COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2230-CR **Cir. Ct. No. 2009CF205**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY G. MEYERS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Anthony Meyers appeals an order denying his postconviction motion for a new trial, after he was convicted following a jury trial

of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1) (2011-12).[1] On appeal, Meyers argues that the evidence was insufficient to support the conviction and that his trial counsel rendered ineffective assistance. For the reasons set forth below, we affirm the order of the circuit court.

STANDARD OF REVIEW

¶2 In reviewing a challenge to the sufficiency of the evidence, we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, when viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable finder of fact could have found guilt beyond a reasonable doubt. ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¶3 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination, which this court decides *de novo*. ***Id.***

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

Sufficiency of the Evidence

¶4 Meyers was convicted of first-degree reckless homicide, contrary to WIS. STAT. § 940.02(1), for the fatal stabbing of his mother's boyfriend, Shon Potschaider, after a physical altercation. Meyers was charged with first-degree intentional homicide under WIS. STAT. § 940.01. At trial, Meyers' counsel requested that the circuit court instruct the jury on the lesser included offense of first-degree reckless homicide, and the request was granted. On appeal, Meyers argues that the evidence was insufficient to support the "utter disregard for human life" element of first-degree reckless homicide. WIS. STAT. § 940.02(1). Related to this argument is his assertion that his trial counsel was ineffective for failing to argue that the evidence did not support a finding that Meyers acted with utter disregard for human life.

¶5 The State argues that Meyers is judicially estopped from challenging the sufficiency of the evidence to support his conviction on the lesser included offense of first-degree reckless homicide because he asked the circuit court to submit that offense to the jury. The State cites ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987), in support of its argument, and we agree that ***Michels*** controls. In ***Michels***, the defendant argued that the evidence was insufficient to support his conviction for manslaughter, heat of passion, even though he had requested jury instructions on that offense as a lesser included offense of second-degree murder. ***Michels***, 141 Wis. 2d 81 at 97-98. This court held that the defendant was judicially estopped from raising the issue because it was directly contrary to what he had argued in the circuit court. ***Id.*** The same principle applies here. Under ***Michels***, Meyers is judicially estopped from raising

the sufficiency of the evidence issue as to first-degree reckless homicide, and we resolve the issue on that basis.

¶6 Meyers is also estopped, under ***Michels***, from raising the related issue of whether his trial counsel was ineffective for failing to raise the sufficiency of the evidence issue. Meyers' trial counsel requested the instruction on first-degree reckless homicide and urged the jury to return that verdict as an alternative to the charged offense of first-degree intentional homicide. This was a strategic decision that played out in Meyers' favor. The jury returned a verdict of guilty as to first-degree reckless homicide. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶7 However, even if Meyers were not judicially estopped from raising the sufficiency of the evidence issue, the record contains more than sufficient evidence to support the jury's verdict. Meyers does not contest that his conduct of stabbing Potschaider in the chest with a knife caused Potschaider's death. Meyers argues only that the evidence was insufficient to prove that he acted with utter disregard for human life. *See* WIS. STAT. § 940.02(1). He argues that his conduct of calling 911 and asking the police about Potschaider's condition was conduct that demonstrated that he did have some regard for human life. To support his argument, Meyers cites ***State v. Miller***, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188.

¶8 In ***Miller***, this court concluded that the evidence was insufficient to prove utter disregard for human life, focusing principally on the reason for Miller's conduct, and also considering his conduct of calling 911. ***Id.***, ¶¶39-40, 42. However, a defendant's mitigating conduct does not necessarily preclude a

finder of fact from finding, beyond a reasonable doubt, that the defendant acted with utter disregard for human life. *See., e.g.*, ***State v. Jensen***, 2000 WI 84, ¶¶30-32, 236 Wis. 2d 521, 613 N.W.2d 170 (concluding that the evidence was sufficient to find utter disregard for human life, even though the defendant called 911 after he noticed that the infant he had shaken was having difficulty breathing).

¶9 In this case, the jury heard evidence from several witnesses, including Meyers, regarding his conduct before, during, and after the stabbing. Meyers' mother, Amy Meyers, testified that she heard Potschaider and Meyers yelling within their home and came downstairs and saw Potschaider with Meyers in a chokehold. She testified that she tried to separate them. Meyers then ran to the kitchen and retrieved a knife. Amy told him to put it down. Meyers yelled as he approached Potschaider and said he was going to kill Potschaider. Amy testified that Meyers' back was to her, and she could see Meyers and Potschaider fighting. Potschaider went out the front door and Meyers got down on the floor. Amy went outside and saw Potschaider on the ground.

¶10 Kevin Schutz, a friend of Meyers who was present at the house during the altercation, also testified that Meyers grabbed a knife from the kitchen and yelled that he was going to kill Potschaider. Schutz testified that Meyers stabbed Potschaider from the left shoulder to the chest and waist area, swinging the knife back four or five times. After Meyers backed off and Potschaider fell out the front door, Schutz went outside and saw Potschaider on the ground. Schutz observed Potschaider shaking and said that someone better call 911. Schutz went to the backyard and Meyers came out of the house and was on his phone, saying he had stabbed his stepdad and was going to go to prison.

¶11 Meyers testified on his own behalf and said that he did not remember entirely what happened after the fight between him and Potschaider was broken up. Meyers had been drunk. He remembered grabbing a knife, but did not recall where he got it. He admitted that Potschaider was not punching him and was not near him when he went to get the knife. The next thing Meyers remembered was stabbing Potschaider by the front door. Meyers testified that he had not been trying to kill Potschaider, but rather just wanted Potschaider to leave. When Meyers was interviewed by law enforcement, he asked police if Potschaider had died. He admitted that he asked about whether Potschaider was alive or dead because, if Potschaider lived, this "was going to go away." Meyers further admitted that he had been concerned about what consequences he would face if Potschaider died.

