COURT OF APPEALS
DECISION
DATED AND FILED

May 26, 1998

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. 97-0944-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENDRIC J. WINTERS,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Kendric J. Winters appeals from a judgment entered after a jury convicted him of first-degree intentional homicide, party to a crime, and attempted first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1), 939.05 and 939.32, STATS. He also appeals from an order denying his postconviction motion. Winters claims: (1) his trial counsel was

ineffective for failing to request that a juror who expressed doubts about his ability to be impartial be struck for cause; (2) the trial court erred when it refused to grant Winters's request that his deceased trial counsel's handwritten notes be transcribed or deciphered; (3) the trial court erred when it refused to submit the lesser-included offense instruction of second-degree intentional homicide to the jury; (4) the trial court erroneously exercised its discretion in admitting certain evidence that Winters claims was unfairly prejudicial; and (5) the trial court erred in refusing to suppress Winters's confession.

Because trial counsel was not ineffective, because Winters failed to develop his second argument, because the trial court did not err in refusing to submit a lesser-included offense instruction, because the trial court did not erroneously exercise its discretion in admitting the challenged evidence, and because the trial court did not err in refusing to suppress Winters's confession, we affirm.

I. BACKGROUND

This case arises out of a dispute that arose in a tavern and continued when Winters and his two accomplices, who were in one car, chased the victims, Alphonzo Goss and Lisa Taylor, who were in Taylor's car. Someone in Winters's car fired a gun into Taylor's car, killing Goss. Winters was charged with first-degree intentional homicide, party to a crime, and attempted first-degree intentional homicide, party to a crime. The jury convicted on both counts. Judgment was entered. Winters filed a postconviction motion alleging ineffective assistance of trial counsel, which was denied. He now appeals. Additional facts pertinent to each claim will be set forth where appropriate.

II. DISCUSSION

A. Ineffective Assistance.

Winters claims his trial counsel was ineffective for failing to request that a juror who expressed bias be struck for cause. We reject this claim.

In order to establish that he did not receive effective assistance of counsel, Winters 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). A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.***, 466 U.S. at 687. Even if Winters 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, Winters 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." ***State v. Sanchez***, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

In assessing the defendant'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. Further, because trial counsel died before a ***Machner***[1] hearing was held, it is presumed that he had a reasonable basis for his actions, *see* ***State v. Lukasik***, 115 Wis.2d 134, 140, 340 N.W.2d 62, 65 (Ct. App. 1983), and Winters has the burden of overcoming this presumption by clear and convincing evidence. *See* ***id.***

The juror at issue here was juror No. 11. In response to the prosecutor's question as to whether any of the prospective jurors had been involved in an altercation arising in a tavern, juror No. 11 responded that he had. When asked whether his ability to decide this case would be affected, the juror responded: "I would say my position would be biased then." No request was made to strike this juror for cause, although trial counsel did exercise a peremptory challenge to remove the juror from the panel that ultimately decided the case.

In reviewing the record, we conclude that Winters has failed to overcome the presumption that trial counsel's actions were reasonable. *See* ***id.*** He has failed to show by clear and convincing evidence that his trial counsel's decision to use a peremptory strike to remove juror No. 11 from the jury, rather than challenging him for cause, constituted deficient performance.

There is nothing in the record to convince us that trial counsel's decision to peremptorily strike juror No. 11 was deficient performance, rather than a strategic decision. The record reveals that trial counsel moved to strike one juror for cause, concurred with a prosecution request to strike another juror for cause, and opposed a prosecution request to strike yet another juror for cause. This conduct demonstrates that counsel was not shirking his responsibility, but rather

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

actively participating in the jury selection process. Further, it is clear from the record that much attention was directed to juror No. 11, who was questioned at some length. Given the active participation of counsel and the attention given to juror No. 11, it is unlikely that counsel simply forgot to request that this juror be struck for cause.

Based on the foregoing, it is reasonable to conclude that trial counsel made the strategic decision to forego requesting that the court strike this juror for cause. It is reasonable to conclude that trial counsel was satisfied with the jury pool and believed the seven peremptory strikes afforded the defense were more than enough to remove the few objectionable jurors. Winters has failed to satisfy the requisite burden. His claim fails.[2]

B. Counsel's Handwritten Notes.

Winters next argues that the trial court erred in denying his request to order trial counsel's secretary to transcribe trial counsel's handwritten notes that were difficult to decipher. Winters, however, has not even provided the notes as a part of the appellate record. Because he failed to include the notes in the record on appeal, we assume that every fact essential to sustain the trial court's exercise of discretion is supported by the record. *See* ***Austin v. Ford Motor Co.***, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979). Thus, we affirm the trial court's determination.

