COURT OF APPEALS DECISION DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1309

Cir. Ct. No. 2003CF2931

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAVELL DEANGELO LOVE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lavell Deangelo Love appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06 (2013-14).[1] He

[1] Because this opinion discusses criminal charges and statutory penalties for an offense arising in 2003, all subsequent references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

asserts that, in his trial for first-degree intentional homicide, his trial counsel was ineffective for requesting a jury instruction on a lesser-included offense that the jury ultimately agreed he committed. He asserts that his postconviction counsel was ineffective in turn for failing to challenge his trial counsel's ineffectiveness. He seeks a new trial. The circuit court denied the requested relief after conducting an evidentiary hearing. We affirm.

BACKGROUND

¶2 On May 3, 2003, police responded to reports of a shooting and found Ronnie Washington dead on the porch of his Milwaukee, Wisconsin home. He had sustained multiple gun shot wounds. A few weeks later, police questioned Love and he admitted that, on May 3, 2003, he struggled with and shot at Washington. The State charged Love with first-degree intentional homicide while armed with a dangerous weapon, and the matter proceeded to a jury trial.

¶3 As the trial progressed, the lawyers discussed jury instructions with the trial court in chambers.[2] The State indicated its intention to request a jury instruction not only as to first-degree intentional homicide while armed, but also as to the lesser-included offense of first-degree reckless homicide while armed. Love, by trial counsel, requested an instruction on the lesser-included offense of second-degree reckless homicide while armed. The State initially opposed Love's request but eventually withdrew the objection, and the trial court instructed the

[2] The Honorable Mary M. Kuhnmuench presided over the trial in this matter. We refer to Judge Kuhnmuench in this opinion as the trial court. The Honorable David L. Borowski presided over the postconviction proceedings and entered the order underlying this appeal. We refer to Judge Borowski as the circuit court.

jury on all three offenses. The jury found Love guilty of second-degree reckless homicide while armed.

¶4 Love pursued a direct appeal of his criminal conviction, alleging the trial court should have suppressed his inculpatory statement to police. We affirmed. *See* ***State v. Love***, No. 2005AP3152-CR, unpublished slip op. (WI App Aug. 3, 2006). He next filed a petition for a writ of *habeas corpus* in this court alleging his appellate counsel was ineffective for failing to challenge the validity of his arrest. We denied the petition. ***State ex rel. Love v. Smith***, No. 2009AP1503-W, unpublished op. and order (WI App Oct. 14, 2009). He then launched the postconviction litigation underlying this appeal, alleging his trial counsel was ineffective for requesting a lesser-included offense instruction and his postconviction counsel was ineffective for failing to raise the issue during the direct appeal process.

¶5 The circuit court conducted a hearing at which trial counsel and Love both testified. No one disputed that, mid-trial, the State and Love's trial counsel discussed lesser-included offenses with the trial court outside of Love's presence. According to Love, his trial counsel thereafter told him the prosecutor was seeking an instruction on the lesser-included offense of first-degree reckless homicide. Love responded that he did not want any lesser-included offenses presented to the jury, but trial counsel told him the trial court would certainly grant the State's request. Love testified he had no additional discussion with trial counsel about lesser-included offenses and never authorized or approved a request for an instruction on second-degree reckless homicide.

¶6 Trial counsel described events somewhat differently. Although he too recalled telling Love that an instruction on first-degree reckless homicide was

"out of [the defense's] hands," trial counsel testified his goal was to "get the jury away from first degree intentional" homicide, and trial counsel believed an instruction on an additional lesser-included offense, namely, second-degree reckless homicide, would further that goal. Trial counsel therefore discussed with Love the option of requesting such an instruction. According to trial counsel, Love reluctantly acquiesced to counsel's recommendation that he pursue an instruction on second-degree reckless homicide.

¶7 At the conclusion of the postconviction hearing, the circuit court rejected Love's claims, explaining that it "believe[d trial counsel's] testimony fully." The circuit court determined that trial counsel consulted Love and then made a proper strategic decision to pursue an instruction on second-degree reckless homicide. Love appeals.

DISCUSSION

¶8 To establish constitutionally ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one prong of the analysis, the court need not address the other. ***Id.*** at 697. To demonstrate deficient performance, the defendant must show specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, "[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." ***Id.*** at 694. When, as here, a defendant alleges postconviction counsel provided ineffective assistance by failing to allege that the defendant's trial counsel was ineffective, the defendant cannot prevail without establishing that

trial counsel's representation was in fact ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

¶9 Whether an attorney's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If the answers to those questions rest on the circuit court's factual findings, we will not disturb those findings unless they are clearly erroneous. ***Id.*** at 127. Additionally, we defer to the underlying credibility assessments of the circuit court "because of its superior opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). With these principles in mind, we turn to Love's claims.

