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DISTRICT IV

June 10, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2112-CR State of Wisconsin v. Ali A. Hassan (L.C. # 2016CF2626)

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ali A. Hassan appeals a judgment of conviction and an order denying a postconviction motion without a hearing. Hassan contends that his trial counsel was ineffective by failing to request a lesser-included offense instruction for attempted homicide by intoxicated use of a firearm as to a charge of attempted first-degree intentional homicide. Based upon our review of

the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

Hassan was charged with multiple offenses based on a shooting at a "state-licensed adult family home." The charges included first-degree intentional homicide based on the death of one of the shooting victims, and attempted first-degree intentional homicide based on injuries to another shooting victim who survived. At trial, defense counsel requested a lesser-included offense instruction of homicide by intoxicated use of a firearm as to the first-degree intentional homicide charge. Counsel did not request a lesser-included offense instruction as to the attempted first-degree intentional homicide charge. The circuit court gave the requested instruction. Hassan was convicted of the lesser-included offense of homicide by intoxicated use of a firearm, and the offense of attempted first-degree intentional homicide.

Hassan filed a postconviction motion asserting that his trial counsel was ineffective by failing to request the lesser-included offense instruction of attempted homicide by intoxicated use of a firearm as to the attempted first-degree intentional homicide charge. The circuit court denied the postconviction motion without a hearing.

If a postconviction motion alleges sufficient facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. If the motion does not allege sufficient facts or presents only conclusory allegations, the circuit court may deny the motion without a hearing. ***Id.*** To allege sufficient facts that, if true, would entitle a defendant to relief on a claim of ineffective assistance

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

of counsel, a postconviction motion must explain "the five 'w's' and one 'h'; that is who, what, where, when, why, and how," showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Id.***, ¶¶23, 26. Counsel's performance is deficient if it fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense if, absent the errors, there is a reasonable probability of a different result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). We review de novo whether a postconviction motion alleges sufficient facts to require the circuit court to hold an evidentiary hearing. ***Allen***, 274 Wis. 2d 568, ¶9. Our review is limited to the four corners of the postconviction motion. ***Id.***, ¶27.

Hassan asserted in his postconviction motion, and argues on appeal, that his trial counsel was ineffective by failing to request submission of the lesser-included offense of attempted homicide by intoxicated use of a firearm as to the attempted first-degree intentional homicide charge. He argues that attempted homicide by intoxicated use of a firearm is a chargeable offense because homicide by intoxicated use of a firearm is a felony. *See* WIS. STAT. § 939.32(1) ("Whoever attempts to commit a felony … may be fined or imprisoned or both as provided …."). He argues that attempted crimes are not limited to those with an intent element, *see* ***State v. Henning***, 2013 WI App 15, ¶10, 346 Wis. 2d 246, 828 N.W.2d 235 (there is no "general rule that a crime may be charged as an attempt only when the crime has an intent element"), and that even strict liability offenses may be charged as attempted crimes, *see* ***State v. Lackershire***, 2007 WI 74, ¶29, 301 Wis. 2d 418, 734 N.W.2d 23, *abrogated on other grounds by* ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, (sexual assault of a child "is generally viewed as a strict liability offense" because "the consent of the child in a [child sexual

assault] violation is not relevant") and ***State v. Grimm*** 2002 WI App 242, ¶¶7-10, 258 Wis. 2d 166, 653 N.W.2d 284 (sexual assault of a child charged as attempt).

The State responds that it is unsettled whether attempted homicide by intoxicated use of a firearm is a chargeable offense, but that case law suggests that it is not. It points out that, under WIS. STAT. § 939.32(1), a felony may not be charged as an attempt when excluded by statute or case law. The State cites ***State v. Briggs***, 218 Wis. 2d 61, 66, 579 N.W.2d 783 (Ct. App. 1998), for its holding that "under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent." Thus, the State points out, it has been recognized that there is no crime of attempted felony murder, *see* ***id.*** at 67-68, or attempted reckless homicide, *see* ***State v. Melvin***, 49 Wis. 2d 246, 250, 181 N.W.2d 490 (1970).[2] The State notes that in ***Henning*** we held that attempted possession of a firearm by a felon was a chargeable crime despite the lack of a specific intent element. *See* ***Henning***, 346 Wis. 2d 246, ¶¶10-11. The State contends, however, that the key to our decision in ***Henning*** was that the crime of being a felon in possession of a firearm has "an element that requires proof of a mental state," that is, knowing possession of a firearm, in contrast to the crimes at issue in ***Melvin*** and ***Briggs***. *See* ***id.***, ¶¶11, 14. The State disputes Hassan's reading of ***Grimm*** as suggesting that strict liability crimes may be charged as an attempt, citing language in ***Grimm***, 258 Wis. 2d 166, ¶¶11-13, recognizing that child sexual assault has a state of mind element. The State argues that, in contrast, homicide by intoxicated use of a firearm has no state of mind element, and that it follows that, under ***Melvin***, ***Briggs***, and ***Henning***, there is no such crime as attempted homicide by intoxicated use

[2] ***State v. Melvin***, 49 Wis. 2d 246, 250, 181 N.W.2d 490 (1970), was overruled in part on other grounds by ***State v. Smith***, 55 Wis. 2d 304, 198 N.W.2d 630 (1972).

of a firearm. It asserts that, at the very least, this issue is unsettled, and that trial counsel cannot be ineffective by failing to pursue an unsettled issue of law. *See* ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance.").

