COURT OF APPEALS
DECISION
DATED AND RELEASED

February 4, 1997

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

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

No. 95-2759-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEONARD AVERY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Leonard Avery (hereinafter "Leonard") appeals from his conviction of one count of first-degree intentional homicide while possessing a dangerous weapon, as a party to a crime. Leonard was also convicted of two counts of first-degree recklessly endangering safety while possessing a dangerous weapon, as a party to a crime; however, those convictions are not a part of this appeal.

Leonard, along with his brother, Andre Avery (hereinafter "Andre"), were both charged with the same crimes and were tried together but had separate juries. Leonard believes the trial court erred in not submitting to his jury his requested jury instruction for the lesser-included offense of second-degree intentional homicide. Although this instruction was given to his brother's jury, both brothers were found guilty of first-degree intentional homicide while possessing a dangerous weapon, as a party to a crime. Because the trial court correctly determined that there was no evidence in the record of any mitigating circumstances involving Leonard, it was entirely proper to refuse to give the lesser-included offense instruction for second-degree intentional homicide to Leonard's jury. We affirm.

I. BACKGROUND.

The jury was faced with a variety of conflicting and contradictory versions of the events leading to the shooting. What is known and undisputed is that both Averys and the victim of the homicide, Chris Davis, grew up in the same neighborhood. Testimony at trial revealed a history of friction between members of the two families. Among the incidents related were allegations of one of the Averys burglarizing the Davis home, which resulted in years of retaliatory acts including confrontations in parks, shootouts, gunplay, and other violent acts.

On the night of the shooting, the parties agree that both Leonard and Davis were at the Tapp I tavern. There was a confrontation between the two men and an exchange of angry words. It is also uncontroverted that Davis was following Leonard out the door of the tavern when Davis was shot by Andre.

The conflicts in testimony revolve around the events which took place earlier in the evening. Three different versions were presented to the jury. Sackie Roby, a friend of the two brothers, testified at trial. At the time of the trial he had pleaded guilty to lesser offenses connected with this incident but had not yet been sentenced. Roby told the jury that early on the night of the shooting he was with Andre at a store where Andre worked. Roby left to buy more beer. When he returned, Andre was on the phone with his brother Leonard. After concluding the phone call, Andre told him that Leonard and

Davis were both at the same bar and Davis was "talking crazy." The two men then decided to drive to the bar, but returned to the store when they did not see Leonard's wife's car. Shortly thereafter, Leonard arrived at the store. Leonard told the two of them that Davis was making threats. This led to the collective decision to return to the bar and ambush Davis. According to Roby, Leonard planned to go into the bar and lure Davis out of the tavern. Roby testified that upon arriving at the bar, the three of them walked to the tavern with Leonard going inside to entice Davis to come out. He and Andre remained outside. Roby claimed that after waiting several minutes, Leonard walked out of the tavern door. Roby testified he did not see Davis following him but he did witness Andre fire several shots at the door of the bar. Roby stated that after the shots were fired by Andre he ran to the car, never firing his gun.

The next version of the events was related by Andre. It differs from that of Roby. Andre admits to shooting Davis and agrees with some of Roby's testimony with respect to the events earlier in the evening. The significant difference in their stories, however, is Andre's insistence that Leonard never came to the store, nor was there a plan to ambush Davis. Andre testified that he and Roby, independent of any request by Leonard, decided to go to the bar after Andre talked to Leonard on the phone. Their intent, according to Andre, despite the fact they were both armed when they left the store, was to see if they could gain access to the bar as they believed the bar to be extremely crowded. Andre related that after driving with Roby to the Tapp I, and while approaching the bar entrance, he happened to see his brother walk down the steps of the bar with Davis behind him holding a gun pointed at his brother's back. Believing that his brother was about to be shot, Andre fired his gun, killing Davis. Andre explained that the reason fifteen or sixteen rounds were fired was because the gun was an automatic and it simply kept firing.

The final version of the night's events came from Leonard. Leonard did not testify at the trial, but several of his statements given earlier to the police were introduced. The gist of Leonard's first statement was that he called Andre to tell him Davis was at the bar and that Davis had threatened him. After concluding the phone call, he felt uneasy as he feared Andre might come to the bar because there was significant ill will between Davis and his brother. He then tried calling his brother back, but no one answered. Leonard claimed that some time later Davis approached him in the bar and offered to fight him outside. Leonard then proceeded outside under the belief he and Davis would fight. When he got outside, much to his surprise, he saw Roby

and his brother approach the bar with drawn guns. Upon seeing them, Leonard stated he ran into a yard. Simultaneous with his running, he heard several gunshots. He told the police he never saw Davis with a gun that evening. In later statements given to police, Leonard admitted asking Roby and Andre to come to his aid, but he denied asking them to bring guns, stating he only wanted them as backup because he was outnumbered by Davis's friends and family. In both statements, Leonard disputed Roby's claim that he came to the store and plotted with the two of them before returning to the bar.

II. ANALYSIS.

Leonard submits that the trial court erred in failing to give his requested lesser-included instruction of second-degree intentional homicide. We disagree.

