COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2698-CR **Cir. Ct. No. 2008CF5563**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS L. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL and RICHARD J. SANKOVITZ, Judges. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Curtis L. Jackson appeals from a judgment of conviction of second-degree reckless homicide by use of a dangerous weapon, and from the order denying his motion for a new trial. Jackson argues that the jury

was inadequately instructed as to self-defense as it pertained to second-degree reckless homicide. Jackson also argues that the trial court improperly denied his motion to admit evidence of the victim's reputation for violence and that his trial counsel was ineffective.[1] We affirm the trial court.

BACKGROUND

¶2 Jackson was charged with one count of first-degree intentional homicide by use of a dangerous weapon for the shooting death of Angelo McCaleb. Multiple witnesses, including Jackson, testified at Jackson's trial. Although the details of the shooting and the events leading up to the shooting varied, it is undisputed that the events were triggered when Tanya Davis, a woman living at Jackson's house, borrowed Jackson's car to go to a bar on the evening of November 4, 2008. Davis testified that while at the bar, she had drinks with McCaleb and his friend, Wayne Johnson. Davis knew McCaleb, but was meeting Johnson for the first time that evening. Jackson called Davis while she was at the bar, asking her to return his car. Davis testified that she returned the car at around 10:30 p.m. and parked the car behind Jackson's house. Both McCaleb and Johnson drove behind Davis, but parked their car on the street and walked to the back of Jackson's house.

¶3 It is undisputed that Jackson, McCaleb and Johnson entered into an unfriendly verbal exchange. Both McCaleb and Jackson walked back towards their respective cars. Jackson testified that he went to his car to retrieve a gun

[1] Although before the trial court Jackson sought permission to introduce both reputation and specific acts evidence, Jackson never identified a witness who would testify about the victim's reputation for violence. Nor has Jackson argued specific acts evidence separately here. Thus, we deem that issue abandoned. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

from the glove box because he feared an attack from McCaleb and Johnson. Jackson attempted to keep the gun hidden. Jackson further testified that he pushed McCaleb away from another female resident of his home because it appeared as though McCaleb was going to strike her. Jackson stated that McCaleb then angrily went back to his car and appeared to have retrieved something. Jackson then saw McCaleb "look me dead in the eye, comin' directly at me fast." Jackson testified that he told McCaleb not to "walk up on me," then fired because McCaleb was "closing ground." Jackson shot McCaleb in the chest and then called 911 to report the shooting. Jackson admitted to the shooting, but argued that his action was in self-defense. McCaleb died from the gunshot wound. A jury found Jackson guilty of the lesser included offense of second-degree reckless homicide by use of a dangerous weapon.

¶4 Jackson moved for a new trial pursuant to WIS. STAT. § 809.30 (2009-10),[2] alleging that: (1) the jury received "incomplete and defective [jury] instruction[s] for Second-Degree Reckless Homicide as it affected self-defense"; (2) the trial court erroneously denied admission of evidence of McCaleb's reputation for violence; and (3) trial counsel was ineffective for not ensuring that the jury was properly instructed and for providing an inadequate proffer as to McCaleb's reputation for violence, resulting in the trial court's refusal to admit evidence on the issue. The trial court denied the motion. This appeal follows. Additional details are provided as relevant to the discussion.[3]

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] The Honorable Daniel L. Konkol presided over the pretrial proceedings and the trial. The Honorable Richard J. Sankovitz decided the motion for a new trial.

DISCUSSION

¶5 On appeal, Jackson argues that: (1) the jury was inadequately instructed as to self-defense to the lesser-included crime of second-degree reckless homicide; (2) the trial court erroneously denied Jackson's motion to admit evidence of McCaleb's reputation for violence; and (3) trial counsel was ineffective for failing to ensure that the jury was properly instructed and for failing to provide the trial court with a proper proffer in support of Jackson's motion to admit reputation evidence.

A. The Jury Instructions.

¶6 Jackson claims that the following language, missing from the instruction on second-degree reckless homicide by use of a dangerous weapon, misled the jury by not giving proper weight to self-defense: "If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not show criminally reckless conduct." We disagree.

