**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 14, 2001

**Cornelia G. Clark**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 00-0468-CR**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL THOMPSON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY WAGNER-MALLOY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Michael Thompson appeals from a judgment convicting him of first-degree intentional homicide with a dangerous weapon and from an order denying his postconviction motion for a new trial. Thompson contends that three witnesses were intimidated by the State, trial counsel was

ineffective for failing to present defense witnesses, and the prosecutor improperly commented during his closing argument on Thompson's failure to prove his innocence. We reject Thompson's arguments and affirm.

¶2 The charges against Thompson arose from the apparently gang-related shooting death of Marvead Role in July 1995. Thompson's July 1996 trial ended in a mistrial because the jurors could not agree on a verdict. Thompson was convicted at his second trial in June 1998. Postconviction proceedings took place in late 1999 and early 2000. We will discuss the facts as needed to resolve the appellate issues.

¶3 Thompson's first appellate arguments allege witness intimidation by the State. He argues that the arrest of Timothy Taylor in the hallway outside the courtroom following Taylor's testimony in the first trial influenced Taylor and other witnesses to change their testimony in the second trial and testify more favorably for the State. At the first trial, Taylor testified that Thompson did not shoot the victim. Taylor also denied being a gang member. As he entered the hallway outside of the courtroom after his testimony, Taylor was arrested for perjury because he had falsely denied his gang membership. The commotion in the hallway was heard in the courtroom and witnessed by two other witnesses who were waiting in the hallway (Monique Thompson, the defendant's sister, and Mark McCray).

¶4 At the second trial, Taylor testified that Thompson shot Role after Role or a companion began shooting at the car in which Thompson was riding. Thompson posits that Taylor changed his testimony for the second trial because he was intimidated by his arrest for perjury at the first trial.

¶5 At the postconviction motion hearing, the circuit court found that Thompson did not show a nexus between Taylor's changed testimony and the alleged intimidation. The court found a "complete lack of any evidence showing governmental intimidation of witnesses [which] had any effect on the trial …." These findings are not clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000).

¶6 Thompson seems to argue that there need not be a nexus between the State's actions and the witness's testimony in order to reverse a conviction. We disagree. In ***Webb v. Texas***, 409 U.S. 95, 98 (1972), the Supreme Court reversed a conviction where the trial judge gratuitously and harshly admonished the sole defense witness on the dangers of perjury. As a result, the witness refused to testify. The Court found a nexus between the judge's comments regarding perjury and the witness's refusal to testify when it noted that "[t]he fact that [the witness] was willing to come to court to testify in the [defendant's] behalf, refusing to do so only after the judge's lengthy and intimidating warning [regarding perjury], strongly suggests that the judge's comments were the cause of [the witness's] refusal to testify." ***Id.*** at 97. The Court found that the defendant's due process right to offer witness testimony, which is integral to the right to present a defense, was violated by the judge's comments. ***Id.*** at 98; *see also* ***State v. Koller***, 87 Wis. 2d 253, 278, 274 N.W.2d 651 (1979) ("A fundamental element of due process of law is the defendant's right to present witnesses in his defense."). The issue is whether the witness was coerced into silence or other testimony by threats of prosecution. ***Id.***

¶7 Applying the nexus requirement, we conclude that Thompson has not demonstrated that Taylor's arrest during the first trial affected his testimony in the second trial. At the second trial, Taylor testified that his testimony incriminating Thompson resulted from his desire to "come clean" and tell the truth

to "[g]et it over with." Two weeks before the second trial, Taylor told police of Thompson's involvement in the shooting. Taylor also explained the aftermath of his arrest for perjury. He stated that after he testified at the first trial that he was not a gang member, the prosecutor confronted him with photographs which showed a gang insignia in his haircut. Taylor explained to the prosecutor that he had not been a gang member, was young when he got the haircut and was "a wannabe trying to get acknowledged by the older people and trying to get in a gang and trying to fit in." Taylor was released thirty minutes after he was arrested and no charges were brought. Taylor did not testify at the postconviction motion hearing. Therefore, we do not know whether Taylor would have supported Thompson's intimidation claim.