[2] Contrary to Winters's assertion, we conclude that ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997) does not control here because the instant case, unlike ***Ramos***, arose in the context of an ineffective assistance claim. In ***Ramos***, defense counsel moved to strike a juror for cause, but the trial court denied the request. *See* ***id.*** at 14, 564 N.W.2d at 329. The Wisconsin Supreme Court held that forcing defense counsel to use a peremptory challenge to correct a trial court error deprives the defendant of a statutorily granted right. *See* ***id.***

C. Lesser-Included Offense Instruction.

Winters next claims that the trial court erred when it denied his request to submit the lesser-included charge of second-degree intentional homicide to the jury. We reject this claim.

This issue presents a question of law that we review independently. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

Winters would be entitled to a lesser-included offense instruction only if there existed reasonable grounds in the evidence both for acquittal on the greater offense and conviction on the lesser offense. *See* ***id.*** The instruction is not warranted, however, when it is supported by a "mere scintilla" of evidence. It must be supported by a reasonable view of the evidence; there must be some appreciable evidence supporting the lesser-included offense instruction. *See* ***Ross v. State***, 61 Wis.2d 160, 171-72, 211 N.W.2d 827, 832-33 (1973).

The record demonstrates that there was no basis for submission of the lesser-included offense instruction and, therefore, the trial court did not err in denying Winters's request.

The jury found Winters guilty beyond a reasonable doubt of first-degree intentional homicide, party to a crime. Second-degree intentional homicide is committed by one who causes the death of another with the intent to kill and, pertinent to this case, "the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist as required by s. 940.01(3)." Section 940.05(1)(a), STATS. Section 940.01(2)(b), STATS., provides the mitigating circumstance that Winters argues was present in this case, "unnecessary defensive force."

According to § 940.01(2)(b), STATS., Winters would be guilty of second-degree intentional homicide by using "unnecessary defensive force" if the State fails to disprove, beyond a reasonable doubt, that: "Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." Even when viewing the evidence most favorably to the defense, there is no appreciable evidence to support Winters's claim that the shooting occurred because his accomplice "believed he … or another was in imminent danger of death or great bodily harm." Winters argues that because he heard his accomplice say that the victim had a gun and because a gun was found under the victim, that the jury could have believed the shooting occurred in self-defense. We do not agree.

It is undisputed that no shots were fired from the victims' car, that the victims were trying desperately to flee from Winters and his accomplices, and a multitude of shots were fired from Winters's car into the victims' car during a high-speed chase. Based on the foregoing, we conclude that the scintilla of evidence relied on by Winters is insufficient to support giving the requested lesser-included offense instruction. There is no reasonable evidence to support a jury acquitting of the greater offense and convicting on the lesser. There simply is no appreciable evidence supporting Winters's mitigating "defensive force" theory.

D. Evidentiary Rulings.

Winters next claims that the trial court made three erroneous evidentiary rulings. First, he claims the trial court should have excluded from evidence a letter he wrote requesting that his friends attempt to threaten potential witnesses so they would not testify against him. He also asserts that if the letter

was admitted, then the gang affiliations referenced in the letter should have been redacted. Second, he claims the trial court should not have allowed testimony that some of the witnesses in this case were threatened by unidentified sources. Finally, he claims the trial court should have excluded evidence revealing that Winters had been incarcerated in the past. We are not persuaded.

The decision whether to admit or exclude evidence is a matter left to the sound discretion of the trial court and will not be reversed on appeal unless the decision constituted an erroneous exercise of discretion. *See* ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). We will not find an erroneous exercise of discretion if the decision has a reasonable basis and was made in accordance with proper legal standards and the facts of the record. *See* ***id.***

Winters argues that the letter's probative value was outweighed by the fact that it was unfairly prejudicial and that the gang references were not relevant because this was not a gang-related homicide. Clearly, a letter of this threatening nature is prejudicial. Nonetheless, the trial court ruled that it was admissible as relevant to establish Winters's consciousness of guilt, to bolster the credibility of the witnesses who were threatened, and to establish Winters's guilt of the charged offense by showing the willingness of fellow gang members to conspire together or aid and abet each other in criminal activity, thereby contradicting Winters's defense that he was just in the wrong place at the wrong time. This decision was reasonable and based on applicable law.