¶10 According to Love, his trial counsel was ineffective for requesting an instruction on second-degree reckless homicide because the request "went against Love's clear and understood objective to go for outright acquittal." Whether to request a jury instruction on a lesser-included offense, however, is a strategic decision that rests with trial counsel. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-32, 246 Wis. 2d 648, 630 N.W.2d 752. "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). A review of the facts and the law here unquestionably shows a reasonable basis for requesting an instruction on second-degree reckless homicide.

¶11 We first review the relevant facts. The evidence at trial included Love's statement to police placing Love at the scene of Washington's shooting. Love told police he was with several companions who enlisted him to buy drugs from Washington and then steal valuables from Washington's home. Love went

on to say that when he knocked on Washington's door and asked for some "weed," Washington grabbed Love, whose gun went off. Love said he got scared, "fired [the gun] about five times" at Washington to escape his grasp, and fled.

¶12 The jury also heard testimony from Kennies Minniefield, who was one of Love's companions on the day of the homicide. Minniefield described driving Love and two other men to a Milwaukee neighborhood. The three passengers got out of the car on a street behind Washington's home. Two of the passengers returned to the car without Love, and Minniefield heard gunshots. Moments later, Love hurried to the car and told the other men that he "shot the person ... everywhere."

¶13 The Milwaukee medical examiner testified that Washington died after receiving five separate bullet wounds. The medical examiner went on to tell the jury that one of the bullets entered Washington's body while the gun was pressed against Washington's flesh, and several of the shots that penetrated his chest were fired from close range.

¶14 Next, we review the applicable law. The elements of first-degree intentional homicide are: (1) the defendant caused the death of a victim; and (2) the defendant intended to kill the victim. *See* WIS JI—CRIMINAL 1010; *see also* WIS. STAT. § 940.01(1)(a). "[E]very degree of homicide is a lesser included offense of first-degree intentional homicide." *See* ***State v. Chapman***, 175 Wis. 2d 231, 241, 499 N.W.2d 222 (Ct. App. 1993); *see also* WIS. STAT. § 939.66(2). Both the prosecution and the defense may request lesser-included offense instructions. ***Zenou v. State***, 4 Wis. 2d 655, 668, 91 N.W.2d 208 (1958). The circuit court must give an instruction on an issue raised by the evidence when a

party requests such an instruction. *See* ***State v. Head***, 2002 WI 99, ¶44, 255 Wis. 2d 194, 648 N.W.2d 413.

¶15 In this case, the State requested an instruction on first-degree reckless homicide. The elements of first-degree reckless homicide are: (1) the defendant caused the death of the victim; (2) the defendant caused the victim's death by criminally reckless conduct; and (3) the circumstances of the criminally reckless conduct showed utter disregard for human life. *See* WIS JI—CRIMINAL 1022; *see also* WIS. STAT. § 940.02(1). "Criminal recklessness" is defined as action that "creates an unreasonable and substantial risk of death or great bodily harm to … another and the actor is aware of that risk." *See* WIS. STAT. § 939.24.

¶16 The first two elements of first-degree reckless homicide constitute the crime of second-degree reckless homicide under WIS. STAT. § 940.06(1). "The difference between first and second degree reckless homicide is that the first degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life." WIS JI—CRIMINAL 1022.

¶17 The foregoing facts and law support the instructions presented to the jury here. The testimony offered by the medical examiner and Minniefield, if believed, reasonably suggests Love either intended to kill Washington or that Love acted recklessly and with utter disregard for the possibility that the shots he fired might be fatal. The evidence thus supported instructions requested by the State on both first-degree intentional homicide and first-degree reckless homicide. Indeed, on appeal Love does not dispute that the jury properly received instructions on those crimes. On the other hand, Love's statement to police suggested that Love was in a panic and fired wildly when confronted by the victim. This evidence, if

believed, permitted the jury to conclude that Love shot recklessly but without the utter disregard for human life required to convict him of first-degree reckless homicide.