We conclude that Hassan failed to sufficiently allege ineffective assistance of counsel because he does not establish that attempted homicide by intoxicated use of a firearm is a crime under Wisconsin law. First, Hassan's broad assertion that there must be an attempt crime because homicide by intoxicated use of a firearm is a felony is a nonstarter, as it is well-established that certain felonies that lack any intent or state of mind element may not be charged as an attempt. *See* ***Henning***, 346 Wis. 2d 246, ¶¶9-11. Second, we are not persuaded that homicide by intoxicated use of a firearm falls squarely within the category of crimes that lack an intent element but are nonetheless subject to an attempt charge as recognized in ***Henning***. We explained in ***Henning***, 346 Wis. 2d 246, ¶10, that "[i]t was logical for the courts in ***Briggs*** and in ***Melvin*** to conclude that the crimes at issue in the respective cases—felony murder and reckless homicide—could not be charged as attempted crimes because of the inherent nature of those crimes." In contrast, we stated, "[p]ossession crimes do not fall into that category of crimes where it is illogical to charge the crime as an attempt. Unlike the two crimes considered in ***Briggs*** and in ***Melvin***, it makes sense that the State may charge a felon with attempting to possess a firearm" because felon in possession of a firearm "does have an element that requires proof of a mental state," that is, *knowing* physical control over a firearm. ***Id.***, ¶¶10-11. We explained that "[i]t is this feature of the felon in possession of a firearm offense that distinguishes it from the crimes considered in ***Briggs*** and in ***Melvin*** for purposes of determining whether the firearm offense may be charged under the attempt statute." ***Id.***, ¶11.

Hassan does not develop an argument that homicide by intoxicated use of a firearm includes a state of mind element. *See* WIS JI—CRIMINAL 1190 (elements of homicide by intoxicated use of a firearm are that the defendant: (1) handled a firearm; (2) causing the death of another; (3) while under the influence of an intoxicant). To the extent that Hassan argues that ***Henning*** and ***Grimm*** support an argument that a crime may be charged as an attempt even if it lacks any state of mind element, we disagree. Hassan does not cite anything in either case that would support such an interpretation. Because Hassan has not shown that homicide by intoxicated use of a firearm may be charged as an attempt, he has at best asserted that such a crime should be recognized. Thus, regardless of the merits of such an argument, Hassan has at most asserted that whether attempted homicide by intoxicated use of a firearm is a chargeable offense is an unsettled question of law. It follows that trial counsel was not ineffective by failing to request a jury instruction for that charge as a lesser-included offense. *See* ***Jackson***, 333 Wis. 2d 665, ¶10.

Moreover, even if we were to agree with Hassan that attempted homicide by intoxicated use of a firearm is a chargeable offense, we would nonetheless conclude that he failed to sufficiently allege that his counsel was ineffective by failing to request to submit it as a lesser-included offense. Hassan alleged in his postconviction motion, and argues on appeal, that the evidence at trial would have supported acquittal for attempted first-degree intentional homicide and conviction for attempted homicide by intoxicated use of a firearm. *See* ***State v. Morgan***, 195 Wis. 2d 388, 434, 536 N.W.2d 425 (Ct. App. 1995) (lesser-included offense should be submitted when "there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense."); ***State v. Davis***, 144 Wis. 2d 852, 855, 425 N.W.2d 411 (1988) (on review of whether lesser-included offense should have been submitted, we are to view the

evidence in a light most favorable to the defendant). Hassan contends that his trial counsel could not have had any reasonable strategy for failing to request to submit the lesser-included offense of attempted homicide by intoxicated use of a firearm as to the attempted first-degree intentional homicide charge, in light of counsel's successful request for submission of the lesser-included offense of homicide by intoxicated use of a firearm as to the first-degree intentional homicide charge. Hassan asserts that the lesser-included offense applied equally to both charges, and that the only legal distinction between the two charged offenses was that one homicide was accomplished and the other homicide was not. Hassan acknowledges that there are factual differences between the offenses, but argues that there are no differences in the facts as to whether Hassan intended to kill either of the victims. He contends that the lesser-included offense instruction should have resulted in a conviction for attempted homicide by intoxicated use of a firearm, rather than attempted first-degree intentional homicide, because the jury found him guilty of the lesser-included offense as to the completed homicide.

The State responds that there was overwhelming evidence of Hassan's guilt of attempted first-degree intentional homicide and that a request to submit a lesser-included offense therefore would have failed. It points to trial testimony by the attempted homicide victim, including her testimony that Hassan pointed his gun at her and shot her several times, resulting in injuries to her chest, stomach, and right arm, and that Hassan then disabled the home's landline phone and ripped off the victim's shirt as she tried to flee. It cites ***State v. Kramar***, 149 Wis. 2d 767, 793, 440 N.W.2d 317 (1989), for the proposition that "when one intentionally points a loaded gun at a vital part of the body of another and discharges it, it cannot be said that he [or she] did not intend the natural, usual, and ordinary consequences."

We conclude that Hassan has not established ineffective assistance of counsel for failing to request the lesser-included offense instruction. In particular, Hassan fails to establish that there was a reasonable basis for acquittal on the attempted first-degree intentional homicide charge in light of the testimony by the surviving victim. So far as we can tell, Hassan's argument depends on the premise that the lesser-included offense instruction was warranted for the attempted homicide because it was submitted as to the completed homicide. However, Hassan does not address the significant distinction that there was no testimony by a surviving victim or witness of the completed homicide to show Hassan's intent, while the surviving victim of the attempted homicide was able to testify as to Hassan's actions in pointing the gun directly at her before shooting her multiple times, and then trying to prevent her from leaving or seeking help. Because that testimony provided overwhelming evidence of Hassan's guilt as to the attempted first-degree intentional homicide, counsel was not ineffective by failing to request a lesser-included offense instruction. *See* ***State v. Ziebart***, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369 (counsel's failure to raise meritless argument is neither deficient nor prejudicial).

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition will not be published.

Sheila T. Reiff
Clerk of Court of Appeals