?
>
> A It could.

According to Roane, the misfeed he encountered while test firing the gun was consistent with Bach's description of the shooting.

¶11 Roane's only comments regarding the effects of intoxication were in response to the following question:

> Q Okay. Is it appropriate for an individual to try to clear a weapon like this or a good practice when they are intoxicated with alcohol or drugs?
>
> A It's not appropriate for somebody who's intoxicated to be anywhere near a weapon, a loaded gun.
>
> Q Okay.
>
> A And certainly not in shooting it or – or trying to fix it.

¶12 The postconviction court denied Bach's motion after finding that Bach never told his trial counsel "that the murder weapon discharged as he, the defendant, was attempting to clear a jam in the weapon but rather that he was attempting to commit suicide and the victim grabbed his arm and the gun then discharged." The court further found that the proposed expert testimony to the effect that a discharge occurred as Bach "was attempting to clear a jam in the weapon would have therefore been irrelevant and misleading to the jury." Finally, the court made a factual finding that Bach and his trial counsel discussed Bach's intoxication "and determined that any defense based on intoxication would be incompatible with the defendant's pronounced intent to kill himself and inconsistent with the defendant's trial testimony that the homicide was not caused in any way by the defendant's drinking." Bach now appeals.

II. ANALYSIS.

A. Standard of review.

¶13 Bach claims that his trial counsel was ineffective because counsel: (1) did not consult with or call a firearms expert at trial; and (2) did not consult

with or call psychological experts at trial regarding Bach's intoxication at the time of the shooting, and the effect it had on his ability to form the requisite intent and to safely handle a firearm. A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient; and (2) the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious so as to deprive him or her of a fair trial and a reliable outcome, ***id.*** at 687, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," ***id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. We need not address both aspects if the defendant does not make a sufficient showing on either one. ***Id.*** at 697.

¶14 We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous. ***Id.*** However, we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 128. We now address each of Bach's claims in turn.

B. Trial counsel was not ineffective for failing to consult with and call a firearms expert at trial.

¶15 Bach asserts that his trial counsel was ineffective due to counsel's failure to consult with anyone or research "the double feed, jam and misfire issue." He continues: "There was no reason [counsel] could not have exercised due diligence and spent an hour or so and done a simple Google search for a firearms expert or information on the double-feed jams and inadvertent discharges." Bach

argues that his presentation of Roane's testimony at the postconviction motion hearing "confirmed, to a reasonable degree of professional certainty, that the handgun [he] held was subject to jamming and misfire when used with the ammunition Bach had loaded in the clip," and also established "how a person attempting to clear the jam without removing his finger from inside the trigger guard could have accidentally caused the pistol to fire."

¶16 The State contends:

> Bach presented a firearms expert at the postconviction hearing who testified that Bach's gun could have discharged accidentally if it were hit in an attempt to clear a jam if hitting the gun both cleared the jam and moved the gun in a manner that caused the trigger finger to pull the trigger. However, Bach was not prejudiced by the absence of that testimony, as it would not have supported his account of what happened. Bach did not testify that the gun went off [when] he struck it; rather, he testified at trial that the gun went off as he was pushing the victim away after she had grabbed his arm.

(Record citations omitted.) We agree.

¶17 During the ***Machner*** hearing, when questioned by the prosecutor, Bach's trial counsel explained that it was never Bach's contention that the gun went off while he was hitting it or attempting to clear the jam:

> Q In other words, there was nothing about as I was hitting the gun to try and clear it[,] it went off. That wasn't [Bach's] story at trial or to you in your conversations with him at pretrial at all was it?
>
> A No.
>
> Q And when we talk about whether or not there was a jam of this gun and that in his attempts to clear the jam, that was how this homicide occurred, that was never the way it was presented to you that at the moment the firing was done, the lethal shot came out of that gun, Mr. Bach never said to you [trial counsel], I was just trying to clear that thing and

> either deliberately, reflexively or whatever words he may have used, it just went off. That wasn't the way he described it at any point, was it?
>
> A It was the victim's arm grabbing at his arm. The question about that they fought for the gun, there was something that we had discussed for hours. Why would the police say that you said that you fought for this gun. What does that mean to you. And it wasn't because he was slapping the gun when the gun went off. It was just a part of the manipulation of the gun ultimately before the [victim's] arm grabbed his arm and then the shooting took place.

Bach's testimony at trial was consistent with that of his trial counsel.

¶18 Although Bach testified that he "slapped" and "hit" the gun because he thought it had jammed, these acts preceded when he pushed the victim and when the gun actually fired. Thus, we agree with the postconviction court that the testimony from a firearms expert that the gun could fire when struck would not have been relevant to Bach's defense because that is not what Bach contends happened. Moreover, like the postconviction court, we conclude that it may have misled the jury regarding the sequence of the events that transpired—that Bach hit the gun, the victim's hand grabbed his forearm, he pushed her away, and the gun went off—which came from Bach's own trial testimony. During his cross-examination, Bach's testimony was clear: "I know that the gun went off when – when I was pushing her away. That's all I know."