¶8 On this record, we see no connection between Taylor's arrest at the first trial and his testimony at the second. Taylor was questioned at the second trial about the inconsistencies in his two trial appearances. The arrest related to questions about his gang status, not his substantive testimony about the events surrounding Role's death.

¶9 As to the witnesses in the hallway, we see no link between Taylor's arrest and what happened at Thompson's second trial. Mark McCray but did not testify at either the first or the second trial. Thompson's sister, Monique, was a defense witness for the first trial and did not testify at the second trial.

¶10 Even though we do not find reversible error in the Taylor situation, we take a dim view of the prosecutor's decision to arrest Taylor immediately outside the courtroom in front of other witnesses. This approach created problems at the first trial and an appellate issue after the second trial. Such an approach may not always result in an error-free proceeding. We are confident that another

approach to apprehending Taylor could have been taken which would not have brought the matter within earshot of witnesses, trial participants and the jury. For example, Taylor could have been followed outside and arrested there.

¶11 Thompson also complains that Milton Lott was intimidated by the State. At the first trial, Lott testified that he never saw Thompson shoot a gun and did not know who shot Role. At the second trial, Lott testified that Thompson shot Role and had also fired a gun during an altercation two days before Role's death. Thompson attributes the change in Lott's testimony to the fact that Lott was aware of the existence of a draft criminal complaint charging him with conspiracy to commit murder and that other witnesses present at the shooting had been threatened with conspiracy charges.

¶12 At the second trial, Lott explained the change in his testimony. Lott testified favorably for Thompson at the first trial because he was concerned for his safety as he and Thompson were to be going to the same prison after trial. Lott contended that he was testifying truthfully at the second trial and that he and Thompson were no longer incarcerated together. Lott stated that he was not aware of any complaint charging him with conspiracy to commit murder.[1] Lott testified that a few weeks prior to the second trial, he initiated contact with the prosecutor to reveal what really happened to Role.

¶13 We fail to see any connection between any acts of the State (i.e., a draft conspiracy complaint) and Lott's incriminating testimony at the second trial.

[1] Lott was impeached with a letter he wrote to his former attorney before the first trial inquiring about the conspiracy charge. Counsel confirmed a pending investigation but no filed complaint. However, Lott affirmed on redirect that he had not been charged with the offense and never received the criminal complaint.

Lott's testimony at the second trial more closely tracked the statement he gave to police in July 1995, one day after the shooting.[2] Furthermore, defense counsel questioned Lott at the second trial about any promises or threats he received relating to his testimony. The jury was free to weigh this evidence. Finally, Lott did not testify at the postconviction motion hearing.

¶14 Thompson also argues that Calvin Edwards, who testified at the first trial but not the second, also learned of the existence of an unfiled criminal complaint charging him with conspiracy to commit murder. Thompson alleges that this threatened Edwards and affected his testimony.

¶15 This argument, which is not very well developed, lacks merit. While Edwards was advised of a possible perjury charge before the first trial, he nevertheless testified favorably for Thompson. Edwards did not testify in the second trial or at the postconviction motion hearing. We fail to see any nexus between Edwards's knowledge of a possible perjury charge and his trial testimony.

¶16 We turn to Thompson's ineffective assistance of trial counsel claims. To establish a claim of ineffective assistance, Thompson must show that his counsel's performance at the second trial was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Thompson must show that his counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The case is

[2] At the first trial, Lott disavowed parts of his statement to police.

reviewed from counsel's perspective at the time of trial, and Thompson has the burden to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** Professionally competent assistance encompasses a wide range of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689.

¶17 Even if counsel's performance was deficient, we will not reverse Thompson's judgment of conviction unless he proves that the deficiency prejudiced his defense. ***Id.*** at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** "The defendant 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." ***Id.*** at 694.

