COURT OF APPEALS
DECISION
DATED AND FILED

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David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP848-CR **Cir. Ct. No. 2007CF2496**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MITCHELL A. BOOSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Mitchell A. Boose appeals the judgment of conviction entered after a jury found him guilty of first-degree reckless homicide while armed, *see* WIS. STAT. §§ 940.02(1) & 939.63, and being a felon in possession of a firearm, *see* WIS. STAT. § 941.29(2)(a). He also appeals the order denying his postconviction motion. Boose claims: (1) there was insufficient evidence to

support the verdict; (2) it was prosecutorial misconduct for the prosecutor to tell the jury during closing argument that "the natural reaction of a person who is being shot at, [is to] turn"; (3) his lawyer gave him ineffective assistance; and (4) the trial court erroneously exercised its discretion by giving the self-defense instruction. We affirm.

I.

¶2 On May 14, 2007, at approximately 11:00 p.m., Fred Richardson was fatally shot in the back during an argument with Boose. Jazmine Badger saw the shooting from her window. She testified that Richardson and Sam Sanders approached Boose in an alley on 40th Street and the three men were arguing when Boose "pulled out his gun and shot [Richardson,] and Sam took off running and [Boose] took off chasing behind him." Richardson died from the single gunshot wound.

¶3 Boose was charged with first-degree reckless homicide while armed and being a felon in possession of a firearm. Boose told police that he was at his friend Trenton Edwards's house at the time of the shooting. Edwards, however, testified that Boose did not get to his house until approximately 11:15 p.m. Torrence Gayton, Badger's boyfriend and Boose's close friend, testified that he was in front of the house when he heard arguing followed by a gunshot that came from the alley. According to Gayton, Boose sought his help the day after the shooting, admitted that he was arguing with Sanders and Richardson in the alley, and told Gayton that "then he just squeezed the trigger one time and shot." Boose also told Gayton that the shot was meant for Sanders, that he had hidden the gun on Meinecke Avenue between 41st and 42nd Streets, and "[a]sked [Gayton] to … get rid of it."

¶4 As we have seen, the jury found Boose guilty. He filed a postconviction motion claiming his lawyer was ineffective because the lawyer: (1) did not argue at Boose's preliminary examination the apparent conflict between Badger's testimony that the argument was face-to-face, and the fact that Richardson was shot in the back; (2) did not appeal the bindover because of this alleged inconsistent evidence; (3) agreed to a self-defense instruction at trial; and (4) did not object to the prosecutor's statement during closing argument that Richardson "turned away" just before he was shot. The trial court denied the motion:

> [T]he prosecutor's closing argument was fair argument and constituted a reasonable and permissible assessment of the evidence. The State offered its own theory as to what could have occurred to explain the discrepancy in the evidence. The court finds the argument entirely proper.

The trial court further found that "there was sufficient evidence for bindover," the self-defense request was reasonable, and any objection during the prosecutor's closing would have been overruled. We address these matters in turn.

II.

A. *Sufficiency of the Evidence.*

¶5 Boose argues the evidence is insufficient to support his conviction because the evidence as to how Richardson was shot was, he contends, "patently incredible." He claims that Badger's eyewitness testimony that the men were facing each other during the argument is inconsistent with the undisputed evidence that Richardson was shot in the back. We disagree.

¶6 In reviewing claims of insufficiency, we apply the standard recounted in ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.... If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Here, the evidence is more than sufficient to support the conviction. The elements required to prove first-degree reckless homicide are that: (1) the defendant caused the death of the victim, (2) the defendant acted recklessly, and (3) the circumstances showed utter disregard for human life. *See* WIS. STAT. § 940.02(1). Badger testified that she saw Boose arguing with Richardson, saw Boose shoot Richardson, and saw Richardson fall. Gayton testified that Boose came to him for help the next day and asked him to get rid of the gun. Edwards testified that Boose did not come to his home until after the time of the shooting. From these three witnesses, the jury could reasonably find Boose guilty as charged.

¶7 Boose argues that Badger's testimony about the face-to-face confrontation renders it impossible to find that Boose shot Richardson because Richardson was shot in the back. Boose wants us to infer that someone else must have shot Richardson because the eyewitness did not say that Richardson turned his back to Boose. Reasonable inferences are, however, for the jury to draw, not us, and the finding of guilt is fully supported by reasonable inferences the jury could have drawn from the evidence, including what Boose contends is the

conflict. First, no one testified that Richardson was facing Boose at the moment of the shooting. Second, the jury could reasonably infer from the testimony that Richardson turned just prior to the shot. "If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction." ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 103, 765 N.W.2d 557, 562.

