COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2056-CR **Cir. Ct. No. 2011CF422**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Fond du Lac County: RICHARD J. NUSS, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Jason Anderson appeals from a judgment convicting him of first-degree intentional homicide in the shooting death of his wife and of being a felon in possession of a firearm. Anderson also appeals from an order denying, without an evidentiary hearing, his postconviction motion

alleging ineffective assistance of counsel. We conclude that the circuit court properly exercised its discretion when it denied the postconviction motion without an evidentiary hearing because the record conclusively demonstrates that trial counsel's representation was neither deficient nor prejudicial. We affirm.

¶2 A circuit court may exercise its discretion to deny an evidentiary hearing on a postconviction motion if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996).

¶3 The ineffective assistance standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.

State v. Kimbrough, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations omitted). The prejudice inquiry asks whether "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. Romero-Georgana***, 2014 WI 83, ¶41, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted).

¶4 As we discuss the appellate issues, we bear in mind that Anderson does not challenge the sufficiency of the evidence to convict him of first-degree intentional homicide and being a felon in possession of a firearm. The evidence at trial included Anderson's inculpatory statements, physical and forensic evidence, testimony about Anderson's relationship with his wife, Anderson's ability to use,

disassemble and reassemble the gun he used to shoot his wife, and Anderson's expressed dislike for his wife and his multiple threats to shoot her. A witness reported that Anderson pointed a loaded gun at his wife and threatened to shoot her. We observe that the evidence against Anderson was strong and compelling. The evidence did not support Anderson's defense that he accidentally shot his wife.

Motion to Suppress

¶5 After he shot his wife, Anderson fled to Birmingham, Alabama where he was later apprehended. During a jailhouse interview in Birmingham, Alabama, with Fond du Lac, Wisconsin detectives, Anderson admitted that he owned a handgun despite his status as a felon, and he described the circumstances under which the gun fired. Sometime during the night, while in the marital bedroom, Anderson thought he heard a noise, and he retrieved his gun from the closet. While he fumbled with the gun, the gun seemed to jam and fired twice. One of the bullets struck and killed his wife, who was in the bed. Anderson then left the house and drove to Alabama.

¶6 Anderson's claims that his trial counsel was ineffective in relation to a motion to suppress Anderson's statements to law enforcement officers. Anderson contends that he was unlawfully questioned after he invoked his right to silence, but his trial counsel failed to cite his right to silence as a basis to suppress his statements.[1] Early in the jailhouse interview, Anderson stated that he

[1] Counsel's motion to suppress challenged the absence of counsel during Anderson's questioning. The circuit court rejected this basis for suppressing Anderson's inculpatory statements.

understood his ***Miranda***[2] rights. When he was asked to initial the ***Miranda*** rights waiver form, Anderson said, "I can't talk right now." Postconviction, Anderson argued that "I can't talk right now" was an invocation of his right to silence. Therefore, his subsequent interactions with the detectives and his ensuing inculpatory statements violated his constitutional rights. The circuit court ruled that "I can't talk right now" was not sufficient to invoke Anderson's right to silence.

¶7 A successful invocation of the right to silence requires that law enforcement officers cease questioning the suspect. ***State v. Cummings***, 2014 WI 88, ¶52, 357 Wis. 2d 1, 850 N.W.2d 915. Whether a suspect sufficiently invoked the right to remain silent presents a question of constitutional fact. ***State v. Markwardt***, 2007 WI App 242, ¶30, 306 Wis. 2d 420, 742 N.W.2d 546. We will uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently apply the constitutional principles to those facts. ***Id.***

¶8 If a suspect's expressed interest in remaining silent "is susceptible to 'reasonable competing inferences' as to its meaning, then the 'suspect did not sufficiently invoke the right to remain silent.'" ***Cummings***, 357 Wis. 2d 1, ¶51 (citation omitted). In light of the foregoing, the issue distills to whether "I can't talk right now" is a statement "susceptible to 'reasonable competing inferences'" as opposed to an unequivocal invocation of the right to silence. ***Id.***, ¶¶49, 51. Whether Anderson unequivocally invoked his right to silence is determined by examining the statement in the full context of the jailhouse interview. ***Id.***, ¶61.

