COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1660-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY LUCKETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

NETTESHEIM, J. Larry Luckett appeals from a judgment of conviction for attempted first-degree intentional homicide and aggravated battery while armed with a dangerous weapon.[1] He additionally appeals from the trial

[1] Luckett was additionally convicted of attempted robbery while armed with a dangerous weapon. Luckett does not challenge this conviction.

court order denying his motion for postconviction relief. Luckett argues that he was denied effective assistance of counsel because his trial counsel failed to request a lesser included offense for the jury's consideration. We reject Luckett's argument. We affirm the judgment and the order denying postconviction relief.

FACTS

On January 4, 1996, the State filed a criminal complaint against Luckett charging him with attempted first-degree homicide with a dangerous weapon contrary to §§ 940.01(1), 939.32 and 939.63, STATS.; attempted robbery contrary to §§ 943.32(2) and 939.32, STATS.; and aggravated battery with a dangerous weapon contrary to §§ 940.19(5) and 939.63, STATS.[2]

The facts of the complaint allege that in the early morning hours of October 18, 1995, Luckett shot and wounded a cab driver, William Finnigan, while attempting to rob him. When an officer from the Kenosha police department found Finnigan, he was bleeding profusely from his right cheek area. Finnigan was transported to a hospital where he was able to describe the incident and the assailant, later identified as Luckett. Finnigan reported to the police that he had picked up Luckett and was transporting him to the train station. However, when they neared the train station, Luckett requested that Finnigan drop him off at a nearby location. Luckett asked Finnigan to pull over and Finnigan complied. Finnigan stated that he came to a stop, he heard a loud bang and he felt pain in his mouth area. Finnigan further stated that Luckett did not demand anything or say

[2] The complaint also alleged a charge of obstructing an officer contrary to § 946.41, STATS. At Luckett's request, this charge was severed from the other charges. Following Luckett's conviction on the charges related to the incident in this case, the State moved to dismiss the obstructing charge. The trial court granted the State's motion.

anything prior to the shooting. After shooting Finnigan, Luckett fled from the cab on foot.

The complaint additionally included a statement made by Luckett after he had been taken into custody and read his ***Miranda***[3] rights. Luckett stated that he needed money to settle a drug debt so he decided to call a cab in order to rob the cab driver. Luckett used the telephone at his residence and asked the cab to pick him up down the street so that his residence would be unknown. When Luckett left the house he retrieved a gun he had hidden under his younger brother's sandbox and placed the gun in his right jacket pocket. Luckett walked down the street, got in the cab and asked to be taken to the train station. When they arrived at the station, Luckett decided that there were too many people around. He ordered Finnigan to take him to an apartment building near the train station. Finnigan then stopped the cab and took out his fare chart.

According to Luckett, he pulled out his gun at this point and pointed it at Finnigan's chest area. He stated, "[G]ive me all your money." Luckett stated that Finnigan then raised his hands and tried to get the gun. Luckett pulled back the hammer of the gun and Finnigan ceased his attempts. Luckett stated that he had his finger on the trigger of the gun when Finnigan tried again to get the gun. Luckett states that the gun went off during the ensuing struggle. Luckett claimed that when he fled from the cab, he did not know if Finnigan had been shot. In his written statement, Luckett claims, "I never intended to shot [sic] this cab driver. I intended to take his money because I was in trouble over the drugs."

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Luckett was represented in the trial court by Attorney David Berman. Prior to the preliminary hearing, the State offered Luckett a plea agreement by which the State would amend the charge of attempted first-degree homicide while armed to first-degree reckless injury with a weapon if Luckett agreed to waive his preliminary hearing and enter a guilty plea to the reduced charge and the armed robbery charge. Luckett refused the offer based on his contention that he was not involved in the incident. Following his preliminary hearing, Luckett was bound over for trial and an information was filed charging the same offenses as the original complaint.[4] Luckett pled not guilty to the charges and the matter was scheduled for a jury trial.

Prior to trial, Berman renewed plea negotiations with the State. Berman proposed that Luckett plead guilty to a charge of aggravated battery while armed and recklessly endangering safety while armed in exchange for the State's dismissal of the attempted homicide charge. The State declined this offer and the matter proceeded to a jury trial.

