COURT OF APPEALS
DECISION
DATED AND RELEASED

December 3, 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. 96-0401-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYRONE DAVIS SMITH,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM R. MOSER, Reserve Judge. *Affirmed*.

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

FINE, J. Tyrone Davis Smith appeals from a judgment entered on a jury verdict convicting him of attempted first-degree intentional homicide while armed. *See* §§ 940.01(1), 939.32, & 939.63(1)(a)(2), STATS.[1] He claims that

[1] Section 940.01(1), STATS., provides:

First-degree intentional homicide. (1) OFFENSE. Except as provided in sub. (2),

the trial court erroneously failed to instruct the jury on a lesser-included offense. We affirm.

I.

(..continued)

> whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

Section 939.32, STATS., provides in material part:

> **Attempt. (1)** Whoever attempts to commit a felony or a battery as defined by s. 940.19 or theft as defined by s. 943.20 may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime; except:
>
> (a) Whoever attempts to commit a crime for which the penalty is life imprisonment is guilty of a Class B felony.
>
> ....
>
> **(3)** An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

Section 939.63(1)(a)2, STATS., provides:

> **Penalties; use of a dangerous weapon. (1)** (a) If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> ....
>
> 2. If the maximum term of imprisonment for a felony is more than 5 years or is a life term, the maximum term of imprisonment for the felony may be increased by not more than 5 years.

Sherman Lee Lewis, the victim in this case, testified at the trial that Smith tried to kill him, when he, Smith, and David Boyd were all in Smith's car. Smith was driving, Lewis was in the passenger seat, and Boyd was sitting in the back seat, behind Smith. Smith drove the car on East Capitol Drive in Milwaukee into a wooded area where he parked. Smith got out of the car, went to the rear of the car, returned, got back in, reached under his seat, and came up with a small gun in his hand. According to Lewis, Smith pointed the gun at Lewis's head from about four to five inches away and pulled the trigger. Lewis ducked. The bullet struck the back of Lewis's neck on the left side. Boyd grabbed Smith's arm, the gun discharged again; this time, the bullet hit Lewis's nose. A third shot from the gun hit Lewis in his right arm near the elbow. Lewis testified that Boyd took the gun from Smith, who then ran away. Boyd corroborated Lewis's testimony.

Smith testified that Lewis and Boyd tried to rob him. He told the jury that they flagged him down, that he drove to the wooded area, and got out of the car to relieve himself. When he got back into the car, he testified, Boyd "pulled a gun" on him, and that the gun went off when Smith grabbed Boyd's hand. Smith testified on direct-examination:

ASomehow, I got the gun from him.

....

QOkay. What happens next?

AAll I knew, it went off, my hand was on the trigger.

All I knew, it went off.

QAnd how many times did you fire the gun?

AAll I can remember, I just pulled the trigger once.

QOkay, could it have been more than once?

AI heard the gun more than once, but I don't know, but that's all I remember.

I just pulled the trigger once.

Smith said that he ran away and called the police, telling them that he "was being robbed, my car was stolen and that I had shot someone by mistake." Smith admitted that when he was interviewed by a Milwaukee police detective, he told the detective that he had shot Lewis outside rather than inside the car, but claimed that he was "confused and scared" at the time.

The detective told the jury that Smith related that after he had stopped the car both Boyd and Lewis got out and, as Smith was getting out of the car, Smith saw Boyd pull a gun on him. The detective recounted for the jury Smith's version:

> The subject states, before [Boyd] could pull the trigger he, Smith, grabs the gun from [Boyd] and starts to shoot towards the rear of the car where [Lewis] was standing. Subject states, he pulled the trigger once.
>
> The subject states, he didn't shoot [Boyd] first because after he, Smith, grabbed the gun from [Boyd], he, Smith, had his back towards [Boyd].
>
> The subject states, he could see [Lewis] at the rear of the car.

Smith signed the statement he gave to the detective. Shell casings, a deformed bullet, and blood splattering was found on the inside of the car—the casings and bullet were found on the front passenger seat.

The trial court rejected Smith's request to instruct the jury on recklessly endangering safety, *see* § 941.30, STATS., ruling that it was not a lesser-included offense of first-degree intentional homicide.[2]

II.

Contrary to the trial court's ruling, the crime of recklessly endangering safety is a lesser-included offense of first-degree intentional homicide. ***State v. Weeks***, 165 Wis.2d 200, 206, 477 N.W.2d 642, 644 (Ct. App. 1991). The State concedes this. Nevertheless, we can affirm the trial court's ruling if the result was correct. *See* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (trial court will be affirmed if it reaches right result for wrong reason).

Whether a lesser-included offense should be submitted to the jury for its consideration is a legal issue that we have to determine independently. ***State v. Kramar***, 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). A jury may be given the option of finding a defendant guilty of a lesser-included offense "*only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.***, 149 Wis.2d at 792, 440 N.W.2d at 327 (emphasis in original). In making this determination, the evidence must be viewed "in the light most favorable to the defendant." ***Ibid***. Additionally, the trial court must, upon request, submit a lesser-included offense to the jury "even when the defendant has given exculpatory testimony"

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[2] Section 941.30, STATS., provides:

> **Recklessly endangering safety. (1)** FIRST-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety under circumstances which show utter disregard for human life is guilty of a Class D felony.
>
> **(2)** SECOND-DEGREE RECKLESSLY ENDANGERING SAFETY. Whoever recklessly endangers another's safety is guilty of a Class E felony.