A trial court engages in a two-step analysis in determining whether to submit a lesser-included offense jury instruction. *See* ***State v. Muentner***, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). First, the court must determine whether the crime is a lesser-included offense of the charged crime. ***Id***. Next, the court must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. ***Id.*** If both steps are satisfied, the trial court should submit the lesser-included instruction to the jury if the defendant requests it. *See* ***id***. A trial court commits reversible error if it refuses to submit an instruction on an issue that is supported by the evidence. ***State v. Weeks***, 165 Wis.2d 200, 208, 477 N.W.2d 642, 645 (Ct. App. 1991). Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law that we review *de novo*. ***Id***. In addition, we must view the evidence in a light most favorable to the defendant. ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988).

Second-degree intentional homicide is a lesser-included offense of first-degree intentional homicide because it is a less serious form of criminal homicide. *See* § 939.66(2), STATS. Therefore, we need only address whether there was a reasonable basis in the evidence for the jury to acquit Leonard of first-degree intentional homicide and convict him of second-degree intentional homicide. ***Muentner***, 138 Wis.2d at 387, 406 N.W.2d at 421.

At trial, Leonard argued that since his criminal acts consisted solely of being a party to the crime of first-degree intentional homicide (the state alleging his role was limited to that of a co-conspirator/aider and abettor to the actual shooter), he should automatically be entitled to the benefit of the lesser-included offense instruction given to the shooter. Alternately, at trial Leonard presented a theory—now abandoned—that his phone call to his brother might be construed as a cry for help or a cry for some kind of a defense which would provide sufficient basis to give a lesser-included offense instruction.

In his appellate brief, Leonard has argued for the first time that there were sufficient grounds in the record for the second-degree intentional homicide instruction. Leonard submits that the jury could have mixed and matched the various versions of the events, and if they believed parts of each, he could be found guilty of second-degree intentional homicide. Leonard contends that the jury could have believed, as related by Roby, that there was a conspiracy to ambush Davis, but the jury could then also have believed the part of Andre's story in which he related that he only shot Davis to protect his brother, when he realized Davis was pointing a gun at his brother's head.

With respect to the new theory Leonard raised in his appellate brief, the State submits that under the dictates of ***State v. Rogers***, 196 Wis.2d 817, 539 N.W.2d 897 (Ct. App. 1995), Leonard has waived this argument. We agree. Generally, "a party seeking reversal may not advance arguments on appeal which were not presented to the trial court." ***Id***. at 826, 539 N.W.2d at 900.

> [This] rule is based on a policy of judicial efficiency. By forcing parties to make all of their arguments to the trial court, it prevents the extra trials and hearings which would result if parties were only required to raise a general issue at the trial level with the knowledge that the details could always be relitigated on appeal.

Id. at 827, 539 N.W.2d at 901 (citation omitted). Leonard never presented this theory to the trial court; thus, he did not preserve the argument for our review.

It is also Leonard's contention that he is entitled to the same instructions given to his brother's jury. His brother, Andre, successfully argued at trial that the lesser-included offense instruction of second-degree intentional homicide be given to the jury. The trial court reasoned that Andre's version of the events, if believed, warranted the giving of the second-degree instruction. Andre's version denies any conspiracy or plan among himself, his brother and Roby. Andre testified he fortuitously appeared on the scene to witness his brother and Davis exit the tavern. Believing his brother was in danger of being injured as Davis was pointing a gun at him, he shot Davis. Accordingly, the trial court found that he was entitled to the second-degree intentional homicide

instruction because his account, if true, would fall within the mitigation provisions of § 940.01(2)(b), STATS.[1]

As the State correctly argued, however, none of the three versions of the homicide presented, when viewed separately, reasonably required the trial court to give Leonard's jury the second-degree homicide instruction. In Roby's version, Leonard, Andre, and Roby planned an ambush with Leonard enticing the victim outside. In this version, the jury could conclude that each was a party to the crime of first-degree intentional homicide. In Andre's version, the jury could reasonably conclude that there was no prior plan to shoot Davis. Andre suggested that he happened to come to the bar at the exact moment his brother and Davis walked out. In this version, Leonard was guilty of no crime. Finally, in Leonard's version, as related by his statements to the police, Leonard had a conversation with his brother and Roby about Davis, but there was no plan to harm him. In his version Leonard claimed he knew nothing about the victim pointing a gun at him, and was surprised to encounter his brother with a drawn gun when he stepped outside with Davis. If the jury believed Leonard's rendition, Leonard was, again, not guilty of any wrongdoing.

While the jury could reasonably find Andre guilty of second-degree intentional homicide based on the presented evidence, none of the versions, even when viewed most favorably to Leonard, would allow a reasonable jury to acquit Leonard of first-degree intentional homicide and convict him of second-degree intentional homicide. In denying Leonard's request for this lesser-included offense, the trial court stated: "[E]xamining the

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[1] Section 940.01(2)(b), STATS., provides:

> **(2)** MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:
>
> ....
>
> (b) *Unnecessary defensive force*. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

evidence, [this court] could not find any other facts that would justify giving the instructions on second-degree .... There still must be an evidentiary basis for the Court to give those instructions and the Court found none." We agree. Under the above three versions of the evidence, Leonard was either guilty of first-degree intentional homicide or no criminal homicide at all. As such, the trial court did not err in refusing to give the lesser-included jury instruction.

By the Court.—Judgment affirmed.

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