COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1105-CR **Cir. Ct. No. 2005CF1878**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL B. MEY,

DEFENDANT-APPELLANT.

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

Before Dykman, Lundsten and Bridge, JJ.

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

¶2 The State alleged that Mey 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 Mey 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 abetters, 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, Mey 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 the 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 Mey 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 Mey's brief is vague as to his position on whether it is the defendant, or instead counsel, who must make the decision on whether to ask for a lesser included instruction. We clarify that point. In ***State v. Ambuehl***, 145 Wis. 2d 343, 355-56 n.4, 425 N.W.2d 649 (Ct. App. 1988), 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. 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.

¶6 As to deficient performance, Mey argues that his attorney's performance was deficient in two ways. The first is that counsel did not reconsult with Mey about a lesser-included instruction after the State's evidence was presented. The only authority Mey relies on to show the existence of such a duty

is ***Ambuehl***, but it does not so hold. In the absence of any suggestion that the evidence was substantively different from what was originally expected, we conclude that counsel did not have a duty to reconsult with Mey before making the decision on whether to ask for the instruction.

¶7 Mey also argues that counsel's performance was deficient by not asking the court for the lesser-included instruction. The essence of this argument appears to be that the instruction should have been requested because the defense strategy actually used at trial was so weak as to be objectively unreasonable.

¶8 Mey's strategy at trial was based on argument that Mey was not present at the shooting. This argument consisted of questioning the credibility of the State's witnesses who participated in the shooting, and pointing out other claimed inconsistencies in the State's evidence of Mey's participation, but not by introducing evidence of any specific alibi.

¶9 Even if we agree that this was a weak defense, that does not mean there was a *better* defense available. Mey appears to argue on appeal that it would have been better to defend on the ground that the shooters lacked intent to kill. As evidence of lack of intent, he points to the distance the shooters stayed from the victims, their lack of attempt to approach the victims to inflict additional injuries, and testimony from some shooters that they did not have intent to kill at the time of the shooting. While possibly these facts would have given a jury reasonable doubt about intent, we cannot say that this defense is a strong one. Given the weakness of a defense based on intent, which is the only defense that would warrant the lesser-included instruction, we cannot say counsel's performance was deficient by not asking for that instruction instead of pursuing the defense actually used at trial.

¶10 Finally, Mey argues that we should grant a new trial on the homicide charges in the interest of justice under WIS. STAT. § 752.35 on the ground that justice has miscarried. He argues that justice has miscarried because the jury was not able to consider the lesser-included offense. We do not see, and Mey does not clearly explain, how the absence of this instruction, by itself, means that justice has miscarried in this case.

By the Court.—Judgment and order affirmed.

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