COURT OF APPEALS
DECISION
DATED AND FILED

February 16, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0023-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN BATTISTE,

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. John Battiste appeals from a judgment entered after a jury convicted him of one count of attempted first-degree intentional homicide, while armed, and one count of aggravated battery, while armed, contrary to §§ 940.01(1), 940.19(5), 939.32(1) and 939.63(1)(a)2, STATS. He also appeals from an order denying his postconviction motion. He claims: (1) the trial

court erred when it denied his postconviction motion alleging ineffective assistance of trial counsel without conducting a ***Machner*** hearing;[1] (2) he received ineffective assistance of trial counsel; and (3) the evidence was insufficient to support the conviction. Because the trial court did not err in denying Battiste's postconviction motion without a hearing, because Battiste received effective assistance of trial counsel, and because the evidence is sufficient to support the convictions, we affirm.

I. BACKGROUND

On June 28, 1996, Battiste and his wife, the victim, met in an alley near where the victim was living. Although married, the two were estranged, residing in separate residences. The victim was on foot and Battiste was in his vehicle following her. The events leading to the victim's injuries were disputed at trial. The victim's landlady, Margaret Barra, witnessed the incident and testified that Battiste ran over the victim with his car. She testified that Battiste then got out of his car, walked over to the victim, who was lying injured on the pavement, and said "I told you I'd kill you." After this, Battiste left in his vehicle and turned himself in two days later.

The victim was conveyed to the hospital where she remained for thirty-three days. She was treated for fractures of two lumbar vertebrae, a double fracture of the pelvis, a broken right ankle, a broken rib and a pulmonary embolism. She underwent two surgeries, including an abortion, which was performed in part because of the serious pelvic injuries. She testified that she was

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

ten to eleven weeks pregnant at the time of the incident, but that Battiste was not aware of this fact.

While at the hospital, the victim corroborated Barra's version of events. She later recanted, however, and at trial both the victim and Battiste testified that Battiste did not intend to run her over and both denied Battiste's stated intent to kill the victim.

The jury convicted. Battiste filed a postconviction motion alleging his counsel was ineffective. The trial court denied the motion without a hearing. Battiste now appeals.

II. DISCUSSION

A. Machner Hearing/Ineffective Assistance Claims.

Battiste's first two arguments are intertwined. He claims the trial court should have held a ***Machner*** hearing before denying his claims of ineffective assistance. He further claims that his trial counsel provided ineffective assistance by: (1) failing to raise the defense of intoxication; (2) failing to adequately investigate the case; (3) failing to disclose a conflict of interest; and (4) failing to object to evidence that the victim was pregnant and elected to abort the pregnancy. We reject each argument.

Standards governing a defendant's contention that the trial court should not have denied the request for a hearing on postconviction motions were set forth in ***State v. Bentley***, 201 Wis.2d 303, 308-11, 548 N.W.2d 50, 52-53 (1996). A defendant is not entitled to an evidentiary hearing on a postconviction motion unless the motion alleges facts which, if proven, would entitle the defendant to relief. *See* ***id.*** at 310-11, 548 N.W.2d at 53. The trial court has the

discretion to summarily deny the motion if: (1) the motion fails to allege sufficient facts to raise a question of fact; (2) the motion presents only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***id.*** at 309-10, 548 N.W.2d at 53. It is only when the motion alleges sufficient facts which, if proven, would entitle the defendant to relief that the trial court does not have any discretion and must hold an evidentiary hearing. *See* ***id.*** at 310, 548 N.W 2d at 53.

Whether the motion alleges sufficient facts is a question of law that we review independently. *See* ***id.*** However, when the motion does not raise sufficient facts, the trial court's decision is reviewed under the erroneous exercise of discretion standard. *See* ***id.*** at 310-11, 548 N.W.2d at 53. To succeed on an ineffective assistance of counsel claim, a defendant must show both that counsel's conduct was deficient and that the deficient conduct prejudiced the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). If the defendant fails to make an adequate showing on either, the claim fails. *See* ***id.***

Battiste first claims that trial counsel was ineffective for failing to assert the intoxication defense. It was undisputed that Battiste had been drinking heavily on the date of the incident. The trial court concluded that it would not have given the intoxication defense instruction, even if requested, and, therefore, no prejudice could result from any failure to request instruction on this defense.

In so reasoning, the trial court explained that Battiste's defense did not rely on or assert that his alcohol consumption somehow rendered him incapable of forming intent, which is required in order to justify the instruction. *See* ***Larson v. State***, 86 Wis.2d 187, 195, 271 N.W.2d 647, 650 (1978). Rather, Battiste's defense was that he accidentally hit the accelerator instead of the brake.

