COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP115-CR **Cir. Ct. No. 2013CF475**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN W. CHAVEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kevin Chavez appeals a judgment convicting him of attempted first-degree intentional homicide with use of a dangerous weapon as a repeater. Chavez also appeals an order denying his postconviction motion in which he challenged the sufficiency of the evidence and alleged his trial counsel provided ineffective assistance. He argues: (1) the State presented insufficient evidence of his intent to kill; and (2) his trial counsel was ineffective for failing to object to the prosecutor's closing arguments in which she allegedly invited the jury to convict Chavez on less than sufficient proof. We reject these arguments, and we affirm the judgment and order.

Sufficiency of the Evidence

¶2 When reviewing the sufficiency of the evidence, this court must review the evidence in the light most favorable to sustaining the jury's verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. ***Id.*** Applying this deferential standard of review, we conclude the State presented sufficient evidence to support the conviction.

¶3 Chavez and the victim, Max,[1] had a verbal altercation at an outdoor party. As Max turned to walk away, Chavez pulled a sawed-off shotgun from his pants and shot Max from a distance of about five feet. Max suffered an injury to his buttocks and substantial injury to his forearm. After the shooting, Chavez immediately fled the scene. At his trial, Chavez denied he was the shooter. The

[1] Pursuant to the policy behind WIS. STAT. RULE 809.81(8) (2015-16), we use a pseudonym when referring to the victim.

State's theory at trial to prove intentionality was that the shotgun pellets striking Max's forearm instead of vital organs probably saved his life. Medical experts testified the pellets entering Max's lower back torso could have been life threatening because they could have struck a major artery. The experts also testified that any gunshot could be life threatening, and being shot in the torso creates a higher risk of death.

¶4 To establish Chavez's intent to kill Max, the State had to prove two elements: (1) that Chavez had the mental purpose to take the life of Max or was aware that his conduct was practically certain to cause Max's death; and (2) Chavez did acts toward the commission of the crime which demonstrate unequivocally that he intended to kill and would have killed Max except for the intervention of another person or some other extraneous factor. WIS JI—CRIMINAL 1070 (2001). Intervention of another person or some other extraneous act is not an additional element. ***State v. Robbins***, 2002 WI 65, ¶37, 253 Wis. 2d 298, 646 N.W.2d 287. Rather, an attempted crime is complete when the intent to commit the crime is coupled with sufficient acts to demonstrate the improbability of free-will desistence. ***Id.*** The defendant's voluntary abandonment once an attempt is completed is not a defense. ***Id.***

¶5 Aiming a shotgun at a person's mid-section and deliberately firing it from a distance of five feet constitutes sufficient evidence to allow a jury to infer intent to kill. *See, e.g.*, ***State v. Webster***, 196 Wis. 2d 308, 324, 538 N.W.2d 810 (Ct. App. 1995). Nonetheless, Chavez contends four facts show he did not intend to kill Max: (1) he made no statements before or at the time of the shooting that threatened Max's life; (2) he fired only one shot; (3) he did not strike any vital organs; and (4) he allegedly considered driving Max to a hospital after the shooting. While threats, multiple shots fired, and striking a vital organ may be

sufficient to establish intent to kill, the law does not require proof of any of those facts. Regarding Chavez's alleged willingness to drive Max to a hospital after the shooting, the jury could reasonably find that testimony not credible, and remorse after the shooting does not prove lack of intent at the time of the shooting. *See* ***State v. Stewart***, 143 Wis. 2d 28, 45-46, 420 N.W.2d 44 (1988). From Chavez's acts, the jury could reasonably infer Chavez's mental purpose to take Max's life, that he was aware his conduct was practically certain to cause Max's death, and that Chavez did acts which demonstrate unequivocally that he intended to kill Max and would have done so but for the good fortune of Max's forearm absorbing the brunt of the shot.

Effective Assistance of Counsel

¶6 Chavez contends his trial attorney was ineffective for failing to object to statements the prosecutor made in her closing arguments. The prosecutor said, "[I]t's the intent to kill [Max] or intend acts that would have unequivocally meant that that was a possibility, and that's what we're saying Kevin Chavez did." In her rebuttal argument, the prosecutor further argued, "This is attempted because he intended the act that could have killed [Max]." Chavez contends the words "possibility" and "could have" understate what the State was required to prove.

¶7 To establish ineffective assistance of counsel, Chavez must show both deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, Chavez must show his counsel's failure to object was outside the wide range of professionally competent assistance. *See* ***id.*** at 690. To establish prejudice, he must show a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. ***Id.*** at 694. A reasonable probability is one that undermines out confidence in the outcome. ***Id.***

¶8 Chavez established neither deficient performance nor prejudice from his counsel's failure to object to the prosecutor's closing arguments. Chavez concedes the circuit court appropriately instructed the jury on the elements of the offense. The court also instructed the jury to "consider only the evidence received at trial and the law as given to you by these instructions," and to "decide upon your verdict according to the evidence under the instructions given to you by the court." The jury is presumed to follow the court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Under these circumstances, Chavez's counsel could reasonably rely on the jury to follow the court's instructions regardless of the prosecutor's arguments. Furthermore, in light of the circuit court's instructions, counsel's failure to object to the arguments does not undermine our confidence in the outcome of the trial.

By the Court.—Judgment and order affirmed.

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