

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2009

David R. Schanker
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. 2007AP2610-CR

Cir. Ct. No. 2005CF1875

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY K. ADEYANJU,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Jeremy Adeyanju appeals from a judgment of conviction and from an order denying his motion for postconviction relief. The main issue is ineffective assistance of counsel. We affirm.

¶2 The State alleged that the defendant was one of a number of people who jumped from three vehicles in the street, fired a hail of bullets up a driveway towards a group of people near a garage, and then quickly fled. At trial, the State presented several witnesses who claimed to have been among the shooters, and who testified as to the involvement of the defendant and three other co-defendants tried at the same time. The jury found the defendants guilty on three counts each of attempted first-degree intentional homicide while armed, and three counts each of endangering safety by use of a firearm, under WIS. STAT. § 941.20(2)(a) (2007-08).¹ The jury was instructed on three theories of defendant liability, namely, as direct actors, as aiders and abettors, and as co-conspirators. The jury was not asked to indicate which theory its verdicts were based on, so we do not know which theory or theories it relied on.

¶3 On appeal, Adeyanju argues that his trial counsel was ineffective. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Strickland*, 466 U.S. at 697.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Adeyanju argues that his counsel was ineffective as to the homicide counts by not requesting a lesser-included instruction for the offense of recklessly endangering safety. He argues that the instruction was warranted because the jury could reasonably have found that the shooters' acts did not unequivocally show intent to kill, but would have satisfied the reckless state of mind required for recklessly endangering safety.

¶5 To establish deficient performance, Adeyanju's argument appears to proceed in these steps: trial counsel had a duty to discuss with Adeyanju whether to request a lesser-included instruction; if that discussion had occurred, Adeyanju would have asked counsel to request the instruction; if Adeyanju had so asked, counsel would have been obligated to request the instruction; and, therefore, counsel's performance was deficient by not consulting with Adeyanju.

¶6 This argument has two weak links. For the propositions that counsel has a duty to discuss a lesser-included instruction with the defendant, and that whether to request the instruction is a decision made by the defendant, Adeyanju cites *State v. Ambuehl*, 145 Wis. 2d 343, 425 N.W.2d 649 (Ct. App. 1988). That case does not support either proposition. In *Ambuehl*, we quoted from the *ABA Standards for Criminal Justice*, Standard 4-5.2, commentary (2d ed. 1980), which opined that the defendant should be the one to decide. *Ambuehl*, 145 Wis. 2d at 355-56 n.4. However, we later concluded that *Ambuehl* did not actually adopt that standard, and we held that the decision to ask for the instruction is generally counsel's. *State v. Eckert*, 203 Wis. 2d 497, 508-11, 553 N.W.2d 539 (Ct. App. 1996). More specifically, we wrote 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.

¶7 Adeyanju’s brief acknowledges *Eckert* in just one sentence, which states only that we “questioned” whether *Ambuehl* adopted the ABA standard. However, we did far more than “question” that point:

Our reading of the *Ambuehl* case does not comport with Eckert’s contention. Although *Ambuehl* does reference and cite this ABA Standard, there is no language within *Ambuehl*, indicating that this standard was adopted as the law in our state. In fact, in *Ambuehl*, this court specifically notes that the proposition contained within the commentary to this ABA Standard does not contain any citation to authority.

Eckert, 203 Wis. 2d at 508-09.

¶8 Adeyanju does *not* argue that counsel’s performance was deficient if it is counsel who makes the decision about whether to ask for a lesser-included instruction. In other words, Adeyanju does not argue that it was objectively unreasonable for an attorney to forego a lesser-included instruction on the facts of this case. *See State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752 (test for deficient performance is an objective one that asks whether trial counsel’s performance was objectively reasonable under prevailing professional norms). This absence is a fatal omission in the steps of his argument. Accordingly, we conclude that Adeyanju has failed to establish that his trial counsel’s performance was deficient.

By the Court.—Judgment and order affirmed.

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

