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

**June 28, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP970-CR** **Cir. Ct. No. 2008CF56**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHAD JORGENSEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Langlade County: FRED KAWALSKI and JAMES R. HABECK, Judges. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Chad Jorgensen appeals a judgment convicting him of solicitation to commit first-degree intentional homicide. He also appeals an

order denying his postconviction motion in which he alleged ineffective assistance of trial counsel. The State charged Jorgensen with soliciting Ryan Becker to kill Jorgensen's ex-wife, Kelly. Jorgensen argues: (1) reading the jury the transcripts of his discussions with Becker instead of playing the recordings of the conversations denied him a fair trial because the transcripts were inaccurate, provided no context for the statements, and failed to reflect the tenor of Jorgensen's statements; (2) Jorgensen's counsel was ineffective for failing to play the recordings; (3) his counsel was ineffective for failing to discuss entrapment in his closing argument; and (4) the court improperly limited cross-examination of Kelly and Becker. We reject these arguments and affirm the judgment and order.[1]

## BACKGROUND

¶2 Jorgensen and Becker were inmates in the county jail. Becker reported to jail officials that Jorgensen told other inmates he wanted to have his wife killed and Becker believed Jorgensen was serious. Becker offered to wear a wire in exchange for being released from jail. He recorded conversations with Jorgensen that occurred outside the jail on March 22 and March 26, 2008.

¶3 Although the recordings of the conversations were not played to the jury, witnesses and the district attorney read various portions of the transcripts to the jury, and the transcripts were sent to the jury room during deliberations. Becker read from a transcript of the March 22 conversation, parts of which indicate that prior discussions had occurred, Jorgensen was serious about wanting Kelly killed, and Jorgensen would feign dislike for Becker so the police would not

[1] The judgment of conviction was entered by Judge Kawalski and the order denying the postconviction motion was entered by Judge Habeck.

suspect collusion between them. Becker asked, "So if I do her in, how much would you give me?" Jorgensen responded, "I don't know." When Becker said he did not know what Jorgensen's ex-wife looked like, Jorgensen responded, "Well, that's why I was thinking that once we both got out of our situation, we've both got plenty of pictures still. There's no problem with that. I can give you the address." When Becker said, "I could go down to [inaudible transcript], shoot her, come back to Antigo, go back to jail, whose gonna know?" Jorgensen responded, "No big deal." Jorgensen also indicated he believed he could buy a handgun off the streets of Milwaukee, and when Becker questioned whether a .22 "would kill her," Jorgensen responded, "Yeah, slowly." They also discussed ways of disposing of the body, by cutting her into pieces, burning the body or throwing it in a lake. Jorgensen provided Becker with a mystery novel that set out "the perfect way of committing the crime of murder."

¶4 After some discussion which included mention of Becker buying a van from Jorgensen, Becker suggested a price of $10,000. He said, "I'd like to at least get half, and then we'll work something out where, you know, you want to see me do it that's fine." Jorgensen responded after laughing, "No. I can't believe I'm even talking about it, what I was hoping was we wouldn't really have to talk about nothing. I mean, if you do it, you do it, you know?" After an unintelligible statement from Becker, Jorgensen continued, "I'd be good for it. I'd give you half up front."

¶5 The State concedes that Becker's reading of the transcript included some errors. While reading from the transcript, at one point Becker added the words, "I says" before he read the statement, "You're the one that's always saying something you go, I'm not going to say anything. Then you say something like, you know, I had this dream and I'm like just don't say nothing." By adding the

words "I says," Becker changed the identity of speaker from Jorgensen to himself. Becker also failed to point out the blanks in the transcription where the transcriber was unable to discern what was said, giving an inaccurate rendition of the conversation.

