COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP65 **Cir. Ct. No. 1995CF951814**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMANUEL D. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Emanuel D. Johnson, *pro se*, who was convicted of first-degree intentional homicide as a party to a crime in 1995, appeals from an

order denying his WIS. STAT. § 974.06 (2009–10) motion for postconviction relief without a hearing.[1] He argues that his trial lawyer gave him constitutionally deficient representation when he withdrew Johnson's request that the lesser-included offense of felony murder be submitted to the jury. We reject Johnson's argument and affirm the order.

BACKGROUND

¶2 Johnson was charged with first-degree intentional homicide as a party to the crime in connection with the shooting death of Elvis Anderson. The State alleged that Johnson and Sabir Wilcher, who were associates of a drug house, planned to rob Anderson while driving him home. Johnson drove the car with Anderson in the front seat, while Wilcher sat in the backseat. As they were driving, Wilcher shot Anderson three times in the back of the head. Johnson and Wilcher put Anderson's body in an alley, took drugs from his pocket, and left.

¶3 Johnson's defense at trial was that although Johnson and Wilcher had discussed killing Anderson, Johnson "did not know, did not think that … Wilcher would shoot anyone during the drive on that night." Johnson testified that was "just talk" and that his only intention was to rob Anderson.

¶4 Johnson's lawyer asked the trial court to instruct the jury on two lesser-included crimes: first-degree reckless homicide and felony murder. The trial court agreed to give the felony murder instruction, but the State subsequently

[1] The Honorable Kevin E. Martens denied Johnson's postconviction motion, while the Honorable Stanley A. Miller presided over Johnson's 1995 trial.

All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

objected, noting that Johnson was not charged with an underlying felony.[2] When the State objected, Johnson's lawyer told the trial court that he would withdraw the request for the instruction on felony murder, explaining:

> I talked with Mr. Johnson on four separate occasions this morning. I went through with him again what had originally been a joint request for a lesser included, explained to him what the situation was, explained to him the maximum possible penalties of the lesser included, explained to him the legal way that a jury might deliberate regarding a single charge of first degree intentional homicide or the combined lesser included in terms of what numbers need to be reached in order to [get] a conviction and acquittal or going on to a lesser included, and then I also discussed with him the practical ramifications of jury deliberations based upon my experience over the years.
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> He had plenty of time to think about it, and he's indicated to me that he wishes to withdraw his request for felony murder as a lesser included. And so the point is, the legal argument becomes moot so we're requesting the withdrawal of that.

Johnson's lawyer then renewed his request that the jury be instructed on first-degree reckless homicide. The trial court denied the motion and the jury was instructed solely on first-degree intentional homicide as a party to the crime.

¶5 The jury found Johnson guilty and he appealed his conviction. In his direct appeal, he argued "that the trial court erred in denying his request for a lesser-included instruction, that the party-to-a-crime jury instruction violated his right to have the State prove each element of the crime, and that the jury polling was defective." *See* ***State v. Johnson***, No. 1996AP2093–CR, unpublished slip op.

[2] Because we affirm on other grounds, we do not consider whether the felony murder instruction could have been given despite the absence of an underlying felony charge. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (appellate court should decide cases on the narrowest possible grounds).

at 1–2 (WI App August 12, 1997). We rejected his arguments and affirmed. *See* ***id.***

¶6 Over thirteen years later, Johnson filed the *pro se* postconviction motion that is the subject of this appeal.[3] He argued that his trial lawyer gave him constitutionally deficient representation when he withdrew Johnson's request that the lesser-included offense of felony murder be submitted to the jury. To avoid the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), Johnson alleged that the lawyer who represented him in postconviction proceedings provided constitutionally deficient representation by not alleging that Johnson's trial lawyer performed deficiently, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) ("It may be in some circumstances that ineffective postconviction counsel constitutes a sufficient reason as to why an issue which could have been raised on direct appeal was not."). The trial court denied Johnson's motion without a hearing.[4]

DISCUSSION

¶7 Where, as here, a defendant alleges that his postconviction lawyer provided constitutionally deficient representation by failing to allege that the

[3] Based on this delay, the State argues that Johnson's claim is barred by laches. Because we affirm on other grounds, we do not consider this argument. *See* ***Blalock***, 150 Wis. 2d at 703, 442 N.W.2d at 520.

