COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0059-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERK E. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES and ELSA C. LAMELAS,[1] Judges. *Affirmed.*

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

[1] Judge Sykes entered the judgment of conviction and Judge Lamelas presided over and denied Thomas's postconviction motion.

¶1 PER CURIAM. Perk E. Thomas appeals from the judgment of conviction entered after he pled guilty to first-degree intentional homicide, contrary to WIS. STAT. § 940.01 (1997-98).[2] Thomas also appeals from the order denying his postconviction motion to withdraw his guilty plea based on the ineffective assistance of trial counsel. On appeal, Thomas argues that his trial counsel was ineffective for: (1) failing to request a ***Miranda-Goodchild***[3] hearing to determine whether his statements to the police should be suppressed; and (2) advising him that the adequate provocation theory of second-degree intentional homicide was not a viable defense. We conclude that Thomas's trial counsel was not ineffective and, therefore, we affirm.

I. BACKGROUND.

¶2 The only account of the events which led to Thomas's wife's murder are Thomas's. Thomas alleged that he had become increasingly suspicious that his wife was engaging in extramarital affairs. He suspected that she was in the habit of inviting other men to their house after he left for work. On the night in question, before Thomas and his wife went to bed, Thomas claimed that his wife initially refused his sexual advances, informing him that she had had sex with two other men earlier that day. Nevertheless, the two did eventually engage in sexual intercourse before falling asleep.

¶3 According to Thomas, early the next morning, Thomas was awakened when his wife called out another man's name in her sleep. Angered,

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[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise specified.

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

Thomas got out of bed and went to his car to get cigarettes. While there, he spotted an aluminum baseball bat in the car and he carried the bat back into the house. Thomas returned to the bedroom where his wife still slept. He sat on the bed to smoke a cigarette. Just then his wife repeated the other man's name. As Thomas later related, he then became enraged and struck his wife on the head several times with the bat. Seeing that she was still alive, he then went to the kitchen, returned with a knife, and stabbed her in the abdomen. The knife broke, so Thomas again went to the kitchen, returned with a bigger knife, and stabbed his wife twice more in the stomach.

¶4 According to Thomas, after he realized what he had done, he attempted suicide. To this end, he ingested the contents of several bottles of prescription medications, a bottle of liquid labeled "poison," and twelve ounces of Isopropyl alcohol. Thomas waited to die, but instead, he merely vomited and passed out. When Thomas awoke several hours later, he called his sister to tell her that he had done "something stupid." Immediately following their phone conversation, Thomas's sister went to his home where he told her that he had killed his wife. His sister then escorted him to the police station where she informed the officer at the front desk that Thomas had something to tell him. She then said something to the effect that "My brother just killed his wife."

¶5 Thomas then spoke to the officer and told the officer that he had murdered his wife. He further related his account about his attempted suicide and stated that he was still feeling ill and he needed an ambulance. Thomas was then transported to the hospital, where he was treated for his attempted overdose. While at the hospital, Thomas waived his ***Miranda*** rights and provided the police with a more detailed statement concerning the murder.

¶6 Thomas was charged with first-degree intentional homicide and he pled guilty. He was sentenced to life imprisonment with no parole eligibility for forty years. Thomas then filed a postconviction motion to withdraw his guilty plea, claiming ineffective assistance of trial counsel. Thomas argued that trial counsel was ineffective for: (1) failing to file a ***Miranda-Goodchild*** motion to suppress his first statement to the police; and (2) advising him that the adequate provocation theory of second-degree intentional homicide was not a viable defense. Thomas's motion to withdraw his guilty plea was denied following a hearing.

II. ANALYSIS.

¶7 The familiar two-pronged test for an ineffective assistance of counsel claim requires a defendant to prove (1) deficient performance and (2) prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (holding that the ***Strickland*** analysis applies equally to ineffectiveness claims under the state constitution). To prove deficient performance, a defendant must show specific acts or omissions of counsel, which are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant's claim will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed as of the time of counsel's conduct. *See* ***id.*** We will "strongly presume" that counsel rendered adequate assistance. ***Id.***

¶8 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. *See* ***id.*** 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. If this court concludes that the defendant has not proven one prong, we need not address the other prong. *See* ***id.*** at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). But proof of either the deficiency or the prejudice prong is a question of law which this court reviews *de novo*. *See* ***id.***

¶9 Thomas argues that his trial counsel was ineffective for failing to request a ***Miranda-Goodchild*** hearing to determine whether his statements to the police should be suppressed. Thomas contends that counsel's performance was deficient because counsel had "nothing to lose by requesting a motion to suppress these statements prior to trial." Further, Thomas maintains that the trial court's summary of the facts at his guilty plea hearing was based primarily on his statement to the police, and that if his statements had been suppressed, there would have been an insufficient factual basis to find him guilty. Therefore, he concludes that counsel's failure to move to suppress the statements was prejudicial. Like the trial court, we are satisfied that Thomas was not prejudiced by counsel's failure to file a motion to suppress his statements because the State would have been able to introduce Thomas's incriminating statements by calling Thomas's sister as a witness.