¶6 On several occasions in the March 22 and March 26 conversations, Becker indicated that he would commit suicide rather than return to prison. Becker testified the threat of suicide was not serious. The court prohibited the defense from presenting evidence that Becker made a suicide attempt in the jail in March 2008, concluding that evidence was not probative of Becker's bias or motivation for falsifying testimony and was inflammatory in nature. The court reasoned the evidence of a suicide attempt would not add anything and would be very prejudicial.

¶7 Several witnesses testified that Jorgensen repeatedly talked about killing Kelly. They did not believe he was serious. Kelly testified Jorgensen threatened her on several occasions. The court prohibited the defense from introducing evidence that Kelly called the police on nineteen occasions but did not report Jorgensen's threats to her life. The court indicated the defense could ask Kelly whether she ever reported threats to the police, but could not go into the nineteen incidents or introduce the police reports because they were irrelevant and would confuse the jury.

¶8 Jorgensen testified that he never told Becker he wished to have Kelly killed and that Becker offered to kill Kelly after Jorgensen said she was "mean." He testified he was just joking when he discussed killing Kelly with Becker and it was "just talk." By the end of the March 22 conversation, Jorgensen said he came to believe Becker was serious about carrying out the killing. On

cross-examination, Jorgensen admitted he did nothing after he started to believe Becker was serious. Jorgensen said the reason he met with Becker on March 22 was to talk to Becker about hiring him to do some odd jobs, but admitted they never actually talked about the odd jobs. The prosecutor then reminded Jorgensen that he had testified under direct examination that he would never have hired Becker.

¶9 The prosecutor then directed Jorgensen to read aloud from portions of the transcripts. The prosecutor, reading Becker's part of the conversation, asked whether Jorgensen was going to have another person called Bubba "do it for [him]." Jorgensen responded, "Yeah, for five hundred bucks." Reading from the transcript of the March 26 meeting, Jorgensen indicated:

> The only thing at this point that would make me feel comfortable is if some time lapsed, you know, and can you sit there in Appleton or scope the area out and get a plan, or whatever you need to do, you know, but almost like no contact with me.

He further explained:

> Well you know, what I would say is just hold back for half a year or whatever it takes to just be completely like out of the blue, it seems just too much if I go to Texas and then she gets whacked, and you know what I'm saying. It just seems too planned and then they are going to pressure me until I crack, like I know who did it, ha ha ha.

Jorgensen indicated he was "nervous" because Becker was a "good talker." He believed Becker had discussed the plan with other inmates, with Becker's wife and possibly with his father.

¶10 On redirect examination, defense counsel pointed out that Jorgensen said, "I'm telling you I just don't want it done. There's too many reasons to say no right now, and not enough to say yes." Jorgensen concluded the March 26

meeting saying, "I'm calling it off." Becker argued with Jorgensen's decision, indicating that he needed the money so he could flee the jurisdiction before his trial. Jorgensen said, "I'm telling you not to do this," and "O.K.? I'm calling it done."[2]

¶11 Jorgensen's trial counsel requested a jury instruction on entrapment, and the court granted that request. In his closing argument, counsel stressed that Becker repeatedly turned the conversation to a discussion about killing Jorgensen's ex-wife and tried to persuade Jorgensen to go through with the plan when Jorgensen tried to call if off. However, counsel did not specifically mention entrapment.

¶12 In his postconviction motion, Jorgensen faulted his trial counsel for failing to play the recordings for the jury, failing to develop the entrapment defense, and failing to argue that the court's limitations on cross-examinations of Becker and Kelly violated Jorgensen's constitutional right to confront witnesses. Jorgensen's trial counsel testified that he preferred using the transcripts because of the technical difficulties that would result from trying to play select portions of lengthy conversations, and some of Jorgensen's statements would not "play well" with the jury. Regarding the entrapment instruction, counsel accepted the State's suggestion that the entrapment defense was inconsistent with Jorgensen's defense that he never solicited Becker. The circuit court denied the postconviction motion, concluding defense counsel was not ineffective for relying on the transcripts because counsel employed a reasonable strategy. The court also concluded that

[2] The defendant's renunciation or withdrawal is not a defense to a prior completed act of solicitation. ***State v. Boehm***, 127 Wis. 2d 351, 354-56, 379 N.W.2d 874 (Ct. App. 1985).

counsel made a rational decision regarding the closing argument by stressing that Becker was working "hand-in-hand" with the county sheriff and, thus, presenting the entrapment defense without specifically calling it to the jury's attention during the closing argument. The court concluded it appropriately limited the cross-examinations of Becker and Kelly.