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶9 Anderson argues that the proximity of "I can't talk right now" to the discussion of his ***Miranda*** rights suggests an unequivocal invocation of the right to remain silent. The postconviction motion alleges that when Anderson stated "I can't talk right now," the detective responded, "We can hold up a little bit if you want … until you feel a little better about it." The motion also alleges "Anderson emotionally stated that he did not want to live anymore." The audio of the interview includes sounds of Anderson crying. While "I can't talk right now" could be taken literally, the statement is also susceptible to a competing inference that it sprang from Anderson's agitated and emotional state as evidenced by the surrounding interaction, i.e., Anderson was having a hard time speaking due to his emotional state. Anderson then resumed conversing with the detectives, indicating that he did not intend to invoke his right to silence when he said "I can't talk right now."

¶10 Anderson's testimony and the circuit court's ruling at the motion to suppress hearing also do not help Anderson on appeal. Anderson testified that he wanted to speak to law enforcement officers and he did not demand a lawyer because "I was afraid that they wouldn't want to talk to me anymore and talk about the case, you know, I wouldn't be able to explain my side of the story." In denying Anderson's motion to suppress due to the absence of counsel, the circuit court found that Anderson was advised of all of his ***Miranda*** rights, including the right to silence, he waived those rights before he was questioned, and his inculpatory statements were not the product of coercion. Although the circuit court was not asked to decide whether Anderson invoked his right to silence, the court, having reviewed the interview, found that Anderson "wanted to volunteer ---volunteer information and cooperate with the authorities." The court found that Anderson's uncoerced, deliberate decision to speak with law enforcement officers

"radiates throughout that entire interrogation process." The court noted that there were times Anderson "may well have expressed some remorsefulness and became emotional," but that did not undermine the court's assessment that Anderson's inculpatory statements were made voluntarily.

¶11 Based on the foregoing, we agree with the circuit court that a motion to suppress based on a violation of Anderson's right to remain silent would have lacked merit. Therefore, trial counsel's failure to make this argument did not prejudice Anderson. *Cf.* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient performance if the challenge would have been rejected). The circuit court did not err in rejecting this ineffective assistance claim without an evidentiary hearing because the record conclusively demonstrates that Anderson was not entitled to relief.

Michael Harmsen's Testimony

¶12 Anderson argues that the circuit court should have held an evidentiary hearing on his claim that trial counsel was ineffective in the manner in which she cross-examined Michael Harmsen, a long-time friend of Anderson. Anderson argues that his trial counsel's cross-examination undermined Harmsen's credibility and rendered useless any aspect of Harmsen's testimony that might have been helpful to Anderson.

¶13 We need not determine whether counsel performed deficiently if we can decide the issue on the prejudice prong of the ineffective assistance analysis. ***Kimbrough***, 246 Wis. 2d 648, ¶26. We conclude that the record conclusively shows no reasonable probability that, but for counsel's allegedly unprofessional errors in cross-examining Harmsen, Anderson would have been acquitted of either

crime. ***Romero-Georgana***, 360 Wis. 2d 522, ¶41. Harmsen's testimony on direct examination was damaging and under no reasonable view of the evidence, would Harmsen's "helpful" testimony have led to an acquittal.

¶14 In addition to all of the other evidence supporting the guilty verdict,[3] the jury heard the following from Harmsen. Anderson was fascinated by and had extensive experience with guns, Harmsen and Anderson had fired guns together, Anderson possessed the gun used in this case, Harmsen observed Anderson shoot 100-150 rounds with the gun, and Anderson had completely disassembled, cleaned and reassembled the gun.

