COURT OF APPEALS DECISION DATED AND FILED

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2010AP1749-CR

Cir. Ct. No. 2007CF3735

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE C. GRAYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Jimmie C. Grayer appeals the judgment entered on a jury verdict finding him guilty of first-degree reckless injury (use of a dangerous weapon), *see* WIS. STAT. §§ 940.23(1)(a) & 939.63, and from an order denying his motion for postconviction relief. He claims that his trial lawyer gave him

constitutionally deficient representation and that the trial court should have granted him an evidentiary hearing because his trial lawyer: (1) told the jury his statement to police was not recorded (when in fact it had been recorded, and the prosecutor played part of the recording for the jury); (2) did not object when the prosecutor called Grayer's act "intentional" during closing argument; (3) did not object when the prosecutor made sarcastic remarks during the State's rebuttal argument; and (4) should have requested the lesser-included defense of second-degree reckless injury. We affirm.

I.

¶2 On August 1, 2007, Grayer was home alone when his stepson, Henry Williams, came into the house and according to Grayer, repeatedly called him names including "punk bitch ass nigga." Williams threw a half-full bottle of Gatorade at Grayer that, according to Grayer, hit him in the face. In response, Grayer, picked up his handgun and shot in Williams's direction, striking him in the back. The bullet hit Williams's spinal cord and, at the time of trial, he was partially paralyzed from the waist down.

¶3 The police arrested Grayer and he admitted shooting Williams. In his statement to the investigating detective, Grayer said:

- The day before the shooting, Williams had come into the house during the middle of the night, made a lot of noise, and left with what Grayer thought was a rifle.
- He took out his handgun because he feared that someone would come to the house "trying to retaliate what went down last night."

- On the day of the shooting, he had called 911 to report seeing "four boys and [his stepson] Henry" "wrapping" "a rifle" "with this towel" and putting it under the hood of a car in his driveway. Grayer told the 911 operator that he believed the boys were preparing to do a driveby shooting.

- He thought Williams was mad because Grayer "squealed" on him and his friends when he called 911, and that this was the reason for the name-calling and Gatorade attack.

¶4 The State charged Grayer with first-degree reckless injury. He pled not guilty, claiming he acted in self-defense. His first trial ended in a mistrial, asked for by his lawyer, to allow DNA testing on the handgun. Before the mistrial, however, Grayer's trial lawyer on cross-examination asked the detective who interviewed Grayer: "[W]as the interview of Jimmie Grayer recorded?" and the detective testified: "Yes. … [O]n audio."

¶5 The case was retried in April of 2009. During the opening statement on the retrial, the prosecutor told the jury, "You will hear Mr. Grayer's statement." Grayer's trial lawyer then told the jury in the defense opening:

> I'm going to correct something that was said. [The prosecutor] just told you that you're going to hear Mr. Grayer's statement. You will not be hearing Mr. Grayer's statement. You may be hearing what the detective says Mr. Grayer said.
>
> But there was no recording made. Because the time this statement was supposed to have been taken, the police department was not required at that time to record these statements. There are none. This is not a recorded statement.

> So you will not be hearing Mr. Grayer's statement. I wish you had that chance, but you don't. You're only going to be hearing what the detective says he said.

As we have seen, Grayer's statement to police was, in fact, recorded. Part of the recording was played for the jury during the re-trial. At the jury instruction conference, Grayer's lawyer told the trial court that he would not ask for any lesser-included defenses. The trial court asked Grayer if that was true, and Grayer confirmed that he did not want any lesser-included defenses.

¶6 During the State's summation, the prosecutor argued that Grayer's action was not self-defense, and "might be worse than reckless. It might be intentional." In the defense summation, Grayer's lawyer focused on Grayer's character, emphasizing that he was a "good, decent, God-fearing, hard working man, somebody who has worked for the city, that's most of you and me and him and him for 28 years whose lived the life of a model citizen." He contrasted Grayer's character with the stepson's, calling Williams "the child from hell," "a violent man," who is "beyond disrespectful," and a child "[m]ost of us … would drive … to Children's Court and turn them in with guns and drugs and violence."

¶7 The prosecutor, in his rebuttal, sarcastically argued: "Maybe after working for 28 years with the city we should just issue people who put in that kind of time a hunting license for the youth of Milwaukee. Go ahead. Shoot one." As we noted, the jury found Grayer guilty, and the trial court summarily denied his postconviction motion.

II.

¶8 Grayer argues that his trial lawyer gave him constitutionally deficient representation in four respects, and that the trial court should have

granted him an evidentiary hearing. Before we address his arguments, we set out the applicable standards.