## DISCUSSION

### Use of Transcripts Instead of Playing the Recordings

¶13 Jorgensen's argument that using excerpts of the transcripts denied him a fair trial fails for several reasons. First, regarding any defects in the transcripts or the manner in which Becker read from them, the jury was provided with a copy of the transcripts and could read for itself who was speaking and could see the blanks left by the transcriber. While there were other errors in the transcript, Jorgensen exaggerates their magnitude as they do not relate to the most damning part of the conversation. The State's case did not turn on the inaccuracies in the transcripts, and the prosecutor did not rely on them in making his case. In addition, Jorgensen's trial counsel did not object to the State's use of the transcripts at trial. Therefore, any challenge to the use of the transcripts must be brought in the context of ineffective assistance of counsel.

¶14 Jorgensen requests that this court grant a new trial in the interest of justice because the real controversy was not fully tried. Use of the written transcripts in lieu of the recordings themselves does not prevent the controversy from being fully tried. Our review of the recordings supports the finding that Jorgensen was serious about having Kelly killed and solicited Becker to kill her for $10,000.

**Effective Assistance of Counsel**

¶15 To establish ineffective assistance of counsel, Jorgensen must show deficient performance and prejudice to the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He must overcome a presumption that counsel's challenged actions might constitute sound trial strategy. *See* ***id.*** at 689. Strategic choices made after thorough investigation of the law and facts are virtually unchallengeable. ***Id.*** at 690. To establish prejudice, Jorgensen must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.***

¶16 Counsel's decision to rely on the transcripts constituted a reasonable trial strategy. Jorgensen contends the recordings would have established his casual or joking demeanor. After listening to the recordings, we conclude a jury could reasonably find Jorgensen was serious. Counsel therefore could reasonably fear that introducing the recordings would harm Jorgensen's defense.

¶17 Jorgensen also failed to establish ineffective assistance of counsel based on the decision not to aggressively pursue the entrapment defense in the closing argument. Counsel could reasonably believe the jury would not be impressed by an argument that Jorgensen did not solicit Becker to kill Kelly, but if he did, he was entrapped. The entrapment defense was not particularly strong, as there was much evidence suggesting Jorgensen's predisposition to have Kelly killed. *See* WIS JI CRIMINAL 780 (2002). In his closing argument, Jorgensen's counsel noted that a detective told Becker "we can plant the seed," and "tell him whatever it is that you can to make him bite." Counsel also told the jury that Jorgensen did not solicit commission of the crime, Becker did. By requesting an

entrapment instruction and suggesting that a detective and Becker hatched the plot, counsel could have the jury consider entrapment without having to concede the possibility that Jorgensen was otherwise guilty of the offense.

**Limiting Cross-examination**

¶18 The court properly limited cross-examination of Kelly by prohibiting the defense from going into the details of the nineteen police reports that did not mention threats. The threats were not a central part of the State's case. The court indicated it would allow the defense to ask Kelly whether she reported any of the threats to the police. The court properly exercised its discretion under WIS. STAT. § 904.03 (2011-12)[3] by prohibiting introduction of further detail regarding the nineteen incidents. The court appropriately concluded any additional inquiry would have been needlessly cumulative, confusing for the jury and a waste of time.

¶19 The court also properly limited cross-examination of Becker regarding his suicide attempt. The court properly concluded the suicide attempt had limited probative value that was far outweighed by its potential to unduly prejudice or confuse the jury.

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

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

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.