COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-3048-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Antonio Manns,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Antonio Manns appeals from the judgment of conviction for attempt first-degree intentional homicide while armed and first-degree reckless injury while armed, and from the trial court order denying his postconviction motion for a new trial. He argues that trial counsel was ineffective and that the trial court improperly decided his ineffective assistance

of counsel claims without holding an evidentiary hearing. He also argues that the trial court erred in allowing "other crimes" evidence. We affirm.

I. Background

The facts relevant to resolution of this appeal are not in dispute. As summarized in the trial court's written decision denying Manns's motion for a new trial:

> Manns went to visit the victim while armed with a loaded shotgun for purposes of extracting money from her which she allegedly owed him. The victim testified that, while the defendant was in her apartment with the gun, he sexually assaulted her (although sexual assault was not charged in the case). Immediately after the assault, there was a knock at the door. As the victim attempted to go to the door to answer it, the defendant was directly behind her with the gun pointed in her direction. She never made it to the door. The defendant discharged the shotgun, shooting the victim in the back. The dispute was whether Manns accidentally or recklessly pulled the trigger (as he claimed in his statement to the police), or whether he purposely pulled the trigger with intent to kill the victim. It was conceded at trial that he did sho[o]t her in the back with the shotgun and caused her substantial injury (she survived but is permanently paralyzed.) Manns'[s] defense was that he did not intend to kill the victim, but that the shooting was an accidental or reckless act.

The State charged Manns with attempt first-degree intentional homicide while armed (count one) and first-degree reckless injury while armed (count two). The trial court also granted the defense requests for lesser included offense instructions: 1) on count one—first and second-degree reckless endangering safety while armed; and 2) on count two—second-degree reckless injury while armed. Based on the defense closing argument, however, the trial

court withdrew two of the three lesser included offense instructions—second-degree reckless endangering safety while armed (count one), and second-degree reckless injury while armed (count two). The jury convicted Manns of the original charges in both counts.

II. Ineffective Assistance of Counsel

Manns argues that trial counsel was ineffective for failing to impeach the victim with her prior convictions, and for presenting a closing argument asking the jury to convict him of first-degree reckless endangering safety while armed (count one) and first-degree reckless injury while armed (count two).

In order to prevail on a claim of ineffective assistance, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to establish either deficient performance or prejudice, his claim fails and, therefore, "[r]eview of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice....'" ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990) (quoting ***Strickland***, 466 U.S. at 697). Establishing prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Strickland***, 466 U.S. at 687. A defendant must establish "a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id***. at 694.

A. Prior Convictions

Manns argues that counsel was ineffective for failing to impeach the victim with her criminal convictions. The victim had been convicted of prostitution in 1978 and shoplifting in 1982. When the victim testified, however, defense counsel failed to impeach her with the convictions. Realizing that failure following her testimony, counsel attempted to introduce certified copies of the two judgments of conviction. The trial court denied the request ruling

"it's too late now....[a]nd certainly the substance of those convictions could not have come in in any event for impeachment purposes."

Manns argues that "the credibility of the victim was in issue and it was important to impeach her testimony." He fails to acknowledge, however, that the fact of two prior convictions, if allowed, would have been of minimal significance in light of the substantial evidence bearing on the victim's credibility. Denying the postconviction motion, the trial court explained:

> [A]lthough Manns has arguably demonstrated that counsel was deficient in his performance by failing to at least attempt to question the victim about her prior convictions (it is not certain that he would have been given permission to impeach with these convictions, given their age), he is simply unable to establish that his case was prejudiced by the omission....
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> Manns'[s] trial counsel did, in fact, present the jurors with very unfavorable evidence with regard to [the victim] in the form of testimony offered by [the victim's neighbor]. [The neighbor] resided above [the victim] and described an array of seamy behavior on the part of [the victim], including "countless" men going to and from the victim's apartment implying that the victim prostituted herself on a regular basis; drug use by the victim; and the victim's home resembling a filthy pig sty. During this testimony, the jurors were unequivocally left with the impression that [the victim] engaged in prostitution and drug use and that [she] had possibly lied about her involvement with each of those vices when she testified earlier that she never prostituted herself and never used drugs. In light of this testimony relating to [the victim's] allegedly seedy life style, I find that Manns'[s] case was not prejudiced by counsel's failure to question the victim

> about her two convictions, which occurred seventeen and thirteen years ago.

