COURT OF APPEALS
DECISION
DATED AND RELEASED

February 21, 1996

NOTICE

No. 94-3302-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTURO PEREZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MICHAEL FISHER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Arturo Perez appeals from a judgment convicting him of second-degree intentional homicide with a weapon as a repeater contrary to §§ 940.05, 939.63(1)(a)2 and 939.62(1)(c), STATS., and from an order denying his postconviction motion for a new trial. On appeal, Perez argues that the trial court erred when it refused to instruct the jury on a lesser-included offense of homicide by negligent use of a dangerous weapon and erroneously gave a self-defense instruction premised on the defendant being the aggressor. Perez also claims that he was prejudiced by the deficient performance of trial counsel. We disagree and affirm.

Perez was charged with first-degree intentional homicide while armed with a dangerous weapon (a 12-gauge shotgun) in the shooting death of Michael J. Becker. As a party at Perez's home was ending in the late evening hours of September 18 and the early morning hours of September 19, 1993, one of the female guests reported to her husband and Perez that some men made offensive comments to her in front of Perez's house. Words were exchanged between one of the men, Becker and Perez. Perez ordered Becker and his companion off his property and they retreated to a neighborhood bar. Becker, his companion and others later returned to Perez's house. Perez testified that he ran inside his house and grabbed a disassembled shotgun belonging to a friend. He assembled the weapon, although he testified that he had never assembled or fired a gun before and did not realize that the gun was loaded. When the group was within ten feet of Perez's home, Perez, believing that he was going to be beaten, attempted to scare the men by pointing the gun at the ground and pulling the trigger. The gun did not discharge at that moment, but when Perez turned to run away, the gun discharged and killed Becker. James Stuart, who testified for the defense, stated that the men continued to approach Perez until he fired the gun.

Other witnesses countered Perez's testimony regarding the circumstances of the shooting. Two detectives testified that Perez told them that he raised the gun to approximately hip level and fired at the approaching men. Other participants in the confrontation testified that Becker had stopped approaching Perez and was turning away when Perez shot Becker without warning from a distance of twenty feet or less. Another witness, James Cisewski, testified that Perez held the gun horizontally, not toward the ground, during the confrontation. David Uttech testified that although the barrel was initially pointed toward the ground, Perez fired from hip level. Ben Carrigan, who lived across the street from Perez and observed the confrontation, testified that Perez was the aggressor.

The court submitted four degrees of homicide to the jury: first-degree intentional, second-degree intentional, first-degree reckless and second-degree reckless. The trial court declined Perez's requested instruction on homicide by negligent handling of a dangerous weapon, WIS J I—CRIMINAL

1175,[1] because the jury could not reasonably infer negligent use of a firearm from the evidence adduced at trial.

While every degree of homicide is generally a lesser-included offense of first-degree intentional homicide, additional evidentiary standards must be satisfied before a particular lesser-included offense instruction is submitted to the jury. *See* ***State v. Chapman,*** 175 Wis.2d 231, 241, 499 N.W.2d 222, 225-26 (Ct. App. 1993). A lesser-included offense instruction is appropriate when there are reasonable grounds in the evidence for acquittal on the original offense and conviction on a lesser offense. ***Id.*** at 241, 499 N.W.2d at 226. In making this determination, the evidence is viewed in the light most favorable to the defendant. "If a reasonable view of the evidence is sufficient to support a guilty verdict beyond a reasonable doubt for the original offense and the lesser included offense, then no lesser included offense instruction need be given." ***Id.***

Perez apparently believes that the homicide by negligent use instruction should have been given to the jury if any reasonable view of the evidence cast a reasonable doubt as to some element of the originally charged offense, first-degree intentional homicide. For this proposition, he cites ***Chapman***.

Perez reads ***Chapman*** too broadly. In ***Chapman,*** the defendant sought an instruction on a lesser-included offense of second-degree reckless homicide; he was charged with first-degree intentional homicide. ***Id.*** at 240, 499 N.W.2d at 225. Because the trial court and this court considered only one proposed lesser-included offense, this court had no cause to speak in anything other than the singular when referring to the need for a lesser-included offense when a reasonable view of the evidence casts reasonable doubt as to some element of the original offense. *See* ***id.*** at 241, 499 N.W.2d at 225-26.

[1] WISCONSIN J I—CRIMINAL 1175 is derived from § 940.08, STATS., which deems a Class D felony causing the death of another human being by the negligent operation or handling of a dangerous weapon.

