COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

NOTICE

No. 95-3101-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Yolanda McClinton,

Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Reversed and cause remanded with directions*.

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

PER CURIAM. A jury found Yolanda McClinton guilty of first-degree reckless injury while using a dangerous weapon. After a hearing, the trial court denied a post-conviction motion that raised ineffective assistance of counsel. McClinton contends that trial counsel was ineffective because he did not request a jury instruction on the lesser included offense of second-degree reckless injury while using a dangerous weapon. We conclude that McClinton's

trial counsel failed to provide effective assistance of counsel. Accordingly, we reverse the order denying the post-conviction motion. The case is remanded to the circuit court with directions to enter an order vacating the judgment of conviction and granting McClinton a new trial.

The criminal charges arose out of an altercation between McClinton and Stephanie Christian n/k/a Stephanie Christian-Lobley. As a result of the incident, McClinton shot Christian-Lobley in the chest at close range. Both women had been romantically involved with Leotha Lobley, and each had an infant fathered by Lobley.

The night before the shooting, McClinton and Lobley fought, and both left McClinton's residence. When McClinton returned the following morning, she discovered that her residence had been burglarized. She told the police that Lobley was responsible. She testified that she moved from the residence and purchased a handgun for protection because she was afraid of Lobley.

At the time of the shooting, McClinton and five other individuals were taking the last of her belongings to her new residence. McClinton stopped at Christian-Lobley's residence because she saw a car Lobley drove. McClinton testified that Lobley had repeatedly paged her during the day, and with the others present, she believed that she could safely talk with him. McClinton went to the door accompanied by her brother James. Lobley was not there, and an argument ensued between McClinton and Christian-Lobley. When McClinton left the porch, Christian-Lobley followed her. At the front gate, Christian-Lobley hit McClinton. They struggled briefly and moved into the street where Christian-Lobley grabbed McClinton from behind. Both McClinton and Christian-Lobley testified that McClinton removed a gun from her waist and reached behind her with the weapon. The gun discharged, and a bullet struck Christian-Lobley in the chest. Christian-Lobley then turned and was returning to the residence when McClinton fired a second bullet, which did not hit anyone. McClinton fled the scene.

At the trial, McClinton testified about the confrontation and the shooting. According to her testimony, Christian-Lobley denied having McClinton's things and started arguing. McClinton said that she was not there

to argue with Christian-Lobley and that she walked away. Christian-Lobley continued to argue and call McClinton names. McClinton admitted talking loudly, but said that she did not call Christian-Lobley names or "disrespect" her. McClinton testified that she heard someone say, "I'm going to kill this bitch" before Christian-Lobley attacked her from behind. After a few seconds of struggle, McClinton broke free and went out the gate. When McClinton was almost to the street, Christian-Lobley again attacked McClinton from behind. McClinton testified that Christian-Lobley had one hand around McClinton's throat and the other hand holding one of McClinton's hands. McClinton freed her hand, grabbed the handgun from her waist, and reached behind her. The gun went off.

McClinton testified that she felt threatened when Christian-Lobley started to argue and ask questions and that she was in a state of shock when Christian-Lobley attacked her the second time. She claimed that she pulled the gun to get away. McClinton testified that she had not handled a firearm before and that either of them could have been shot. She wished she could have fired the weapon into the air or the ground.

McClinton acknowledged that she fired the second time although she denied being aware of doing so or doing so intentionally. She denied that she raised the gun and aimed at Christian-Lobley, and she thought the gun was fired downward because her hand was down when she "woke up" from the dazed state she was in after the gun went off the second time.

The closing arguments and jury instruction conference were not reported. McClinton apparently argued that she acted in self-defense. The record indicates that the State had requested an instruction on second-degree reckless injury but withdrew the request when McClinton's attorney objected. Trial counsel's objection to the lesser-included-offense instruction is the basis of McClinton's claim of ineffective assistance of counsel.

The trial court held an evidentiary hearing on the post-conviction motion. Trial counsel and McClinton testified. Trial counsel could not recall the details of the jury instruction conference or his closing argument. The outline for closing argument in his file indicated that self-defense was argued. Counsel had no notes concerning the lesser included offense issue or of any discussions

with McClinton about it. Counsel could not give a reason for objecting to the instruction other than the hypothetical one of not wanting to give the jury a middle ground. He could not testify as to the difference between the two crimes. He testified that he understood self-defense to require intentional use of force and that he did not believe the facts adduced at trial supported the intent element. He believed that the key issues at trial were the existence of a second shot, the credibility of the various witnesses, and the various perceptions regarding an intent to fire the gun.