¶7 "A [trial] court has wide discretion in determining which jury instructions to give…. If the given jury instructions adequately communicated the law and were applicable to the facts, no grounds for reversal exist." ***260 North 12th Street, LLC v. DOT***, 2011 WI 103, ¶66, 338 Wis. 2d 34, 808 N.W.2d 372 (internal citation omitted). "Moreover, even if the [trial] court rejected proposed jury instructions that were arguably appropriate, we will not reverse unless the court's failure to include the proposed jury instructions was prejudicial." ***Id.*** "On review, the language of a jury instruction should not be fractured into segments, one or two of which, when considered separately and out of context, might arguably be in error." ***State v. Paulson***, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982). "Rather, the instruction must be read as a whole and for there to be

reversible error, the error must permeate the underlying meaning of the instruction." ***Id.*** We must "not view a single instruction to a jury in artificial isolation." ***State v. Glenn***, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996). "As a general matter, if we determine 'that the overall meaning communicated by the instruction as a whole was a correct statement of the law, and the instruction comported with the facts of the case at hand, no grounds for reversal exists.'" ***Nommensen v. American Cont'l Ins. Co***., 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301 (citation omitted). An error of law when modifying a standard jury instruction[4] is an erroneous exercise of discretion, but is harmless when it does not affect the substantial rights of the parties. ***Weborg v. Jenny***, 2012 WI 67, ¶¶73-74, 341 Wis. 2d 668, 816 N.W.2d 191.

¶8 We note first, that the language Jackson complains was omitted is currently not actually a part of WIS JI—CRIMINAL 1017, the standard instruction on second-degree reckless homicide as one of several lesser included offenses of first-degree intentional homicide. *See* WIS JI—CRIMINAL 1017. Second, Jackson's counsel did not object to the lack of that language. In fact, Jackson's counsel specifically stated that such language was not necessary because the trial

[4] The WISCONSIN JURY INSTRUCTIONS—CRIMINAL are "[p]repared for the Wisconsin Judicial Conference by its Criminal Jury Instructions Committee" which consists of eleven circuit court judges, a representative of the office of the Attorney General, a representative of the State Public Defender, and a Professor Emeritus from the University of Wisconsin Law School. *See* ***id.*** at i. The Instructions are published by the Regents of the University of Wisconsin. The instructions are so commonly requested by lawyers, and are used by judges throughout the state without modification of the published language that they have come to be referred to as "standard" or "pattern" instructions. Appeals generally involve deviations from their language. *See, e.g.*, ***State v. Paulson***, 106 Wis. 2d 96, 108, 315 N.W.2d 350 (1982); ***State v. Glenn***, 199 Wis. 2d 575, 590, 545 N.W.2d 230 (1996); ***Weborg v. Jenny***, 2012 WI 67, ¶¶73-74, 341 Wis. 2d 668, 816 N.W.2d 191.

court had rejected an instruction on homicide by negligent use of a weapon.[5] To obtain relief based on a jury instruction to which no objection was made, Jackson must show that "considering the proceedings as a whole, … [there is] a reasonable likelihood that the jury applied the … jury instruction in an unconstitutional manner." ***State v. Burris***, 2011 WI 32, ¶23, 333 Wis. 2d 87, 797 N.W.2d 430. "It is the defendant's burden to establish a reasonable likelihood that the jury unconstitutionally applied an instruction." ***Id.*** at ¶46. A defendant meets this burden only if he or she establishes that a constitutional violation was reasonably likely. ***State v. Lohmeier***, 205 Wis. 2d 183, 193, 556 N.W.2d 90 (1996). "'Wisconsin courts should not reverse a conviction simply because the jury possibly could have been misled; rather a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner.'" ***Burris***, 333 Wis. 2d 87, ¶49 (citation omitted).

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[5] Jackson was present during the jury instructions conference at the close of trial. After conferring with Jackson specifically about the lesser included offense, his counsel asked for an instruction on homicide by negligent operation of a dangerous weapon. The trial court denied the request because Jackson testified he introduced the gun into the altercation, which the trial court described as "a highly charged situation with the argument that's going on," demonstrating "more than ordinary negligence to a high degree." Jackson does not appeal the trial court's refusal to instruct on homicide by negligent use of a weapon.

The trial court reviewed the remainder of the changes to WIS JI—CRIMINAL 1017 previously requested by the defense. The trial court asked defense counsel:

> So what you're asking for is the wording [:] "However, defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another … and you must find him not guilty."

Defense counsel initially replied "Yes," then immediately corrected herself, stating: "I'm not asking for that language—*it was as a part of asking for criminal negligence* but now that would be out…." (Emphasis added.)

¶9 The trial court instructed the jury on the original first-degree intentional homicide charge, as well as on three lesser included offenses: second-degree intentional homicide, first-degree reckless homicide, and second-degree reckless homicide. After summarizing all of the offenses, the trial court stated:

> It will also be important for you to consider the privilege of self-defense in deciding which crime if any the defendant has committed.