¶15 Harmsen also testified about Anderson's relationship and interactions with the victim. "Pretty much every time" Anderson drank with Harmsen, Anderson would say that he did not like his wife and he talked about wanting to shoot or kill[4] her. On one occasion, Harmsen witnessed Anderson pointing a loaded gun at his wife, saying that he wanted to shoot her. Harmsen described this incident as Anderson "just joking around" and Anderson's wife "laughed it off." Three to four months before the shooting, Anderson told Harmsen he was having an affair with Lori, an ex-girlfriend.

¶16 Harmsen claimed that law enforcement officers badgered or harassed him which led him to offer information so that the officers would leave him alone. In response to this testimony, the State impeached Harmsen with the

[3] See paragraph four.

[4] In a prior recorded statement, Harmsen said that Anderson made this statement "probably a dozen times." In his trial testimony Harmsen testified that Anderson made this statement only once.

testimony of one of the interviewing detectives and Harmsen's prior statements, including a recorded interview that did not support Harmsen's claim that officers harassed and badgered him.

¶17 Anderson complains that his trial counsel elicited additional damaging testimony from Harmsen to the effect that Harmsen detests law enforcement and lawyers, Harmsen would say anything to such persons whether true or not, and Anderson would be willing to engage in violence against such persons. We fail to see how, in the context of the entire trial, this cross-examination prejudiced Anderson.

¶18 Anderson argues that his trial counsel undermined certain of Harmsen's testimony, which Anderson characterizes as "helpful" to his defense. This "helpful" testimony included: Anderson was drinking and joking when he pointed a loaded gun at his wife, Anderson was not comfortable handling the gun, when Anderson shot the gun in Harmsen's presence he could not hit the target from "five feet away," Harmsen believed that pointing the gun at his wife indicated that Anderson was "not right in the head."

¶19 As the State points out on appeal, Harmsen's allegedly helpful testimony would not have been helpful at all, and the jury was not required to believe it or place weight on it. There was sufficient evidence that Anderson was comfortable with the gun he used to shoot his wife, and Anderson spoke about disliking and killing his wife. Bullet-riddled paper targets were found under Anderson's bed. The physical and forensic evidence did not support Anderson's accident defense. Finally, Anderson did not put his mental health in question as part of his defense, which effectively orphaned Harmsen's suggestion that Anderson was "not right in the head."

¶20 Our confidence in the outcome of the trial is not undermined by counsel's cross-examination of Harmsen. ***Id.*** Because the record conclusively demonstrates that Anderson was not prejudiced by counsel's cross-examination of Harmsen, the circuit court did not misuse its discretion when it rejected this ineffective assistance claim without an evidentiary hearing.

Other Acts Evidence

¶21 Anderson argues that his trial counsel was ineffective because she did not object to: (1) testimony from Anderson's former girlfriend, Lori, that she and Anderson had a sexual encounter approximately two months before the shooting, (2) the testimony of other witnesses about the relationship between Lori and Anderson, (3) evidence about a 2004 fight or argument between Anderson and his wife,[5] and (4) evidence that Anderson had a short temper.

¶22 The circuit court rejected this ineffective assistance claim without an evidentiary hearing. With regard to Lori's testimony, the court determined that such testimony was not other acts evidence; rather, it was panorama evidence that placed the shooting in context. "Evidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." ***State v. Dukes***, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515. The court determined that evidence about the 2004 fight between Anderson and his wife was also not other acts evidence. The court did not address the evidence of Anderson's temper.

[5] The shooting occurred in November 2011.

¶23 We focus on the prejudice prong of the ineffective assistance analysis and conclude that the record conclusively demonstrates that Anderson was not prejudiced by counsel's failure to object to this evidence. Evidence of Anderson's temper, his extramarital relationship, and his arguments with his wife were not unfairly prejudicial in light of testimony that Anderson told others that he disliked and wanted to kill his wife and had pointed a loaded gun at her. The record conclusively shows no reasonable probability that, but for counsel's allegedly unprofessional errors with regard to the alleged other acts evidence mentioned above, Anderson would have been acquitted of either crime. ***Romero-Georgana***, 360 Wis. 2d 522, ¶41.

