

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 20, 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. 94-3221-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CLARENCE E. HILL,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

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

SULLIVAN, J. Clarence E. Hill appeals from a judgment of conviction, after a jury trial, for one count of first-degree reckless homicide, contrary to § 940.02(1), STATS. He also appeals from an order denying his motions for postconviction relief. On appeal, Hill claims that: (1) the trial court imposed an excessive sentence; (2) the trial court erred in giving lesser-included offense jury instructions; (3) the trial court erred in allowing opinion testimony

from Detective Brian O'Keefe that Hill's version of events was physically impossible; and (4) the trial court erred in excluding certain evidence. We reject Hill's assertions and affirm.

I. BACKGROUND.

Hill was charged with first-degree intentional homicide for allegedly firing a single gunshot into the head of his wife during an argument they were having while sitting in Hill's parked truck. The facts were disputed at trial. Hill claimed that his wife had pulled a gun on him in the truck and that while he was trying to disarm her, it accidentally went off. Hill's wife died from a single gunshot wound to the head. The State presented a different version of events.

The State theorized that Hill intended to kill his wife because she was divorcing him, which would leave him without any form of support. In support of its theory, the State introduced evidence that the single gunshot was a "hard contact wound," meaning that the muzzle of the gun was in contact with her head, in a manner which left a "defined muzzle imprint."

II. ANALYSIS.

A. Sentencing.

Hill argues that the twenty-year maximum sentence, which he received, was excessive. We reject Hill's argument. Sentencing is a matter for trial court discretion which this court will not disturb unless there is an erroneous exercise of that discretion. *State v. Echols*, 175 Wis.2d 653, 681-82, 499 N.W.2d 631, 640-41, *cert. denied*, 114 S. Ct. 246 (1993).

The primary factors the trial court must consider in imposing sentence are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *Id.* It is clear from our review of the sentencing transcript that the trial court adequately addressed each of these factors. The trial court considered the gravity of the crime—a conviction for first-degree reckless homicide. The trial court addressed the fact that, after the shooting, Hill hid his wife's body in a basement behind a furnace and left her there for two days. The trial court also addressed Hill's character, noting his extensive prior record and lack of remorse. Finally, the trial court addressed the need to protect the public due to the nature of this crime.

Based on the foregoing, we are convinced that the trial court did not erroneously exercise its discretion in imposing sentence.

Further, we will find that a sentence within the permissible range set by statute is harsh and excessive only if it is “so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). Given the seriousness and the impact of Hill's offense, we cannot conclude that the sentence he received meets this standard. We also conclude that Hill's allegation that a harsh sentence was imposed because he elected to go to trial finds no support in the record.

B. Lesser-Included Jury Instructions.

Hill next claims that the trial court should not have charged the jury with lesser-included instructions. Hill claims that because he was charged with first-degree intentional homicide, the jury should only have been instructed on that crime. In other words, Hill wanted to give the jury a chance to either convict him of first-degree intentional homicide or acquit him altogether. Based on the evidence, however, and at the State's request, the trial court charged the jury with first- and second-degree intentional homicide as well as first- and second-degree reckless homicide.

Determining whether to submit lesser-included offense instructions to the jury involves a two-pronged test. *State v. Carrington*, 134 Wis.2d 260, 262 n.1, 397 N.W.2d 484, 485 n.1 (1986). First, the trial court must determine whether the lesser-included offenses are actually included within the charged offense. *Id.* Hill does not dispute that the three lesser-included offenses given in this case were included within the charged offense.

Second, the trial court must analyze the facts to determine whether a reasonable basis exists in the evidence for acquittal on the charged greater offense and conviction on the lesser. *Id.* The trial court determined that the evidence justified giving the lesser-included offense instructions of second-degree intentional homicide, and first- and second-degree reckless homicide. Upon reviewing the evidence in the record, we agree.

Under § 940.05(1), STATS., second-degree intentional homicide occurs when one causes the death of another with intent to kill, but where mitigating circumstances may be present. In Hill's case, the evidence could reasonably support an acquittal of first-degree intentional homicide, but a conviction of second-degree intentional homicide. The jury may have concluded that Hill intended to kill his wife, based on the forensic evidence, but that the mitigating factor of "unnecessary defensive force" was present because Hill feared his wife would kill him. As noted above, Hill argued that it was his wife who had pulled the gun on him. Hill indicated that his wife had a motive to kill him because he was accusing her of tax fraud and had initiated a letter writing campaign against her.

Under § 940.02(1), STATS., first-degree reckless homicide occurs when one “recklessly causes the death of another human being under circumstances which show utter disregard for human life.” Second-degree reckless homicide occurs without necessarily showing the utter disregard for human life element. Section 940.06, STATS. We again agree that a reasonable view of the evidence supported giving these instructions. The jury may have believed that Hill had actually pulled out the gun and, although he did not intend to kill his wife, he recklessly discharged the gun during the struggle between them, either with or without utter disregard for human life.

Because the evidence supports charging with each of the lesser-included offenses given in this case, we reject Hill's contentions on this issue.