We agree and, therefore, conclude that Manns has failed to establish that he was prejudiced by counsel's failure to impeach the victim with her criminal convictions.

B. Closing Argument

Manns next argues that counsel was ineffective when he "inexplicably argued to the jury that the defendant should be convicted" of first-degree reckless endangering while armed (count one) and first-degree reckless injury while armed (count two). Manns contends that counsel's argument "[i]n essence,... without consultation with the defendant, admitted the defendant's guilt to CT 2" and, further, caused the trial court to withdraw the instructions on a second degree option on each count. In closing argument, trial counsel argued, in part:

> As far a[s] the defense is concerned, you can disregard the not guilty as far as the reckless injury is concerned. I think the State clearly has proven beyond a reasonable doubt that Antonio Manns, through his stupidity, his recklessness, committed a first degree reckless injury. There's no question she's badly injured. There's no question that he was walking around with a loaded shotgun that he didn't know how to handle. He's not stupid by nature. At least he knows how to read and write. He's got to know that shotguns are dangerous. He was aware that pointing a gun constitutes a danger to someone when you don't know what you're doing with the gun, and certainly the State has proven that this conduct when fooling around with this gun while it was pointed at her back, even if he doesn't mean to kill her, even if he pulls the trigger by accident 'cause he's trying to cradle it or hold it or takes the trigger instead of the trigger guard or however it may have

happened, if he is that careless with a gun, he has shown utter disregard for her life.

As far as we're concerned, on the first degree reckless injury charge, the State has proven their case and you have a right to find him guilty and I think you should.

On the attempted first degree intentional homicide,... the State ... has not proven that ... when he put his finger on the trigger, that he had in his mind that he either wanted to kill her or he knew the gun was pointed at her when his finger was on the trigger and he knew there was a substantial certainty that pulling the trigger would almost certainly cause her death.

....

... [O]ne of the lesser offenses is first degree reckless endangering .... There's no question I think that the State has proven that he ... committed a first degree endangering safety for many of the reason[s] that he's guilty of the first degree reckless injury .... [A]nd I think the State has proven its case on the question of a first degree endangering safety.

....

I ask you to return the two verdicts I've requested. As I said, we agree the State has proven beyond a reasonable doubt two crimes of first degree reckless injury, first degree endangering safety while armed. She failed to prove their case on the attempted homicide. I ask you to acquit him on those charges.

Antonio Manns committed ... two crimes on that day. He has no business walking out of here a free man. He should be held accountable for what he did and he should not be held accountable and convicted of something the State failed to prove because of the

> severity of the injury to her. I ask you to hold him accountable for what he did. No more and no less.
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> I ask you to find him guilty of first degree reckless injury while armed and first degree endangering safety while armed.

Following the defense closing argument, the trial court immediately held an off-the-record side bar conference and then advised the jury that "based on what I have just heard [defense counsel's] closing argument to be, I'm withdrawing the second degree reckless injury and the second degree recklessly endangering safety verdict forms" and withdrawing the instructions on those offenses.

