COURT OF APPEALS
DECISION
DATED AND RELEASED

June 12, 1996

No. 95-1443-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN H. FISHER,

Defendant-Appellant.

APPEAL from judgments and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. John H. Fisher appeals from judgments convicting him of first-degree recklessly endangering safety with a weapon and felon in possession of a firearm, both as a repeater,[1] and from an order denying his postconviction motion for a new trial. On appeal, Fisher challenges the trial court's refusal to conduct an evidentiary hearing on all postconviction issues and claims that his trial counsel was ineffective and there was insufficient

[1] *See* §§ 941.30(1), 939.63, 941.29, 939.62, STATS.

evidence to convict him of first-degree recklessly endangering safety while armed. We decide these issues against Fisher and affirm.

Fisher was charged with endangering the safety of Kenyada Helton under circumstances which showed utter disregard for human life while possessing a dangerous weapon. *See* § 941.30(1), STATS. Helton testified that in May 1993, after spending approximately two hours at Fisher's home with Fisher and Helton's brother, Cory Burr, Fisher drove them to Racine at approximately midnight. On the way back to Kenosha, they stopped at a restaurant because Fisher was hungry. Fisher ordered food for himself and Helton; Burr used the rest room, returned to the car and fell asleep in the back seat.

Fisher drove Helton home and when he stopped in front of her house inquired where his wallet was. Helton said she did not have it. Fisher then drove away from Helton's home and they argued while he was driving. Helton testified that Fisher stopped the car and said he was going to show how mad he gets when his wallet is missing. Fisher reached between his legs and raised a gun to Helton's head. Helton, who was in the passenger seat, tried to grab the gun and unlock the car door with her other hand. Fisher grabbed her, pulled her toward him and told her she was not going anywhere. Helton then grabbed the gun and they started wrestling on the floor of the car. She testified that Fisher threatened that if she did not release the gun, he was going to shoot. Helton refused to release the gun, and approximately three seconds later the gun discharged. She was wounded in the finger. Helton managed to escape Fisher's grasp and he tried to pull the trigger again. Helton fled the car and ran down an alley where she met Charles Petrin, who took her to his home and called police. Petrin confirmed that Helton was extremely agitated when he encountered her.

Burr testified that Helton was in the front passenger seat and he was asleep in the back seat on the trip from Racine to Kenosha. Burr said that he remembered hearing a gunshot, waking up and asking where Helton was. Fisher told him she was gone. Burr said he never owned a gun and never saw a gun that night.

Fisher testified that when he, Helton and Burr left Racine to return to Kenosha, Burr was awake in the back seat. Fisher testified that he noticed his

driver's license was under the armrest of the car and that this was unusual because he keeps the license in his wallet. He then pulled over, checked his pocket and found that his wallet was missing. Fisher admitted that he accused Helton and Burr of stealing his wallet. Helton denied having the wallet, and when she tried to get out of the car, Fisher locked the door. Fisher told her she could not leave until they determined what happened to his wallet. Fisher testified that Burr told him Helton did not know anything about the wallet and that Burr told him he was going to take them home. At that point, Fisher felt something in the lower part of his back and saw that Burr had a gun in his back. Fisher grabbed Burr's arm and they struggled for the gun. During the struggle, Burr pointed the gun toward Helton; she pushed it away. The gun went off, Helton opened the door, and Burr and Helton ran off. Fisher denied possessing a gun that night and said that Burr took the gun with him after the shooting. The jury convicted Fisher.

Fisher claims that his trial counsel was ineffective because he failed to: (1) request instructions on lesser-included offenses; (2) object to the form of the verdict on first-degree recklessly endangering safety and to the instruction on the "while armed" portion of the associated jury instruction; and (3) offer a stipulation on Fisher's prior felony conviction and request a cautionary instruction after the nature of Fisher's prior felony conviction was disclosed. The trial court did not hold an evidentiary hearing on the first two claims of ineffective assistance of counsel.