¶8 Further, Boose's lawyer made the same contention to the jury that Boose makes on appeal—"You cannot shoot somebody face to face and have the shot go in the back." His lawyer attacked Badger's credibility, arguing her testimony was inconsistent and she was making things up. Credibility determinations and resolution of inconsistencies or discrepancies in the testimony, however, are resolved by the jury. ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d 506, 538, 664 N.W.2d 97, 112.

B. *Prosecutorial Misconduct.*

¶9 Boose's next complaint is that "it was prosecutorial misconduct to tell the jury that Fred Richardson turned away, when the evidence adduced at trial contradicted that assertion." (Capitalization omitted.) We disagree.

¶10 A prosecutor is allowed latitude in closing and "may comment on evidence and argue from it to a conclusion." ***State v. Cockrell***, 2007 WI App 217, ¶41, 306 Wis. 2d 52, 76, 741 N.W.2d 267, 278. Whether the prosecutor's argument was proper or misconduct is a discretionary determination. ***Id.***, 2007 WI App 217, ¶41, 306 Wis. 2d at 75, 741 N.W.2d at 278.

¶11 As we have seen, there is no evidence that Boose and Richardson were face-to-face at the moment the gun was fired. So, Boose is wrong—the prosecutor's "turned away" comment did not contradict the evidence. Although it

is true that no one testified to seeing Richardson turn away, the prosecutor's suggestion that Richardson turned before he was shot was not "[a]rgument on matters not in evidence," *see* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980), which would be improper. Rather, it was a reasonable inference the prosecutor could logically ask the jury to draw.

¶12 We affirm the trial court's discretionary ruling that the "[p]rosecutor's closing argument was fair argument and constituted a reasonable and permissible assessment of the evidence."

C. *Ineffective Assistance.*

¶13 As noted, Boose argues he received ineffective assistance of counsel. He claims: (1) the lawyer who represented him at the preliminary examination should have argued the inconsistency during that hearing; (2) the lawyer who represented him after the preliminary examination should have appealed the bindover decision; (3) his lawyer should have objected to the prosecutor's closing argument and moved for a mistrial; and (4) his lawyer should not have agreed to the self-defense instruction because, he contends, it does not apply to a reckless homicide charge.[1] We address and reject each contention in turn.

¶14 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must

[1] Boose also argues the trial court erroneously exercised its discretion in giving the self-defense instruction. Boose's lawyer, however, stipulated to the instruction and therefore waived any right to challenge the instruction on the merits. We therefore address it only in the context of ineffective assistance of counsel.

point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. Further, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8 (2003) (per curiam); *see also* ***id.***, 540 U.S. at 11 (lawyer need not be a "Clarence Darrow" to survive an ineffectiveness contention).

¶15 To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. We need not address both deficient performance and prejudice if the defendant does not make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

1. Preliminary Examination.

¶16 Boose claims that his lawyer should have noticed an apparent conflict between the autopsy report (defendant shot in the back) and the testimony that the men were facing each other. Boose, however, fails to explain how not arguing this alleged conflict caused him prejudice.

¶17 The burden of proof at the preliminary examination is whether there is sufficient evidence to believe that a felony was committed. ***State v. Anderson***, 2005 WI 54, ¶24, 280 Wis. 2d 104, 122, 695 N.W.2d 731, 740. The trial court must determine "'whether the facts and the reasonable inferences drawn therefrom

support the conclusion that the defendant probably committed a felony.'" ***Ibid.*** (citation omitted).

¶18 At Boose's preliminary examination, Badger testified she saw Boose shoot Richardson. As we have seen, a reasonable inference from that testimony is that Richardson turned just before Boose pulled the trigger. Thus, the trial court reasonably determined, based on Badger's testimony and the reasonable inferences therefrom, that Boose probably committed a felony. Boose has not shown any prejudice from his lawyer's failure to argue any alleged conflict between the autopsy report and Badger's testimony.

¶19 For the same reason, we reject Boose's claim that his lawyer should have appealed the bindover. Under the applicable standard governing bindovers that we have already mentioned, any petition to appeal this non-final order either would not have been granted or, if granted, the appeal would not have been successful because, as we have seen, there was clearly sufficient evidence to support the bindover. Therefore, Boose has not established that any prejudice resulted from his lawyer's failure to appeal the bindover.

2. Closing argument—Mistrial.

¶20 Boose also contends that his trial lawyer was ineffective for not objecting when the prosecutor argued in summation that Richardson must have turned away at the last moment. Boose also claims that his lawyer should have argued that Badger's testimony that the men were "right on top of" each other was inconsistent with the medical examiner's finding that there was no gun-powder stippling on Richardson. Again, Boose has not shown prejudice.