Following the format of WIS JI—CRIMINAL 1017, the trial court continued with a detailed instruction on self-defense:

> The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his person by the other person. However, he may intentionally use only such force as he reasonably believes is necessary to prevent or terminate the interference.
>
> He may not intentionally use force which is intended or likely to cause death unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

At defense counsel's request, the trial court added the following emphasized language to the instruction:

> *The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.*
>
> As applied to this case, the [e]ffect of the law of self-defense is the defendant is not guilty of any homicide offense if the defendant reasonably believed that he was presenting or terminating an unlawful interference with his person and reasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself.

¶10 The trial court then instructed the jury that it was to consider self-defense in *each* of the crimes described. Specifically with regard to first and second-degree reckless homicide, the trial court instructed the jury that it:

> will be asked to consider the privilege of self-defense in deciding whether the elements of first and second[-]degree reckless homicide are present. Because as the law provides, it is the State's burden to prove all the facts necessary to constitute a crime beyond a reasonable doubt. You will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty for first or second[-]degree intentional homicide or for first or second[-]degree reckless homicide.

¶11 The trial court explained the specific elements of each of the offenses. In discussing reckless homicide, the trial court properly explained that first-degree reckless homicide requires proof that "the defendant's conduct showed utter disregard for human life," while second-degree reckless homicide does not. The self-defense instruction relating to first-degree reckless homicide, which again followed WIS JI—CRIMINAL 1017, was given by the trial court:

> If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another. *I have previously defined the privilege of self-defense and you should refer to this definition in your deliberations.*
>
> ….
>
> *You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life.* If the defendant was acting reasonably in the exercise of privilege of self-defense, his conduct did not show utter disregard for human life.

(Emphasis added.)

¶12 The trial court then explained, in greater detail, that second-degree reckless homicide did not require proof of utter disregard for human life:

> Second[-]degree reckless homicide as defined in s. 940.06 of the Criminal Code of Wisconsin is committed by one who recklessly causes the death of another human being. The difference between first and second[-]degree reckless homicide is that the first[-]degree offense requires proof of one additional element; That the circumstances of the defendant's conduct showed utter disregard for human life.
>
> If you are satisfied beyond a reasonable doubt that all the elements of first[-]degree reckless homicide were present except the element requiring that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second[-]degree reckless homicide. In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of [the victim] by criminally reckless conduct, you should find the defendant guilty of second[-]degree reckless homicide.
>
> If you are not so satisfied, you must find the defendant not guilty.

¶13 The trial court added substantial defense-requested language, not a part of WIS JI—CRIMINAL 1017, emphasizing the role of self-defense in the various types of homicide:

- A paragraph on the reasonableness of the defendant's belief that the force used was necessary was added to the explanation of self-defense. *See* WIS JI—CRIMINAL 1017 at 2-3.

- The emphasized language was added to the following instruction: "While motive may be shown as a circumstance to aid in establishing the guilt *or lack of guilt* of a defendant, the State is not required to prove motive on the part of a defendant in order to convict." *See* WIS JI—CRIMINAL 1017 at 5 (emphasis added).

- The emphasized language was added to the following instruction: "if after full and complete consideration of the evidence you conclude that further deliberation would not result in unanimous agreement on the charge of first[-]degree reckless homicide, you should consider whether *or not* the defendant is guilty of second[-] degree reckless homicide." *See* WIS JI—CRIMINAL 1017 at 11-12 (emphasis added).

- The following language was added to the explanation of first-degree-reckless homicide: "I have previously defined the privilege of self-defense and you should refer to this definition in your deliberations." *See* WIS JI—CRIMINAL 1017 at 10.

- An explanation of utter disregard for human life was added in first-degree reckless homicide: "If the defendant was acting reasonably in the exercise of [the] privilege of self-defense, his conduct did not show utter disregard for human life." *See* WIS JI—CRIMINAL 1017 at 11.

¶14 Considering the instructions as a whole, and noting the numerous additions of language further explaining how Jackson's self-defense claim related to the various degrees of homicide which the jury was to consider, we conclude that the instructions, as given, fairly explained the elements of the crimes and the nature of the defense to the jury. We further conclude that the jury was not confused because of the missing language of which Jackson complains (and which was specifically rejected by Jackson's counsel), nor would that language, had it been included, likely have caused the jury to have come to a different conclusion.

B. McCaleb's reputation for violence.

¶15 Jackson also argues that the trial court erroneously denied his motion to admit evidence of McCaleb's reputation for violence. Jackson argues that McCaleb's reputation was both relevant and admissible as it pertained to Jackson's self-defense claim. We conclude that evidence of the victim's reputation for violence, as it pertains to the facts of this case, was properly excluded.

