

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2004AP2864

Cir. Ct. No. 2001CF390

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY T. GREENE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Jeremy Greene appeals an order denying his postconviction motion brought under WIS. STAT. § 974.06 (2003-04).¹ The issues relate to whether Greene is entitled to relief because the jury should have received a lesser-included instruction on felony murder on a different theory than was argued at trial. We conclude that he is not. We affirm.

¶2 After a jury trial, Greene was convicted of first-degree intentional homicide, burglary, and armed robbery, all arising from the same incident. In broad terms, the allegations were that Greene and three others decided to rob a certain person; that Greene and Corey Ellis entered the victim's bedroom through a window; and that the victim was stabbed to death during the robbery. Greene was tried together with Genevieve Pauser, while Ellis and the fourth member of the group testified for the State. Ellis testified that, after he had left the premises, Greene stabbed the victim. Greene and Pauser were convicted on all counts submitted.

¶3 Greene appealed to this court and argued that the circuit court erred by denying his request for jury instructions on reckless homicide and felony murder as lesser-included offenses. He argued that the court should have given these instructions because there was evidence that, even if Greene participated in the robbery, it was Ellis acting alone who stabbed the victim. We concluded this argument was waived because Greene's request during trial for the instructions was based on a different theory. Greene then filed a *pro se* postconviction motion

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

under WIS. STAT. § 974.06. The circuit court denied the motion without an evidentiary hearing. Greene appeals that order.

¶4 In reviewing a motion under WIS. STAT. § 974.06, the court shall hold a hearing unless the motion and the files and records of the action conclusively show that the defendant is entitled to no relief. WIS. STAT. § 974.06(3). We review *de novo* whether a postconviction motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶5 Greene's motion and arguments on appeal are divided into several parts, all of which appear related to whether the lesser-included offense instructions should have been given to the jury. Green first argues that the trial court erred at trial by denying his counsel the opportunity to present an argument in support of the felony murder instruction.

¶6 We reject Greene's characterization of the trial court's actions in relation to trial counsel's request for a felony murder instruction. The court first analyzed Greene's request for a lesser-included instruction on first-degree reckless homicide. The court concluded that this instruction would not be proper because Greene asserted an alibi defense, and therefore if the jury acquitted him as to the greater charge on that basis, there would be no basis to convict him of the lesser offense. The court then asked if Greene's attorney had "anything more." Counsel responded: "I'm assuming it will be the same for felony murder request – instruction for felony murder for Mr. Greene. I'm making the request for that." The court replied: "I understand you're making the request. I think the analysis is made." We understand counsel's statement that he is "assuming it will be the same for felony murder" to mean that counsel is assuming the court will reach the

same result as to that request, for the same reason. It is implicit in that comment that counsel's request for a felony murder instruction would not be based on a different ground, or on a ground inconsistent with the court's analysis. The court responded to that comment by confirming that its analysis was the same as to both requests. The court did not improperly preclude counsel from arguing a separate ground for the felony murder instruction and the record shows that counsel offered no additional argument.

¶7 Greene next appears to argue that the trial court should have granted his request for a felony murder instruction, but on a theory his counsel did not argue for at trial. We concluded in his direct appeal that Greene waived this issue. Greene provides no sufficient reason for revisiting that conclusion.

¶8 Greene next argues that he did not receive effective representation at trial. Specifically, he argues that, if the alternative analysis for requesting a felony murder instruction was waived by not raising it at trial, then his trial counsel was ineffective for not arguing that ground, and his appellate counsel was ineffective by attempting to make the argument directly to this court in the first appeal, rather than by alleging that trial counsel was ineffective. We disagree.

¶9 To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate prejudice, 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 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶10 The parties agree that a lesser-included offense instruction may be given only when there is a reasonable basis in the evidence for both acquittal on the greater charge and conviction on the lesser charge. *See State v. Borrell*, 167 Wis. 2d 749, 779, 482 N.W.2d 883 (1992). Felony murder is, by statute, a lesser-included offense of first-degree intentional homicide. WIS. STAT. § 939.66(2). In deciding whether there are reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser offense, the court reviews the evidence in the light most favorable to the defendant. *State v. Kramar*, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989). To show prejudice in his ineffectiveness claim, Greene would have to demonstrate that if his trial attorney had made the argument Greene now proposes, the circuit court would have granted the request to give the instruction, applying the legal standards we have just stated. We conclude that Greene's claim fails because the record conclusively shows that the court would not have granted the request.

¶11 Greene argues that he should have received a felony murder instruction because there was a reasonable basis in the evidence for the jury to acquit him of first-degree intentional homicide. He asserts the jury could have rejected his alibi defense, but also believed that Greene aided and abetted or conspired with Ellis, who may have been the person who directly committed the homicide. Greene's brief describes that evidence as including credibility problems in Ellis's own version of events, Ellis's plea bargain for a lesser charge in exchange for his testimony, Ellis having been in a position to stab the victim and having a greater motive to do so, and Ellis's apparent willingness to use violence.

¶12 We conclude, however, that there was not a reasonable basis to acquit Greene on the greater charge. We note, first, that Greene's own defense in his case-in-chief did not introduce any evidence or testimony stating directly that

Ellis was the stabber. Greene's proffered evidence was based entirely on alibi, with the support of Greene's own testimony to that effect. If Greene's alibi defense was believed by the jury, there would be an acquittal on *all* charges, including any lesser-included theory. This is why, for Greene to be entitled to a lesser-included instruction, the jury must be able to reasonably both reject his alibi defense, and still have reasonable doubt that he was the stabber.

¶13 We conclude that a reasonable jury could not both reject the alibi defense and have reasonable doubt about whether Greene was the stabber. A rejection of the alibi defense leads to a conclusion that Greene was present and involved. That conclusion would put the jury in agreement with certain testimony of Ellis and the fourth member of the group, who both testified for the State. For the jury to then have reasonable doubt about whether Greene was the stabber, or instead believe it was Ellis, the jury would have to credit only certain parts of the testimony by Ellis and the fourth member, while rejecting or having uncertainty about the parts implicating Greene as the stabber. Greene's reasons for why the jury would make that distinction are not convincing. We do not believe that a reasonable jury could have reasonable doubt, after rejecting the alibi defense, about whether Greene was the stabber, as testified to by Ellis and the fourth participant, and in the absence of affirmative evidence that Ellis was the stabber.

¶14 Because that was the only reasonable conclusion, we are satisfied the record conclusively shows that, even if Greene's attorney had sought a felony murder instruction on the ground Greene now proposes, that request would have been denied. Therefore, Greene cannot show prejudice from counsel's allegedly deficient performance.

By the Court.—Order affirmed.

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