Threats against witnesses are relevant to establish a defendant's consciousness of guilt, *see* ***Bowie v. State***, 85 Wis.2d 549, 553, 271 N.W.2d 110, 112 (1978), and evidence of other crimes, wrongs, or acts is admissible to establish the background or context of a criminal act, *see* ***State v. Hereford***, 195

Wis.2d 1054, 1069, 537 N.W.2d 62, 68 (Ct. App. 1995), *cert. denied*, 516 U.S. 1183 (1996). Further, evidence of a gang affiliation is relevant to prove a defendant's motive, which is relevant to the element of intent to kill and may be offered to prove that the crime was committed. *See generally* ***Barrera v. State***, 99 Wis.2d 269, 280, 298 N.W.2d 820, 825 (1980).

Based on the foregoing, the unredacted letter was relevant and properly admitted. This evidence helped to prove Winters's consciousness of guilt, and the evidence of gang membership helped to disprove Winters's theory that he was simply in the wrong place at the wrong time. As a member of a gang, Winters assisted fellow gang members in committing the crime and, in turn, relied on fellow gang members to threaten witnesses so he might escape liability. Although prejudicial, we cannot conclude that the probative value of the unredacted letter was substantially outweighed by unfair prejudice. The standard for unfair prejudice is not whether the evidence harms the defense's case, but rather whether the evidence tends to influence the outcome of the case by "improper means." *See* ***State v. Johnson***, 184 Wis.2d 324, 340, 516 N.W.2d 463, 468 (Ct. App. 1994). That standard was not met here. The record demonstrates that Winters admitted writing the letter, that he enlisted the help of fellow gang members to threaten witnesses, and that witnesses were threatened by phone and by gunshots into their homes or their relatives' homes.

Winters also claims that the trial court should not have allowed testimony from witnesses who claimed that they were threatened because the witnesses could not connect the threats to Winters. There was inferential evidence, however, that connected Winters to the threats, including his letter, and the fact that the threat to one witness occurred only after defense counsel inadvertently turned over the witness's address and phone number to Winters.

The threats against witnesses were relevant to prove Winters's consciousness of guilt and therefore admissible. The inability to connect the threats directly to Winters was a matter of weight of evidence for the jury. Certainly, the evidence provided a basis for the jury to infer that the threats were made by Winters or on his behalf.

Finally, Winters claims the trial court should not have allowed him to testify as to his past incarceration. There was no objection to this question, however, and therefore, Winters waived his right to raise this issue on appeal. *See* § 901.03(1)(a), STATS.

E. Confession.

Last, Winters claims the trial court should have suppressed his confession as a "sew-up" because the confession was obtained past the time the State would have needed to decide whether to charge or release him. We do not agree.

Winters was arrested on December 11, 1995, at 2 p.m. He was interviewed by police twice that same day. On December 12, Winters received a judicial "probable cause" determination in compliance with ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). The police continued to investigate these crimes through the taking of the confession that Winters challenges, which occurred on December 15. On December 12, witnesses positively identified Winters in photo arrays and lineups. On December 13, the police recovered the semi-automatic weapon and the vehicle used to commit the crimes. On December 15, Winters spoke with a detective for thirty minutes. There were no threats or promises made. Winters voluntarily spoke with the detective.

The issue here is whether the delay between Winters's arrest on December 11, and the date he gave the challenged confession on December 15, was unreasonably long, which would render the December 15 statement a "sew-up" confession in violation of ***Phillips v. State***, 29 Wis.2d 521, 533, 139 N.W.2d 41, 46 (1966). We conclude that the delay was not unreasonable.

There is no set time established within which a suspect must be released or charged. ***Wagner v. State***, 89 Wis.2d 70, 76, 277 N.W.2d 849, 852 (1979). Post-arrest detention will be permitted as long as the detention is for proper purposes, *see* ***Phillips***, 29 Wis.2d at 533, 139 N.W.2d at 46, and is not unjustifiably long under the circumstances of the case. *See* ***State v. Wallace***, 59 Wis.2d 66, 77, 207 N.W.2d 855, 861 (1973). In the instant case, the detention was both for proper purposes and not unjustifiably long. The four-day detention occurred for proper investigative purposes: to interview witnesses, to conduct lineups, to verify Winters's version of events, to search for accomplices, to track down the murder weapon and the car used in the shootings, and to seek out any other relevant evidence. Under these circumstances, we cannot conclude that the trial court should have suppressed the December 15 statement as a "sew-up" confession. *See* ***Wagner***, 89 Wis.2d at 76, 277 N.W.2d at 852.

By the Court.—Judgment and order affirmed.

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