Trial on felon in possession of firearm charge

¶24 Anderson argues that his trial counsel was ineffective because she did not advise him to plead guilty to the felon in possession of a firearm charge. Anderson essentially argues that there was no conceivable reason to put the felon in possession charge before the jury. Trying the firearm charge prejudiced his defense on the first-degree intentional homicide charge because the firearm charge could have led the jury to find that the shooting was not accidental because Anderson knew he was not supposed to possess a firearm.

¶25 The circuit court rejected this ineffective assistance claim without an evidentiary hearing.

¶26 It is undisputed that Anderson shot and killed his wife. Pleading guilty to the felon in possession charge would have kept from the jury evidence of the requisite prior felony for that crime: possession of tetrahydrocannabinols within intent to deliver. However, when considered in light of the strong and compelling evidence of Anderson's guilt of first-degree intentional homicide, it is

not reasonably probable that knowledge of Anderson's prior possession of tetrahydrocannabinols felony conviction played any role in the jury's decision to convict Anderson of the first-degree intentional homicide. ***Id.*** Anderson was not prejudiced by his trial counsel's approach to the felon in possession charge.[6]

Trial counsel's closing argument

¶27 Postconviction, Anderson complained that during her closing argument, trial counsel improperly referred to his decision not to testify and failed to object to the prosecutor's response to this reference, all to Anderson's detriment. The circuit court rejected this claim without an evidentiary hearing. The court noted that the jury was instructed that the arguments of counsel are not evidence and ruled that there was nothing improper in the closing arguments.

¶28 During her closing argument, Anderson's counsel declared trials a "gotcha business." Counsel explained that Anderson decided not to testify because his memory about the circumstances of the crimes was poor, and he would have been "obliterate[ed]" on cross-examination by the State. The State did not object. Before beginning its rebuttal, the State argued that it had to counter any juror speculation about why Anderson did not testify. The State asked the jury not to consider trial counsel's suggestion that Anderson's decision not to

[6] During her closing argument, trial counsel argued, "There's a charge for which you can find him guilty of which is felon in possession of a firearm. No one is fighting that." The State argues that counsel made a tactical decision to try the firearm charge to give the jury an option to convict Anderson of a less serious crime.

In the absence of an evidentiary hearing and findings of fact regarding trial counsel's strategy or lack thereof relating to the felon in possession charge, we cannot address whether trying that charge was a tactical decision designed to assist in the defense of the first-degree intentional homicide charge.

testify had anything to do with the prospect of being cross-examined. The State continued:

> Folks, I can speak clearly, I can ask questions, I know the law, I know the rules of evidence. I can't make a witness say anything on the witness stand. I can ask them questions and hope they tell the truth. And I don't know about obliterating witnesses, but the only witnesses who are afraid to testify if I'm asking them questions are the ones who aren't telling the truth, because that's my job. I confront them with the truth, the truth of the evidence.

Trial counsel did not object to this argument.

¶29 Anderson argues that his trial counsel was ineffective when she referred to Anderson's failure to testify. The jury was instructed that the arguments of counsel are not evidence. *See* WIS JI—CRIMINAL 160. We are not persuaded that counsel's reference prejudiced Anderson.

¶30 Anderson next argues that the State's response went beyond what is permissible in circumstances where the defendant's counsel offers unsworn reasons for a defendant's decision not to testify. ***State v. Edwardsen***, 146 Wis. 2d 198, 213, 430 N.W.2d 604 (1988). We disagree. The State's measured response focused on the prosecutor's perspective on the function of cross-examination, not on Anderson's silence. *See* ***id.*** Therefore, the State's response did not violate Anderson's right to remain silent. In the absence of that injury, the closing arguments did not prejudice Anderson.

¶31 The circuit court did not misuse its discretion when it rejected this ineffective assistance claim without an evidentiary hearing.

Conclusion

¶32 Having concluded that Anderson was not prejudiced by the performance of his counsel, we do not address Anderson's final argument that he was prejudiced by the cumulative effect of counsel's alleged deficiencies.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under Rule 809.23(3)(b).