At trial, Luckett's theory of defense contended that although Luckett was guilty of the attempted robbery, he was not guilty of attempted first-degree intentional homicide and aggravated battery. Luckett argued that the shooting of Finnigan was accidental and that Luckett did not intend to kill or injure him. After a two-day trial, a jury found Luckett guilty as to each charged offense.

On March 12, 1997, Luckett filed a motion for postconviction relief based on his claim that trial counsel's performance was deficient because (1)

[4] Later an amended information was filed, but the charges remained the same as in the original information.

counsel had failed to request instructions on the lesser included offenses of first- and/or second-degree recklessly endangering safety while armed and (2) counsel had never discussed or explained a lesser included defense with Luckett. Following a ***Machner*** hearing, the trial court denied Luckett's motion.[5] Luckett appeals.

DISCUSSION

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his or her defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. *See* ***id***. at 697. "An attorney's performance is not deficient unless it is shown that, 'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" ***State v. Guck***, 170 Wis.2d 661, 669, 490 N.W.2d 34, 38 (Ct. App. 1992) (quoted source omitted). We must assess whether such performance was reasonable under the circumstances of the particular case. *See* ***State v. Hubanks***, 173 Wis.2d 1, 25, 496 N.W.2d 96, 105 (Ct. App. 1992).

We affirm the trial court's findings of fact unless they are clearly erroneous, but the determinations of deficient performance and prejudice are questions of law that we review without deference to the trial court. *See* ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985).

At the ***Machner*** hearing, Berman confirmed that he had not requested a lesser included defense instruction. Berman testified that "[the]

[5] *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

argument to the jury was going to be that it wasn't [attempted first-degree intentional homicide] because [Luckett] didn't have the intent, the gun went off accidentally and that therefore there should be a verdict of not guilty on that." Thus, Berman's strategy was to limit Luckett's sentencing exposure by "going for broke."

The "go for broke" strategy employed by Berman describes a situation in which either the State or the defendant opts for "an all (conviction of the greater offense) or nothing (acquittal) verdict." ***State v. Myers***, 158 Wis.2d 356, 367, 461 N.W.2d 777, 782 (1990). "By not requesting instructions on lesser included offenses, the accused hopes that the jury will acquit of the greater offense rather than convict on what the accused views as arguably insufficient evidence. The accused is counting on the jury to comply with the instructions that the state's burden is to prove guilt beyond a reasonable doubt." ***Id***. at 368, 461 N.W.2d at 782.

Luckett concedes that a "go for broke" strategy may be reasonable if defense counsel consciously decides to forego a lesser included offense defense. *See* ***United States ex rel. Sumner v. Washington***, 840 F. Supp. 562, 573 n.18 (N.D. Ill. 1993). However, Luckett argues that, contrary to Berman's testimony and the trial court's finding, Berman was not employing a "go for broke" strategy. Rather, Luckett contends that Berman's decision to forego a lesser included offense defense was not the product of any strategy, but rather the product of Berman's oversight or ignorance of the law of lesser included offenses. In support of his argument, Luckett points to a statement made by Berman during the ***Machner*** hearing that he "probably didn't even think of [asking for a lesser included] because … [he] may have been so focused on going … for broke regarding the attempted first degree intentional homicide."

We disagree with Luckett that this isolated statement establishes that Berman was ineffective in failing to pursue any lesser included offenses at the trial. We first address Luckett's claim that Berman was unaware that the facts of the case allowed for the possible submission of lesser included offenses. As we have noted, prior to trial the State had proposed that Luckett admit to charges of first-degree reckless injury with a weapon and attempted armed robbery. Luckett rejected that proposal. However, following the bindover, Berman renewed the plea negotiations, offering that Luckett plead guilty to aggravated battery while armed and recklessly endangering safety while armed. The endangering safety charge is the very charge which Luckett contends Berman overlooked as a possible lesser included offense. These pretrial negotiations belie Luckett's argument that Berman was unaware that the facts of the case did not accommodate possible lesser included offenses. *See* ***Sumner***, 840 F. Supp. at 573 n.18.