However, where a court instructs a jury as to several lesser degrees of homicide, a defendant must show "reasonable doubt as to all greater degrees of homicide on which the court plans to instruct the jury, before defendant may secure an instruction on the next lesser degree." ***Harris v. State,*** 68 Wis.2d 436, 441, 228 N.W.2d 645, 647 (1975). Here, the court instructed, without objection from Perez, on the charged crime and three lesser degrees of homicide. In order to warrant an instruction on homicide by negligent use, Perez had to demonstrate reasonable doubt as to all greater degrees of homicide submitted to the jury.

Whether the trial court should have given the homicide by negligent use instruction based upon the evidence adduced at trial is a legal question which we review independently. *See* ***State v. Martin,*** 156 Wis.2d 399, 402, 456 N.W.2d 892, 894 (Ct. App. 1990), *aff'd,* 162 Wis.2d 883, 470 N.W.2d 900 (1991).

In order to obtain an instruction on homicide by negligent use, there had to be a reasonable basis in the evidence for finding Perez not guilty of the least serious of the other lesser-included offenses, second-degree reckless homicide. Section 940.06, STATS., prohibits recklessly causing the death of another human being. Conduct is criminally reckless when "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Section 939.24(1), STATS.[2]

Perez concedes in his appellant's brief that in introducing an unfamiliar dilapidated shotgun into the volatile atmosphere outside his home without first determining whether it was loaded "subjected all persons in the area to a substantial risk of death or great bodily harm." This concession satisfies the first prong of the definition of criminal recklessness. The remaining question is whether there was a reasonable ground in the evidence for finding that Perez was unaware that his conduct created such a substantial risk of death or great bodily harm.

[2] The jury was so instructed in this case.

Perez testified that he got the gun to ward off people approaching his house. He admitted pulling the trigger, but claimed that the gun was pointed at the ground when he did so. However, the victim was shot in the left side of his back and other witnesses testified that Perez had the barrel raised during the confrontation. There was no testimony that in the course of turning away after he pulled the trigger, Perez accidentally raised the gun.

Viewed reasonably, evidence that the gun was raised rather than pointed at the ground at the time of discharge does not allow a conclusion that Perez was unaware of the risk posed by wielding the weapon. Even if the weapon fired accidentally, the evidence was sufficient to support a conviction for reckless homicide, *see* ***State v. Blair,*** 164 Wis.2d 64, 72 n.5, 473 N.W.2d 566, 570 (Ct. App. 1991), and precluded a homicide by negligent use instruction, *see* ***Shelley v. State,*** 89 Wis.2d 263, 282-83, 278 N.W.2d 251, 260 (Ct. App. 1979).

Perez next argues that the trial court erroneously instructed the jury using WIS J I—CRIMINAL 815. The instruction advises the jury of the limitations on the self-defense privilege when the defendant provokes the confrontation. Perez contends that the evidence did not support the submission of the defendant-as-aggressor instruction because he was not the aggressor. He claimed that he fired to scare the victim and the others and that his actions were, at all times, consistent with the permissible exercise of self-defense.

A trial court does not err if it gives a jury instruction where the evidence reasonably requires it. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 9, 492 N.W.2d 381, 384 (Ct. App. 1992), *cert. denied,* 509 U.S. ___, 113 S. Ct. 3053 (1993). Here, there was sufficient evidence that Perez was the aggressor to warrant the instruction. Perez's neighbor described Perez as the aggressor, and the State's witnesses testified that the approaching men had stopped their advance when Perez fired without warning. The trial court did not err in giving the defendant-as-aggressor self-defense instruction.

Perez also argues that his trial counsel rendered ineffective assistance when he decided not to call a firearms expert to testify about the ways in which Perez's shotgun could have discharged consistent with Perez's version of the incident.

To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. ***Id.*** at 127, 449 N.W.2d at 847-48.

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***Id.*** at 127, 449 N.W.2d at 848. The 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. ***Id.*** at 129, 449 N.W.2d at 848. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** In applying this principle, reviewing courts are instructed to consider the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 542 (1992). However, the final determinations of whether counsel's performance was deficient and prejudiced the defense are questions of law which this court decides without deference to the trial court. ***Id.***

Perez claimed that he first pointed the gun at the ground, did not cock the hammer and pulled the trigger to scare the approaching men, but nothing happened. Perez then turned to run away and the gun discharged into Becker. He contends that his trial counsel was ineffective for failing to investigate the possibility of "hang-fire" or slow burn, which would have

accounted for the delay in discharging the weapon which Perez described. He further contends that trial counsel's decision not to call David Balash, a firearms expert, to testify at trial regarding this phenomenon prejudiced him.