¶9 To establish constitutionally deficient representation, a defendant must show: (1) deficient representation; and (2) resulting prejudice. ***Strickland v. Washington**,* 466 U.S. 668, 687 (1984). To prove deficient representation, a defendant must point to specific acts or omissions by his or her lawyer that are "outside the wide range of professionally competent assistance." ***Id.**,* 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694. This is not, however, "an outcome-determinative test. In decisions following ***Strickland***, the Supreme Court has re-affirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379, 386 (1997) (citations and quoted source omitted). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on either one. *See* ***Strickland***, 466 U.S. at 697.

¶10 Our review of an ineffective-assistance-of-counsel claim presents mixed questions of law and fact. *See* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). A trial court's findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** Its legal conclusions whether the lawyer's performance was deficient and, if so, prejudicial, are questions of law that we

review *de novo*. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. A defendant is entitled to an evidentiary hearing only if the defendant "alleges sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. If the defendant's motion does not raise facts sufficient to entitle him to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny the hearing. ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 123, 700 N.W.2d 62, 68. "Whether the Record 'conclusively demonstrates that the defendant is not entitled to relief' is a legal issue that we review *de novo*." ***State v. Marks***, 2010 WI App 172, ¶13, 330 Wis. 2d 693, 706, 794 N.W.2d 547, 554 (one set of quote marks omitted).

A. *Opening statement.*

¶11 Grayer argues that his lawyer was constitutionally ineffective because he told the jury that Grayer's statement to police was not recorded, when in fact it was, and the prosecutor played part of it for the jury. The State concedes, and we agree, that the lawyer was deficient by telling the jury that the interrogation was not recorded. Grayer has not shown prejudice, however.

¶12 Grayer contends that he *was* prejudiced because: (1) "one can only assume that trial counsel lost credibility" and (2) the deficiency was so great, prejudice is automatic (relying on ***Anderson v. Butler***, 858 F.2d 16 (1st Cir. 1988)).

1. <u>Credibility</u>

¶13 In order to get an evidentiary hearing, Grayer must allege facts, which if true, show prejudice. He cannot rely solely on the conclusory *assumption* that his trial lawyer probably lost credibility with the jury. *See **Allen***, 2004 WI 106, ¶26, 274 Wis. 2d at 587, 682 N.W.2d at 443–444. He does not submit any facts supporting his conclusory assumption. As the State points out, the "jury had no reason to believe this [incorrect statement] was anything other than an honest mistake." Significantly, as the State also tells us, the defense lawyer's misstatement was not "called … to the jury's attention at any point." Grayer does not point out how the misstatement made the verdict "unreliable" or "unfair." *See **State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (We may reject undeveloped arguments that are supported by only general statements.).

2. <u>Automatic Prejudice</u>

¶14 In ***Anderson***, during the defense lawyer's opening statement, he promised the jury "he would call a psychiatrist and a psychologist," who would testify that Anderson was "'walking unconsciously towards a psychological no exit … Without feeling, without any appreciation of what was happening, … like a robot programmed on destruction.'" ***Anderson***, 858 F.2d at 17. The defense lawyer did not call the promised witnesses who were to flesh out the defense theory. ***Ibid.*** ***Anderson*** held that the trial lawyer's conduct was "prejudicial as a matter of law" because the "promise [the lawyer made during opening] was dramatic, and the indicated testimony strikingly significant." ***Id.***, 858 F.2d at 17, 19. ***Anderson*** found significant that: (1) the defense lawyer made the claim in the opening statement the day before resting his case, so it was fresh in the jurors' minds; and (2) the defense lawyer started the closing argument by telling the

jurors he decided against calling the medical witnesses because the lay witnesses had adequately described Anderson's state of mind. ***Id.***, 858 F.2d at 17–19.

¶15 The trial court ruled ***Anderson*** was not applicable here because Grayer's lawyer "did not promise specific testimony from any particular witness which would have been 'strikingly significant.' … and it did not rise to the level of an 'unfulfilled promise.'" Although wrong, the defense lawyer's misstatement was not, as we have seen, prejudicial. Further, unlike the situation in ***Anderson*** (which would not be binding on us in any event, *see* ***State v. Beauchamp***, 2010 WI App 42, ¶17, 324 Wis. 2d 162, 177–178, 781 N.W.2d 254, 261, *aff'd*, 2011 WI 27, ___ Wis. 2d ___, ___ N.W.2d ___ ("On federal questions, Wisconsin courts are bound only by the decisions of the United States Supreme Court."), the defense lawyer's promise did not leave any *substantive* promise unfulfilled because Grayer admitted making the statement to police and did not dispute any portions played for the jury. Grayer also testified at the trial, and admitted shooting Williams, but claimed it was in self-defense.

