COURT OF APPEALS
DECISION
DATED AND RELEASED

April 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos.94-2474-CR
94-3144-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES L. HOLLOWAY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE and JOHN A. FRANKE, Judges. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. James L. Holloway appeals from a judgment of conviction, after a jury trial, for three counts of first-degree intentional homicide while armed, as a party to a crime, contrary to §§ 940.01(1), 939.63 and 939.05, STATS. He also appeals from an order denying his postconviction motion for a

new trial.[1] He raises several disparate issues for our review: (1) whether the trial court erred by denying his postconviction motion for new trial without a ***Machner***[2] hearing (Holloway had challenged the effectiveness of his trial counsel); (2) whether the Wisconsin Constitution places the burden of disproving prejudice in an ineffective assistance of counsel claim on the State; (3) whether the trial court should have given the jury a lesser-included offense instruction on second-degree intentional homicide; (4) whether the trial court erred in instructing the jury on the theory of the case, the location of the defendant following the crime, and accomplice liability; and (5) whether the trial court erred in admitting other acts evidence. We reject Holloway's arguments and affirm.

I. BACKGROUND.

Holloway and his co-defendant were convicted of killing three people in a drug house by shooting them in the head at point-blank range. The amended criminal complaint alleged that Holloway and Bland killed the victims after an argument over the quality of drug deliveries and encroachment on territory. Each defendant claimed that the other had done the shootings and each defendant said he went along out of fear of being killed. We address further facts within the relevant discussions below.

II. ANALYSIS.

A. Ineffective Assistance of Counsel Claim.

Holloway argues he should have been granted a new trial because he received ineffective assistance of trial counsel. The trial court denied his new trial motion without a ***Machner*** hearing. Holloway argues that the trial court

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[1] The Hon. Michael D. Guolee presided over the trial; the Hon. John A. Franke presided over the postconviction motion.

[2] *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

should have held an evidentiary hearing before deciding his motion. We disagree.

Before a trial court must grant an evidentiary hearing on an ineffective assistance of counsel claim, a defendant must raise factual allegations in the motion and affidavits that raise a question of fact for the court. *See* ***State v. Washington,*** 176 Wis.2d 205, 214-15, 500 N.W.2d 331, 335-36 (Ct. App. 1993). "A conclusory allegation of ineffective assistance of counsel, unsupported by any factual assertions, is legally insufficient and does not require the trial court to conduct an evidentiary hearing." ***State v. Toliver,*** 187 Wis.2d 346, 360, 523 N.W.2d 113, 118 (Ct. App. 1994). We review a trial court's denial of a motion for a ***Machner*** hearing *de novo*. ***State v. Tatum,*** 191 Wis.2d 547, 551, 530 N.W.2d 407, 408 (Ct. App. 1995). We must review the defendant's motion to determine whether it contains factual allegations to support the dual-pronged ineffective assistance of counsel standard set forth in ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). *See* ***State v. Saunders,*** 196 Wis.2d 45, 51, 538 N.W.2d 546, 549 (Ct. App. 1995). The first prong requires that the defendant show that counsel's performance was deficient. ***State v. Johnson,*** 126 Wis.2d 8, 10, 374 N.W.2d 637, 638 (Ct. App. 1985), *rev'd on other grounds*, 133 Wis.2d 207, 395 N.W.2d 176 (1986). That is, the defendant must show that counsel's conduct was "`unreasonable and contrary to the actions of an ordinarily prudent lawyer.'" ***Id***. at 11, 374 N.W.2d at 638 (citation omitted). The second prong requires that the defendant show that the deficient performance was prejudicial. ***Id***. at 10, 374 N.W.2d at 638. To be considered prejudicial, 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"—i.e., "a probability sufficient to undermine confidence in the outcome." ***Strickland,*** 466 U.S. at 694.

In his postconviction motion, Holloway alleged ineffective representation in several respects: (1) for failing to move to sever Holloway's case from Bland's case; (2) for failing to object to the introduction and publication of crime scene photographs; (3) for misstating Holloway's burden of proof during closing argument; and (4) for failing to object to Holloway appearing in prison clothes during *voir dire*. Holloway did not present any affidavits with his postconviction motion. Our *de novo* review of the postconviction motion establishes that Holloway did not raise sufficient *factual* allegations in his motion with respect to any of his contentions to support both

prongs of the ***Strickland*** test. *See* ***Saunders,*** 196 Wis.2d at 51, 538 N.W.2d at 549. Accordingly, the trial court properly denied his motion without an evidentiary hearing.