[4] The circuit court denied Johnson's motion based on ***State v. Truax***, 151 Wis. 2d 354, 444 N.W.2d 432 (Ct. App. 1989). Because we affirm on different grounds, we decline to summarize the circuit court's analysis. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16, 20 (Ct. App. 1995) (court may affirm on grounds different than those relied on by the circuit court).

defendant's trial lawyer performed deficiently, the defendant must first establish that the trial lawyer's representation was constitutionally deficient. *See* State v. Ziebart, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 480, 673 N.W.2d 369, 375. The defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not discuss both prongs "if the defendant makes an insufficient showing on one." ***Id.*** at 697.

¶8 Johnson argues that his trial lawyer erred when he withdrew Johnson's request that the lesser-included offense of felony murder be submitted to the jury. We conclude that Johnson's claim fails because he cannot prove prejudice. Specifically, he cannot show that he was entitled to a lesser-included offense instruction for felony murder.

¶9 "A circuit court has the duty to accurately give to the jury the law of whatever degree of felonious homicide the evidence tends to prove and no other." ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317, 327 (1989). "While the circuit court is given broad discretion with respect to the submission of jury instructions, when the issue is whether the evidence adduced at trial permits the giving of a lesser-included offense instruction, a question of law is presented," which this court decides independently. ***Id.***, 149 Wis. 2d at 791, 440 N.W.2d at 327. ***Kramar*** summarized the test that this court must use to determine whether a lesser-included jury instruction should have been given:

> It is error for a court to refuse to instruct the jury on an issue which is raised by the evidence or to give an instruction on an issue which finds no support in the evidence. The submission of a lesser-included offense is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. In applying this test, the evidence is to be reviewed in the light most favorable to the defendant.

Id., 149 Wis. 2d at 792, 440 N.W.2d at 327 (citations omitted).

¶10 Our application of this test to determine whether Johnson was entitled to an instruction on felony murder is made easier by the fact that we already analyzed a related issue on Johnson's direct appeal: whether Johnson was entitled to an instruction on first-degree reckless homicide. We held, as a matter of law, that "the evidence offers no reasonable grounds for acquittal on first-degree intentional homicide." *See* ***Johnson***, unpublished slip op. at 1–2. In doing so, we adopted the State's argument:

> "[I]f the killing that actually occurred during the robbery the accused planned or assisted was an intentional killing and that killing was a natural and probable consequence of the robbery, then the accused is guilty of first-degree intentional homicide, not merely extremely reckless conduct. The fact that appellant personally contemplated only robbery or did not believe his cohort would actually kill the victim (even though his cohort had said he would) is legally irrelevant.
>
> Appellant focuses on his claimed conduct, asserting it was only extremely reckless because he did not know the killing would actually occur. But his theory misses the whole point. He is not only guilty of intentional homicide because he actually, subjectively intended the victim to be killed. He's guilty of intentional homicide because his cohort who shot the victim actually intended the victim to be killed."

Id. at 3 (quoting the State's brief). We concluded: "[E]ven assuming Johnson did not expect or intend [Wilcher] to shoot Anderson, Johnson, by his own account, acted in ways that aided and abetted the shooting…. [A]s a matter of law there was no reasonable basis in the evidence for acquittal of first-degree intentional homicide, party to a crime." ***Id.*** at 4.

¶11 The State argues that this court's determination that there was no basis for acquittal on the first-degree intentional homicide charge is binding on

this court pursuant to the "law of the case" doctrine. *See* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis. 2d 252, 261, 500 N.W.2d 339, 342 (Ct. App. 1993) ("It is axiomatic that 'a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'") (citation omitted). The State explains:

> To determine whether [Johnson's trial lawyer] performed deficiently by failing to pursue a lesser included offense instruction for felony murder, this court must determine whether "reasonable grounds exist in the evidence … for acquittal" on first degree intentional homicide. The court already made that determination in Johnson's direct appeal, albeit in the context of a different lesser-included-offense challenge. The court explicitly stated that "no reasonable basis" existed for acquittal on the first-degree intentional homicide charge as "*a matter of law*[.]" … Therefore, Johnson's ineffectiveness claim in his postconviction motion is barred by the law of the case doctrine.

(Citations omitted; emphasis in original.)

¶12 We agree with the State. In Johnson's direct appeal we examined the facts presented at Johnson's trial and concluded, as a matter of law, that there was no reasonable basis for acquitting Johnson of first-degree intentional homicide. Because there was no basis for acquittal on that charge, Johnson was not entitled to a lesser-included offense instruction for either first-degree reckless homicide, as we concluded in Johnson's direct appeal, or for felony murder. Therefore, Johnson cannot prove that he was prejudiced by his trial lawyer's alleged deficiencies concerning the withdrawal of Johnson's request for a felony murder instruction. We affirm the order denying Johnson's postconviction motion.

By the Court.—Order affirmed.

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