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DISTRICT III

May 17, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Brown County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP63-CR State of Wisconsin v. Michael Lee Endries
(L. C. No. 2019CF406)

Before Stark, P.J., Hruz and Gill, 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).

Michael Endries appeals from a judgment convicting him of attempted first-degree intentional homicide, as a party to the crime, and from an order denying his postconviction motion for a new trial. Endries contends that his trial counsel provided ineffective assistance by failing to request a jury instruction on a lesser-included offense. After reviewing 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 affirm.

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

To establish a claim of ineffective assistance, a defendant must prove two elements: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Sholar***, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. Whether counsel's conduct violated the constitutional standard for effective assistance is ultimately a legal determination that this court decides de novo. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, we will not set aside the circuit court's factual findings about counsel's actions or the reasons for them unless they are clearly erroneous. ***Id.***, ¶19.

Endries contends that his trial counsel should have requested a jury instruction on the offense of first-degree recklessly endangering safety. Endries asserts that first-degree recklessly endangering safety is a lesser-included offense of attempted first-degree intentional homicide, and he devotes a significant portion of his brief to explaining why he believes the evidence at trial would have supported the lesser charge—even if that charge was inconsistent with his own defense of innocence. We agree that a reckless endangerment charge is a lesser-included offense of a homicide charge, and we will assume without deciding that Endries would have been entitled to a reckless endangerment instruction if he had requested one. *See* ***State v. Weeks***, 165 Wis. 2d 200, 206-08, 477 N.W.2d 642 (Ct. App. 1991) (discussing elements of recklessly endangering safety and intentional homicide); *see also* ***State v. Sarabia***, 118 Wis. 2d 655, 663, 348 N.W.2d 527 (1984) (holding that a defendant may request and receive a lesser-included offense instruction—despite presenting an exculpatory version of the facts—if a reasonable but different view of the record, apart from the defendant's exculpatory version, supports acquittal on the greater charge and conviction on the lesser charge).

The problem for Endries is that the circuit court made an explicit factual finding that, after "carefully consider[ing]" the topic of lesser-included offenses, Endries and his trial counsel

instead agreed upon an "all or nothing" strategy. That finding was directly supported by trial counsel's testimony that he and Endries had discussed whether to put "a lesser or minor charge" before the jury, but they decided to "force the jury to either pick all four elements [of attempted first-degree intentional homicide] and find them true or acquit." Counsel testified that Endries was not interested in giving the jury the option of considering a lesser-included offense—as counsel put it, Endries "wasn't going to make it easier for the jury to convict him." Counsel stated that Endries understood that the State would have difficulty proving the attempted first-degree intentional homicide charge, and that if the State could not meet its burden, Endries would walk free. Accordingly, as counsel explained, not requesting the lesser-included instruction was a strategic decision. Endries does not challenge the court's finding as clearly erroneous, and we therefore accept it as true.

An "all or nothing" defense is a reasonable trial tactic to force the jury to acquit by depriving it of an alternative option to convict. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. Trial counsel does not perform deficiently by making "a strategic decision not to request a lesser-included instruction because it would be inconsistent with, or harmful to, the general theory of defense." ***State v. Eckert***, 203 Wis. 2d 497, 510, 553 N.W.2d 539 (Ct. App. 1996). Nor does the fact that an "all or nothing" defense fails mean that counsel's representation was inadequate. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). In sum, Endries cannot claim that his trial counsel's decision not to seek an instruction on a lesser-included offense constituted deficient performance when the decision was based upon an "all or nothing" strategy that Endries had agreed counsel should pursue.

We need not address both elements of the test for ineffective assistance if the defendant fails to make a sufficient showing on one of them. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. Because we conclude that trial counsel's performance was not deficient, we do not address the prejudice element of the test.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals