COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2425-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

FOIST JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

PER CURIAM. Foist Johnson appeals from a judgment entered after a jury found him guilty of first-degree intentional homicide while armed with a dangerous weapon and recklessly endangering safety by use of a dangerous weapon, contrary to §§ 940.01, 941.20, and 939.63, STATS. He also appeals from an order denying his postconviction motion. Johnson claims that: (1) he received

ineffective assistance of trial counsel; (2) the trial court erred in refusing to conduct a postconviction ***Machner*** hearing; (3) the trial court erroneously exercised its discretion in instructing the jury that intoxication is not a defense to first-degree reckless homicide; (4) the trial court erroneously exercised its discretion in allowing the individual jurors to test the trigger-pull of the murder weapon; and (5) the evidence was insufficient for a rational jury to find guilt of first-degree intentional homicide beyond a reasonable doubt. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

On November 26, 1994, members of the Milwaukee Police Department, responding to a dispatch, arrived at 4208-A North 40th Street in Milwaukee. Upon arriving, Officer Scott Thorne observed the defendant, Johnson, jump out of one of the windows of the residence, cross the street, and enter the residence at 4209 North 40th Street. In the bedroom of 4208-A North 40th Street, Officer Thorne found the body of Yolanda Jenkins, who had suffered a gunshot wound to the head. A .38 caliber handgun was found on the floor.

A second officer then went to the 4209 address to apprehend Johnson but, upon entering the residence, Johnson pointed a .22 caliber handgun at the officer. Johnson then ran back to 4208-A where he was arrested by Officer Thorne.

A witness, Rondell Ray, testified that he and Johnson had driven to the apartment to see Johnson's ex-girlfriend, Jenkins. Johnson entered the apartment and went upstairs. Ray then heard Johnson kick down a door, and that is when Ray entered the apartment. Ray then saw Johnson fighting with someone later identified as Dale Gregory. As the two were wrestling, Jenkins asked Ray to

break up the fight. Ray then attempted to separate the two combatants, but Johnson told Ray to leave. Ray then went across the street to the residence at 4209 North 40th Street.

Gregory testified that when he saw Johnson enter the apartment, Johnson appeared to have a gun in his hand. Johnson and Gregory then began to fight in order to gain control of the gun after Johnson tried to hit Gregory with the gun. While fighting, the two fell down the stairs and landed on the landing between the first and second stories. Gregory then fled the apartment. As he was leaving, he said he heard two gunshots fired behind him. He later heard a single shot fired. Two bullet holes were later discovered by the Milwaukee Police Department in the landing where Gregory and Johnson were fighting, consistent with Gregory's statements. Bullet casings were also found in the hallway.

Brian Brown, who occupied the residence at 4209 North 40th Street, entered the apartment after Gregory left. Brown had his .38 caliber handgun and, when he saw Johnson, he and Johnson began to fight for the gun. Johnson took control of the gun, and went upstairs. Brown started to follow Johnson, but then heard arguing and decided to leave. As he was leaving the apartment, he heard a single gunshot. He then observed Johnson fleeing the apartment.

Johnson testified that he and Jenkins began to fight when he was alone with her in the bedroom of the apartment. Johnson said a struggle ensued for control of the handgun. Johnson said that the gun discharged killing Jenkins. The police found bite marks on Jenkins's body, and scratches on Johnson's body. A .38 caliber handgun coated in dried blood was found at the top of the stairs near the door leading to the second-floor porch, and there were also hairs on the muzzle of the gun.

Autopsy reports indicated that Jenkins died of cerebral lacerations and contusions due to a gunshot wound to the head. It was the opinion of Dr. John Teggatz, Deputy Medical Examiner for Milwaukee County, that the muzzle of the gun was placed directly against the head of Jenkins when she was shot, thus the reason for the hairs on the muzzle.

Johnson was convicted by a jury of first-degree intentional homicide while armed with a dangerous weapon and recklessly endangering safety while armed with a dangerous weapon. Johnson filed a postconviction motion alleging that he received ineffective assistance from trial counsel. The trial court denied the motion without a hearing. Johnson now appeals.

II. DISCUSSION

A. Ineffective Assistance

Johnson claims his trial counsel provided ineffective assistance in two ways: (1) by failing to request an instruction of either absolute self-defense or imperfect self-defense; and (2) by refusing to discuss with the defendant prior to trial the concept of self-defense for the purposes of establishing trial strategy, determining the nature of closing arguments, and deciding which lessor included offenses should be requested. The trial court concluded that Johnson received effective assistance of counsel. We agree.

In order to establish that he did not receive effective assistance of counsel, Johnson must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis.2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient

unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if Johnson can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id***. Stated another way, to satisfy the prejudice-prong, Johnson 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." ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76 (citation omitted).

In assessing Johnson's claim, we need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. *See* ***Strickland***, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. *See* ***Sanchez,*** 201 Wis.2d at 236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see* ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. *See* ***id.*** at 236-37, 548 N.W.2d at 76.

