COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2021

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2020AP722 **Cir. Ct. No. 2013CF838**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

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

¶1 PER CURIAM. James Anderson appeals an order denying his WIS. STAT. § 974.06 (2019-20)[1] postconviction motion to vacate his conviction for attempted first-degree intentional homicide of his mother and to grant him a new trial on multiple remaining charges based on ineffective assistance of counsel. Specifically, Anderson contends that his appellate counsel failed to argue on appeal that the evidence at his jury trial was insufficient to sustain a guilty verdict for the attempted homicide conviction. In addition, Anderson argues his appellate counsel failed to argue that the circuit court erred by not allowing the jurors to see certain evidence they requested during deliberations. We reject Anderson's arguments and affirm.

BACKGROUND

¶2 An amended Information charged Anderson with attempted first-degree intentional homicide, kidnapping, felony intimidation of a witness, strangulation and suffocation, false imprisonment, aggravated battery of an elderly person, and disorderly conduct, all as acts of domestic abuse. At the jury trial, Anderson's mother, Cecelia,[2] testified that Anderson, who lived with her, became upset and confronted her about an insurance settlement. Cecelia stated that during the eighteen months before the incident, Anderson had become increasingly hostile and threatened violence against her on "three or four" occasions. This behavior included threatening to put her "under a lake" or to put her in a barrel, nail it shut, pour gasoline on it, and then set it on fire.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Consistent with the spirit of WIS. STAT. RULE 809.86, we use a pseudonym for the victim to protect her identity.

¶3 Cecelia further testified that on the night in question, Anderson came into her bedroom and began choking her, telling her "today was the day [she was going to die]." Anderson voluntarily released her from the chokehold, but he then slapped her on the side of the face, grabbed her by her hair and threw her on the floor, threatened to kill her again, and then broke her cell phone in half. At some point before the date of the incident, Anderson had asked Cecelia if this was the day she wanted die, and told her that he had two bullets in a gun—one for her and one for his father.

¶4 After the physical altercation, Anderson retrieved a gun and told Cecelia she was going to drive them to Anderson's father's house. While Cecelia was putting on her shoes to leave, Anderson said "[h]e was going to kill [them] both" and that "he was going to kill [her] fast and [his father] slow." Thereafter, Anderson forced Cecilia to start driving toward his father's house. At some point, Cecelia feigned illness, telling Anderson that she was having pain in her chest and thought she might be having a heart attack, prompting her to pull into a gas station parking lot. Cecelia slowly walked into the gas station building and sought assistance. The attendant hid her in a utility closet, locked the station doors, and called the police. When law enforcement arrived, Cecelia spoke with them outside; Anderson however, had left by that time. Law enforcement retrieved a surveillance video recording from the gas station's exterior security camera.

¶5 Anderson's testimony as to his version of the evening's events differed substantially from Cecelia's testimony. Anderson acknowledged there was an argument regarding the insurance settlement, which escalated into the two of them pushing one another and Anderson slapping Cecelia across the face. However, Anderson denied ever choking Cecelia, breaking her cell phone, or grabbing a gun.

¶6 Anderson also testified that after he slapped Cecelia, she told him that he would have to ask his father about the insurance settlement and that she did not know anything about it. At that point, Anderson suggested that the three of them discuss the issue. According to Anderson, they both voluntarily got into Cecelia's car to drive to his father's house. On the way, they continued to argue about the settlement, and Cecelia made an excuse to stop at a gas station. After Cecelia did not return for a while, Anderson left with the car. He was subsequently located camping in Michigan.

¶7 During the trial, the jury watched the surveillance video of the exterior of the gas station where Cecelia and Anderson stopped on the night in question. The gas station attendant who was working that night testified as to the video's contents. She testified that she saw Cecelia and Anderson parked outside of the station and thought it was going to be a "domestic abuse" situation. She further testified that Cecelia came into the gas station after Anderson left and asked, "Could you help me?"

¶8 After about four hours of deliberation, the jury asked to see several exhibits again. As relevant here, the jury asked to review the surveillance video from the gas station again. The circuit court allowed the exhibits that were previously published to the jury to be sent to the jury room. The court, however, denied the jury's request to again watch the surveillance video.

