COURT OF APPEALS DECISION DATED AND FILED

March 17, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2008AP507-CR

Cir. Ct. No. 2005CF20

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK A. LAGUNA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mark Laguna appeals a judgment, entered upon a jury's verdict, convicting him of second-degree intentional homicide. Laguna also appeals the denial of his postconviction motion for a new trial. Laguna seeks a new trial on the basis of ineffective assistance of trial counsel or, alternatively, in

the interest of justice. We reject Laguna's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Laguna with first-degree intentional homicide, arising from the March 16, 2005 shooting death of his wife, Brenda. Laguna had been upset and depressed between early November and the date of the homicide because Brenda had moved out with the couple's two daughters, obtained a restraining order and refused to talk to him about why she wanted to end the marriage. Laguna's contemporaneous journal writings showed he was becoming increasingly angry and vengeful, as he complained about having nothing left and being forced to live in his parents' house. In one entry, Laguna wrote:

> This divorce is bullshit. I'm growing very impatient with her. Time will tell all. She destroyed my world, my marriage my family. Rage is building up inside of me now. Bad thoughts. Very bad thoughts. It's hard to concentrate on anything now. I'm consumed with hate and vengeance.

On the night of March 15 and during the day of March 16, Laguna vandalized what was the couple's home, writing on the walls and sticking poems and a wedding picture to the walls with knives. Laguna left a letter at the house labeled, "Final Words to Brenda," again expressing his unhappiness with the situation.

¶3 On the day of the shooting, Laguna waited in his vehicle for Brenda to leave her job at the Iron County Courthouse and then repeatedly rammed her car into a snow bank. As Brenda ran from the car, Laguna shot her in the back of the head with a sawed-off shotgun. Laguna then surrendered to authorities.

¶4 Laguna initially entered a plea of not guilty by reason of mental disease or defect (NGI) and also sought to pursue a defense of involuntary

intoxication by prescription drugs.[1] At trial, however, Laguna abandoned the insanity defense, opting to pursue only the involuntary intoxication defense. Laguna presented psychiatric opinion evidence, in addition to mental health history and lay evidence, to support the involuntary intoxication defense. Laguna argued that his various prescription medications in combination with his bipolar disorder prevented him from distinguishing between right and wrong at the time of the murder. The jury ultimately found Laguna guilty of the lesser-included offense of second-degree intentional homicide. Following a ***Machner***[2] hearing, the trial court denied Laguna's postconviction motion for a new trial. This appeal follows.

DISCUSSION

I. Ineffective Assistance of Counsel

¶5 Laguna claims he was denied the effective assistance of trial counsel. 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 court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the

---

[1] The insanity defense provides that a person is not responsible for criminal conduct "if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." WIS. STAT. § 971.15 (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

In turn, the involuntary intoxication defense provides that an intoxicated or drugged condition of the actor is a defense only if such condition is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed. WIS. STAT. § 939.42(1).

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

attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶6 "The benchmark for judging whether counsel has acted ineffectively is stated in ***Strickland v. Washington***, 466 U.S. 668 (1984)." ***State v. Johnson***, 153 Wis. 2d 121, 126, 449 N.W.2d 845 (1990). To succeed on his ineffective assistance of counsel claim, Laguna must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶7 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight … and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. In reviewing counsel's performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 689.

¶8 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at

694. We may address the tests in the order we choose. If Laguna fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶9 Here, Laguna argues trial counsel was ineffective for abandoning the insanity defense in favor of focusing on an involuntary intoxication defense. In the context of the insanity defense, Wisconsin law requires a bifurcated trial procedure in which the issue of guilt or innocence is kept separate from, and tried before, the issue of the defendant's mental responsibility. WISCONSIN STAT. § 971.165 provides that if a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect, "[t]here shall be a separation of the issues with a sequential order of proof in a continuous trial." The not guilty plea is determined first and the NGI plea is determined second.

¶10 Relevant to this appeal, psychiatric opinion testimony about whether the defendant had the capacity to form criminal intent is inadmissible at the guilt phase of a bifurcated trial. ***Steele v. State***, 97 Wis. 2d 72, 294 N.W.2d 2 (1980). At the ***Machner*** hearing, counsel testified that he abandoned the insanity defense based on his conclusion that the psychiatric testimony necessary to support the involuntary intoxication defense would not be admissible during the guilt phase of a bifurcated insanity trial. Counsel continued: "I was thinking, well without that psychiatric testimony there is no way [the involuntary intoxication] defense is going to work." Counsel confirmed he made a tactical decision based on his knowledge of the law or what he believed the law to be. Counsel testified, however, that following Laguna's trial, he came to believe his decision to forgo the insanity defense was based on a mistaken view of the law. That counsel, in retrospect, questions his own thought process and strategy does not end our inquiry.