We agree with the trial court's reasoning and conclude that the record conclusively refutes that trial counsel's failure to request this instruction prejudiced Battiste. Our conclusion is further supported by Battiste's own testimony. He testified in detail to the amount of alcohol he consumed on the date in question and provided a specific recollection of all of the day's events, including the striking of his wife. Based on this specific and detailed recollection, there is no basis in the record to conclude that at the time the crimes occurred he was suffering from a "mental impairment due to the consumption of intoxicants sufficient to negate the existence of the intent to kill." ***State v. Strege***, 116 Wis.2d 477, 486, 343 N.W.2d 100, 105 (1984). Accordingly, the trial court was not required to conduct a ***Machner*** hearing on this claim of ineffective assistance.

Battiste next asserts that trial counsel was ineffective because he failed to adequately investigate the case. More specifically, he failed to obtain all the medical records generated by the victim's medical treatment. Battiste argues that the records may contain information that could affect the credibility of the victim, namely that she was on drugs when she made her initial statement that Battiste intended to run her over and kill her. He also argues that the records may contain information to refute Barra's testimony that Battiste ran over the victim. His claims fail.

The jury was well aware of the victim's "drugged" condition and was free to consider her state of mind when she made her initial statement, which was subsequently recanted. The jurors could assess the victim's credibility as to which statement was truthful, the initial one made against Battiste, or the subsequent statement made supporting Battiste's version of events. Further, there was medical testimony presented to the jury confirming that the victim's injuries were consistent with a person run over by a car. Therefore, the medical records

would not have refuted Barra's testimony in that regard. Accordingly, the trial court was not required to conduct a ***Machner*** hearing on this claim, nor was it required to conduct an *in camera* review of the entire medical chart.

Battiste next claims counsel was ineffective for failing to disclose a conflict of interest. He claims that a conflict existed because trial counsel hired an investigator on the case, Tiffany Hofer, whom he was romantically involved with and who was also his secretary/paralegal. The trial court rejected this claim reasoning that Hofer's relationship with counsel did not prejudice Battiste's case. Hofer offered only testimony helpful to the defense. The record supports the trial court's determinations.

Moreover, Battiste's postconviction motion fails to set forth sufficient facts demonstrating how any alleged conflict of interest prejudiced the outcome of this case. The motion merely alleges that Hofer's presence prejudiced the outcome because she did not have the skills necessary to appear credible to the jury and because she failed to take notes. These are merely conclusory allegations insufficient to require an evidentiary hearing.

Battiste's final ineffective assistance claim is that trial counsel should have objected to the admission of testimony that the victim was pregnant at the time of the incident and elected to abort the pregnancy while in the hospital. He claims the jury was prejudiced by this information, which implied that Battiste's actions also harmed the fetus. The trial court rejected this claim, ruling that the record refutes any possibility that this information was prejudicial. The trial court stated in pertinent part:

> I cannot find that counsel's failure to object to evidence of his wife's abortion was prejudicial. Evidence of his wife's abortion was certainly not the clincher in this case.

> Evidence that two small children shouted out to their grandma that "He's going to hit her!" and evidence of Margaret Barra's observations of the defendant actually hitting her and backing up over her contributed substantially to the defendant's conviction. Evidence that [the victim] told Margaret Barra just two weeks before the incident that she wanted to move because the defendant said he was going to kill her was also very significant. Evidence that Margaret Barra heard the defendant say, "I told you I would kill you," was damning. Evidence of a long list of minute details preceding the "accident" from the mouth of the defendant was most impressive; however, his explanation of how the accident occurred and his presentation of a convenient black-out to account for his failure to assist his wife after "accidentally" hitting her, going straight over to his sister's house to loan her his vehicle and to a liquor store, and not appearing for two days thereafter, despite the fact that he had told Detective Spingola on June 30, 1996 that he knew he had hit his wife … was an extremely compelling contribution to his conviction.

Thus, even if trial counsel had objected to this evidence and even assuming such objection would have resulted in the exclusion of this evidence, the outcome would not have changed. The evidence against Battiste was strong and, therefore, the admission of the challenged information was not prejudicial. Accordingly, based on the foregoing, the trial court was not required to conduct a hearing on this claim of error.

B. Insufficient Evidence Claim.

Battiste also claims that the evidence was insufficient to support his convictions. He argues that because both the victim and he denied that any intent to harm the victim existed, his convictions should be vacated. We cannot agree.

When reviewing a challenge based on insufficiency of the evidence:

> This court must affirm if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt. The function of weighing the credibility of witnesses is exclusively in the jury's province, and the jury

> verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.

State v. Alles, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (citation, emphasis and internal quotation marks omitted). Based on this standard of review, we cannot conclude that the evidence was insufficient to support the convictions. The record contains the eyewitness testimony of Barra that Battiste ran over his wife, stopped only to tell his injured wife that "I told you I would kill you," and then fled the scene without summoning help. The record also contains medical testimony indicating that the victim's injuries were consistent with being run over by a motor vehicle. Despite the victim's and Battiste's testimony contradicting this evidence, the evidence is sufficient to affirm the jury's verdict.

By the Court.—Judgment and order affirmed.

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