COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1678-CR **Cir. Ct. No. 2004CF1934**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY A. RODEFELD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Troy Rodefeld appeals from a judgment, entered upon a jury's verdict, convicting him of second-degree recklessly endangering safety and disorderly conduct. He also appeals an order denying his motion for postconviction relief. Rodefeld argues the trial court erred by denying a theory of

defense instruction and he was denied the effective assistance of trial counsel. Alternatively, Rodefeld urges this court to exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35 (2005-06),[1] because the real controversy has not been fully tried. We reject Rodefeld's arguments and affirm the judgment and order.

BACKGROUND

¶2 In September 2004, Rodefeld was charged with second-degree recklessly endangering the safety of another and disorderly conduct, contrary to WIS. STAT. §§ 941.30(2) and 947.01, respectively. The charges arose from allegations that while his two children were in the backseat of the family car, Rodefeld drove the car from the driveway onto the front steps/deck of the family home while his wife, Rhea Guild-Rodefeld, was walking up the steps. Rodefeld was ultimately convicted upon a jury's verdict of the crimes charged. The trial court withheld sentence and imposed five years' probation with four months in jail as a condition of probation. Following a ***Machner***[2] hearing, the trial court denied Rodefeld's postconviction motion for a new trial. This appeal follows.

DISCUSSION

I. Theory of Defense Instruction

¶3 Rodefeld argues the trial court erred by failing to submit what he characterized as a "Theory of the Defense Jury Instruction on Negligence and

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

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

Criminal Negligence." A trial court has broad discretion in deciding whether to give a requested instruction. *See* ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). "However, a [trial] court must exercise its discretion in order 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** at 212. A defendant is entitled to a theory of defense jury instruction if: "(1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence." ***Id.*** at 212-13 (citations omitted).

¶4 The source of such evidence may be facts produced by the state or by the defense. *See* ***id.*** at 214. Further, we must ask whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the defense. *See* ***id.*** On review of a denial of a requested instruction, we examine the instructions as a whole to determine whether they were appropriate and, even if instructions were rejected which were arguably appropriate, we will not reverse unless the failure to include the requested instructions would be likely to prejudice the defendant. *See* ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976).

¶5 Here, the trial court acknowledged that the proposed instruction described the concepts of ordinary negligence and criminal negligence, but concluded that the jury did not need to be concerned about either concept because they were not at issue in the case. The court ultimately concluded:

> [T]he classifications of negligence described in the proposed Theory of Defense instruction are not relevant except by way of argument. It would appear that the defendant … seeks, in effect, to acquire the benefit of a

> lesser included offense…. In any event, the court does not find the standard instructions to be in any manner inadequate to illustrate adequately the legal issues now before the jury….

¶6 At trial, Rodefeld's theories of defense were that his car malfunctioned or he drove into the deck either by accident or without awareness that his action created an unreasonable and substantial risk of death or great bodily harm. The trial court properly instructed the jury on the elements of second-degree recklessly endangering safety and, consistent with Rodefeld's theory that he lacked the requisite awareness, the court further instructed the jury that "[i]f the defendant was not aware that his conduct created an unreasonable and substantial risk of death or great bodily harm, the defendant is not guilty of the crime of second-degree recklessly endangering safety." Because the jury instructions as a whole gave correct and appropriate guidance to the jury, *see* ***Lenarchick***, 74 Wis. 2d at 455, we conclude the trial court properly exercised its discretion by rejecting the requested instruction.

II. Effective Assistance of Trial Counsel

¶7 Next, Rodefeld 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 trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Id.*** However, the ultimate determination whether the attorney's performance falls below the constitutional minimum is a question of law that this court reviews independently. ***Id.***

¶8 "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, Rodefeld must show both: (1) that his counsel's representation was deficient; and (2) that this deficiency prejudiced him. ***Strickland***, 466 U.S. at 694.

¶9 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.… [A]nd 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.… [T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689. Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable…." ***Id.*** at 690.

¶10 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 Rodefeld fails to establish prejudice, we need not address deficient performance. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶11 First, Rodefeld argues counsel was ineffective for failing to pursue a lesser-included jury instruction for second-degree recklessly endangering safety.[3] Rodefeld contends that negligent operation of a vehicle is a lesser-included offense of second-degree recklessly endangering safety. Rodefeld is mistaken. Wisconsin uses the "elements only" test to determine whether one offense is included within another. ***State v. Carrington***, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986). The test "focuses on the statutes defining the offense, not the facts of a given defendant's activity." ***Id.*** Thus, "[u]nder the elements only test, the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense." ***Id.*** at 265. In other words, "an offense is a lesser included one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the greater offense." ***Id.***, quoting ***Hagenkord v. State***, 100 Wis. 2d 452, 481, 302 N.W.2d 421 (1981).