¶9 The jury found Anderson guilty of all seven charges, including attempted first-degree intentional homicide. Anderson filed a postconviction motion alleging that his trial counsel was ineffective for failing to object to the testimony of the two investigating officers regarding what Cecelia told them as impermissible vouching. Anderson also claimed his trial counsel performed

deficiently by failing to call an expert witness to address the testimony of the State's expert regarding Cecelia's injuries. After a ***Machner***[3] hearing, the circuit court denied the motion. On appeal, we rejected Anderson's arguments and affirmed his convictions. ***State v. Anderson***, No. 2016AP2128-CR, unpublished slip op. (WI App Jan. 3, 2018). Anderson's petition for review was denied.

¶10 Through new counsel, Anderson filed a WIS. STAT. § 974.06 motion in the circuit court claiming that "his direct appeal counsel" provided constitutionally ineffective assistance by failing to raise two additional issues: (1) that the evidence was insufficient to convict him of attempted first-degree intentional homicide; and (2) that the circuit court erred by denying the jury's request to view the gas station surveillance video again. The State responded that any claim of ineffective assistance of counsel against Anderson's appellate counsel could not be brought in the circuit court but, rather, had to be pursued in the court of appeals via a petition for a writ of habeas corpus. The State further argued that Anderson's claims were meritless.

¶11 The circuit court held another ***Machner*** hearing, at which the attorney who handled Anderson's direct appeal at both the postconviction and appellate stages testified. Anderson's direct appeal counsel stated that she did not specifically recall considering either issue that Anderson raised in his WIS. STAT. § 974.06 motion, but she testified that her practice is to always consider sufficiency of the evidence and did not think it was a viable claim in this case. Counsel also stated that she knew the circuit court's decision not to allow the jury

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

to review the surveillance video was a discretionary one, and she did not think it was an issue worth pursuing.

¶12 The circuit court addressed the merits of Anderson's arguments, finding that there was sufficient evidence to support his conviction for attempted first-degree intentional homicide. The court further held that it had appropriately exercised its discretion by denying the jury's request to again review the surveillance video, and that any potential error was harmless. The court therefore found neither deficient performance by Anderson's initial appellate counsel, nor any prejudice to Anderson. Anderson now appeals.

DISCUSSION

I. Circuit court competency

¶13 At the outset, we address the circuit court's competency to consider the two ineffective assistance claims raised in Anderson's WIS. STAT. § 974.06 motion. Challenges to an attorney's performance should be brought in the court where the allegedly ineffective act or omission occurred. ***State ex rel. Warren v. Meisner***, 2020 WI 55, ¶36, 392 Wis. 2d 1, 944 N.W.2d 588. When an act or omission is something that took place or should have taken place after an appeal was filed, the appropriate procedure for bringing an ineffective assistance claim is to file a petition for a writ of habeas corpus in the court of appeals, more commonly known as a ***Knight***[4] petition. ***Id.***, ¶¶34, 39. The failure to follow the proper procedure for bringing an ineffective assistance of appellate counsel claim deprives the court of competency to proceed to judgment. *See* ***State v. Starks***,

[4] ***State v. Knight***, 168 Wis. 2d 509, 512, 484 N.W.2d 540 (1992).

2013 WI 69, ¶¶35-36, 349 Wis. 2d 274, 833 N.W.2d 146, *abrogated on other grounds by* ***Warren***, 392 Wis. 2d 1, ¶52.

¶14 The State argues that Anderson did not follow the proper procedure in bringing his ineffective assistance of appellate counsel claims, and that the circuit court should have dismissed them for lack of competency to proceed. In his WIS. STAT. § 974.06 motion, Anderson asserted that the circuit court was the proper forum for his ineffective assistance claims because he was alleging that direct appeal counsel was ineffective by failing to raise certain issues in a postconviction motion in the circuit court. The State notes, however, that under WIS. STAT. RULE 809.30(2)(h), a defendant must "file a motion for postconviction or postdisposition relief before filing a notice of appeal unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Both of the issues that Anderson claims his direct appeal counsel should have raised fall within these categories and would have been properly brought on Anderson's prior direct appeal. According to the State, however, Anderson's claim that counsel was ineffective in his direct appeal for failing to raise claims of sufficiency of the evidence and error in disallowing a jury's request to see a video played at trial should have been brought in this court via a ***Knight*** petition.