Smith's counsel did not specify which subsection he thought applied to the case. On appeal, Smith argues that the jury should have been instructed first-degree recklessly endangering safety—§ 941.30(1), STATS.

if a reasonable view of the evidence, including testimony by the defendant other than the exculpatory portions of that testimony, "supports acquittal on the greater charge and conviction on the lesser charge." ***State v. Wilson***, 149 Wis.2d 878, 900, 440 N.W.2d 534, 542 (1989).

A conviction of recklessly endangering safety under § 941.30(1), STATS., requires that the State prove the following elements beyond a reasonable doubt: (1) that the defendant endangered the safety of another person; (2) "by criminally reckless conduct"; and (3) that shows "utter disregard for human life." ***State v. Holtz***, 173 Wis.2d 515, 518, 496 N.W.2d 668, 669 (Ct. App. 1992). "`[C]riminal recklessness' means that 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. (emphasis added).

According to Smith's trial testimony, he was struggling to get the gun away from Boyd outside the car when the gun just went off—once. Aside from the fact that this trial testimony was contradicted by Smith's statement to the police made shortly after the event, and in light of the overwhelming evidence of Smith's intent to kill Lewis that was placed before the jury by both the testimony of Lewis and of Boyd that Smith fired the gun after pointing it at Lewis's head, *see* ***Payne v. State***, 36 Wis.2d 307, 312, 152 N.W.2d 903, 906 (1967) (pointing gun at person and firing is sufficient evidence of intent to kill), so that we cannot say that a reasonable jury could convict Smith of first-degree recklessly endangering safety while acquitting him of attempted first-degree intentional homicide, there is simply no evidence that Smith's actions—even as circumscribed by his exculpatory trial testimony—betrayed the requisite awareness that he was putting another at the "substantial risk of death or great bodily harm." According to Smith's trial testimony, he was struggling to get the gun when "it went off." Stated another way, in trying to get the gun away from Boyd, Smith was trying to *save* human life; he was not acting in such a way so that his conduct was "so inherently fraught with danger to the victim's life that ... it implies a constructive intent to maim or kill." ***Balistreri v. State***, 83 Wis.2d 440, 458, 265 N.W.2d 290, 298 (1978).

By the Court.—Judgment affirmed.[3]

Publication in the official reports is not recommended.

[3] Smith argues that the State is judicially estopped from arguing that he was not entitled to the instruction because the prosecutor told the trial court he "would not object" to the instruction. In order to apply "judicial estoppel" to foreclose a party from taking a position contrary to a position advanced previously, there must be evidence of at least a constructive attempt to manipulate the system by luring a tribunal into error. *See* ***State v. Petty***, 201 Wis.2d 337, 346–354, 548 N.W.2d 817, 820–823 (1996). Not objecting to an instruction does not foreclose argument on appeal that failing to give an instruction was not error.

SCHUDSON, J. (*dissenting*). All agree the trial court erred in concluding that recklessly endangering safety is not a lesser-included offense of first-degree intentional homicide. The majority concludes, however, that the trial court reached the right result for the wrong reason. I disagree.

As the majority acknowledges, when determining whether a requested lesser-included offense instruction is required, a court must view the evidence "in the light most favorable to the defendant." ***State v. Kramar***, 149 Wis.2d 767, 792, 440 N.W.2d 317, 327 (1989). Here, although a jury certainly could have rejected Smith's trial testimony and explanation of his apparently inconsistent statement to police, his testimony supports an instruction on recklessly endangering safety. As Smith argues:

> In ***[State v.] Holtz***, [***173 Wis.2d 515, 496 N.W.2d 668 (Ct. App. 1992)***], the court discussed what qualifies as "utter disregard for human life:"
>
> > the charged conduct had to be not simply negligent or reckless, but "so fraught with danger to the victim's life that to engage in it implies a constructive intent to maim or kill." As the supreme court has made clear on an earlier occasion, however, such intent is satisfied if the act is performed with "the general intention to do harm without concern whether such harm would result in death."
>
> ***Id.*** at 520 (citations omitted. Under this standard and Mr. Smith's version of the facts, the jury in this case could have acquitted Mr. Smith of attempted first-degree intentional homicide by finding that he lacked intent to kill in the shooting but still convicted him of endangering safety by finding that his admission that he pulled the trigger after he got the gun away from his assailant qualified as a general intention to do harm without concern whether the harm would result in death as discussed in ***Holtz***.

At trial, the State conceded that Smith "may be entitled" to the lesser-included offense instruction and did not object to it. On appeal, the State fails to address Smith's argument under ***Holtz***. Although Smith's factual foundation could prove flimsy before a jury, his legal argument is solid. Accordingly, I respectfully dissent.