¶11 A reviewing court is not required to view defense counsel's subjective testimony as dispositive of an ineffective assistance claim. ***State v. Kimbrough***, 2001 WI App 138, ¶35, 246 Wis. 2d 648, 630 N.W.2d 752. Trial counsel's subjective testimony merely constitutes evidence the reviewing court can consider in assessing whether counsel's actual performance was constitutionally deficient. ***Id.***, ¶¶31-35. This court's function "is to determine whether defense counsel's performance was objectively reasonable according to prevailing professional norms." ***Id.***, ¶31. Thus, the issue before us is not whether counsel's conclusion with regard to the psychiatric testimony was correct but, rather, whether it was objectively reasonable.

¶12 Laguna fails to demonstrate that counsel's conclusion was objectively unreasonable, as the state of the law on this subject is unsettled. Citing ***State v. Flattum***, 122 Wis. 2d 282, 361 N.W.2d 705 (1985), Laguna argues that properly qualified psychiatric testimony of a defendant's mental health history is admissible, if relevant, to prove or disprove a defendant's capacity to form intent. ***Flattum***, however, involved a first-degree murder case in which the defendant raised a voluntary intoxication defense, claiming he was so intoxicated at the time of the murder that he did not have the capacity to form the intent to kill.[3] Further, Flattum did not assert an insanity defense and, therefore, did not have a bifurcated trial.

---

[3] Unlike the test for involuntary intoxication, which requires that the intoxication render the defendant incapable of distinguishing right from wrong, a voluntary intoxication defense requires that the intoxication render the defendant incapable of forming the specific intent to commit the crime. WIS. STAT. § 939.42(2).

¶13 In ***State v. Repp***, 122 Wis. 2d 246, 362 N.W.2d 415 (1985), a first-degree murder case, the defendant asserted an insanity defense and had a bifurcated trial. Repp sought to introduce psychiatric opinion testimony that a combination of severe intoxication, rage, and multiple personality disorders created a brief reactive psychosis which caused the defendant to lose control and judgment, and compelled him to kill his mother. ***Id.*** at 249. Our supreme court upheld the trial court's exclusion of this testimony in the guilt phase of Repp's bifurcated trial because "the testimony causally linked the defendant's severe intoxication and mental health history with his lack of capacity to form the requisite criminal intent" and was therefore inadmissible under ***Steele*** and ***Flattum***. ***Repp***, 122 Wis. 2d at 253-54.

¶14 In ***State v. Gardner***, 230 Wis. 2d 32, 35, 601 N.W.2d 670 (Ct. App. 1999), this court held that an involuntary intoxication defense is available when the intoxication is due to prescription drugs taken as directed. However, we affirmed the trial court's exclusion of proffered expert testimony that failed to assert Gardner's intoxication affected his ability to tell right from wrong. ***Id.*** In the context of distinguishing voluntary from involuntary intoxication, we noted that the involuntary intoxication standard, rather than being congruent with the lack of specific intent standard for voluntary intoxication, is coextensive with the mental responsibility test of the insanity defense. ***Id.*** at 38. The ***Gardner*** court did not, however, expound on the "coextensive" statement as Gardner had not asserted an insanity defense.

¶15 Ultimately, Laguna identifies no precedent on point regarding the admissibility of psychiatric opinion evidence to support an involuntary intoxication defense during the guilt phase of a bifurcated insanity trial. "Because the law is not an exact science and may shift over time, the rule that an attorney is

not liable for an error of judgment on an unsettled proposition of law is universally recognized." ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 58 (internal quotations omitted). Here, the case law regarding admissibility of psychiatric opinion testimony to establish an involuntary intoxication defense at the guilt phase of a bifurcated insanity trial is unsettled, and there is no controlling case law on point. Therefore, trial counsel's decision to forgo the insanity defense in favor of the involuntary intoxication defense was neither objectively unreasonable nor deficient.

II. A New Trial in the Interest of Justice

¶16 Laguna seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Laguna must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Laguna "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy N.K.***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶17 Laguna's claim for discretionary reversal in the interest of justice hinges on a conclusion that counsel was ineffective for failing to pursue the insanity defense. As we discussed above, counsel was not deficient for opting to forgo that defense. Moreover, WIS. STAT. § 752.35 "was not intended to vest this court with power of discretionary reversal to enable a defendant to present an alternative defense that may have not been advanced by trial counsel … whose representation is alleged to be ineffective because of that failure." ***State v. Flynn***, 190 Wis. 2d 31, 49 n.5, 527 N.W.2d 343 (Ct. App. 1994). Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Laguna a new trial.

By the Court.—Judgment and order affirmed.

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