¶15 The State, nonetheless, acknowledges that Anderson is in the same position he would have been had he pursued the proper procedure and filed a ***Knight*** petition that we might deem sufficient to entitle him to a hearing. Although the State could bring a laches defense in response to a ***Knight*** petition, it does not assert one here. *See* ***State ex rel. Lopez-Quintero v. Dittmann***, 2019 WI 58, ¶10, 387 Wis. 2d 50, 928 N.W.2d 480. And because we review ineffective assistance claims de novo, we can consider Anderson's claims regardless of whether the circuit court had competency to proceed. *See* ***State v. Savage***, 2020

WI 93, ¶25, 395 Wis. 2d 1, 951 N.W.2d 838. For those reasons, we opt to review the merits of Anderson's claims.

II. Ineffective assistance of appellate counsel

¶16 This court's review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The circuit court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law that we review independently. ***Id.***

¶17 To demonstrate constitutionally ineffective assistance, a defendant must show both that counsel's performance was deficient and that it prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness by demonstrating that counsel "made errors so serious that 'counsel' was not functioning as the counsel guaranteed by the Sixth Amendment." ***Savage***, 395 Wis. 2d 1, ¶28 (citation omitted). When the defendant is challenging appellate counsel's failure to raise a particular claim, the defendant must also show that the claim "was clearly stronger than issues that counsel did present." ***Starks***, 349 Wis. 2d 274, ¶59 (citation and emphasis omitted).

¶18 To demonstrate prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial. ***Savage***, 395 Wis. 2d 1, ¶32. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. A reasonable probability is a probability sufficient to

undermine our confidence in the outcome. *See* ***id.*** If the defendant fails to satisfy either prong of the ineffective assistance test, we need not consider the other. ***Savage***, 395 Wis. 2d 1, ¶25.

A. Sufficiency of the evidence of attempted first-degree intentional homicide charge

¶19 Anderson first argues that the evidence at trial was insufficient to sustain his attempted first-degree intentional homicide conviction, and that appellate counsel was therefore ineffective for failing to challenge the sufficiency of the evidence to support that conviction. Whether the evidence was sufficient to support a guilty verdict is a question of law that we review de novo. *See* ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. When reviewing a sufficiency of the evidence challenge, we must view the evidence in the light most favorable to sustaining the verdict. ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). We will not "reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶20 The Wisconsin statutes define the crime of attempt as follows:

> An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

WIS. STAT. § 939.32(3). In summary, attempt has two elements: (1) that the defendant had the requisite intent to commit the crime attempted; and (2) "that he [or she] perform 'acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he [or she] formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.'" ***Berry v. State***, 90 Wis. 2d 316, 326, 280 N.W.2d 204 (1979).

¶21 Anderson relies upon the necessary temporal element of an attempt offense to argue that the evidence here was insufficient to convict him as a matter of law. "Under [WIS. STAT.] § 939.32(3), … one attempts to commit a crime only when it has become too late to 'repent[] and withdraw[]' from the criminal act." ***State v. Henthorn***, 218 Wis. 2d 526, 533, 581 N.W.2d 544 (Ct. App. 1998) (citation omitted) (bracketed alterations in original). To determine whether "under all the circumstances it was too late [for the defendant] to 'repent[] and withdraw[]," Wisconsin courts have adopted the so-called "stop the film" test. ***Id.*** at 534. Under that test, the evidence is evaluated

> as though a … film, which has so far depicted merely the accused person's acts without stating what was his [or her] intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question[,] then the accused has done what amounts to an "attempt" to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough.

Id. (citation omitted). From this perspective, the circuit court considers "to what end the [defendant's] acts are directed." *See* ***State v. Stewart***, 143 Wis. 2d 28, 42, 420 N.W.2d 44 (1988).

