COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1577-CR **Cir. Ct. No. 2005CF6820**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYRUS L. BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN and THOMAS P. DONEGAN, Judges. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Cyrus L. Brooks appeals from a judgment of conviction for two counts of first-degree recklessly endangering safety, and from a postconviction order denying his motion for a new trial.[1] The issue is whether trial counsel was ineffective for agreeing to the trial court reading a stipulation to the jury that one of the alleged victims would not be testifying because he was dead, but "not as a result of the alleged events in this incident." We conclude that Brooks's counsel did not render ineffective assistance because: (1) trial counsel's performance was not deficient for stipulating to an explanation of why that alleged victim would not be testifying; (2) Brooks has not proven that the stipulation was prejudicial to his defense; (3) Brooks personally agreed to the stipulation; and (4) trial counsel explained his strategic reasons for stipulating to the trial court reading those statements to the jury. Therefore, we affirm.

¶2 Brooks was charged with two counts of first-degree recklessly endangering safety, as a party to each crime, for him and Maurice D. Stokes shooting at Xavien Bates and Terry Baker. Baker died several days later for reasons unrelated to the shooting for which Brooks was charged.

¶3 The case was tried to a jury. At the beginning of the trial, the prosecutor proposed a stipulation of facts to the trial court to be read to the jury to explain why one of the two alleged victims would not be testifying, namely because he was dead. The trial court considered the stipulation and suggested an additional clarification, namely that the alleged victim's "death was not related to the shooting in this case." That clarification was acceptable to both the State and

[1] The Honorable Michael B. Brennan presided over the jury trial. The Honorable Thomas P. Donegan presided over the postconviction proceedings.

the defense, and presumably allayed Brooks's personal concerns about the stipulation because he then agreed to it. The trial court explained to the jury that the parties agreed that the following statements were true:

> Xavien Bates and Terry Baker are named in counts one and two of the information as the alleged victims. Mr. Bates in count one, Mr. Baker in count two. You will not hear testimony from Terry Baker, the alleged victim named in count two, because he is deceased although not as a result of the alleged events in this incident.
>
> There were disagreements, accusations, and confrontations before October 23rd, 2005, between Terry Baker and Xavien Bates who were friends and Cyrus Brooks and Maury Stokes.
>
> The Court has determined that no testimony will be received regarding those prior incidents.

¶4 Both counsel referred to this stipulation in their respective closing arguments. The prosecutor stated that "the judge did read the stipulation to you that Mr. Baker unfortunately is no longer with us. He is not able to testify." During the defense closing argument, counsel argued from that stipulation as follows:

> Something hanky is going on there. He is a convicted criminal. He knew Cyrus Brooks and did not like him. That's stipulated to that there's animosity between these two groups.
>
> ….
>
> So I would implore you if you look over all the evidence that there isn't any real evidence here that Cyrus Brooks – outside of Xavien Bates saying this and Xavien Bates is a liar – that he did this. Therefore, you should find Mr. Cyrus Brooks not guilty.

¶5 During deliberations, the jury returned with four questions: (1) how did police find out about the incident; (2) who contacted them; (3) when did Baker die; and (4) how did he die. The trial court, after seeking input from the

prosecutor and defense counsel, sent a note to the jury that said, "[t]he court cannot respond to your first three inquiries. With regard to your fourth inquiry, please see Exhibit 23 [the stipulation set forth previously], which is attached." The jury found Brooks guilty of two counts of first-degree recklessly endangering safety as a party to each crime, in violation of WIS. STAT. §§ 941.30(1) (2005-06) and 939.05 (2005-06). The trial court imposed two ten-year sentences, each comprised of five-year periods of initial confinement and extended supervision. The sentences were imposed to run concurrently to each other, but consecutive to any other sentence. Brooks moved for a new trial on the basis of trial counsel's ineffectiveness for agreeing to the stipulation read to the jury about Baker's unrelated death. The trial court conducted a ***Machner*** hearing at which Brooks's trial counsel was the sole witness.[2] The trial court found the facts and concluded that trial counsel's performance was not deficient or prejudicial. Brooks appeals.

¶6 To prevail on an ineffective assistance claim, the defendant must show that trial counsel's performance was deficient, and that this deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. Prejudice must be "'*affirmatively*

[2] A ***Machner*** hearing is an evidentiary hearing to determine trial counsel's effectiveness. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

prove[n].'" ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (citation omitted; emphasis in ***Wirts***). The necessity to prove both deficient performance and prejudice obviates the need to review proof of one, if there is insufficient proof of the other. *See* ***State v. Moats***, 156 Wis. 2d 74, 100-01, 457 N.W.2d 299 (1990). Matters of reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. ***Strickland***, 466 U.S. at 690-91.