First, with respect to the severance claim, Holloway does not raise sufficient factual allegations with respect to the performance prong—that is, that his counsel was deficient in failing to move for severance of the defendants. His motion alleges that, at trial, once it became clear that the co-defendants' defenses were "mutually antagonistic," the trial court called the parties into chambers to discuss the matter. He alleges that counsel advised the court that he had discussed the matter with Holloway and that based on his advice Holloway did not wish to sever the trial. He does not raise any factual allegations of what counsel's advice was. Hence, Holloway did not raise specific factual allegations of how counsel's advice was deficient or specific factual allegations of how this advice prejudiced him. *See* ***id***.

Second, with respect to the crime scene photographs, Holloway raises only conclusory allegations in his motion, not specific factual allegations. *See* ***id***. He alleged "that he was prejudiced by these photographs because the only purpose they served was to appeal to the jury's sympathies, arouse its sense of horror and provoke its instinct to punish." This allegation is "opinion-subjective" and, accordingly, is insufficient to necessitate an evidentiary hearing. *See* ***id***. (citation omitted).

Third, on the burden of proof statements in the closing argument, Holloway alleged in his motion that "[o]n several occasions during the closing argument, ... counsel told the jury that he had the burden of proving Mr. Holloway innocent." He alleged "that this misstatement by his trial counsel severely prejudiced his case because it gave the jury the impression that Mr. Holloway had to prove that he was innocent." Again, without further specific factual assertions of what happened, the allegation is insufficient to mandate a hearing because it is merely conclusory. "More is needed." ***Id***. at 52, 538 N.W.2d at 549.

Finally, with respect to the prison clothes issue, Holloway alleged that on the day of *voir dire* his street clothes were missing and that a stranger's

clothes were in their place. He then alleged that the "trial court instructed that Mr. Holloway either wear the clothes that were available or else appear before the jury in prison clothes." Holloway wore the prison clothes. Additionally, he alleged that "when Mr. Holloway's trial counsel failed to object, Mr. Holloway was denied his fundamental right to a fair trial ...." These allegations are insufficient to raise a factual question with respect to the prejudice prong of the ***Strickland*** test—that is, he has not raised a question of fact on how this alleged error undermines the confidence in the proceeding.

In sum, the trial court properly denied Holloway's ineffective assistance of counsel motion without a hearing. Accordingly, we will not address the merits of Holloway's claim.

B. Ineffective Assistance Claim Under Wisconsin Constitution.

Holloway argues that Article I, Section 7 of the Wisconsin Constitution requires that the State bear the burden of showing that a defendant was not prejudiced by the ineffectiveness of counsel. He bases his argument on Wisconsin cases predating the United States Supreme Court decision in ***Strickland***. We need not resolve this question because the Wisconsin Supreme Court has consistently applied the test presented in ***Strickland.*** *See, e.g.*, ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). Indeed, "[w]hether such a burden should be adopted is properly left to our supreme court." ***State v. Esser,*** 166 Wis.2d 897, 905, 480 N.W.2d 541, 544 (Ct. App. 1992) (discussing whether Wisconsin requires a higher ***Miranda*** waiver burden than federal constitution).

C. Lesser-Included Offense Instruction.

Holloway argues that the trial court erroneously exercised its discretion by rejecting his request for a charge of second-degree intentional homicide based upon his coercion defense. The court concluded that the evidence conclusively proved that Holloway conspired to commit the crimes and that it was insufficient to prove that he withdrew from the conspiracy.

A trial court engages in a two-step analysis in determining whether to submit a lesser-included offense jury instruction. *See* ***State v. Muentner,*** 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). First, the court must determine whether the crime is a lesser-included offense of the charged crime. ***Id***. Next, the court must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. ***Id***. If both steps are satisfied, the trial court should submit the lesser-included instruction to the jury if the defendant requests it. *See* ***id***. A trial court commits reversible error if it refuses to submit an instruction on an issue that is supported by the evidence. ***State v. Weeks,*** 165 Wis.2d 200, 208, 477 N.W.2d 642, 645 (Ct. App. 1991). Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law that we review *de novo*. ***Id***. In addition, we must view the evidence in a light most favorable to the defendant. ***State v. Davis,*** 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988).