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 or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.***

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. ***State v. Johnson,*** 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). 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. We need not consider whether trial counsel's performance was deficient if we can resolve the ineffectiveness issue on the ground of lack of prejudice. *See* ***State v. Moats,*** 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

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, 541 (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.***

Fisher argues that the trial court erroneously denied him a full evidentiary hearing on his ineffective assistance of counsel claims. A trial court properly exercises its discretion to deny a postconviction motion without a hearing "if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Washington,*** 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993) (quoted source omitted).

In declining to hold an evidentiary hearing on Fisher's first two ineffective assistance of counsel claims, the trial court essentially moved directly to the prejudice prong of the ***Strickland*** analysis and determined as a matter of law that Fisher was not prejudiced by counsel's performance. We review this legal conclusion independently.

Trial counsel is not ineffective if he or she fails to request a lesser-included offense instruction when the defendant would not have been entitled to the instruction in the first instance. *See* ***State v. Van Straten,*** 140 Wis.2d 306, 320, 409 N.W.2d 448, 454-55, *cert. denied,* 484 U.S. 932 (1987); ***State v. Leach,*** 124 Wis.2d 648, 675, 370 N.W.2d 240, 254 (1985). In deciding whether to instruct the jury on a lesser-included offense, the circuit court must determine as a matter of law whether the lesser offense is a lesser-included offense and whether the instruction is justified based on the evidence. ***State v. Carrington,*** 134 Wis.2d

260, 262 n.1, 397 N.W.2d 484, 485 (1986). A lesser-included offense instruction is appropriate where there are reasonable grounds in the evidence for acquittal on the original offense and conviction on a lesser offense. ***State v. Chapman,*** 175 Wis.2d 231, 241, 499 N.W.2d 222, 226 (Ct. App. 1993). In ruling on the propriety of a lesser-included offense instruction, the court must view the evidence in the light most favorable to the defendant and the requested instruction. ***State v. Foster,*** 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

The State argues that the trial court correctly determined that Fisher was not entitled to an instruction on second-degree recklessly endangering safety because there was no reasonable basis for acquitting him on the greater offense of first-degree recklessly endangering safety. The State also argues that the trial court correctly concluded that Fisher was not entitled to an instruction on endangering safety by use of a dangerous weapon, § 941.20, STATS., because that crime is not a lesser-included offense of first-degree recklessly endangering safety while armed under § 941.30(1), STATS.

The State concedes that second-degree recklessly endangering safety is a lesser-included offense of first-degree recklessly endangering safety. *See* § 939.66(1), STATS. (an included crime is one which does not require proof of any fact in addition to those facts which must be proved for the crime charged). Both degrees of recklessly endangering safety require reckless endangerment. First-degree recklessly endangering safety requires the additional element of having done so "under circumstances which show utter disregard for human life." Section 941.30(1), STATS. We turn to whether there was an evidentiary basis to acquit Fisher of first-degree recklessly endangering safety while armed and convict him of second-degree recklessly endangering safety. *See* ***Chapman,*** 175 Wis.2d at 241, 499 N.W.2d at 226.

In considering whether trial counsel was ineffective for not requesting a second-degree recklessly endangering safety instruction, the court noted that the evidentiary basis for such an instruction was lacking in the record. The victim testified that Fisher held a gun to her head and threatened to shoot before the struggle for the gun ensued. From this testimony, the court concluded that Fisher's conduct demonstrated utter disregard for human life. Fisher claimed he never had the gun and that he was innocent in the incident. Because Fisher denied having the gun and contended that Burr was holding the gun when it went off, the court found that there was no reasonable view of the

evidence which would justify a jury finding that Fisher endangered Helton's safety without demonstrating utter disregard for human life. That is, if Fisher recklessly endangered Helton's safety, he did it with a gun, a circumstance which showed utter disregard for human life.