We reject Johnson's ineffective assistance claim. In doing so, we address only whether he has shown that his lawyer's performance was deficient. Johnson alleges that his trial counsel should have: (1) requested self-defense jury instructions; and (2) discussed self-defense as a possible defense with Johnson. Johnson asserts that self-defense should have been presented because at the time of the shooting, he was struggling to keep Jenkins from gaining control of the handgun and shooting him. By not even discussing self-defense as an option, Johnson claims that his trial counsel's performance was deficient.

Trial counsel is free to select a particular defense from the several alternative defenses available to him. *See* ***State v. Hubanks***, 173 Wis.2d 1, 28, 496 N.W.2d 96, 106 (Ct. App. 1992). ***Strickland*** does not require that counsel undermine the chosen defense strategy by presenting the jury with an inconsistent alternative defense. *See* ***State v. Eckert***, 203 Wis.2d 497, 507-11, 553 N.W.2d 539, 543-45 (Ct. App. 1996). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed choices made by the defendant and on information supplied by the defendant." ***Strickland***, 466 U.S. at 691.

In this case, Johnson maintained throughout that the shooting was an accident. Johnson said the gun went off when he and Jenkins were struggling for control of the gun. Johnson testified that he did not know who pulled the trigger, and that the gun went off instantly when the two fell on the bed while they were fighting. There is no factual basis for a theory of self-defense, either perfect or imperfect, from Johnson's testimony nor from the testimony of the other witnesses.

To offer a theory of self-defense would contradict Johnson's assertions that the shooting was an accident. A self-defense theory, either perfect or imperfect, assumes that the actor intentionally used force against the victim. *See* ***State v. Foster***, 191 Wis.2d 14, 23-25, 528 N.W.2d 22, 26-27 (Ct. App. 1995). Furthermore, "both perfect and imperfect self-defense require a defendant to possess a reasonable belief that he is preventing or terminating an unlawful interference with [his] person." ***State v. Camacho***, 176 Wis.2d 860, 879-80, 501 N.W.2d 380, 387 (1993). Johnson's testimony was that the gun went off when he and Jenkins were fighting—not that he was acting in self-defense.

Johnson has never asserted that he shot Jenkins intentionally to prevent Jenkins from harming or killing him.

Also, the uncontradicted evidence is that Johnson provoked the fight. "A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack." Section 939.48(2)(a), STATS. Here the uncontradicted evidence is that Johnson provoked the attack. He burst into Jenkins's apartment; he swung at Gregory provoking the fight that ensued; he fought Brown to gain control of Brown's gun; he started arguing and fighting with Jenkins; and he grabbed the phone from Jenkins and tore the phone cord out of the wall when she attempted to call "911". Furthermore, he was the person in possession of the gun when he was arguing with Jenkins. Unquestionably, Johnson's conduct provoked the events that occurred that evening. Thus, he is not entitled to claim the privilege of self-defense.

Johnson received effective assistance of counsel. Self-defense was not discussed with Johnson as a defense option because Johnson never claimed that he intentionally shot Jenkins. Furthermore, Johnson provoked the events which led to the shooting, thus barring him from claiming the privilege of self-defense. For counsel to present self-defense to the jury would have undermined his defense of Johnson because self-defense is inconsistent with the facts as they were presented. Therefore, not requesting a self-defense instruction and not discussing self-defense as a defense theory does not constitute deficient

performance. For these reasons, we reject Johnson's claim of ineffective assistance of counsel.[1]

B. Jury Instruction

Johnson next claims that the trial court erred when it instructed the jury that: "a voluntary [sic] produced intoxicated or drug[ged] condition is not a defense if the actor had not been in that condition, he or she would have been aware of creating an unreasonable and substantial risk of death or great bodily harm to another human being." Johnson claims that this instruction misdirected the jury because he never claimed that his intoxication was a defense. We disagree.

A trial court has broad discretion in developing the language of the jury instructions given at trial. *See* ***State v. Selders***, 163 Wis.2d 607, 620, 472 N.W.2d 526, 531 (Ct. App. 1991). The instructions do not have to conform exactly to the standard jury instructions. *See* ***Foster***, 191 Wis.2d at 26, 528 N.W.2d at 27. An appellant is not entitled to relief unless the instructions either misstated the law or misdirected the jury in the manner asserted by the appellant. *See* ***id.*** at 28, 528 N.W.2d at 28. We will not find an erroneous exercise of

[1] Appellant also argues that the trial court erred in denying his postconviction motion for relief without conducting a ***Machner*** hearing. Although a trial court must hold a hearing on an ineffective-assistance-of-counsel claim, s*ee* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979), a hearing is not required unless the defendant alleges specific facts that, if true, constitute deficient performance and prejudice; "conclusory" or "barebones" allegations are not enough. *See* ***State v. Bentley***, 201 Wis.2d 303, 316, 548 N.W.2d 50, 56 (1996). We review the trial court's denial of a ***Machner*** hearing *de novo*. *See* ***State v. Toliver***, 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). As noted in the text of this opinion, there was no factual basis for an instruction on self-defense. Johnson's motion asserts merely conclusory allegations and, therefore, it was not an error for the trial court to decline to hold a ***Machner*** hearing.

discretion if the instructions, as given, correctly stated the law and were supported by the facts properly before the jury. *See* ***Selders***, 163 Wis.2d at 620, 472 N.W.2d at 531.