Manns explains that, on each count, first and second-degree reckless conduct is distinguished by whether a defendant's conduct is "under circumstances which show utter disregard for human life," and by substantial differences in penalties. Thus, Manns maintains, he was prejudiced by his counsel's argument that effectively denied the jury the opportunity to convict him of lesser offenses carrying substantially lesser penalties. Denying Manns's postconviction motion, the trial court provided a thoughtful assessment that, while not coinciding exactly with our own, provides helpful analysis. The trial court wrote:

> [Manns's] argument fails for two reasons. Manns'[s] own statement to the police basically constituted an admission that his conduct was criminally reckless, resulting in the substantial endangerment of and serious injury to the victim. It is clear that Manns'[s] trial counsel's strategy during closing argument -- consistent with Manns'[s] statement to the police -- was to admit to behavior consistent with first degree reckless injury in count two so that the jury could more readily return a verdict of first degree recklessly endangering safety in count one rather than attempt first degree intentional homicide, which carried a substantially greater penalty. Consequently, counsel argued the merits of count two first, conceding that Manns acted recklessly and

> stupidly, "walking around with a loaded shotgun that he didn't know how to handle", and arguing that this "macho man" mentality caused him to discharge the gun, hitting the victim in the back and causing her very serious injury. He then continued to argue that, consistent with this behavior, Manns likewise *recklessly* endangered [the victim's] safety, as opposed to intentionally attempting to kill her.
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> You can find him guilty of first degree reckless injury, members of the jury, and still conclude that it was an accidental shooting, that he didn't intend to kill her, that the gun discharged by accident because he wasn't paying attention to what he was doing. Those are not mutually exclusive. It is consistent with an accident to find him guilty of first degree reckless injury and first degree endangering safety.

This type of strategy, under the circumstances of this case, does not constitute deficient performance. To the contrary, it is quite reasonable, given the strength of the evidence against the defendant in this case.

Without an evidentiary hearing to determine the basis for trial counsel's closing argument, we cannot conclude that counsel's strategy was clear and reasonable. After all, defense counsel, the State, and the trial court were satisfied that all the lesser included offense instructions were appropriate. Why, then, would counsel argue in a manner that effectively eliminated two of them? If the answer to that question is as the trial court presumed, why did counsel request the instructions in the first place?

Perhaps with such questions in mind, the trial court also analyzed the prejudice prong. Denying Manns's postconviction motion, the trial court wrote:

> Assuming *arguendo*, however, that counsel's position during closing argument was not that which a reasonable attorney would have taken under similar circumstances, I cannot find that the defendant's case was prejudiced, for the simple reason that the jurors unanimously concluded that Manns was guilty as charged on both counts, and so it is clear that they never would have reached the point of considering any "second degree" lesser included offenses had they been argued by counsel or available as possibilities.
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> Therefore, even though trial counsel may have eliminated the possibility of submitting the "second degree" lesser included offenses to the jury on each count (as originally intended), there was no prejudice to the defense. The jury's verdicts demonstrate unequivocally that lesser included offense options of second degree recklessly endangering safety on count one and second degree reckless injury on count two would not have been considered even had they been presented and argued.

Although our analysis differs somewhat, we appreciate, as did the trial court, that under the unusual circumstances of this case, the jury's verdict on count one guides the analysis.

In ***State v. Truax***, 151 Wis.2d 354, 363-365, 444 N.W.2d 432, 436-437 (Ct. App. 1989), we explained that, under certain circumstances, where a jury convicts on the original charge, a defendant is not prejudiced by a failure to instruct on a *second* lesser included offense. In such a case, the jury has had the chance to consider the original and first lesser included offenses. The jury would not have considered the second lesser included offense unless it had not been satisfied of the defendant's guilt on the original charge.

On count one of this case, ***Truax*** controls. The jury considered the original charge of attempt first-degree intentional homicide while armed and the lesser offense of first-degree reckless endangering while armed. Counsel's argument resulting in the withdrawal of the *second* lesser included offense of second-degree reckless endangering while armed was not prejudicial because the jury's verdict establishes that the jury never would have considered that second lesser included offense.

The analysis of count two extends logically from the verdict on count one. In count two we do not have a pure ***Truax*** situation because the first and only lesser included offense instruction was withdrawn. As the State argues, however:

> On count 1, the jury found that the defendant attempted to kill the victim. Given this verdict, it is not reasonably probable that they would have returned a verdict of second-degree reckless on count 2 if offered that opportunity. Although the [trial] court did not emphasize it, the fact that both counts derive from the same conduct is fundamental to its ruling. The jury could not logically convict the defendant of attempting to kill [the victim] by shooting her and then pass over the first-degree reckless injury and convict on the lesser included of second degree reckless for [the] same act when deciding count 2. Although juries have been known to return inconsistent verdicts, in judging prejudice and the likelihood of a different outcome, a defendant has no entitlement to the luck of a lawless decision maker.

