COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

No. 94-3057-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HAROLD C. MAASS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Jefferson County: ARNOLD SCHUMANN, Judge. *Affirmed*.

Before Vergeront, J., and Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Harold Maass appeals from a judgment convicting him of second-degree intentional homicide. Maass argues that the definition of self-defense in the jury instructions incorrectly failed to explain that the use of defensive force could be motivated by a desire to cause great bodily harm in certain circumstances. He also argues that the prosecutor was

judicially estopped from requesting an instruction on the lesser-included offense of second-degree intentional homicide. We affirm.

Maass was charged with first-degree intentional homicide for shooting Robert Woelfel. After the evidence was presented, the prosecutor requested that the jury be instructed on the lesser-included offense of second-degree intentional homicide. Maass was convicted of the lesser-included offense.

Maass first argues that the trial court should have modified pattern jury instruction number 1014 which distinguishes between first- and second-degree intentional homicide on the basis of self-defense. Maass objected to the following portion of the instruction:

> 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 such 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.* (Emphasis added.)

WIS J I—CRIMINAL 1014 (1994).

Maass contends that the last sentence should have been modified as follows: "He may not intentionally use force which is intended or likely to cause death *or great bodily harm* unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." (Emphasis added.) Maass argues that the phrase "or great bodily harm" should have been added to the jury instruction because that phrase is used in § 939.48(1), STATS., the statute which defines self-defense. That statute provides

that a person "may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself." Maass contends that the instruction implied the privilege was not available in a case like his--where he intentionally used force which was likely or intended to cause great bodily harm, but not death.

Instruction of the jury is left to the sound discretion of the trial court. ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). When we review a trial court decision refusing to give a jury instruction, we consider the instructions given to the jury in their entirety to determine whether the jury was fully and fairly instructed. ***State v. Skaff***, 152 Wis.2d 48, 59, 447 N.W.2d 84, 89 (Ct. App. 1989).

We conclude that the trial court acted within its discretion in giving the pattern instruction 1014 rather than the modified instruction requested by Maass. We agree with the State that the phrase "or great bodily harm" is included in § 939.48, STATS., because that statute is a general self-defense statute applicable to crimes other than intentional homicides. That language was not included in this jury instruction, despite the fact that this instruction dealt with self-defense, because this instruction relates only to intentional homicides. Both first-degree intentional homicide and the lesser-included offense of second-degree intentional homicide require a showing of an intent to kill. We agree with the State that:

> It is unnecessary to include the pattern 1014 instruction in the language from sec. 939.48, STATS., that `the actor may not intentionally use force which is intended or likely to cause ... *great bodily harm*' because the intentional use of such force is not sufficient to establish [first- or second-degree intentional homicide], without even considering the privilege of self-defense. (Emphasis in original.)

As aptly explained by the State, "if the jury had found that [Maass] intentionally used force which was intended or likely to cause great bodily harm rather than death, [the jury would have acquitted him] of both first- and second-degree

intentional homicide because of the [S]tate's failure to prove [Maass's] intent to kill."

Maass next argues that the prosecutor was judicially estopped from requesting an instruction on the lesser-included offense of second-degree intentional homicide because both before and after her request for the lesser offense instruction, she argued that he should be found guilty of the more serious charge.

The prosecutor properly requested that the jury be instructed on the lesser-included offense of second-degree intentional homicide because, under a reasonable view of the evidence, Maass was guilty of that charge, but not of the more serious charge. It was not inconsistent for the prosecutor to argue, however, that Maass *should* be convicted of the more serious charge. She was simply advocating for conviction on the more serious charge, while conceding that the evidence might reasonably support conviction on the lesser-included offense. There was no error.

By the Court.—Judgment affirmed.

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