McClinton testified that she had twice discussed potential defenses with trial counsel. She believed that counsel would argue that her conduct was only second-degree reckless injury. She claimed she was "heartbroken" when he did not mention it during closing arguments.

The trial court found that trial counsel made a tactical decision not to request the lesser-included-offense instruction. In this regard, the court stated, "The trial tactic as I recall it and as I glean from what's submitted to the Court ... was that this wasn't really a self-defense defense in the straight sense of the word. I think he was demonstrating or trying to demonstrate that there was no utter disregard for life." The court then summarized the testimony that supported this "modified self-defense" claim and again summarized the claim as follows:

> [T]he defense as I recall in the argument was that there was a lack, there was no proof that there was an utter disregard for human life because of the way the event occurred and the injury was sustained, and even though it was self-defense that was being claimed, it was not a real self-defense claim. Self-defense was to show that there was no utter disregard for life, at least that was my impression.
>
> That was the trial tactic .... It seems to me that the entire defense was based on the fact that under the circumstances the State could not show that there was an utter disregard for human life and that was the basis of the defense, and with that element

> missing she would have been acquitted rather than found guilty of a lesser included [offense].

The trial court then concluded that under the circumstances and facts of the case, the strategy satisfied the objective standard of reasonableness. The court also concluded that McClinton was not prejudiced. It stated that "under the circumstances the woman was shot, the bullet went all the way through her body. She spent a great deal of time in the hospital, and in my view the verdict would have, the result would have been the same."

A defendant has a constitutional right to effective assistance of counsel. ***State v. Ludwig***, 124 Wis.2d 600, 606, 369 N.W.2d 722, 725 (1985). Courts use a two-step process to determine whether an accused received ineffective assistance of counsel. ***Id.*** at 607, 369 N.W.2d at 725. First, the defendant must show that his trial counsel's performance was deficient. ***Id.*** Second, the defendant must show that the deficient performance prejudiced his defense. ***Id.*** The appropriate standard for measuring counsel's performance is reasonableness, considering all of the circumstances. ***State v. Brooks***, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985). An attorney is held to the quality of representation provided by an ordinarily prudent lawyer who is skilled and versed in criminal law and privately retained. ***Id.*** The prejudice component requires a showing that trial counsel's errors were so serious they deprived the accused of a fair trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

If the trial court makes determinations of factual matters, they will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). The questions of whether counsel's performance was deficient, i.e. unreasonable under the facts of the case, and whether the deficiency was prejudicial to the defendant are questions of law that this court decides independently. ***Id.*** at 634, 369 N.W.2d at 715; ***Strickland***, 466 U.S. at 690. It is presumed, however, that counsel rendered adequate assistance; therefore, judicial scrutiny of counsel's actions is highly deferential. ***Id.*** at 637, 369 N.W.2d at 716. A court must not second-guess counsel's considered selection of trial tactics or the exercise of his or her professional judgment. ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983). An

appellate court will second-guess counsel, however, when the trial tactics are irrational or based on caprice rather than judgment. ***Id.*** at 503, 329 N.W.2d at 169.

The issue in this case is whether counsel provided ineffective assistance by not seeking submission of a lesser included offense to the jury, and we begin by determining if submission of the offense was appropriate. A lesser included offense is one in which the statutorily defined elements of the lesser offense are included within the statutory elements of the greater crime, and no additional element or fact is necessary to prove the lesser offense. ***State v. Carrington***, 134 Wis.2d 260, 265, 397 N.W.2d 484, 486 (1986).

Here, the State does not dispute that second-degree reckless injury is a lesser included offense of first-degree reckless injury. Both offenses require proof that a defendant recklessly caused great bodily harm to another human being. Section 940.23(1) & (2), STATS. First-degree reckless injury, however, also requires proof that the defendant acted with "utter disregard for human life." *See* § 940.23(1).

A lesser included offense should be submitted only if a reasonable view of the evidence supports a reasonable doubt on some element of the greater offense and guilt beyond a reasonable doubt on all elements of the lesser offense. ***State v. Borrell***, 167 Wis.2d 749, 779, 482 N.W.2d 883, 894 (1992). Whether the trial court should have submitted the lesser included offense is a question of law, which this court reviews *de novo.* ***Id.*** When reviewing the evidence to determine if a submission is appropriate, the evidence is considered in the light most favorable to the defendant. ***State v. Werlein***, 136 Wis.2d 445, 457, 401 N.W.2d 848, 853 (Ct. App. 1987).