B. *Failure to object during the State's closing argument.*

¶16 Grayer's second claim that his trial lawyer gave him constitutionally deficient representation is that his lawyer did not object when the prosecutor argued in summation:

> So I submit to you it is reasonable to assume that Mr. Grayer picked up what [defense lawyer] called a missile, he had the gun and he went after him. He walked down that hall and then he fired. It might be worse than reckless. It might be intentional. But all you have to know is that it was absolutely reckless. Reckless for him to even put his hands on the gun in the middle of a heated argument. But [w]hat he did was worse.

¶17 Grayer argues that his lawyer should have objected because the jury would not know what "intentional" meant under the law. This argument is wholly without merit. Grayer's theory of defense was that he acted in self-defense; therefore, the trial court instructed the jury that Grayer was allowed to "*intentionally* use force" if he reasonably believed his life was in danger. Grayer does not explain how he was prejudiced by the prosecutor's closing argument. *See* ***Pettit***, 171 Wis. 2d at 646, 492 N.W.2d at 642.

C. *Failure to object during the State's rebuttal argument.*

¶18 Grayer claims that his trial lawyer was deficient because he did not object to statements that the prosecutor made in his rebuttal summation:

> I don't know, maybe [the defense lawyer] is right. Maybe after working for 28 years with the city we should just issue people who put in that kind of time a hunting license for the youth of Milwaukee. Go ahead. Shoot one. Have a ball. That's his defense. That's what he wants you to buy. If you think that makes sense go ahead and acquit him. It is ridiculous.

¶19 Grayer claims this was "outrageous" and his lawyer should have objected. We disagree. A prosecutor has "considerable latitude" in closing argument. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979) ("The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state the evidence convinces him and should convince the jurors.'") (citation omitted). The prosecutor's argument here was fair comment on the evidence because it responded to the defense lawyer's attempt to contrast the respective characters of Grayer and Williams. Thus, the defense lawyer was not ineffective by not objecting. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406, 417 n.10 (1996) (lawyer's failure to make a meritless objection is not deficient performance).

D *Failure to request lesser-included instruction.*

¶20 Grayer claims that his trial lawyer should have asked for a lesser-included instruction on second-degree reckless injury. At the jury instruction conference, however, Grayer's lawyer said, "We're not requesting lesser includeds." The trial court confirmed that the defense lawyer had discussed this with Grayer, and then specifically asked Grayer:

> THE COURT: You do not want a lesser included?
>
> THE DEFENDANT: No.
>
> THE COURT: Is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you've discussed that with your lawyer?
>
> THE DEFENDANT: Just now, yes.
>
> THE COURT: And it's your choice not to have a lesser included; right?
>
> THE DEFENDANT: Yes.

The following morning, the defense lawyer raised the lesser-included issue again, explaining to the trial court that he "had explained to Mr. Grayer generally what a lesser included was and my recommendation to him," but "I did not explain to him anything about second degree reckless injury." He was bringing this up again because he took the time to go over the specific lesser-included defense of second-degree reckless injury and "explain[ed] the difference" between the lesser-included defense of second-degree reckless injury and first-degree reckless injury. The trial court then asked Grayer:

> THE COURT: And you've discussed like we discussed yesterday whether or not you wanted a lesser

> included and the representation from yourself was that you did not. Has your position changed this morning?
>
> DEFENDANT: No, it has not.
>
> THE COURT: So you don't want a lesser included?
>
> DEFENDANT: No.

¶21 The Record conclusively shows that the decision to not request a lesser-included defense was a jointly-decided strategic decision. Thus, Grayer cannot now claim that the selected strategy constitutes ineffective assistance. *See* ***Strickland***, 466 U.S. at 690–691 (Matters of reasonably sound strategy are "virtually unchallengeable" and do not constitute ineffective assistance.); ***State v. Elm***, 201 Wis. 2d 452, 464–465, 549 N.W.2d 471, 476 (Ct. App. 1996) ("A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.").

III.

¶22 In sum, the Record shows conclusively that Grayer's contentions that his trial lawyer gave him constitutionally deficient representation are wholly without merit. Thus, the trial court did not erroneously exercise its discretion when it denied Grayer's claim without holding an evidentiary hearing. *See* ***Love***, 2005 WI 116, ¶26, 284 Wis. 2d at 123, 700 N.W.2d at 68.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.