¶7 At the ***Machner*** hearing, trial counsel explained that the prosecutor approached him about entering a stipulation of facts to explain the failure of one of the alleged victims to testify at trial. Trial counsel testified that he had also considered moving *in limine* as another method of explaining the absence of the alleged victim's testimony. In response to questioning, trial counsel explained his rationale in agreeing to the stipulation:

> [W]e weren't going to be hearing much testimony from [Baker], obviously, because he [wa]s dead. And there wasn't going to be other testimony to make him a sympathetic character either, so the thought of anything that would be prejudicial against [Brooks] would be limited.
>
> In fact, hearing about the other case, about Mr. Baker's death, actually placed more into our hands because somebody else wanted Mr. Baker dead, and perhaps that same somebody was the person who shot at him [Baker] that day. [Brooks] did not shoot at him. [Brooks] was not there. That was our theory of the case. So I did not see it as a prejudicial issue, the fact that he would be – if they hear that he died in a case unrelated to ours.
>
> ….
>
> [I]t went along with our theory of the case. And [Brooks] wasn't there shooting at [Baker] … [t]here is no character development of Mr. Baker, so there is no real sympathy for him, so hearing about him being dead is not going to create a lot of sympathy.

> He is also – It goes along, as I said, to our theory that [Brooks] wasn't there, somebody else must have done the shooting, and other people probably wanted Mr. Baker dead also.

¶8 The trial court denied the motion based on the following findings of fact:[3]

> 1. The parties agree that the jury needed some explanation as to the absence of an alleged witness, Mr. Ba[ker], from the trial.
>
> 2. The parties agree that Mr. Ba[ker] had died prior to the trial.
>
> 3. The parties agree that Mr. Ba[ker]'s death was unrelated to the charges in this case.
>
> 4. The stipulation accurately presented the facts relating to Mr. Ba[ker]'s absence from the trial; that Mr. Ba[ker] was absent because he had died and that his death was not a result of the charge in the case.
>
> 5. The stipulation agreed to by trial counsel and his client and provided to the jury was not prejudicial to the defendant.
>
> 6. The fact that a jury question asked the cause of death of Mr. Ba[ker] does not indicate that the jury was prejudiced against the defendant.
>
> 7. The decision by trial counsel to agree to present the stipulation to the jury explaining Mr. Ba[ker]'s absence from the trial was not prejudicial to the defendant, and therefore it was not ineffective assistance of counsel.

¶9 Brooks does not contend that these factual findings are clearly erroneous. The parties and the trial court agreed to a stipulation of facts to explain what would be a logical question, to quell anticipated speculation by the jurors

[3] The court's postconviction findings mistakenly refer to Baker as Bates. We consequently modify the references accordingly.

about why one of the two alleged victims did not testify. To answer that question and negate any speculation as to the alleged victim's absence from the trial, the trial court read to the jury a stipulation of facts explaining the alleged victim's absence from the trial and telling the jury that his death was not Brooks's fault. Trial counsel did not perform deficiently when he agreed to the trial court reading that stipulation to the jury.

¶10 Brooks contends that the jury's inquiries about when and how Baker died demonstrate prejudice because they establish the jury's belief that Brooks was somehow responsible for Baker's death. The jury was told repeatedly: by the stipulation, by the jury instructions (to rely solely on the evidence including the stipulated facts), and in response to the jury's specific inquiries, that Baker's death was unrelated to Brooks. The jury is presumed to have followed the court's instructions. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). We decline to conclude otherwise, particularly in light of Brooks's burden to affirmatively prove prejudice. *See* ***Wirts***, 176 Wis. 2d at 187.

¶11 Brooks also contends that he did not agree to the stipulation. The record belies his contention. First, he signed the stipulation. Second, trial counsel testified at the ***Machner*** hearing that the initial proposal indicated that Baker would not testify because he was deceased, but that trial counsel "fought for" an additional explanation, also suggested by the trial court, that Baker's death was unrelated to this alleged incident that satisfied Brooks, and that Brooks then personally signed the stipulation. Consequently, Brooks personally agreed to the stipulation.

¶12 Trial counsel also testified at the ***Machner*** hearing that he "made a strategic decision, using my years of experience at legal education and expertise,

that [it] would be to our advantage [for the jury to hear] that [Baker] died unrelated to this incident." Trial counsel referred to the stipulation in closing argument to support his defense theory that Brooks was not even at the scene and there were "probably" others who wanted Baker dead. Trial counsel's decision to agree to the stipulation of facts is consistent with the defense theory, namely that there was limited evidence that Brooks had recklessly endangered Baker's safety, that Brooks was not even at the scene, and that there were "probably" others who wanted Baker dead. This was a reasonable strategic decision, and as such, does not constitute ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 690-91.

¶13 We consequently conclude that the trial court's factual findings were not clearly erroneous. Trial counsel's agreeing to the stipulation of facts read by the trial court to the jury did not constitute deficient performance, nor did the jury's inquiries coupled with the trial court's specific response and general instructions affirmatively prove prejudice. Moreover, trial counsel's expressed reason in agreeing to the stipulation as a strategic decision was reasonable, thereby removing it from the realm of ineffective assistance of counsel. *See* ***id.*** For these reasons, independently and collectively, we affirm the trial court's postconviction order.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).