¶22 Relying upon this analysis, Anderson contends the film was stopped when Cecelia went into the gas station. He argues that, as a matter of law, if the events had played out, there were many possible endings other than Cecelia's murder. He notes that while the evidence may have shown he intended to kill Cecelia, that meets only the first element of attempt. Anderson asserts the evidence of intent must be "accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will." ***Id.*** at 31. According to Anderson, the evidence at trial was insufficient because it did not demonstrate that it was "too late" for him "to 'repent[] and withdraw[]' from the criminal act." *See* ***Henthorn***, 218 Wis. 2d at 533 (citation omitted).

¶23 Anderson further argues that there were other reasonable possible endings "too numerous to count," because the point at which the film stopped was too far removed from the intended final act. Anderson contends this case is like ***Henthorn***, where the court held that a forged prescription did not constitute an attempt to fraudulently acquire prescribed drugs because it was insufficient to demonstrate that it was too late for the defendant to repent—rather, she had to return to the pharmacy multiple times in order to accomplish the crime alleged, and the actual completion of the crime was not the only answer. *See* ***id.*** at 533-34. According to Anderson, his case is similar because he would have had to complete too many intermediary acts for a jury to conclude that Cecelia's murder was the only possible outcome, absent the intervention of the gas station attendant. And, he claims his past history and his threats to Cecelia, which were never acted upon, support a conclusion that Cecelia's murder was not the only possible or likely outcome.

¶24 Contrary to Anderson's assertion, the fact that the crime is not yet completed and that he had sufficient opportunity to change his mind and did not follow through with the crime absent intervention does not mean that there has not been an attempt. *See* ***Stewart***, 143 Wis. 2d at 42. The crime of attempt required the State to prove only that Anderson intended to kill Cecelia before she escaped and he had performed sufficient acts in furtherance of that crime. *See* ***id.*** at 40. Under WIS. STAT. § 939.32(3), Anderson's conduct must have passed the point "where most men [or women], holding such an intention as the defendant holds, would think better of their conduct and desist." ***Stewart***, 143 Wis. 2d at 40 (citation omitted).

¶25 Moreover, Anderson ignores our standard of review. Rather than evaluating only whether there was sufficient evidence to convict Anderson of attempted first-degree intentional homicide, we must instead determine if his appellate counsel performed deficiently in failing to raise the sufficiency of the evidence issue. Anderson's counsel testified that she reviewed the entirety of the case file and sent Anderson a letter outlining which issues might merit review and their potential likelihood of success. Counsel testified that she always considers sufficiency of the evidence, but she did not think it was a viable basis for appeal here because "if you believed everything [Cecelia] said, there was not a sufficiency issue." This decision was reasonable in light of the evidence and the difficult legal standard to overcome for sufficiency of the evidence claims.

¶26 In this case, viewing the evidence in a light most favorable to the verdict, the jury could reasonably conclude that had Cecelia not sought refuge at the gas station, Anderson had taken sufficient steps—specifically, threatening and harming her, forcing her into the car at gun point, and having her drive toward his father's house with a gun threatening to kill both Cecilia and Anderson's father—

that it was unlikely Anderson would have voluntarily desisted from the crime. The jury apparently concluded that it was too late for Anderson to stop and repent. The jury could have also found differently—i.e., that Anderson permitted Cecelia to pull into the gas station and let her go inside showed that he thought better of his conduct and desisted, but it did not. Instead, the jury reasonably concluded that Anderson's actions unequivocally evidenced his intent to kill Cecelia and that the crime would have been committed absent the gas station stop. Given the deference granted to a jury's verdict, Anderson's appellate counsel reasonably determined not to pursue on direct appeal a claim of insufficient evidence to convict Anderson of the attempted homicide charge.

¶27 ***Henthorn*** is distinguishable. Here, Anderson was en route with Cecelia to murder her. He did not have to take separate action at a different time in order to commit the crime. Anderson's actions were not attenuated from the likely crime as was the case in ***Henthorn***. Rather, Anderson had taken unequivocal steps to act. While Anderson could have changed his mind, that is not the test. The test is whether Anderson took sufficient steps such that the jury could have reasonably found beyond a reasonable doubt that he would not have changed his mind absent the intervention.