¶16 Whether to admit or exclude evidence is within the discretion of the trial court, and we review that decision using the erroneous exercise of discretion standard. ***State v. Jackson***, 188 Wis. 2d 187, 196, 525 N.W.2d 739 (Ct. App. 1994) "An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***State v. Gudenschwager***, 191 Wis. 2d 432, 440, 529 N.W.2d 225 (1995).

¶17 Jackson's trial counsel moved to allow the defense to present evidence of the victim's prior violent acts and his reputation for violence. In the motion, Jackson cited three prior incidents of assaultive behavior by McCaleb. These incidents occurred in 1995, 2004 and 2008. Jackson admitted that he was unaware of these incidents at the time he shot McCaleb, but argued that evidence of McCaleb's character trait was admissible under WIS. STAT. § 904.04(2) to show "motive, opportunity, intent and the absence of mistake or accident."

¶18 WISCONSIN STAT. § 904.04 deals generally with character evidence, prohibiting evidence of a character trait to prove that a person acted in conformity with the trait. Generally, § 904.04(2)(a) prohibits introduction of specific crimes

or other acts to show a person's character, then carves out an exception to the prohibition when the acts are offered for a purpose other than proof of character. This has become known as the "other permissible purposes" exception to the prohibition. The statute then creates an exception to the prohibition for the character of a victim:

> (b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

¶19 When character evidence is permitted, WIS. STAT. § 904.05 explains how it may be proved. The permitted methods of proof are by: (1) evidence of reputation in the form of an opinion, or (2) specific instances of the person's conduct when the character or trait "is an essential element of a charge, claim, or defense." *See* § 904.05(2).

¶20 Our supreme court explained how these statutes relate to a claim of self-defense in ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). In that case, Nancy Sue McMorris was convicted of injury by conduct regardless of life. ***Id.*** at 146. At trial, McMorris raised the issue of self-defense, testifying that the victim's "reputation in the community for violence was 'bad.'" ***Id.*** at 147. The trial court refused to allow evidence that "at the time the defendant and [the victim] were fighting, the defendant had personal knowledge of prior violent acts by [the victim]." ***Id.*** The supreme court reversed, establishing the current rule that "[w]hen the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent

and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident." ***Id.*** at 152. The court explained that "[w]hen the defendant seeks to introduce such evidence to establish his state of mind at the time of the affray, it must be shown that he knew of such violent acts of the victim prior to the affray." ***Id.***

¶21 Since ***McMorris***, a defendant's prior knowledge of the victim's character, either by reputation or specific acts, has consistently been a prerequisite to admission of such evidence as part of a self-defense claim. *See* ***Werner v. State***, 66 Wis. 2d 736, 743, 226 N.W.2d 402 (1975) ("[A] defendant who establishes a factual basis for the issue of self[-]defense may testify as to his *personal knowledge of prior specific acts of violence by the victim* of the assault.") (emphasis added); ***State v. Navarro***, 2001 WI App 225, ¶13, 248 Wis. 2d 396, 636 N.W.2d 481 ("[A] *defendant's* state of mind *at the time of the alleged* offense is relevant to his or her claim of self-defense…. Therefore, in order to introduce evidence at trial of the [victim's] reputation for violence or past violent acts … [the defendant] must establish that *at the time of the incident he knew of that reputation or of those acts.*") (citations omitted; emphasis added).

¶22 Jackson attempts to avoid the undisputed fact that he did not know McCaleb by arguing that McCaleb's reputation for violence was offered to prove McCaleb's motive, opportunity and lack of accident or mistake. The flaw in that argument is that McCaleb's state of mind is not an element of Jackson's self-defense claim. Jackson's state of mind (a crucial element of self-defense) is the *only* fact as to which McCaleb's character is relevant. Like the trial court, we conclude that McCaleb's reputation for violence, which was unknown to Jackson before the confrontation, is inadmissible in this case.

C. Ineffective Assistance of Counsel.

¶23 Finally, Jackson argues that his trial counsel was ineffective for failing to ensure that the jury was adequately instructed as to self-defense to second-degree reckless homicide, and for failing to provide an adequate proffer of evidence as to McCaleb's reputation for violence. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result of his attorney's deficient conduct. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). As we have explained, the jury was adequately instructed regarding self-defense when considering whether Jackson was guilty of second-degree reckless homicide. Evidence of McCaleb's reputation for violence was inadmissible in this case because Jackson was unaware of McCaleb's reputation at the time of the shooting. The performance of Jackson's trial counsel was not deficient.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.