¶18 Ineffective assistance claims present a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). The circuit court is the ultimate arbiter of witness credibility at the hearing on such claims, ***State v. Angiolo***, 186 Wis. 2d 488, 495, 520 N.W.2d 923 (Ct. App. 1994), and we will not disturb that court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous, ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law that we decide without deference to the lower court. ***Id.***

¶19 Counsel's strategic decisions will be upheld as long as they were founded on a knowledge of the law and the facts. ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Merely because counsel's strategy was unsuccessful does not mean that his or her performance was legally insufficient. ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987). A trial attorney may select a particular strategy from the available alternatives and need not undermine the chosen strategy by presenting inconsistent alternatives. ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992).

¶20 Thompson faults his trial counsel for not calling Raymond Lenz, Cassandra Gordon or Victoria Waller to testify at trial. Counsel, who has over twenty years of criminal law experience, testified at the postconviction motion hearing that he made a strategic decision not to put on a defense because he believed that the State's case against Thompson was very weak and not proven beyond a reasonable doubt. The trial had been characterized by previously unidentified witnesses, witnesses changing their previous statements (Milton Lott and Timothy Taylor), and witnesses whom counsel deemed incredible. Counsel was concerned that if he put on witnesses, the State would have the weekend to locate witnesses for its rebuttal case. Counsel did not want to present defense witnesses who would detract from the weakness of the State's case and open the door for rebuttal witnesses. This defense strategy evolved during the course of the trial as counsel observed the weakness of the State's case against Thompson. Counsel spoke with Thompson about this strategy at length, and Thompson agreed to employ this strategy.

¶21 Counsel expounded upon his reasons for not calling Lenz, Gordon or Waller to testify at trial. Raymond Lenz, a crime lab technician, had analyzed hand swabs to determine which individuals fired a weapon on the night Role died.

Counsel was aware at the time of the second trial that the state crime laboratory had discontinued performing gunshot residue analyses because they were not useful forensically. Lenz would have testified to this change in crime laboratory policy. Therefore, counsel felt that evidence of gunshot residue on another person present at the shooting, Dache Chapman, would not have been compelling because Lenz would have discounted the value of the analysis. And, to the extent that gunshot residue evidence pointed to another shooter, that would have allowed the State to present rebuttal evidence supporting its claim that Thompson shot Role.

¶22 Cassandra Gordon, whom counsel's investigator interviewed several times, would have testified that she was on the telephone with her mother, heard what sounded like a firecracker, looked out the window, told her mother she had to call "911," looked out again and saw a person standing there with what appeared to be a gun, and saw the person run off. Gordon heard someone screaming "Dache did it, Dache did it"[3] immediately after Role was shot. Gordon told police someone other than Thompson was holding a gun that night.

¶23 Counsel stated that he did not call Gordon to testify because he was concerned that the State would make up for its weak case-in-chief in the rebuttal opportunity created by Gordon's testimony. Counsel did not find Gordon's testimony compelling and felt that Gordon was not a "good enough witness in my view to abandon the strategy of letting the jury decide based upon the case that they'd heard."

¶24 Counsel also considered and rejected calling Victoria Waller to impeach Shantae Lott and Vashti Waller. Shantae and Vashti testified at trial that

[3] Dache is Dache Chapman.

each saw the shooting and Thompson was the shooter. Victoria told counsel's investigator that at the time Role was shot, she was with Shantae and Vashti. They were a block away from the shooting and neither one was in a position to observe who actually fired the gun because her view would have been blocked by a house. Counsel believed that having Victoria testify would have necessitated a change in strategy, and counsel did not believe that Victoria's testimony was necessary. Also, Victoria was a convicted felon whose credibility would be undermined because the jury would have been told of her prior conviction.

¶25 Counsel was further aware that the State had disclosed the existence of a confidential jail informant who would have testified that Thompson confessed his role in the homicide to him. However, the informant did not testify in the State's case-in-chief, and counsel was worried that the informant was being held for rebuttal. Counsel was worried that the State would put on a forceful rebuttal case to buttress a weak case-in-chief if the defense opened the door by calling witnesses.