¶18 Love faced a life sentence if convicted of first-degree intentional homicide, and he faced sixty-five years of imprisonment if convicted of first-degree reckless homicide while armed. *See* WIS. STAT. §§ 940.01, 940.02(1), 939.50(1)(a), 939.63(1)(b). By contrast, Love faced thirty years of imprisonment and the possibility of a fine if convicted of second-degree reckless homicide while armed. *See* WIS. STAT. §§ 940.06(1), 939.63(1)(b), 939.50(1)(d). Given Love's inculpatory statement to police, the risk was great that the jury would find him guilty of homicide in Washington's death. Love faced far less prison time for the crime, however, if the jury convicted him of second-degree reckless homicide instead of the graver homicide charges pursued by the State. Under these circumstances, Love's trial counsel plainly adopted a reasonable strategy in seeking an instruction on the lesser-included offense of second-degree reckless homicide.

¶19 Love complains the strategy was not his, that he wanted "an all or nothing defense" that risked conviction of first-degree intentional homicide in exchange for the gamble of an outright acquittal. A defendant, however, "'has no more right to control his attorney and the conduct of the trial than he has to dictate to his surgeon how to perform the operation.'" *See* ***State v. Harper***, 57 Wis. 2d 543, 550, 205 N.W.2d 1 (1973) (citation omitted).

¶20 More importantly here, trial counsel testified he explained to Love that an "all or nothing" defense was not a possibility in light of the State's request for an instruction on first-degree reckless homicide. Trial counsel further testified

that he consulted with Love, who acquiesced—albeit reluctantly—when trial counsel advised him to request an instruction on second-degree reckless homicide.[3] The circuit court "fully" believed trial counsel's testimony at the postconviction hearing. Accordingly, the evidence establishes that Love acquiesced to his trial counsel's strategy.[4] A defendant who acquiesces to trial counsel's strategic choice is bound by that decision. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 765-66, 457 N.W.2d 562 (Ct. App. 1990); *see also* ***Neuenfeldt v. State***, 29 Wis. 2d 20, 32, 138 N.W.2d 252 (1965) (defendant forfeits the right to claim a jury instruction error when the error was defendant's strategic choice).

¶21 Love fails to show that his trial counsel performed deficiently by requesting an instruction on second-degree reckless homicide. To the contrary, the request was eminently reasonable under the facts and the law, and, in addition, the circuit court found that Love did not oppose counsel's strategic decision. Because Love does not satisfy the deficiency prong of the ***Strickland*** analysis, he cannot prevail on his claim that trial counsel was ineffective. *See* ***id.***, 466 U.S. at 697. Moreover, because Love does not show that his trial counsel was ineffective, he cannot prevail on his claim that postconviction counsel was ineffective

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[3] Defense counsel is not required to consult with the defendant regarding the strategic decision to request lesser-included offense instructions. ***State v. Eckert***, 203 Wis. 2d 497, 509-11, 553 N.W.2d 539 (Ct. App. 1996). Nonetheless, we take this opportunity to emphasize that consultation is the better practice. *Cf.* ***State v. Ambuehl***, 145 Wis. 2d 343, 355 & n.4, 357, 425 N.W.2d 649 (Ct. App. 1988) (defense counsel has an initial duty to discuss lesser-included offense instructions with the defendant although counsel is not necessarily unreasonable in making later decisions about such instructions without additional consultation).

[4] For the sake of completeness, we note that, in closing argument, trial counsel urged the jury to acquit Love, highlighting various reasons to doubt that he was the triggerman and arguing that his statement to police was coerced and unreliable. Trial counsel argued in the alternative, however, that if the jurors believed Love shot Washington, then they should conclude that the facts showed only reckless conduct that did not reflect utter disregard for human life.

for failing to challenge trial counsel's effectiveness. *See* ***Ziebart***, 268 Wis. 2d 468, ¶15.

¶22 Last, we briefly acknowledge the parties' dispute over whether Love has demonstrated that his current claim of trial counsel's ineffectiveness is clearly stronger than the claim appointed postconviction counsel pursued on Love's behalf in earlier litigation. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶¶45-46, 360 Wis. 2d 522, 849 N.W.2d 668 (to prevail in claim that postconviction counsel was ineffective for failing to pursue an issue, ignored issue must be clearly stronger than issues counsel actually pursued). We are satisfied that the parties dispute a moot point. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (issue is moot when its resolution will have no practical effect on underlying controversy). The circuit court ruled against Love on the merits of his claim that trial counsel was ineffective for requesting a lesser-included offense instruction. We affirm that decision here. Determining whether Love's current unsuccessful claim is nonetheless more robust than the unsuccessful claim he pursued in prior litigation would be merely an academic exercise.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).