COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1745 **Cir. Ct. No. 2009CF833**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY T. MURRY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: JASON A. ROSSELL, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Timothy Murry appeals from an order denying his WIS. STAT. § 974.06 (2015-16)[1] motion seeking postconviction relief. We affirm.

¶2 In 2009, Murry shot and injured two people and shot at a third. A jury convicted him of two counts of attempted first-degree intentional homicide and three counts of first-degree reckless endangerment, all by use of a dangerous weapon. The trial court denied his motion for postconviction relief; this court affirmed the judgment and order. ***State v. Murry***, No. 2013AP1300-CR, unpublished slip op. (WI App Mar. 19, 2014).

¶3 Murry's WIS. STAT. § 974.06 motion alleged: instructional error violated his right to be free of double jeopardy, as Counts 2 and 4 (first-degree reckless endangerment) were lesser-included offenses of Counts 1 and 3 (attempted first-degree intentional homicide);[2] prosecutorial misconduct for charging both the greater and lesser offenses; and ineffective assistance of appellate counsel for not raising either of those issues on appeal.

¶4 While the trial court denied the motion as to the claim of prosecutorial misconduct, it agreed that convicting Murry of both the greater and lesser crimes constituted double jeopardy. Accordingly, the court vacated the convictions on the reckless endangerment counts. The court also held that it lacked competence to decide Murry's claim of ineffective assistance of appellate counsel. This appeal followed.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Counts 1 and 2 pertained to victim AG; Counts 3 and 4 pertained to victim JC.

¶5 Murry first contends the trial court erroneously exercised its discretion by simply vacating the lesser-crime convictions rather than granting him a new trial. Murry, the State, and we agree that the first-degree reckless endangerment counts are lesser-included offenses of the attempted first-degree intentional homicide counts, as they are based on the same act and victim. *See* ***State v. Cox***, 2007 WI App 38, ¶8, 300 Wis. 2d 236, 730 N.W.2d 452. An offense is "lesser included" if all of its statutory elements can be demonstrated without proof of any fact or element beyond those which must be proved for the "greater" offense. ***State v. Hagenkord***, 100 Wis. 2d 452, 481, 302 N.W.2d 421 (1981).

¶6 We and the State part ways with Murry, however, in determining the appropriate remedy. Error alone does not dictate reversal. ***Cox***, 300 Wis. 2d 236, ¶9. Rather, reversal is appropriate only if Murry was harmed by the error below. *See* ***id***; *see also* WIS. STAT. § 805.18(2). "Even constitutional errors are subject to the harmless error doctrine." ***State v. Kennedy***, 134 Wis. 2d 308, 324, 396 N.W.2d 765 (Ct. App. 1986). "An error is harmless if a reviewing court is able to determine beyond a reasonable doubt that there is no reasonable probability that the error contributed to the conviction." ***Id.*** If being convicted of both the greater and lesser offenses initially harmed Murry, vacating the two lesser-included offenses eliminated that harm. *See* ***Cox***, 300 Wis. 2d 236, ¶¶1, 9; *see also* ***State v. Hughes***, 2001 WI App 239, ¶9, 248 Wis. 2d 133, 635 N.W.2d 661.

¶7 Murry next alleges that charging him with both the greater and lesser offenses constituted prosecutorial misconduct. We agree that charging him in that manner was error but, again, we conclude it was harmless.

¶8 ***Kennedy*** is instructive. Kennedy was involved in a motor vehicle accident while intoxicated, killing four people and seriously injuring two others.

Kennedy, 134 Wis. 2d at 314. Besides two counts of causing great bodily injury by intoxicated use of a motor vehicle, Kennedy also was charged with four counts of vehicular homicide while intoxicated, four counts of vehicular homicide with a blood alcohol concentration (BAC) of .10% or more, and four counts of homicide by negligent use of a motor vehicle. ***Id.*** at 314-15. The trial court declined to dismiss any of the homicide charges as multiplicitous before trial. ***Id.*** at 323. At sentencing, however, it dismissed the four negligent-homicide convictions as lesser-included offenses and the four counts relating to vehicular homicide with a BAC of .10% or more, *see* WIS. STAT. § 346.63(1)(c), and sentenced Kennedy on the two injury convictions and the four remaining homicide convictions. ***Kennedy***, 134 Wis. 2d at 315, 323.

¶9 We concluded that the trial court erred in refusing to dismiss the four negligent homicide charges before trial but held that the error was harmless. ***Id.*** at 324. The trial court had reasoned that the negligent homicide charges—being lesser-included offenses of the other eight vehicular homicide charges—would have been submitted to the jury even if dismissed, posing little danger of prejudice to Kennedy's right to a fair trial. ***Id.*** at 325.

¶10 Likewise here. We do not condone the practice of prosecutorial overcharging, as it may prejudice a defendant. Here, however, first-degree reckless endangerment is a lesser-included offense of attempted first-degree intentional homicide. Thus, the jury necessarily had to find Murry guilty of the former to find him guilty of the latter.

¶11 Lastly, we address Murry's assertion that the trial court should have ruled on his claim that appellate counsel ineffectively failed to raise the above-discussed issues. We cannot agree.

¶12 Murry challenges the performance of his appellate counsel. As such, he should have brought the claim to this court in the form of a petition for a writ of habeas corpus pursuant to ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). *See* ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146. By challenging the effectiveness of his appellate counsel via postconviction motion in the trial court, Murry pursued his claim in the wrong forum. *See* ***id.***

¶13 Even if in the interest of judicial efficiency we addressed his claim as though properly brought, Murry's argument would not carry the day. He would have to show that deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). That is, he would have to show both that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed … by the Sixth Amendment," errors that deprived him "of a fair trial, a trial whose result is reliable." *See* ***id.*** A defendant must satisfy both prongs to succeed on a claim of ineffective assistance of counsel. ***State v. Carter***, 2010 WI 40, ¶21, 324 Wis. 2d 640, 782 N.W.2d 695.

¶14 We already have concluded that any error in allowing the jury to be made aware of the lesser-included offenses was harmless. Accordingly, we also conclude that any deficient performance by Murry's appellate counsel in failing to raise the issues discussed above was not prejudicial. *See* ***State v. Weed***, 2003 WI 85, ¶35, 263 Wis. 2d 434, 666 N.W.2d 485.

By the Court.—Order affirmed.

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