¶12 Here, the greater offense of second-degree recklessly endangering safety requires proof of two elements: (1) the defendant endangered the safety of another human being; and (2) the defendant did so by criminally reckless conduct. WIS. STAT. § 941.30(2); *see also* WIS JI—CRIMINAL 1347. The second element requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that such conduct created that risk. WIS JI—CRIMINAL 1347. In turn, the lesser offense of negligent operation of a vehicle requires proof that: (1) the defendant

[3] In his brief, Rodefeld contends the trial court erred by failing to give a lesser-included jury instruction for second-degree recklessly endangering safety. Rodefeld, however, concedes that trial counsel never requested this instruction. Therefore, the deficiency, if any, is of counsel and will be addressed accordingly.

operated a vehicle (but not upon a highway); (2) the defendant operated a vehicle in a manner constituting a high degree of negligence; and (3) the defendant's high degree of negligence endangered the safety of another person. WIS. STAT. § 941.01(1); *see also* WIS JI—CRIMINAL 1300. Because negligent operation of a vehicle requires proof that the defendant operated a vehicle, while second-degree recklessly endangering safety does not require the operation of any particular instrumentality, § 941.01(1) is not a lesser included offense of § 941.30(2), and counsel, therefore, was not deficient for failing to pursue the lesser-included instruction.[4]

¶13 Next, Rodefeld contends counsel was ineffective for introducing evidence of Rodefeld's prior acts. During his cross-examination of Rhea Guild-Rodefeld, counsel asked: "And on one occasion did you complain that [Rodefeld] was mad when you were by the [Wisconsin] Dells and the car drove into the ditch with you and the kids in it?" Rhea responded, "Yes." Counsel then asked, "And you told the police that [Rodefeld] frequently drives erratically when he is upset?" Rhea answered affirmatively. Counsel then asked, "When [Rodefeld] gets upset, does he do stupid things based on your history with him?" Rhea answered, "Yes." Counsel continued, "And is it your impression that sometimes he gets mad or angry and just doesn't even think straight?" Rhea responded, "Yes." Counsel then asked, "And do you think he was mad or angry when this accident happened?" Rhea again responded affirmatively.

¶14 Rodefeld also testified about the Dells incident, stating:

[4] Although Rodefeld urges this court to adopt the logic of the accusatory pleading test in analyzing what constitutes a lesser-included offense in Wisconsin, we are bound by prior precedent to use the elements only test. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

> I got upset with [Rhea], and I swerved the car, and at that point, I knew I was irritated and frustrated. I pulled over to the side of the road, and I said will you please drive this car, I am in no state to be driving this anymore, and she proceeded to drive us home.

During closing arguments, defense counsel reiterated Rhea's testimony that when "Troy gets mad, he gets mad and he doesn't think straight." Counsel continued to argue, "Is that what was happening here? You bet. Does that amount to awareness? No."

¶15 At the ***Machner*** hearing, trial counsel testified that he made a strategic decision to use the Dells incident to support the defense theory of lack of awareness. Even were we to conclude that counsel was deficient for introducing this evidence, its admission was harmless in view of the totality of the evidence supporting the verdict. *See* ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). There was overwhelming evidence that Rodefeld was responsible for the present incident as a factual matter. As trial counsel testified at the ***Machner*** hearing, the theory of defense was to prove that Rodefeld did not possess the requisite awareness of the risks posed by his conduct. To that end, we do not believe a reasonable jury would conclude that because Rodefeld swerved off the road on this previous occasion, he was somehow more aware that his conduct in the present case created an unreasonable or substantial risk of death or great bodily harm to Rhea. Because admission of this evidence was harmless, Rodefeld was not prejudiced by any deficiency on the part of trial counsel in introducing the evidence.

¶16 Rodefeld also argues counsel was ineffective for abandoning his role as a zealous advocate by using the term "gunning the gas." The term "gunned the gas" arose from the probable cause affidavit prepared for Rodefeld's arrest by

Dane County Sheriff's Deputy Matthew Meyer. There, Meyer reported that "[Rodefeld] placed the car in drive [and] 'gunned the gas,' heading to the porch." In opening statements, both the State and defense counsel referred to Rodefeld's statement to the police that he "gunned" the gas. At trial, Meyer testified about Rodefeld's statement and, during Rodefeld's own testimony, he used the phrase "gunned the gas" at least three times, twice on direct examination and once on cross-examination.

¶17 In both his postconviction motion and his brief on appeal, Rodefeld claims he never told the officer that he "gunned the gas." Rodefeld thus claims counsel was ineffective for "failing to address the issue of whether [Rodefeld] told [the officer] that he 'gunned' the gas [thereby leaving the jury] with the impression that when one guns the gas they know that the end result could be a loss of control of the vehicle or the creation of a dangerous situation." At the ***Machner*** hearing, defense counsel testified that Rodefeld never used the phrase when talking to him and never admitted using the phrase. However, counsel never affirmatively stated that Rodefeld denied using the phrase when talking to the sheriff's deputy and, as noted above, Rodefeld used the term at trial when describing his actions to the jury.