That brings us to the question of whether Berman's decision to "go for broke" was a reasonable one. Berman testified that because Luckett's statement to the police supported the theory that Luckett accidentally shot Finnigan, they decided to argue that the intent element of first-degree intentional homicide was lacking and, therefore, the jury must acquit. Berman stated:

> [Luckett] was facing a significant amount of exposure on these three charges, and if we could get the jury to give us an acquittal on the attempted first degree intentional homicide, we were going to cut his exposure by more than half and basically that was what we decided that we were going to do through the whole thing was really concentrate on trying to get an acquittal on the attempted first degree intentional homicide.

Berman concluded that because the jury had two other crimes of which it could convict Luckett—attempted robbery and aggravated battery while armed—there was a possibility that it would acquit on the attempted first-degree

homicide charge. Presenting the jury with a third option of convicting Luckett of a lesser included offense as well would have been contrary to Berman's defense strategy of limiting Luckett's exposure to the two other charges. Our supreme court has observed that defense counsel is not required to dilute a chosen defense by presenting alternative theories as well. *See* ***Kain v. State***, 48 Wis.2d 212, 221, 179 N.W.2d 777, 783 (1970).

Here, the trial court found that Berman's attempt to "go for broke" was "a reasonable tactic. It may not have been the most prudent, especially from hindsight; but it was reasonable." Luckett argues that the trial court failed to recognize that Berman's failure to request a lesser included offense "needlessly risked the defendant's conviction of two intentional crimes … when submission of a lesser-included could have resulted in conviction of only one crime of recklessness." We disagree.

The existence of an alternative theory which in hindsight may have been more effective does not render counsel's performance ineffective. Indeed, the theory of defense selected by trial counsel need not be the one which looks best either to appellate counsel or to the reviewing court. *See* ***State v. Felton***, 110 Wis.2d 485, 501-02, 329 N.W.2d 161, 169 (1983). Defense counsel's performance is not measured by the success of the defense strategy; the fact that the strategy did not work does not mean counsel was ineffective for selecting it. *See* ***State v. Teynor***, 141 Wis.2d 187, 212, 414 N.W.2d 76, 85 (Ct. App. 1987). We conclude that Berman's attempt to "go for broke" was a reasonable trial strategy. As such, Berman's performance was not deficient.

Luckett further argues that Berman's assistance was ineffective because Berman failed to confer with him regarding the possibility of requesting a

lesser included offense. Berman testified that although he discussed with Luckett the opportunity of pleading to some lesser included offenses, he did not conduct such discussion during the trial. Luckett contends that if Berman had discussed the possibility of requesting a lesser included offense instruction at trial, he would have authorized Berman to do so.

Luckett relies upon ***State v. Ambuehl***, 145 Wis.2d 343, 425 N.W.2d 649 (Ct. App. 1988), in support of his argument that Berman did not meet his obligation to discuss a possible lesser included offense defense with Luckett. Luckett's reliance on ***Ambuehl*** is misplaced. ***Ambuehl*** did not address whether trial counsel has the obligation to specifically discuss possible lesser included offenses with the defendant. *See* ***State v. Eckert***, 203 Wis.2d 497, 509, 553 N.W.2d 539, 544 (Ct. App. 1996). On that issue, this court has concluded that "a defendant does not receive ineffective assistance where defense counsel has discussed with the client the general theory of defense, and when based on that general theory, trial counsel makes a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." ***Id***. at 510, 553 N.W.2d at 544.

Here, both Luckett and Berman testified that Berman discussed with and explained to Luckett the "going for broke" strategy actually employed at trial. Thus, based on ***Eckert***, we reject Luckett's contention that Berman's assistance was ineffective.

CONCLUSION

We conclude that Berman's representation of Luckett was not deficient.[6] The trial court's finding that Berman pursued a "go for broke" strategy at trial was not clearly erroneous. We further conclude that the strategy employed by Berman was a reasonable one in light of the circumstances in this case. Moreover, Luckett was fully apprised of the strategy that Berman intended to pursue at trial. Accordingly, we affirm the judgment of conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[6] Based on this conclusion, we need not address Luckett's argument that he was prejudiced by Berman's performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (we need not address both components of the analysis if the defendant makes an inadequate showing on one).