

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1672-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MAX P. FUNMAKER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: LEWIS W. CHARLES, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Max Funmaker, Jr., appeals from a judgment convicting him of first-degree intentional homicide while using a dangerous weapon. He also appeals from an order denying postconviction relief. The issues are whether Funmaker received effective assistance from counsel and whether he

is entitled to a new trial in the interests of justice. We reject Funmaker's contentions on these issues and therefore affirm.

On May 7, 1995, Funmaker and his brothers, Eric and Sterling, spent the day socializing and drinking heavily. That night, Eric became belligerent and started threatening people. Sterling attempted to calm him, but Eric attacked his brother, striking him several times. Funmaker reacted by grabbing a knife and fatally stabbing Eric twice in the chest. Several hours after the stabbing, Funmaker registered a .15% blood alcohol level.

At trial, Funmaker relied for his defense on the privilege to use force to protect another. Although it was undisputed that Funmaker was intoxicated, his trial counsel chose not to present an involuntary intoxication defense.

The court used WIS JI—CRIMINAL 1017 entitled: First Degree Intentional Homicide: Self-Defense: Second Degree Intentional Homicide: First Degree Reckless Homicide: Second Degree Reckless Homicide, to instruct the jury. By agreement, the trial court modified it to instruct on defense-of-another rather than self-defense. In part, the court instructed: "The criminal code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with another person by such other person." Counsel did not ask for further clarification of "unlawful interference," and the court provided none. It is agreed that the instruction was lengthy and complex because of the number of lesser included offenses, and the instruction on both perfect and imperfect defense-of-another. The jury subsequently returned a verdict of guilty on the first-degree intentional homicide charge.

Funmaker later filed a postconviction motion alleging ineffective trial counsel. He contended that counsel unreasonably failed to present a voluntary intoxication defense through expert testimony, jury instruction and closing argument. Additionally, Funmaker asserted that counsel should have requested additional, clarifying instructions on his defense-of-another theory. Alternatively, Funmaker asked for a new trial in the interest of justice because the jury was not fully and fairly informed of the law applicable to that defense.

At the hearing on the motion, trial counsel testified that he believed defense-of-another to be the best defense strategy. He did not calculate Funmaker's estimated level of intoxication at the time he stabbed Eric. Nor could counsel recall discussing with Funmaker whether voluntary intoxication was a viable defense. However, he also conceded that, in his opinion, voluntary intoxication would have been a viable defense, and would not have conflicted with his primary defense. Counsel added that he should have employed the defense.¹ Counsel also conceded that he did not ask for a clarifying instruction on defense-of-another, although he believed the instruction as given was difficult and confusing.

To prove a violation of the right to effective counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Deficient performance falls outside the range of

¹ At the hearing, Funmaker presented testimony from an expert forensic toxicologist that Funmaker's estimated level of intoxication, from .25 to .35% BAC, would have left him in a confused state, with emotional instability, loss of critical judgment, impaired perception, memory and comprehension, disorientation, mental confusion, and exaggerated emotional states of fear, rage and sorrow.

professional competent representation and is measured by the objective standard of what a reasonable prudent attorney would do in the circumstances. *Id.* at 636-37, 369 N.W.2d at 716. Prejudice results when there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 642, 369 N.W.2d at 718. Whether counsel's representation was ineffective and whether it prejudiced the defendant are questions of law. *Id.* at 634, 369 N.W.2d at 715.

Trial counsel applied an objectively reasonable trial strategy. In hindsight, counsel believed that he should have presented the involuntary intoxication defense. However, there were two valid reasons for not doing so. First, the evidence introduced at trial did not support the defense. To create a jury issue on the intentional homicide charge, there must be evidence that the defendant's intoxication at the time of the crime rendered him incapable of forming the intent requisite to the commission of the crime. *State v. Strege*, 116 Wis.2d 477, 486, 343 N.W.2d 100, 105 (1984). Here, witnesses described Funmaker as not obviously or apparently intoxicated at the time and shortly after the incident. After stabbing Eric, he essentially took control of the situation, giving Eric first aid and instructing others to call for emergency care. Additionally, the jury heard Funmaker's taped statement to the police, in which he clearly recalled the events of the evening, and was able to articulate an exculpatory version of the stabbing.

Second, Funmaker staked his strongest defense on evidence that he made a considered, reasonable decision to save Sterling from further injury in Eric's brutal attack. Presenting evidence and argument that he was in a state of drunken confusion at the time is simply inconsistent with that defense. Trial counsel may reasonably choose to avoid inconsistent defenses, to avoid the risk

that the jury might reject both. See *Lee v. State*, 65 Wis.2d 648, 654, 223 N.W.2d 455, 458 (1974). (Jury presented with contradictory defenses may find merit in neither).

Counsel also reasonably chose not to seek clarifying instructions. According to Funmaker, counsel's error was his failure to seek clarification or explanation of the term "unlawful interference," in the instruction that Funmaker was privileged to use force against Eric if he reasonably believed Eric to be unlawfully interfering with Sterling. The undisputed evidence showed that Eric's "interference" with Sterling was a brutal beating. Funmaker cannot reasonably contend that the jury would fail to consider that act to be an unlawful interference, without additional clarification.

Additionally, Funmaker is not entitled to a new trial in the interest of justice. We have discretion to reverse and order a new trial if it appears from the record that the real controversy has not been fully tried. Section 752.35, STATS. Funmaker contends the issue of his guilt was not fully and fairly tried because the instruction did not define "unlawful interference," and because the instructions on the perfect and imperfect defense-of-another were not clearly delineated, and were mixed in with the instructions on the lesser included offenses. As already noted, we reject the contention that the jury needed additional explanation of the term "unlawful interference." We also reject Funmaker's assertion that the standard jury instructions used here deprived him of a fair trial. Trial courts should use the standard instructions "because they do represent a painstaking effort to accurately state the law and provide statewide uniformity." *State v. Foster*, 191 Wis.2d 14, 27, 528 N.W.2d 22, 27 (Ct. App. 1995). Nothing in the record indicates that the standard instruction was so confusing as to deprive him of the opportunity to have

his defense fairly considered. His assertion to the contrary is nothing more than speculation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