C. Admitting Opinion Evidence.

Hill next claims that the trial court erred in allowing Detective Brian O'Keefe to testify that, in his opinion, the shooting could not have happened the way Hill said it did. O'Keefe explained that if the gun had been twisted as Hill described, it could not have caused the hard contact wound. We reject Hill's claim because he waived his right to complain on this ground by failing to object at the time O'Keefe testified. *State v. Boshcka*, 178 Wis.2d 628, 643, 496 N.W.2d 627, 632 (Ct. App. 1992); § 901.03(1)(a), STATS.¹

D. Exclusion of Evidence.

Hill's final claim is that the trial court erred in excluding certain evidence of his wife's alleged income tax fraud and of her prior prison record. Hill claimed that his wife had forged his name in filing past income tax returns, and that this evidence, together with her fear of having to return to prison, motivated her to pull the gun on him and attack him. The trial court ruled that this evidence is irrelevant and would only serve to confuse the jury.

¹ We reject Hill's attempt to salvage this failure by relying on objections made at the *Miranda-Goodchild* hearing. The objections made at the hearing were not directed to O'Keefe's opinion and were, therefore, insufficient to preserve this issue.

Whether to admit evidence of “other acts” is addressed to the discretion of the trial court, and we will not disturb the trial court's decision unless it erroneously exercised its discretion. *State v. C.V.C.*, 153 Wis.2d 145, 161, 450 N.W.2d 463, 469 (Ct. App. 1989). In passing on admissibility, the trial court applies a two-part test—first, whether the evidence fits into one of the exceptions set forth in § 904.04(2), STATS.; and second, whether the danger of unfair prejudice from admitting the evidence will substantially outweigh any probative value under § 904.03, STATS. *Id.* at 161-62, 450 N.W.2d at 469.

Hill argues that the evidence lends substance to his contention about his wife's motive and that it was germane to the issue of his credibility. We are persuaded by Hill's contentions. We agree that this evidence may be relevant to motive, which is one of the exceptions in § 904.04(2), STATS., and probably should have been admitted. Nonetheless, we conclude that excluding it was harmless error because it is not reasonably possible that it would have altered the jury's verdict. *State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The undisputed evidence of the hard contact wound to his wife's head belies Hill's contention that the gun discharged accidentally during a struggle. In addition, Hill's post-crime behavior of hiding his wife's lifeless body in the basement of a vacant home repudiates Hill's contentions. For these reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

No. 94-3221-CR (D)

SCHUDSON, J. (*dissenting*). I agree with the majority's conclusion that, under § 904.04(2), STATS., the trial court erred in excluding evidence regarding the victim's alleged motive to pull a gun on Hill. I disagree that the error was harmless.

Hill sought to introduce evidence in an attempt to establish that: his wife had signed his name to joint tax returns; he had received a recent notice of tax irregularities; his wife had been in federal prison for tax fraud, completing parole in 1988; and his wife had told him that "she did not want to go to prison again." On appeal, he argues:

The proffered evidence, if believed, offered a plausible scenario as to why the victim in this case might have produced a gun, and set in motion the chain of events that lead to her death. The jury's resolution of this credibility question may well have been influenced and assisted by this evidence.

In the absence of the documentary evidence which [Hill] sought to have admitted, the jury had only [Hill's] word as to why these things had happened. In the absence of documentary evidence the jury was, undoubtedly, no more willing to take [Hill's] word as to why the victim acted as she did than it would have accepted the claim of a defendant in a similar case, caught with a smoking gun in his hand, that the victim had a gun as well. In that case, any reasonable jury would have wanted to see the other gun: the proof of the defendant's story. In this case as well, the jury wanted to see proof. [Hill] had that proof, but was prevented, by an order of the court, from presenting it to the jury.

The State's response is curious indeed. The State argues that such evidence "does not prove that defendant's wife committed a crime and felt a need to cover it up by threatening or shooting defendant." But, of course, Hill's evidence does not have to *prove* that in order to corroborate his theory of defense. The State further argues that the victim's alleged statement that she "was not going to go back to prison" presents the underlying assumption "that

prison is undesirable.” Thus, incredibly, the State maintains that the evidence was irrelevant given that Hill “did not proffer any evidence about the specific prison experience of Mrs. Hill that made it noteworthy among prison experiences as being particularly undesirable.”

Contending that any error was harmless, the State points to the strength of its evidence including the fact that it “provided evidence of a motive for defendant to pull the gun on his wife.” Clearly, therefore, Hill's attempt to substantiate his account of his wife's motive to pull a gun on him was crucial to his defense. The State views the excluded evidence as “cumulative,” at best, arguing that “both items of [Hill's] proffered evidence—the tax form signatures and Mrs. Hill's alleged statement about avoiding a return to prison—depended totally for their defense value on the credibility of defendant.” More logically, however, in the estimation of a jury, it was the other way around—i.e., Hill's credibility depended on the excluded corroborative evidence.

Accordingly, I respectfully dissent.