As we have stated, ineffective assistance claims are viewed from counsel's perspective at the time of trial. ***Johnson,*** 153 Wis.2d at 127, 449 N.W.2d at 847-48. Accordingly, we must consider the information available to counsel at the time he decided not to have Balash testify at trial. *See* ***State v. Felton,*** 110 Wis.2d 485, 502-03, 329 N.W.2d 161, 169 (1983).

The trial court found that trial counsel decided not to call Balash as a matter of trial strategy because he believed he could establish the desired points through the State's firearms expert, Monty Lutz. The trial court's findings of fact as to trial counsel's conduct and strategic decision not to employ Balash at trial are not clearly erroneous based upon the testimony of trial counsel and Balash at the postconviction motion hearing. *See* ***Knight,*** 168 Wis.2d at 514 n.2, 484 N.W.2d at 542.

At the postconviction motion hearing, trial counsel testified that Balash inspected the gun and made a report. Counsel recalled discussing the possibility of hang-fire, slow burn or delayed firing with Balash.[3] Balash reported "no slow burns or delayed firings during the distance tests [he conducted on the weapon]."

Balash testified at the postconviction motion hearing that he and trial counsel discussed one scenario in which the weapon would not discharge immediately upon pulling the trigger. Balash described a circumstance similar to that described by Lutz at trial. Balash's subsequent tests of the weapon indicated that the gun could fire if the hammer was cocked, the trigger was pulled and then the breech was closed.

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[3] Counsel also directed Balash to examine the shell from the bullet which killed the victim for a double-pin striking. Counsel testified that he learned of the possibility of two pulls on the trigger from Perez and a witness who stated that he heard a clicking sound before the gun discharged. Perez testified at trial and at the motion hearing that he pulled the trigger only once during the incident and the gun was pointed downward when he did so. Balash reported "no indication of a double firing pin strike to the primer."

In cross-examining the State's firearms expert, Lutz, at trial, defense counsel inquired about some of the scenarios in which a weapon could discharge inadvertently or accidentally. Lutz conceded that it was possible the gun could have discharged after Perez intended under the following conditions: (1) there was a round in the chamber, (2) the breech was slightly open such that the firing pin and primer were too far apart to strike each other, (3) the hammer was back, (4) the weapon was held down with pressure on the trigger, (5) the barrel was raised, and (6) the breech was closed. The closing of the breech would permit the firing pin and primer to come in contact, resulting in discharge of the weapon. Counsel testified that the type of information he elicited from Lutz was the type of information he would have elicited from Balash and that this was a factor in his decision not to use Balash. Counsel did not feel Balash would have added anything to the case and there was a risk that the State would elicit unfavorable points on cross-examination.

Reviewing the case from counsel's perspective at the time of trial, we conclude that counsel made a reasonable strategic choice not to use Balash. *See* ***Felton,*** 110 Wis.2d at 502-03, 329 N.W.2d at 169. The record indicates that counsel investigated the possibility of hang-fire, but decided not to use his own expert to establish the possibility at trial. We discern no prejudice to Perez because the testimony elicited by trial counsel from Lutz was the same type of testimony defense counsel would have elicited from Balash had he been called to testify. There is no reasonable probability that had Balash been called to testify, the outcome of the proceeding would have been different. *See* ***Johnson,*** 153 Wis.2d at 129, 449 N.W.2d at 848.[4]

[4] Perez complains on appeal that the trial court declined to allow Richard Thompson, an arms expert, to testify at the postconviction motion hearing. The trial court excluded Thompson because he was not identified as an expert before trial and the relevant inquiry was what trial counsel gleaned from his contacts with the expert he had identified. Perez's argument in his appellant's brief that the trial court erred in excluding Thompson's testimony is not sufficiently developed to permit this court to review it on appeal. *See* ***Vesely v. Security First Nat'l Bank,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985). Although Perez elaborates in his reply brief as to the reasons Thompson should have been permitted to testify, this argument is effectively made for the first time in the reply brief. We do not consider arguments raised for the first time in a reply brief. ***State v. Grade,*** 165 Wis.2d 143, 151 n.2, 477 N.W.2d 315, 318 (Ct. App. 1991). We see no reason to depart from that rule here.

Finally, Perez asks this court to order a new trial pursuant to § 752.35, STATS., on the ground that the real controversy was not fully tried. Perez cites the cumulative effect of the alleged errors we have already discussed. We will not grant a new trial based upon arguments we have already rejected. *See* ***State v. Echols,*** 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989).

By the Court.—Judgment and order affirmed.

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