COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2388-CR **Cir. Ct. No. 2005CF1876**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHON T. ADEYANJU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Jonathon Adeyanju appeals from a judgment of conviction and from an order denying his postconviction motion. The main issue is ineffective assistance of counsel. We affirm.

¶2 The State alleged that the defendant was one of a number of people who jumped from three vehicles in the street, fired a hail of bullets up a driveway towards a group of people near a garage, and then quickly fled. At trial, the State presented several witnesses who claimed to have been among the shooters, and who testified as to the involvement of the defendant and three other co-defendants tried at the same time. The jury found the defendants guilty on three counts each of attempted first-degree intentional homicide while armed, and three counts each of endangering safety by use of a firearm, under WIS. STAT. § 941.20(2)(a) (2007-08).[1] The jury was instructed on three theories of defendant liability, namely, as direct actors, as aiders and abetters, and as co-conspirators. The jury was not asked to indicate which theory its verdicts were based on, so we do not know which theory or theories it relied on.

¶3 On appeal, Adeyanju argues that his trial counsel was ineffective. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Strickland***, 466 U.S. at 697.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Adeyanju argues that his counsel was ineffective as to the homicide counts by not requesting a lesser-included instruction for the offense of recklessly endangering safety. He argues that the instruction was warranted because the jury could reasonably have found that the shooters' acts did not unequivocally show intent to kill, but would have satisfied the reckless state of mind required for recklessly endangering safety.

¶5 To establish deficient performance, Adeyanju's argument appears to proceed in these steps: because a legal basis existed to request the lesser-included instruction, trial counsel had a duty to request the instruction unless there was a reasonable strategic reason for not doing so; and, there was no reasonable strategic reason for not making the request, because the request would have been consistent with Adeyanju's defense, and an "all-or-nothing" strategy would not have been reasonable.

¶6 For purposes of this opinion, we will focus on the last point, whether there was a reasonable strategic basis for Adeyanju's attorney to forego the lesser-included instruction. The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Therefore, even if trial counsel lacked a strategic reason at the time, a claim of deficient performance fails if counsel's action was one that an attorney could reasonably have taken after considering the question, in light of the information available to trial counsel at the time. Trial counsel's own subjective explanation of his reasons for acting or not acting, or trial counsel's lack of any reason at all, is not relevant to the analysis.

¶7 We begin by describing the strategy that Adeyanju's trial counsel used at trial. Counsel appears to have pursued a rather complicated strategy that attempted to put two separate defenses in front of the jury, but in a way that downplayed their potential inconsistency. The first of the two defenses was that Adeyanju was not present at the shooting. Although Adeyanju did not offer evidence of a specific alibi, this defense was implemented by questioning the credibility of the witnesses who placed him there, and otherwise pointing out possible inconsistencies in the evidence placing him there. The second defense theory was that the shooters lacked intent to kill. To directly argue both of these defenses to the jury would place counsel in the awkward position of saying his client was not a shooter, but if he was, then he and the others lacked intent to kill.

¶8 In this case, counsel appears to have placed both theories before the jury, but without falling completely into the trap of inconsistent argument. Counsel began his closing argument by arguing that the four State witnesses who were among the shooters did not have intent to kill. After that, counsel clarified that he was saying this "not with regard to Jonathon or any of the defendants here today." Counsel then turned to arguing that Adeyanju was not present at the shooting, by attacking the State's evidence that he was present.

¶9 Although the State's shooter-witnesses were not on trial, their intent was key to the case because the defendants were all charged as aiders and abetters to, and co-conspirators with, those State witnesses. Therefore, if *any* one of the shooters—whether a witness or defendant—had intent to kill, that intent would be sufficient to convict all defendants.

¶10 By arguing that the *witnesses* lacked intent to kill, counsel raised to the jury the importance of intent and the weaknesses of the State's case as to that

element. Although counsel did not then argue that none of the *defendants* had intent to kill, there is obviously a possibility jurors would see that the question of intent would also have to be decided as to the defendants, if the jury concluded they were indeed among the shooters. In other words, jurors could recognize that whatever evidence might raise reasonable doubt about the intent of the shooter-witnesses might also indicate lack of intent among the defendants. By raising the question of intent, but only in this limited way, counsel was able to direct the jury's attention to both theories of defense, without having to openly argue that Adeyanju was not present, but if he was, he lacked intent.

¶11 The question then becomes whether it was objectively reasonable for counsel to pursue this strategy without also requesting the lesser-included instruction that the jury might have used if it had doubt about the shooters' intent to kill. The State argues that requesting this instruction would have been inconsistent with Adeyanju's "not present" defense, but we disagree. The fact is that counsel was *already* making that inconsistent argument to the jury, although in a less direct way. Obtaining the lesser-included instruction would not have obligated counsel to make the argument in a more directly inconsistent way, because the mere giving of the instruction does not require counsel to base argument on it. The jury would hear that instruction from the court, and later find it in the written instructions, regardless of whether or how much counsel based an argument on the instruction. Simply placing this instruction before the jury can result in the jury using it, even if there is no argument on that point.

¶12 However, even if the giving of the instruction would not have been inconsistent with Adeyanju's theories of defense, its potential use by the jury could still work against his interest. Inconsistent defenses are not the only peril

that a lesser-included instruction presents. This brings us to the question of whether an "all-or-nothing" defense was reasonable in this case.