¶21 First, Boose's lawyer argued to the jury during his summation that it should find Boose not guilty because of the inconsistencies in the evidence. His lawyer argued that no one testified that Boose shot Richardson in the back. He told the jury: "[Badger] doesn't explain how that results in what is absolutely the ineluctable conclusion you must derive from this case is that this young man had an entry wound to the back. Came out the chest. Nobody has explained that." Further, he argued that the State "will never ever be able to explain how this victim could be shot in the back." And, just before finishing, Boose's lawyer told the jury: "Remember there is only one so-called witness. None of it matches up the pure scientific fact that this young man got shot in the back."

¶22 As we have already seen, the prosecutor responded to the defense's contentions in its rebuttal closing argument, explaining why the defense theory with respect to the shooting and the bullet hole going through the back was without merit. As we have also seen, this was wholly permissible and any objection during the rebuttal argument would have properly been denied. Accordingly, Boose has not shown prejudice.

¶23 Second, with regard to the stippling, Badger estimated the distance between Boose and Richardson to be no more than two feet. The medical examiner testified that there was no stippling on Richardson, and explained that "if there was the absence of soot or stippling, then there's a distance of at least two to three feet" from the gun to the spot of impact. The jury could reasonably conclude that the medical examiner's testimony was consistent with Badger's; all distances were, obviously, approximations. Boose has not shown prejudice as a result of his lawyer not making this argument.

3. Self-defense Instruction.

¶24 Boose claims his trial lawyer was ineffective for requesting a self-defense instruction on a charge of reckless homicide. He claims that "[s]elf-defense requires intent on the part of the defendant, and cannot be invoked in a case of reckless or negligent conduct." We disagree.

¶25 The trial court instructed the jury:

> Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person, and the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the inference and the defendant's beliefs were reasonable.
>
> The defendant may intentionally use force which is intended or more likely to cause death or great bodily harm only if the defendant reasonably believed that the force was used is necessary to prevent imminent death or great bodily harm to himself. A belief may be reasonable even though mistaken.
>
> In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.
>
> There is no duty to retreat. However, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the … opportunity to retreat.
>
> You should also consider whether the defendant provoked the attack.… However, if the attack which follows causes the person reasonably to believe that he is in

> imminent danger of death or great bodily harm, he may legally act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.
>
> ….
>
> The state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense. If you're satisfied beyond a reasonable doubt that all three elements of first degree reckless homicide have been proved and the defendant did not act lawfully in self-defense, you should find the defendant guilty. If you're not so satisfied you must find the defendant not guilty.

¶26 In contending that this was error, Boose relies on ***Werner v. State***, 66 Wis. 2d 736, 226 N.W.2d 402 (1975). As the State points out, however, Boose was not charged with recklessly *shooting* Richardson, but with recklessly *killing* him. The intentional act was not the death, but the shooting. Thus, self-defense may be applicable in a reckless homicide case because it could negate the intent to shoot. Further, WIS. STAT. § 939.48 says that self-defense is a privilege and WIS. STAT. § 939.45 says that a privilege can apply to "any crime."

¶27 Werner was tried for second-degree murder, a crime that does not have an intent element. ***Werner***, 66 Wis. 2d at 748, 226 N.W.2d at 407–408. The trial court gave a self-defense instruction: "'If you find that the defendant *did intentionally cause the death of* [the victim] … under circumstances … of self-defense … then you must find the defendant not guilty.'" ***Id.***, 66 Wis. 2d at 748, 226 N.W.2d at 407. On appeal, it was undisputed that the instruction was erroneous because of the reference to "*did intentionally cause the death of* [the victim]." ***Id.***, 66 Wis. 2d at 748, 226 N.W.2d at 408. ***Werner*** held, however, that the trial court could have properly instructed the jury on self-defense if it had

changed the language of the instruction by using "the phrase 'use force intended or likely to cause death or great bodily harm against,' or simply deleted the word 'intentionally.'" ***Id.***, 66 Wis. 2d at 749, 226 N.W.2d at 408. ***Werner*** thus confirmed that a self-defense instruction was applicable to a reckless crime as long as the instruction did not condition the use of self-defense on a finding that the crime was intentional. *See* ***ibid.*** The jury instruction given in Boose's case accurately stated the law and did not premise the self-defense application on a finding of intentional killing. The instruction accurately stated the law and was properly given. Therefore, Boose has not shown prejudice.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.