In this case, Johnson repeatedly referred to his high level of intoxication during his testimony. While neither Johnson nor his trial counsel used his level of intoxication as a defense, the trial court felt that an instruction on intoxication would clarify the law for the jury. We conclude that the instruction correctly stated the law and, because of Johnson's references to his intoxication during his testimony, it was reasonable for the trial court to charge the jury with this instruction. Without the instruction, the jury may have been misled into believing that Johnson's intoxication excused or diminished his conduct. Therefore, the trial court did not erroneously exercise its discretion in giving this instruction.

C. Jury Experimentation with the Murder Weapon

Johnson asserts that the trial court erred in granting the State's request to allow the jurors to test the trigger-pull of the murder weapon. Johnson alleges that allowing the jurors to pull the trigger was an erroneous exercise of discretion because it accentuated one aspect of the State's proof over others and because the experiment resulted in jurors having disparate experiences with respect to the weapon because only ten of thirteen tested the weapon by pulling the trigger. We reject these assertions.

A trial court has broad discretion in choosing to admit demonstrative evidence which luminates or clarifies trial testimony. *See* ***State v. Baldwin***, 101 Wis.2d 441, 454-56, 304 N.W.2d 742, 749-50 (1981). A trial court also has

broad discretion in deciding what exhibits to send to the jury room. *See* ***State v. Jensen***, 147 Wis.2d 240, 259, 432 N.W.2d 913, 921 (1988).

In this case, Johnson asserted throughout the trial that the shooting was an accident. To counter this claim, the State called a ballistics expert. The expert testified that the trigger-pull on a .38 caliber handgun is nine and three-quarter pounds. This was described as being on the "heavy side." To allow the jurors to get a better idea of what a nine and three-quarter pound trigger-pull feels like, the court allowed those members of the jury who chose to to test the trigger-pull on the handgun. The trigger pull of the gun was a relevant factor for the jurors to consider in assessing Johnson's claim that the shooting occurred as the result of an accidental discharge. This was not an erroneous exercise of discretion because it helped to clarify the ballistics expert's testimony.

We also reject Johnson's claim that because only ten of the thirteen jurors tested the trigger-pull, this resulted in disparate consideration of the evidence. If the trial court would not have allowed the jurors to test the trigger-pull during the trial, they most certainly would have had the opportunity to do so when the exhibits would have been sent to the jury deliberations room. The number of jurors that would have actually chose to test the trigger-pull would have remained a mystery. Johnson offers no authority which mandates that each juror must test a piece of evidence. For the foregoing reasons, we reject Johnson's claim that the trial court erroneously exercised its discretion.

D. Insufficient Evidence to Support Verdict

Johnson claims that the trial evidence was insufficient for any reasonable jury to find Johnson guilty of first-degree intentional homicide beyond a reasonable doubt. Johnson asserts that he took the gun from Brown to keep it

away from everyone else to prevent someone from getting hurt. Johnson argues that he was attacked by Jenkins who kicked, scratched, and punched him in an attempt to gain control of the handgun. Johnson claims that it was during this intense struggle that the firearm discharged killing Jenkins. Johnson argues that the physical evidence found at the crime scene, i.e., the bruises and scratches on both Jenkins and Johnson, the overturned furniture, and the nature of the wound itself, prove that Johnson did not intend to kill Jenkins, and that the shooting was an accident. We reject these assertions.

The standard of review that we apply when testing the sufficiency of the trial evidence was stated in ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990).

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507, 451 N.W.2d at 757-58 (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the law of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

In this case, the evidence was such that a reasonable jury could find Johnson guilty of first-degree intentional homicide beyond a reasonable doubt. Police had been called on three separate occasions prior to the night of the killing

because Johnson had physically beaten Jenkins. That night, Johnson broke into the apartment after having consumed alcohol. He then initiated the confrontation with Gregory, causing Gregory to flee. Johnson tore the phone cord out of the wall to prevent Jenkins from calling "911" for help. Johnson fought Brown and gained control of his gun. He then went into the bedroom where Jenkins was, and began to argue and fight with her. Jenkins was shot at virtual point blank range, and the medical examiner believed that the muzzle of the gun was placed directly against Jenkins's head, leaving hairs on the muzzle. After Johnson had shot Jenkins, he said "Look what you made me do." He then fled to Brown's residence where he pointed a handgun at a police officer. In sum, a rational jury could find beyond a reasonable doubt that Johnson intentionally killed Jenkins. We reject Johnson's assertions that the evidence was insufficient to find guilt beyond a reasonable doubt.

By the Court.—Judgment and order affirmed.

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