¶12 At the postconviction motion hearing, Meyers provided more detail about his memory of the incident. He testified that he stabbed Potschaider in the stomach, and not in the heart, because he did not want him to die. He testified that he called 911 and then waited on the phone with dispatch until police arrived.

¶13 The circuit court concluded at the end of the postconviction motion hearing that the evidence was sufficient for the jury to find that Meyers acted with utter disregard for human life, and that Meyers' testimony at the postconviction motion hearing only made that utter disregard more evident. We agree that the evidence was sufficient to support the conviction and that, even if Meyers had presented the same testimony at trial that he did at the postconviction motion hearing, it would not have changed the outcome in his favor.

¶14 In this case, the jury heard the witnesses' accounts of what occurred and determined what weight and credibility to give to the testimony. The

credibility of the witnesses and the weight of the evidence are for the trier-of-fact to determine. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In reviewing the sufficiency of the evidence, where more than one reasonable inference can be drawn from the facts, we must adopt the inference that supports the finding made by the jury. ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1022-23, 480 N.W.2d 842 (Ct. App. 1992).

¶15 It was reasonable for the jury to infer that, when Meyers asked police how Potschaider was doing, he did so more out of concern for the charges he faced than out of concern for Potschaider's life. It was likewise reasonable for the jury to infer that, when he stabbed Potschaider repeatedly in the torso, Meyers acted with utter disregard for human life. Meyers has failed to meet the heavy burden on appeal of demonstrating that the evidence, when viewed in the light most favorable to the State, is so insufficient in probative value and force that, as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 500.

Ineffective Assistance of Counsel

¶16 Meyers argues that his trial counsel was ineffective in a variety of ways. Specifically, he argues that his counsel was ineffective for failing to request a second-degree reckless homicide instruction, failing to request an instruction on retreat, and waiving Meyers' right to elicit testimony on Meyers' knowledge of Potschaider's violent past. For the reasons discussed below, we reject these arguments.

¶17 We will first address the issue of whether counsel was ineffective for failing to request an instruction on second-degree reckless homicide. Even if we assume, without deciding the issue, that trial counsel was ineffective for failing to

request the instruction, Meyers fails to establish that he was prejudiced. *See* ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (a claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel and (2) prejudice resulting from that deficient performance). To prove prejudice, a defendant must show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id***, ¶58. As stated above, we are satisfied that the evidence supports the conviction of first-degree reckless homicide. Meyers has failed to persuade us that, in light of all the evidence regarding his fatal attack on Potschaider, an instruction on second-degree reckless homicide would have changed the outcome.

¶18 Meyers also argues that an additional jury instruction on self-defense should have been requested by the defense. In particular, he argues that the jury should have been instructed that there is no duty to retreat. WISCONSIN JURY INSTRUCTIONS—CRIMINAL 810 (2001) provides:

> 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 with safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.

¶19 At the postconviction motion hearing, Meyers' trial counsel, John Kuech, testified that he was aware of this jury instruction, but that he chose not to request it because he "didn't want to draw any attention to the fact that he could have retreated" even though there was no duty to do so. The record reflects that, after the initial physical altercation between Meyers and Potschaider ended, Potschaider went and stood by the front door. Potschaider was not doing anything and did not have anything in his hands when Meyers approached and stabbed him.

Given the facts in the record, and the language in the jury instruction that allows the jury to consider whether the defendant had an opportunity to retreat, we are satisfied that it was a reasonable, strategic decision for Kuech not to request the jury instruction on retreat. We will not second-guess that strategic decision on appeal. *See* ***Elm***, 201 Wis. 2d at 464.

¶20 It is not clear from Meyers' brief whether he also is attempting to argue that it was error for the circuit court not to give the instruction on retreat, despite the absence of any request to do so. To the extent Meyers makes such an argument, we find no error in the circuit court's failure to give the instruction where no request for the instruction was made.

¶21 Finally, we address Meyers' argument that Kuech was ineffective for waiving the right to elicit testimony about Meyers' knowledge of Potschaider's violent past. Meyers testified at the postconviction motion hearing that Potschaider told him that he used to fight all the time in prison and get into fights on the street. Prior to trial, Kuech informed the prosecutor and the court that the defense had elected not to offer any evidence of the type allowed under ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). In ***McMorris***, 58 Wis. 2d at 150-52, the Wisconsin Supreme Court held that when there is a factual basis to raise a self-defense claim for homicide or assault, the defendant may offer proof of prior specific instances of violence on the part of the victim, if known by the defendant at the time of the crime.

¶22 At the postconviction motion hearing, Kuech testified that, in terms of strategy, he felt Meyers might be more successful without introducing evidence that Meyers knew of Potschaider's violent past. Kuech did not want it to appear to the jury that Meyers had an axe to grind with Potschaider, as the jury may then

have inferred that Meyers intended to kill Potschaider. Given the stated risk associated with introducing evidence that Meyers knew Potschaider had a violent past, we conclude that counsel's strategic decision not to introduce ***McMorris***-type evidence was a reasonable one.

¶23 In sum, we reject Meyers' arguments as to the insufficiency of the evidence and ineffective assistance of his trial counsel, and we affirm the order denying his postconviction motion for a new trial.

By the Court.—Order affirmed.

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