¶26 Postconviction, the prosecutor confirmed that he withheld a number of witnesses for use in rebuttal, including a confidential informant who would have testified that Thompson told him that he shot Role.

¶27 The court made the following findings: Trial counsel did not perform deficiently in any respect. Thompson understood the defense strategy and was active in his defense. There were sound strategic reasons for not calling witnesses. Because these findings are not clearly erroneous, we are left to decide the legal question of whether counsel performed deficiently. We conclude he did not.

¶28 The court's findings comport with the standard of reviewing the case from counsel's perspective at the time of trial. ***Johnson***, 153 Wis. 2d at 127. Thompson did not meet his burden to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** Counsel's strategic decision was founded on a knowledge of the law and the facts, ***Felton***, 110 Wis. 2d at 502. Counsel made a reasonable strategy choice under the circumstances.

¶29 Having concluded that counsel did not perform deficiently, we need not reach the prejudice prong of the ineffective assistance of counsel analysis. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶30 Thompson next argues that the circuit court committed reversible error when it admitted hearsay testimony from Shameka Wade over Thompson's objection. Wade was permitted to testify that she overheard a conversation between Role and Calvin Edwards that Role had lost "his shield" or gang protection. Edwards and Thompson were also affiliated with a gang. The State reasoned that this conversation was relevant to the existence of tension between the two gangs. The State also argued that Wade's testimony about the conversation was evidence of motive on the part of Edwards and those affiliated with his gang, including Thompson, to shoot Role. The State further reasoned that because the evidence was not being offered for the truth of the matter asserted (i.e., Role's gang status), it was not hearsay.

¶31 We disagree with the State's analysis of this evidence and the court's decision to admit this evidence. The evidence was not offered for the truth of Role's gang status. Rather, it was offered as evidence of the motive to shoot Role. This out-of-court statement was offered for the truth of the matter asserted about

motive and therefore constituted hearsay. WIS. STAT. § 908.01(3) (1997-98).[4] While motive is not an element of any crime, ***State v. Brecht***, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988), "[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent ...." ***State v. Johnson***, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984). Intent was an element of the homicide charge against Thompson. WIS. STAT. § 940.01(1). The evidence had a substantive evidentiary purpose and was relevant to Thompson's intent. The evidence should have been excluded as hearsay,[5] and the circuit court misused its discretion in admitting the evidence. ***State v. Miller***, 231 Wis. 2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999) (whether to admit evidence is discretionary with the circuit court).

¶32 Even though the court erred, we conclude that the error was harmless. An error is harmless if there is no reasonable probability that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Wade's hearsay testimony involved a conversation between Role and Edwards before the crime. Thompson admitted the shooting to two people (Timothy Taylor and Turmeika Adams) and eyewitnesses testified that Thompson shot Role. Therefore, it is not reasonably probable that the erroneous admission of Wade's hearsay testimony contributed to Thompson's conviction.

¶33 Finally, Thompson argues that the prosecutor inappropriately commented during closing argument on Thompson's failure to present a defense. The circuit court found that the prosecutor's remark came in the State's rebuttal portion of closing argument after Thompson had remarked that the State had not

[4] All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[5] The parties do not argue that a hearsay exception applies.

called Detective Kenneth Kopesky to testify. Detective Kopesky was one of the investigators of the shooting. After Thompson objected, the prosecutor clarified for the jury that Thompson was not required to testify or offer witness testimony. The jury instructions also made clear that the State bore the burden of proof, not Thompson.

¶34 We conclude that in clarifying for the jury that his comments about Detective Kopesky were not intended to be a suggestion that Thompson bore the burden to prove his innocence, the prosecutor cured any impression he initially gave the jury about Thompson's burden to prove his innocence. With that clarification, the prosecutor's remarks about Detective Kopesky, which came in rebuttal, were fair response to Thompson's remark that the State did not call Detective Kopesky to testify. The prosecutor functionally gave a curative instruction and put his comments about Detective Kopesky in the proper context for the jury.

*By the Court.*—Judgment and order affirmed.

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