¶18 As noted by the trial court in its order denying Rodefeld's postconviction motion, the admission that Rodefeld gunned the gas "was going to be offered in evidence and trial counsel made a reasonable choice to try to acknowledge that reality and attempt to mitigate its impact." Counsel was, therefore, not deficient for using the challenged term at trial. *See* ***Strickland***, 466 U.S. at 689.

¶19 Rodefeld also takes issue with comments made by defense counsel during closing arguments. Rodefeld complains that counsel labeled "benign normal daily activities" criminally reckless and then compared them to Rodefeld's conduct. In Rodefeld's view, the conduct described was significantly less severe than his own, so "ipso facto" counsel was telling the jury that Rodefeld's conduct must also constitute criminally reckless conduct. Although counsel compared several types of behavior to Rodefeld's, Rodefeld addresses only two on appeal.

¶20 First, counsel indicated that his own father "would swing around while he was driving the car and whack my sister and me" when they would misbehave in the back seat. In describing this behavior, counsel conceded that his father might have been acting "criminally or negligently because he should have known better." However, counsel argued that his father was not "aware that [his actions] caused a high likelihood of unreasonable and substantial bodily harm … [because he] acted on emotions. Emotions cloud awareness." Counsel's reference to his father's conduct was consistent with the defense theory that Rodefeld was clouded by emotions and, therefore, unaware of the risks created by his conduct. We discern no deficiency on the part of trial counsel for making this comparison.

¶21 Second, Rodefeld challenges counsel's observations regarding chatting on a cell phone or changing a CD while driving. With regard to these activities, counsel posited, "Is that criminal recklessness? Probably, because they should have known better and because they put other people in harm." Counsel continued:

> But what you need to be sure of is that Troy Rodefeld was aware. Okay. We have all experienced that kind of thing, driving a car where we should have known better, where we missed a stop sign, or we didn't pause, or we took a curve when it was icy …. Should we have known better? Absolutely. Were we in a hurry? Yes. Had we all been

> speeding? You bet.… Are we putting other people in danger? Yes. Are we aware that our speeding is putting other people in danger? No. We're not aware because we are not thinking about it, and we're certainly not aware when we're mad.

¶22 At the ***Machner*** hearing, trial counsel clarified that if he said "criminal recklessness," he meant "criminal negligence." The inadvertent use of the term "criminal recklessness" notwithstanding, we conclude Rodefeld was not prejudiced. Although the single misuse of this term may have caused momentary confusion for the jury, counsel's comparison of Rodefeld with inattentive and speeding drivers was ultimately consistent with the overall defense strategy that Rodefeld was unaware of the risks created by his conduct.

¶23 Rodefeld next challenges counsel's statement that Rodefeld "should have known better," arguing that the statement implies that Rodefeld "was aware" that what he was doing could create an unreasonable and substantial risk of death or great bodily harm. We disagree. This and similar statements were part of counsel's strategy to show that Rodefeld lacked reckless awareness. Counsel conveyed this distinction to the jury, arguing:

> People get in automobile accidents. They happen because they do stupid things. People get hurt when people do stupid things. Not every stupid thing that somebody does in an automobile is a criminal offense. People hurt people all the time, not intending to hurt them. People also hurt people when they should have known better and act inappropriately. But neither of those is sufficient to convict Mr. Rodefeld. You must decide and find that he had actual awareness during the time that he drove the vehicle….

In context, counsel's use of the term "should have known better" was consistent with his defense strategy and, therefore, did not constitute deficient performance.

¶24 Rodefeld also claims counsel was ineffective for referring to Rodefeld as a "stupid idiot." Although seemingly harsh, this description of Rodefeld was consistent with defense counsel's strategy of showing that Rodefeld did not possess the reckless awareness necessary for conviction. Again, we discern no deficiency on the part of trial counsel.

¶25 Finally, Rodefeld argues that when counsel remarked that the disorderly conduct charge was "a tougher call" for the jury, counsel unwittingly implied that Rodefeld's "guilt on the more serious charge had been proven and was an easy decision for the jury." In context, however, counsel implied only that the disorderly conduct charge involved a "he said, she said" situation. Rodefeld thus fails to establish that counsel's comment was either deficient or prejudicial.

III. Discretionary Power of Reversal

¶26 Alternatively, Rodefeld 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, Rodefeld 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, Rodefeld "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).

¶27 Here, Rodefeld argues that the real controversy has not been fully tried because of the combined effect of the alleged errors. As discussed above, we have rejected Rodefeld's various challenges to his conviction. "Adding them together adds nothing. Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Accordingly, we decline to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Rodefeld 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.