The trial court's analysis was correct. The State was required to prove that Fisher had "utter disregard for human life," which is analogous to the former "depraved mind" standard. *See* ***State v. Holtz,*** 173 Wis.2d 515, 519 n.2, 496 N.W.2d 668, 670 (Ct. App. 1992); *see also* ***State v. Loukota,*** 180 Wis.2d 191, 198, 508 N.W.2d 896, 898 (Ct. App. 1993) (conduct evincing a depraved mind remains an element of first-degree reckless endangerment). The State had to prove that Fisher engaged in conduct imminently dangerous to another, evincing a depraved mind. *See* ***State v. Blanco,*** 125 Wis.2d 276, 280-81, 371 N.W.2d 406, 409 (Ct. App. 1985). Where a defendant points a gun at a vital part of the victim's body, there is no reasonable basis to acquit the defendant of a crime in which depraved mind is an element. *See* ***State v. Davis,*** 144 Wis.2d 852, 863-64, 425 N.W.2d 411, 416 (1988). Accordingly, it would not have been reasonable to acquit Fisher of a crime where utter disregard for human life was an element when the evidence demonstrated that he pointed a loaded gun at Helton's head and threatened to shoot. Fisher's contention that he never had the gun is not consistent with the possibility of a conviction for second-degree recklessly endangering safety.

We also reject Fisher's contention that endangering safety by use of a dangerous weapon contrary to § 941.20, STATS., is a lesser-included offense of first-degree recklessly endangering safety, the crime with which he was charged. Section 941.20 has four variations. Each of these variations requires proof of an element not required to establish first-degree recklessly endangering safety under § 941.30(1), STATS.[2] Because endangering safety by use of a dangerous weapon is not a lesser-included offense of first-degree recklessly endangering safety, *see* § 939.66(1), STATS., the court correctly concluded that trial counsel was not ineffective for failing to seek such an instruction.

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[2] Section 941.20(1)(a), STATS., requires proof that the defendant negligently operated or handled a dangerous weapon; § 941.20(1)(b) requires proof that the defendant operated or went armed with a firearm while intoxicated; § 941.20(1)(c) requires intentionally pointing a firearm at or toward another; and § 941.20(1)(d) requires discharge of a firearm within 100 yards of any building devoted to human occupancy.

In arguing the opposite proposition, Fisher relies upon ***State v. Carrington,*** 130 Wis.2d 212, 386 N.W.2d 512 (Ct. App. 1986), in which the court of appeals held that endangering safety under the then-current § 941.20(1), STATS., is a lesser-included offense of first-degree recklessly endangering under § 941.30(1), STATS. However, the supreme court reversed and held that one was not a lesser-included offense of the other. ***Carrington,*** 134 Wis.2d at 270, 397 N.W.2d at 488-89. We are at a loss to understand why the appellant's brief relies upon a superseded court of appeals case.

Next, Fisher challenges trial counsel's failure to object to the verdict which lacked a special question regarding whether Fisher possessed or used a dangerous weapon while committing first-degree recklessly endangering safety and to the "while armed" portion of the associated jury instruction.

Fisher contends the verdict was flawed. The verdict stated: "We, the jury, find the defendant, John H. Fisher, guilty of first-degree recklessly endangering the safety of another while armed with a dangerous weapon."

Fisher argues that under ***State v. Peete,*** 185 Wis.2d 4, 517 N.W.2d 149 (1994), whether he used a dangerous weapon had to be submitted to the jury in the form of a special question on the verdict. However, a single verdict question which incorporates the dangerous weapon element has been approved by this court. ***State v. Villarreal,*** 153 Wis.2d 323, 330, 450 N.W.2d 519, 522-23 (Ct. App. 1989). ***Peete*** and ***Villarreal*** are not inconsistent.

Peete requires that before a defendant's sentence may be enhanced for committing a crime with a dangerous weapon under § 939.63, STATS., the state must prove a nexus between the predicate offense and the weapon possession. ***Peete,*** 185 Wis.2d at 17, 517 N.W.2d at 154. Here, the victim testified that Fisher pointed a gun at her head and that it ultimately discharged and hit her in the finger. Therefore, there were sufficient facts before the jury to permit it to find the required nexus, that is, that Fisher possessed a gun to facilitate the commission of the predicate crime: first-degree recklessly endangering safety.

Fisher also argues that the trial court failed to instruct the jury on the ***Peete*** nexus requirement. Fisher premises his argument on the fact that only a jury can make a factual finding regarding possession of a weapon to facilitate the commission of first-degree recklessly endangering safety. However, the jury was required to do just that by virtue of the verdict it was handed, the versions of the incident presented by the victim and Fisher, and other instructions it was given.