¶13 A lesser-included instruction offers the jury an additional avenue of conviction, under circumstances where the jury might have otherwise acquitted entirely or failed to reach a verdict. If the jury follows the standard instruction, it will not consider the lesser-included charge until it has already decided to acquit, or been unable to reach a verdict, on the greater charge. WIS JI—CRIMINAL 112. In the absence of a lesser-included instruction, an acquittal decision leaves the defendant with complete acquittal, and failure to reach a verdict leads to a mistrial. However, if a lesser-included instruction is present, the jury may continue to deliberate and reach a guilty verdict on that lesser charge.

¶14 However, it is possible that a jury would *not* follow instructions. In the absence of a lesser-included instruction, if a jury is presented with facts showing that *some* crime was clearly committed, the jury might feel compelled to choose conviction, even if it has reasonable doubt about one or more elements of the greater charge, such as intent. That possibility has been recognized in case law describing the purpose of lesser-included instructions as being to prevent a defendant from suffering an unwarranted conviction due to the "coercive nature" of giving the jury only the choice between conviction on a greater offense and acquittal. *See* ***State v. Truax***, 151 Wis. 2d 354, 363, 444 N.W.2d 432 (Ct. App. 1989) (explaining that "[t]he purpose behind requiring that instructions on lesser-included offenses be given, when the evidence warrants it, is to avoid subjecting juries to the choice of either acquitting altogether or finding the defendant guilty of the higher degree where it is convinced only of the lower degree," and that "[t]he coercive nature of such a choice is prejudicial to the defendant").

¶15 This dilemma was present in Adeyanju's case. If the jury had reasonable doubt as to whether any of the shooters had the required intent to kill, the instructions would have required it to acquit. If the jury was unable to reach a verdict on that point, the unanimity instruction would have barred the jury from a finding of guilt. Yet, the jury would likely feel certain that the act of shooting towards people was a crime, and therefore the jury may have reached a guilty verdict even if the reasonable-doubt and unanimity instructions required it not to.

¶16 Case law has already recognized that it can be a reasonable strategic decision for counsel to forego a lesser-included instruction in the hope of forcing the jury into complete acquittal, rather than giving it a second option for conviction. *See, e.g.,* ***Kimbrough***, 246 Wis. 2d 648, ¶¶24-35. This is what is referred to as the "all-or-nothing" position.

¶17 Adeyanju argues that it would be unreasonable in this case for him to aim for acquittal or mistrial, rather than settle for convictions on the lesser-included offenses. He argues that if the jury accepted his not-present defense, it would have acquitted on all six charges, that is, on all three homicide counts, and also on the three counts of endangering safety by use of a firearm, as charged in counts four to six. In this situation, he argues, the lesser-included instruction would have done him no harm, but no good, either. On the other hand, he argues, if the jury rejected his not-present defense, convictions on counts four to six would become a certainty, regardless of whether the jury had doubt about intent to kill, since counts four to six did not require intent to kill. Thus, he argues, foregoing a lesser-included instruction on the homicide counts, for the purpose of obtaining a complete acquittal, was not reasonable because complete acquittal was improbable, even if the jury had reasonable doubt about his intent to kill.

¶18 We agree that if the jury accepted the not-present defense, an acquittal on all charges should follow, and the lesser-included instruction would play no role. We also agree that, if the jury rejected that defense, convictions on counts four to six would be very likely to occur, regardless of the jury's decision about intent to kill or the presence or absence of a lesser-included instruction on the homicide counts.

¶19 However, these points do nothing to change the possible benefits and perils of requesting that instruction. Even though convictions on counts four to six are a given in this scenario, there still remains the question of what *additional* convictions may or may not be entered on counts one to three. The question for the defendant is still what outcome he prefers on counts one to three: acquittals or mistrials, convictions on attempted homicide, or convictions on recklessly endangering safety. The potential penalty range between those choices is large (from nothing to class F to class B), and both convictions are worse than the class G endangering felonies in counts four to six. *See* WIS. STAT. §§ 939.32(1)(a); 941.20(2)(a); and 941.30(1). Thus, the dilemma of the all-or-nothing defense is lessened only slightly, if at all, by the probable convictions on counts four to six.

¶20 Therefore, we conclude that, even though acquittal on all six counts was not a likely outcome in any scenario in which the lesser-included instruction could have played a role, that does not mean it would have been unreasonable for Adeyanju's counsel to adopt an all-or-nothing strategy as to the homicide counts. Because of the size of the potential penalties on those counts, that decision still could have had a significant impact on Adeyanju's future.

¶21 Adeyanju also argues, in his reply brief, that the all-or-nothing position was unreasonable in his case because the evidence in support of his not-

present defense was so weak. This argument fails because the strength or weakness of that defense was not relevant to the calculation of whether to ask for the lesser-included instruction. As we discussed above, if the jury accepted the not-present defense, the lesser-included instruction should play no role in its deliberation, whether to the defendant's benefit or detriment. Only if the jury rejected that defense would it turn to the question of intent to kill, and then possibly use any lesser-included instruction that might have been requested. In essence, a defendant trying to decide whether to ask for the lesser-included instruction would start by assuming that the jury has *already* rejected the not-present defense; the strength or weakness of that defense would not enter into it.

¶22 Finally, Adeyanju argues that we should grant a new trial on the homicide counts in the interest of justice under WIS. STAT. § 752.35. He argues that the real controversy was not fully tried because the lesser-included instruction was not given. We conclude the real controversy was fully tried. The controversy was over whether Adeyanju was present and what the intent of the shooters was. The jury heard the relevant evidence and, as far as we know, received accurate instructions. Those instructions would have led the jury to consider whether Adeyanju was present and what the intent of the shooters was. An additional instruction was not necessary for the controversy to be fully tried.

By the Court.—Judgment and order affirmed.

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