We agree. Overwhelming evidence in this case provided the basis for the jury's verdict on count one. Given the jury's conclusion that Manns attempted first-degree *intentional* homicide while armed, there is no reasonable probability that a defense closing argument preserving the lesser included offense option of second-degree *reckless* injury while armed would have produced a different result.

C. Evidentiary Hearing

Manns also argues that the trial court erred in resolving his ineffective assistance claims without holding an evidentiary hearing. When a defendant alleges ineffective assistance of counsel, an evidentiary hearing often is required to resolve issues that turn on material disputed facts. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Where, however, "the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing." ***Nelson v. State***, 54 Wis.2d 489, 497-498, 195 N.W.2d 629, 633 (1972); *see* ***State v. Bentley***, 201 Wis.2d 303, 309-311, 548 N.W.2d 50, 53 (1996). In this case, although factual uncertainty remains regarding counsel's alleged deficient performance, no uncertainty attends the prejudice prong. The record is clear and, accordingly, the trial court properly denied Mann's motion without an evidentiary hearing.

III. "Other Crimes" Evidence

Finally, Manns argues that the trial court erred in allowing "other crimes" evidence of his alleged sexual assault of the victim immediately preceding the shooting.

Initially, the trial court granted the defense motion *in limine* to exclude the victim's testimony that Manns sexually assaulted her. However, when the prosecutor offered a more detailed account of the victim's anticipated testimony, the trial court explained:

> [T]he jury is going to have to make a credibility decision. They are going to have to decide which story, the defendant's or the victim's, is more credible and which one hangs together better and that this provides the context for the defendant's being there in the first place and for what occurred and helps the state's case in that regard because it helps round out the victim's version of this whole incident, and if the victim is forced to leave it out, then the story doesn't make any

> sense because he's just there for no apparent reason and they find themselves in the bedroom for no apparent reason. They find themselves in the hallway for no apparent reason ....
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> ... [F]or the jury to make an appropriate determination of who is telling the truth here and how this actually happened, they are going to have to know the entirety of the victim's story and that the prejudice can be eliminated or minimized by a curative instruction.

Thus, the trial court allowed the testimony and instructed the jury "regarding other conduct of the defendant for which the defendant is not on trial" that should be considered "only as it relates to the issues of motive, opportunity, intent, preparation or plan, knowledge, identity and sense of mistake or accident."

We will not reverse a trial court's decision to admit evidence absent an erroneous exercise of discretion. *See* ***State v. Parr***, 182 Wis.2d 349, 360, 513 N.W.2d 647, 650 (Ct. App. 1994). To decide whether "other crimes" evidence is admissible, a trial court first determines whether the evidence falls within any exception under § 904.04(2), STATS., and, if it does, the trial court then determines "whether the evidence is more prejudicial than probative." ***State v. Shillcutt***, 116 Wis.2d 227, 235, 341 N.W.2d 716, 719 (Ct. App. 1983), ***aff'd***, 119 Wis.2d 788, 350 N.W.2d 686 (1984).

"[A]n 'accepted basis for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case....'" ***Id.*** at 236, 341 N.W.2d at 720 (citations omitted). A trial court may weigh factors including the "'nearness in time, place, and circumstances of the alleged crime'" to the incident involved in the "other crimes" evidence. ***Sanford v. State***, 76 Wis.2d 72, 81, 250 N.W.2d 348, 352 (1977).

In this case the alleged sexual assault and the shooting involved the same time, place, and circumstances. Testimony about the alleged sexual assault offered contextual information relevant to the shooting and the victim's credibility. The trial court considered the facts and applied the proper standards. We see no erroneous exercise of discretion.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(4), STATS.