The court submitted a verdict requiring the jury to determine whether Fisher acted while armed with a dangerous weapon and so instructed the jury. We presume jurors follow the instructions given to them. ***State v. Johnston,*** 184 Wis.2d 794, 822, 518 N.W.2d 759, 768-69, *cert. denied,* 513 U.S. ___, 115 S. Ct. 587 (1994). Where the trial court's instructions adequately cover the law, we will not find error in the failure to give a particular instruction. ***State v. Kemp,*** 106 Wis.2d 697, 706, 318 N.W.2d 13, 18 (1982). Under the facts of this case, we see no error in the manner in which the jury was instructed on committing the crime while armed with a dangerous weapon.

Because the record demonstrated that Fisher was not entitled to relief on his first two ineffective assistance claims, the trial court did not err in declining to hold an evidentiary hearing on those claims. *See* ***Washington,*** 176 Wis.2d at 215, 500 N.W.2d at 336.

Finally, Fisher argues that trial counsel was ineffective because he failed to stipulate to Fisher's prior felony for purposes of Count 2 (felon in possession of a firearm) so that there would have been no opportunity for the trial court and the prosecutor to inform the jury of Fisher's prior conviction for endangering safety.[3] He further argues that because the prior felony was of the same nature as the charged crime, he was prejudiced by this disclosure and by trial counsel's failure to seek a cautionary instruction regarding the references to Fisher's prior felony.

[3] Under § 941.29, STATS., the State was required to prove Fisher's prior felony in order to obtain a conviction for felon in possession of a firearm.

The court took evidence on this claim at the hearing on Fisher's ineffective assistance claim. We will uphold the trial court's findings of fact unless the findings are clearly erroneous. *See* ***Knight,*** 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. The jury was informed on two occasions of the nature of one of Fisher's prior felonies. The court so informed the jury when it described the charges at the outset of trial. The prosecutor also referred to it in his opening statement.

Where a defendant offers to stipulate that he or she is a convicted felon, the nature of the prior crime is not relevant. *See* ***State v. McAllister,*** 153 Wis.2d 523, 529, 451 N.W.2d 764, 766-67 (Ct. App. 1989). However, ***McAllister*** does not mandate offering such a stipulation.

We evaluate Fisher's ineffective assistance claim by first addressing counsel's performance and assessing whether counsel's performance fell below objective standards of reasonableness. *See* ***State v. McMahon,*** 186 Wis.2d 68, 80, 519 N.W.2d 621, 626 (Ct. App. 1994). This standard encompasses a wide range of professionally competent assistance. *See* ***id.*** "We do not look to what would have been ideal, but rather to what amounts to reasonably effective representation." ***Id.***

Fisher cites no authority for the proposition that counsel must stipulate to the fact that a defendant has a prior felony conviction. The existence of such a conviction is an element of the crime of felon in possession of a firearm. We decline to conclude that counsel is per se deficient for failing to stipulate to an element which the State is otherwise required to prove beyond a reasonable doubt. Turning to the prejudice prong, we conclude that Fisher has not demonstrated a reasonable probability that but for counsel's failure to stipulate, the outcome at trial would have been different. *See* ***Johnson,*** 153 Wis.2d at 129, 449 N.W.2d at 848. In reaching this conclusion, we review the totality of the evidence before the trier of fact. ***Id.*** at 129-30, 449 N.W.2d at 848-49.

If the jury believed the victim's version of events, Fisher stood to be convicted of first-degree recklessly endangering safety. The fact that the jury learned that Fisher had a previous conviction for endangering safety does not

make it reasonably probable that had the jury not been so informed, it would have acquitted Fisher on this charge.

Fisher complains that trial counsel did not ask the court for a cautionary instruction once the nature of the prior felony was revealed. However, the jury was instructed that it was to decide the case based on evidence from the witness stand and exhibits received into evidence. Therefore, the jury was not to consider either the court's remark or the prosecutor's reference to the nature of Fisher's prior felony. The court's instructions at the close of the case reminded the jury that the arguments, opinions and conclusions of the attorneys were not evidence. Jurors are presumed to follow the instructions given to them. ***Johnston,*** 184 Wis.2d at 822, 518 N.W.2d at 768-69.

By the Court.—Judgments and order affirmed.

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