¶10 In its decision on Thomas's postconviction motion, the trial court found that counsel's failure to move for suppression was not prejudicial because the State would have been able to call Thomas's sister as a witness to testify that he had told her that he had killed his wife. Thomas responds that the trial court erred because the "court's reasoning ignores the inherent trustworthiness that jurors place in police officer's testimony," and because there is nothing in the

record indicating "the state's ability or intention to call [Thomas's sister] as a witness." We are not persuaded.

¶11 We agree with the trial court's finding that, even if the officer's testimony had been suppressed, the State would have been able to introduce the same evidence – Thomas's confession – simply by calling his sister as a witness. Thomas told his sister that he had killed his wife and, at his sister's prompting, he went to the police station. While this court does not dispute the inherent trustworthiness of a police officer's testimony, in the instant case, we cannot conclude that had the officer's testimony been suppressed and replaced by the testimony of Thomas's sister, there is a reasonable probability that the outcome of the trial would have been different. Indeed, Thomas's sister's testimony recounting Thomas's confession may have been more compelling than a police officer's recitation of Thomas's confession. Since Thomas is unable to show that but for trial counsel's failure to request a ***Miranda-Goodchild*** hearing to suppress his statement to police, there is a reasonable probability that the outcome of the proceeding would have been different, we determine that he is unable to satisfy the prejudice prong under ***Strickland***. As noted, because we conclude that Thomas has not satisfied the prejudice prong, we will not consider the deficient performance prong of the ***Strickland*** test. *See* ***Strickland***, 466 U.S. at 697. Therefore, we conclude that trial counsel was not ineffective for failing to move to suppress Thomas's statement.

¶12 Finally, Thomas argues that trial counsel was ineffective for advising him that a defense based on the second-degree intentional homicide theory of adequate provocation would not be viable. Adequate provocation is an affirmative defense to first-degree intentional homicide, which mitigates that

offense to second-degree intentional homicide. *See* WIS. STAT. § 939.44(2).[4] Adequate provocation has a subjective and an objective element. *See* ***State v. Williford***, 103 Wis. 2d 98, 113, 307 N.W.2d 277 (1981). "Provocation," the subjective element, is defined in § 939.44(1)(b) as, "something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death." Section 939.44(1)(a) defines "adequate," the objective element, as "sufficient to cause complete lack of self-control in an ordinarily constituted person." To establish the defense of adequate provocation, Thomas would have had to show:

> "mental disturbance, caused by a reasonable, adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason: make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from real wickedness of heart or cruelty or recklessness of disposition."

Williford, 103 Wis. 2d at 113 (citation omitted). Further, "'[t]he provocation, in order to be sufficient in law, must be such as naturally and instantly, to produce in the minds of persons, ordinarily constituted, the highest degree of exasperation, rage, anger, sudden resentment, or terror.'" ***Id.*** (citation omitted); *see also* WIS JI—CRIMINAL 1012.

[4] The Judicial Council Committee Notes following WIS. STAT. § 939.44 indicate that the statute was intended to codify previous Wisconsin case law defining the "heat of passion" defense. Accordingly, it is appropriate for this court to analyze prior case law regarding the heat of passion defense in construing the theory of adequate provocation.

¶13 The record indicates that the facts of the instant case do not support a defense of adequate provocation. On the night before the murder, Thomas claims that his wife originally rebuffed his sexual advances. She allegedly told him "don't worry about me. I [had sex] twice today." But, after making these statements, his wife engaged in consensual sex with Thomas, and the two went to sleep. Thomas claims he was awakened early in the morning by his wife calling out another man's name in her sleep. Thomas argues that the combination of his wife admitting to extramarital affairs and later calling out another man's name in her sleep caused him to completely lose control of himself. As a consequence, Thomas concludes that his trial counsel was ineffective for advising him that the adequate provocation defense would not be viable. We agree with his trial counsel.

¶14 The facts of the case do not rise to the level of adequate provocation as an affirmative defense for first-degree intentional homicide. Of particular relevance is the fact that the provocation did not "naturally and instantly" produce the requisite reaction in Thomas. Rather, Thomas left the house, walked to his car to smoke a cigarette, spotted the baseball bat, walked back into the house, and sat on the edge of the bed to smoke another cigarette. He also stopped after the first knife broke, went back to the kitchen for a second, larger and stronger, knife, and returned to the bedroom. These facts do not support a finding that the provocation "naturally and instantly" produced in Thomas the "highest degree of exasperation, rage, anger, sudden resentment or terror." We are satisfied that trial counsel acted reasonably in advising Thomas that the adequate provocation defense was not viable under the facts of his case. Counsel's advice was not outside the wide range of professionally competent assistance and, therefore, we conclude that trial counsel's performance was not deficient.

¶15 For these reasons, we conclude that trial counsel was not ineffective and we affirm.

By the Court.—Judgment and order affirmed.

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