¶28 In light of the standard of review on the sufficiency of the evidence claim and the evidence in the record, Anderson's counsel did not perform deficiently in failing to raise the sufficiency of evidence issue in Anderson's first postconviction motion. In addition, it was reasonable for counsel to bring what she considered to be stronger claims that affected all of the charges, not just the attempted homicide charge. For these reasons, we reject Anderson's claim that his direct appeal counsel was ineffective by failing to raise a sufficiency of the evidence claim.

B. Showing of surveillance video to the jury during deliberations

¶29 Anderson also contends that the circuit court erroneously exercised its discretion by refusing to permit the jury to review the surveillance video from the gas station during its deliberations, and that his direct appeal counsel was ineffective by failing to argue that the court erred. When determining whether to allow the jury to view an exhibit during deliberations, a circuit court is "guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury." ***State v. Hines***, 173 Wis. 2d 850, 860, 496 N.W.2d 720 (Ct. App. 1993).

¶30 Anderson argues the circuit court did not address the ***Hines*** factors in its oral ruling disallowing the jury to review the surveillance video. And, to the extent the court did address those factors, Anderson asserts that its rationale for refusing to show the jury the video again was "still an erroneous exercise of discretion because the circuit court failed to 'use a demonstrated rational process to reach a reasonable conclusion.'" (Citation omitted.) Anderson further argues that this error was not harmless.

¶31 Again, Anderson ignores our standard of review. We review whether postconviction counsel acted reasonably in deciding not to pursue this issue in Anderson's first postconviction motion and on appeal. Anderson's counsel did not specifically recall considering whether to raise an issue regarding the jury's request to review the surveillance video. She testified, however, that she generally does not believe it is worthwhile to challenge discretionary decisions unless there is no other viable claim. Nevertheless, she stated that if she had

believed the surveillance video issue could have resulted in relief, she would have raised it.

¶32 As Anderson admits, the decision whether to provide an exhibit to the jury during deliberations is committed to the circuit court's discretion. *See* ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by* ***State v. Alexander,*** 2013 WI 70, ¶28, 349 Wis. 2d 327, 833 N.W.2d 126. We will uphold discretionary decisions as long as the circuit court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach." ***State v. Dorsey***, 2018 WI 10, ¶37, 379 Wis. 2d 386, 906 N.W.2d 158 (citation omitted).

¶33 Here, while the circuit court may not have specifically referenced the ***Hines*** factors, we search the record to support its decision. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 264 Wis. 2d 1, 666 N.W.2d 771 The court's comments on the record show that it considered the ***Hines*** factors when it decided not to replay the surveillance video. The court explained that it made the discretionary decision to provide the jury with the requested exhibits that were readily available and were not unduly prejudicial. The court, however, determined that playing the surveillance video and reading back an interview transcript from it would be logistically difficult, would interrupt deliberations, and would risk having the jury unduly focus on portions of those exhibits. The court told the jurors to rely on their collective memory of the surveillance video and interview. The court examined the relevant facts and, consistent with the ***Hines*** factors, reached a decision a reasonable judge could reach.

¶34 In addition, even if the circuit court erroneously exercised its discretion in refusing to permit the jury to again review the video, Anderson has failed to show that his counsel's performance in failing to pursue this claim was prejudicial. Anderson cannot show a reasonable probability of a different outcome had the jury watched the video again. As the court aptly noted, if it had allowed the jury to re-watch the video, "it would have just reaffirmed what they had seen earlier and heard earlier," and they could use their collective memory to reach a decision as instructed, rather than watching the video again. Additionally, Anderson argues that the video showed that he did not have a gun in the car during the abduction. But the jury found that Anderson did not use a dangerous weapon during the incident and acquitted him of the dangerous weapon enhancer, meaning the jurors likely used their collective memory of the video to reach such a conclusion. Anderson provides no other basis for his claim that the jury would have reached a different outcome had they reviewed the video. There is not a reasonable probability that the outcome of Anderson's appeal would have been different had his counsel challenged the court's discretionary decision regarding the video.

By the Court.—Order affirmed.

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