¶19 Given the discrepancy between Bach's version of events and the explanation offered by Roane, the independent firearms analyst he retained, that a gun could fire when struck, Bach has not shown that there is a reasonable probability that but for his trial counsel's failure to retain a firearms expert and present such testimony at trial "the result of the proceeding would have been

different." *See* ***Strickland***, 466 U.S. at 694. The situation described by Roane was not applicable to the actual circumstances of the shooting as described by Bach. Because Bach has not established that he suffered prejudice as a result of his trial counsel's decision not to consult with and call a firearms expert at trial, we do not address the deficient performance prong of the ***Strickland*** test. *See* ***id.*** at 697.

C. Trial counsel was not ineffective for failing to consult with a psychological expert regarding the effect of Bach's intoxication.

¶20 Next, Bach contends he was denied the effective assistance of counsel due to trial counsel's failure to "research, investigate, consult with or call psychological experts at trial" to address the effects of his intoxication at the time of the shooting on his ability to safely handle a firearm and on his ability to form the requisite intent to prove a charge of first-degree intentional homicide. *See* WIS JI—CRIMINAL 1010 (setting forth the elements of the crime that the State must prove on a charge of first-degree intentional homicide, one of which is that "[t]he defendant acted with the intent to kill"). Bach argues: "If a lawyer does even a little research in this area, he would find that in Wisconsin a qualified mental health expert can give an opinion at trial on how intoxication could affect an individual's ability to form the requisite specific intent in a first[-]degree intentional homicide case."

¶21 "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. As the State points out, rather

than showing what an expert would say regarding the effects of Bach's intoxication, Bach poses a rhetorical question:

> Had [trial counsel] done a simple calculation on the ***Hinz***[4] chart, [trial counsel] would have seen that Bach was well over 0.20 BAC at the time of [the victim's] death. How could that not be relevant to Bach's perception, state of mind and his ability to safely handle and correctly and safely clear a jammed firearm?

(Footnoted added.)[5]

¶22 Bach contends that Roane "spoke to this" issue at the postconviction motion hearing. Our review of the record, however, reveals that the extent of Roane's testimony on this point was that "[i]t's not appropriate for somebody who's intoxicated to be anywhere near a weapon, a loaded gun…. And certainly not in shooting it or – or trying to fix it." These generalized statements do not shed light on the effects of Bach's intoxication under the specific circumstances at issue and are insufficient to establish the prejudice that is required for Bach to succeed in his claim that trial counsel was ineffective for not consulting with or calling a psychological expert.

[4] A "***Hinz*** chart" shows estimated blood alcohol concentration based upon the drinker's weight and number of drinks consumed, and a formula for determining blood alcohol concentration decrease over time after drinking ceases. *See* ***State v. Hinz***, 121 Wis. 2d 282, 284-85, 360 N.W.2d 56 (Ct. App. 1984).

[5] In reviewing the record, we have not found (and Bach has not directed us to) any evidence that Bach's blood alcohol level exceeded 0.20 at the time of the shooting. The most relevant testimony in the record on this point is that Bach's blood alcohol level was 0.17 three hours after the shooting.

¶23 In addressing the lack of support for Bach's position that counsel was ineffective for failing to consult with or retain psychological experts, we adopt the following reasoning set forth in the State's brief:

> There are several flaws in [Bach's] argument. First, posing a rhetorical question, even one whose answer the questioner may believe to be obvious, is not a substitute for producing evidence. (For what it is worth, it is not obvious to the State that a person with a 0.20 blood alcohol level would be incapable of forming an intent to kill.) If Bach believes that an expert would have offered an opinion on the effect of his intoxication on his ability to form the requisite intent, it was his obligation to put forth such an expert at the postconviction hearing, just as he did with the respect to the firearms expert issue.

¶24 Rather than relying on conjecture, Bach needed to show with specificity what a consultation with and the testimony of a psychological expert would have revealed and how the outcome of the proceeding would have been different. *See* ***Byrge***, 225 Wis. 2d at 724. In the absence of such a showing, we reject Bach's claim that trial counsel was ineffective for failing to consult with or retain psychological experts because he has not established that he was prejudiced.[6] *See* ***Strickland***, 466 U.S. at 694.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] Bach argues, for the first time in his reply brief, that it was deficient performance for his trial counsel not to request jury instructions on the defenses of voluntary intoxication and accident. *See* WIS JI—CRIMINAL 765 (voluntary intoxication) & 772 (accident). "It is a well-established rule that we do not consider arguments raised for the first time in a reply brief." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661. Thus, we do not consider Bach's contentions with respect to the jury instructions further.