COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0563-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN MCCRANEY,

DEFENDANT-APPELLANT,

COREY GRIFFEN,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

PER CURIAM. Kevin McCraney appeals from a judgment of conviction, following his jury trial, for first-degree reckless homicide while armed,

party to a crime. He also appeals from an order denying his motion for postconviction relief. McCraney contends that (1) there was insufficient evidence presented to support the conviction as party to a crime; and (2) his trial counsel was ineffective. We reject his contentions and affirm.

I. BACKGROUND

In the early morning hours of July 4, 1995, Kevin McCraney, Corey Griffen, George Golden, and Gordon Dillard set out to steal Lamont Richardson's car in order to retrieve a set of "gold thirties," car rims that they believed had been taken from McCraney's car, which had been stolen two days earlier. McCraney had spoken with Richardson about the rims on July 3, but, since they had not been returned, McCraney and his three friends decided to steal Richardson's car.

The foursome drove to Richardson's home and saw the rims on a car parked in front. Gordon parked around the corner and McCraney opened the trunk and removed a .380 handgun. Griffen grabbed a shotgun. When the men walked back to Richardson's home to steal the car, they saw Richardson standing out front talking with two men.

McCraney called out Richardson's name and asked about the rims. Seeing the shotgun, the men with Richardson fled. After discussing the rims for a few minutes, McCraney concluded by telling Richardson that if the rims were returned to him by the next day, they could "squash" the situation. As McCraney turned to leave, however, he heard Griffen fire the shotgun. McCraney immediately pulled his weapon and fired three or four shots in the direction of Richardson. The four men then ran back to their car and drove away. Richardson died of brain lacerations and bruises from a shotgun wound to his head.

II. ANALYSIS

McCraney argues that there was insufficient evidence to demonstrate that he intentionally aided or abetted the first-degree reckless homicide. McCraney further contends that he withdrew his assistance prior to the shooting by Griffen. We are not convinced.

In reviewing the sufficiency of evidence to support a conviction, we will not substitute our judgment for that of the trier of fact unless "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We will not overturn a verdict if there exists any possibility that the trier of fact could have appropriately drawn its inferences from the evidence adduced at trial. *See* ***id.*** at 506-07, 451 N.W.2d at 757.

As the trial court instructed the jury, McCraney could be liable for the offense either by directly committing the crime or, as party to a crime, by intentionally aiding or abetting the person who directly committed the crime. Instructing the jury, the trial court explained:

> A person intentionally aids or abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either, A) assists the person who commits the crime or, B) is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

This instruction is "an appropriate formulation of the test, because it is reasonable to assume that one known to be ready and willing to render aid is considered to be aiding the person who commits the crime as a matter of objective fact." ***State v.***

Martinez, 150 Wis.2d 47, 52-53 n.3, 441 N.W.2d 690, 692 n.3 (1989) (internal quotation marks and quoted source omitted). Based on the evidence in this case, the jury, acting reasonably, could conclude beyond a reasonable doubt that McCraney was a party to the crime of reckless homicide.

McCraney helped plan the venture and encouraged the group to go to Richardson's house to retrieve the rims by stealing Richardson's car. When the group arrived at Richardson's house, McCraney and Griffen armed themselves. McCraney and Griffen displayed the loaded weapons while they spoke with Richardson. After hearing Griffen fire the first shot, a shotgun blast aimed in Richardson's direction, McCraney immediately fired at least three or four shots in Richardson's direction as well.

The jury is entitled to sift and weigh the evidence presented at trial. *See* ***Poellinger***, 153 Wis.2d at 506, 451 N.W.2d at 757. Here there was sufficient evidence before the jury to find that McCraney intentionally aided or abetted the commission of the crime by assisting Griffen or being ready and willing to assist Griffen in this senseless shooting.

McCraney next argues that he received ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's actions constituted deficient performance and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Since both elements of the test must be satisfied, we may dispose of an ineffective assistance of counsel claim if the defendant fails to satisfy either element. *See* ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

Whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587,

609, 516 N.W.2d 362, 368-69 (1994). A trial court's findings pertaining to an attorney's conduct, what happened at trial, and the basis for the challenged conduct are findings of fact and will be upheld unless clearly erroneous. ***State v. Weber***, 174 Wis.2d 98, 111, 496 N.W.2d 762, 768 (Ct. App. 1993). The "ultimate conclusion of whether an attorney's conduct constituted ineffective assistance of counsel is a question of law" which we review de novo. ***Flores***, 183 Wis.2d at 609, 516 N.W.2d at 369.

An attorney's performance is not deficient unless his or her conduct falls outside the "wide range of professionally competent assistance." ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986) (citation omitted). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 216-17, 395 N.W.2d at 181 (internal quotation marks and quoted source omitted). When evaluating counsel's conduct, we give great deference to professional judgments and make every effort to avoid basing our determination on hindsight. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

McCraney first contends that he received ineffective assistance of counsel because trial counsel failed to call Sean Kendricks and Jessie McNeil,[1] who allegedly would have testified that McCraney did not supply the weapons

[1] Kendricks and McNeil were both acquaintances of McCraney who saw the firearms in Golden's car on the evening of July 3, 1995.

used in the offense, and Xavier Hill,[2] who allegedly would have testified that McCraney did not dispose of the weapons. We reject his contention.

McCraney did not dispute that he possessed a firearm at the time of the shooting and fired shots in the direction of the victim; his primary theory of defense was self-defense. His self-defense argument rested on his assertion that someone with Richardson fired the first shot, not on whether he supplied and disposed of the weapons. At the ***Machner***[3] hearing, trial counsel testified that he did not call the three witnesses because he believed that the question of who supplied and disposed of the firearms was of no particular importance to the self-defense theory. Moreover, because Kendricks and McNeil allegedly would have elaborated on McCraney's control over the weapons at the time of the offense, trial counsel believed that their testimony actually would have damaged the self-defense argument. Based on the evidence, anticipated testimony and theory of defense, not calling Kendricks, McNeil, and Hill was a reasonable strategic maneuver. Thus, counsel's performance was not deficient.

McCraney next argues that he received ineffective assistance of counsel because trial counsel failed to call Dillard who allegedly would have testified that the people with Richardson fired the first shot. Again, we disagree.

Although Dillard would have testified that Richardson's side fired first, thus supporting the defense's self-defense argument, he also would have testified that only after seeing Richardson beside the car did the members of

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[2] Hill, who is McCraney's uncle, stated to police that he did not see any guns when McCraney and Dillard came to his home in the early morning hours of July 4, 1995.

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

McCraney's group arm themselves. Thus, trial counsel believed, Dillard's version of the events tended to imply McCraney's premeditation and malice, which would have compromised his theory of self-defense. This was a reasonable assessment and, therefore, not calling Dillard was a strategic maneuver which we do not deem deficient.

Finally, McCraney argues that he received ineffective assistance of counsel because trial counsel failed to object when the prosecutor told the jury of a theory of party to a crime liability not presented in the jury instructions. McCraney argues that counsel was deficient in failing to object when the prosecutor described the "natural and probable consequences" theory of criminal liability under § 939.05, STATS., even though the court did not instruct on this theory.

McCraney concedes that the prosecutor accurately stated the law and that the "natural and probable consequences" theory also may have been applicable to this case. Rather than objecting to the prosecutor's argument, and risk having the jury instructions corrected to present all theories of liability, trial counsel chose to directly respond to the "natural and probable consequences" theory in his own argument by asserting that the facts in this case were not similar to the example given by the prosecutor. Not objecting was a reasonable strategic maneuver which we do not deem deficient.

By the Court.—Judgment and order affirmed.

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