There is no question that second-degree intentional homicide is a lesser-included offense of first degree-intentional homicide. *See* § 939.66(2), STATS. (a crime is a lesser-included offense if it is "a less serious type of criminal homicide than the one charged). Hence, the first prong is satisfied. With respect to the second prong, we conclude that the evidence allows no hypothesis other than Holloway was Bland's co-conspirator. As such, Holloway was not entitled to rely upon the defense that his conduct was the result of Bland's coercion. Section 939.46(1), STATS.; ***State v. Dyleski,*** 154 Wis.2d 306, 310, 452 N.W.2d 794, 796 (Ct. App. 1990).

Evidence that Holloway and Bland conspired to rob the victims is uncontradicted in the record. The trial court submitted all three alternatives of

party-to-a-crime culpability under § 939.05, STATS. Holloway's conduct demonstrated culpability under either a conspiracy or an aider or abettor theory. No element of the coercion defense finds evidentiary support in the record. Holloway points to no evidence that his participation in the homicides was the only means of preventing death or great bodily harm to himself or his girlfriend. No evidence would support a finding that Bland by threat compelled Holloway's participation or even that Bland prevented him from departing the premises. The trial court did not err in declining to submit a lesser-included offense charge.

D. Jury Instruction Errors.

Holloway asserts three errors as to jury instructions. First he argues that the trial court's reading of uniform instruction, WIS J I— CRIMINAL 172, the "so-called" flight instruction, told the jury to conclude that Holloway's conduct did indeed constitute flight. Secondly, by the trial court's reading of WIS J I—CRIMINAL 245 (relating to evaluation of an accomplice's testimony), Holloway argues that the jury would have to conclude that he was a participant in the crimes. Holloway also argues that the trial court's deviations from the pattern charges were reversible errors.

Holloway failed to object to these matters with the required particularity at trial; his objections were general and did not properly preserve the issues for appeal. *See* ***Bethards v. State***, 45 Wis.2d 606, 616, 173 N.W.2d 634, 640 (1970) (stating objections to instructions must be made with specificity). Failure to preserve objections generally forecloses appellate review. *See* ***State v. Marcum,*** 166 Wis.2d 908, 915-16, 480 N.W.2d 545, 549 (1992). Hence, we will not address these alleged errors.

E. Other Acts Evidence.

Holloway argues that the trial court committed prejudicial error by allowing the State to introduce evidence that Holloway shot at another man, two weeks prior to the homicides. The court admitted it on the theory of a plan or preparation and also stated that it completed the "story" of the crime. The court also concluded that its probative value was not substantially outweighed by the danger of unfair prejudice. Holloway counters by stating that the prior shooting was separate and distinct from this crime and did not involve a person linked to the events surrounding the homicides. Further, he argues that the evidence provides no link between the alleged shooting and the homicides.

At an *in limine* hearing on the admissibility of the evidence, a witness testified that he (the witness) sold drugs with Bland out of a drug house frequented by two of the homicide victims. The witness stated that two weeks before this crime, Holloway and Carlos Brown argued about drugs; that Holloway grabbed Brown's .380 caliber handgun and shot at him, but missed; and that Bland took hold of Holloway and prevented further discharges. The witness also testified that the next day Holloway shot at Brown from a window. He also testified that Holloway stole Brown's handgun and gave it to Bland.

The admission of other acts evidence is a question committed to the discretion of the trial court. ***State v. Murphy,*** 188 Wis.2d 508, 517, 524 N.W.2d 924, 927 (Ct. App. 1994). We will reverse a trial court's discretionary decision only upon an erroneous exercise of that discretion. ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). Other acts evidence is admissible when it establishes the context of the crime or when necessary to present the case fully. ***State v. Chambers,*** 173 Wis.2d 237, 255-56, 496 N.W.2d 191, 198 (Ct. App. 1992).

Holloway's shooting at Brown tends to establish his motive and intent for the homicides and, moreover, undercuts Holloway's coercion-withdrawal defense. The trial court did not erroneously exercise its discretion to admit this evidence and properly concluded that its significant probative value was not substantially outweighed by unfair prejudice. *See* RULE 904.03, STATS. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

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