There was evidence that, if believed by the jury, supported submitting the lesser included offense. Christian-Lobley was the aggressor. She followed McClinton and threw the first punch. McClinton testified that she heard someone say "I'm going to kill this bitch" before she was hit. McClinton also testified that after a very brief struggle, she was walking away when Christian-Lobley grabbed her around the neck from behind. McClinton denied that she intentionally fired the weapon. McClinton's testimony would reasonably support an inference that McClinton displayed the gun out of fear

and that the gun went off in the struggle rather than as the result of a deliberate act. If the jury accepted McClinton's testimony and the inferences that could be drawn from it, the jury could acquit McClinton of the greater charge and convict her of the lesser one.

The State argues against submission of the lesser included offense because Christian-Lobley was shot while the gun was pointed at Christian-Lobley and in contact with her shirt. In the State's view, because McClinton aimed a loaded gun at a vital part of Christian-Lobley's body at close range, it would have been unreasonable for the jury to conclude that McClinton did not act with utter disregard for human life. *See* ***State v. Davis***, 144 Wis.2d 852, 864, 425 N.W.2d 411, 416 (1988).

The cases cited by the State are distinguishable. In ***Davis***, although the gun discharged during a struggle, the defendant initiated the incident by deliberately pointing a loaded gun at the victim. ***Id.*** at 855, 425 N.W.2d at 412. Similarly, in ***State v. Sarabia***, 118 Wis.2d 655, 666, 348 N.W.2d 527, 533 (1984), the non-exculpatory evidence showed that Sarabia deliberately fired a weapon directly into a bar where people were present. In ***State v. Melvin***, 49 Wis.2d 246, 181 N.W.2d 490 (1970), the defendant threatened an officer, pulled a gun, and fired directly at the officer. Because there was no evidence that Melvin had panicked, there was no evidence to permit a view that his conduct did not evince little or no regard for human life. ***Id.*** at 253-54, 181 N.W.2d at 494. Finally, in ***State v. Wilson***, 149 Wis.2d 878, 901-02, 440 N.W.2d 534, 543 (1989), there was no non-exculpatory testimony to suggest that Wilson's conduct, while criminal, did not satisfy all the elements of the greater offense.

When ruling on the post-conviction motion, the trial court found that counsel made a tactical decision to reject the lesser included offense. There is, however, no evidence to support this finding. Counsel testified that he could not remember the issue and that he had no file notes concerning it. McClinton testified that counsel did not advise her that the lesser included offense would not be pursued. On the basis of the testimony, the trial court's finding was clearly erroneous.

Additionally, the facts and circumstances of this case make such a tactical decision unreasonable. As the trial court observed, the self-defense

argument was not true self-defense. To invoke self-defense, a defendant must have reasonably believed that he or she was in imminent danger of death or great bodily injury and that the amount of force used was reasonable and not excessive. Section 939.48, STATS. McClinton felt safe enough with family members and friends present to confront Lobley. It would be unreasonable for her to think that they would not assist her in a conflict with Christian-Lobley when Christian-Lobley was unarmed. Additionally, McClinton did not testify that she intentionally shot Christian-Lobley to protect herself. McClinton's testimony suggests that the gun accidently discharged during the struggle.

As the trial court noted, McClinton's defense negated the element of "utter disregard for human life." This defense was what made submission of the lesser included offense appropriate. The lesser included offense does not require the very element to be defeated by McClinton's defense. Without further explanation from counsel, we cannot conclude that the all-or-nothing strategy was reasonable because it did not take advantage of the evidence supporting McClinton's defense. We conclude that trial counsel's performance was not reasonable, considering all the circumstances.

We also conclude that McClinton was prejudiced by counsel's deficient performance. In its decision on the post-conviction motion, the trial court concluded that there was no prejudice because Christian-Lobley was the victim of a shooting. By not pursuing an instruction on the lesser included offense, trial counsel left the jury in the position of convicting on the greater offense or acquitting on the basis of a very weak self-defense claim. Prejudice occurs if the jury, believing McClinton was guilty of *some* offense, found her guilty of the crime charged rather than finding her not guilty. *See* ***Keeble v. United States***, 412 U.S. 205, 212-13 (1973). Thus, we conclude that the order denying the post-conviction motion must be reversed. We remand the case to the trial court with instructions to vacate the judgment of conviction and order a new trial.

By the Court.—Order reversed and cause remanded with directions.

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