COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1654-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD LEE HENNINGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

PER CURIAM. Edward Lee Hennings appeals from a judgment entered after a jury convicted him of one count of first-degree reckless homicide, contrary to § 940.02(1), STATS. He also appeals from an order denying his postconviction motions. Hennings claims the trial court: (1) erred in denying his motion for production of Milwaukee Police Department records; (2) erred in

refusing to submit a second-degree reckless homicide instruction to the jury; (3) erroneously exercised its discretion in denying two motions for a mistrial; and (4) erroneously exercised its sentencing discretion by imposing a forty-year sentence. Because we resolve each issue in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

On June 11, 1996, Hennings and his uncle, Clarence Hennings, went to confront Michael Bailey with regard to why Bailey was attacking members of Hennings's family. Bailey had just hit Clarence three times in the face while Clarence was walking over to his mother's house and had previously hit Clarence in the face a month earlier. During the summer of 1995, Bailey had also shot Hennings's cousin, Brontson Jackson, in the left leg.

On June 11, when Hennings and Clarence found Bailey to question him regarding these attacks, Bailey walked right up to Clarence and said: "What's up nigger. Yeah I did it. You want some more?" Apparently, Hennings felt he had to do something because he then took out the gun that he had brought along, told Bailey to stop messing with Clarence and tried to fire the gun. Although the gun did not fire at first, Hennings managed to fix it and then fired twice. Bailey was struck once in the abdomen and once in the neck. Bailey started running away and Hennings chased him. Bailey died from blood loss due to the gunshot wounds.

Hennings was arrested and charged with first-degree intentional homicide. The case was tried to a jury, which convicted Hennings of the lesser-included offense of first-degree reckless homicide. Hennings was sentenced to

forty years in prison. He filed a postconviction motion, which was denied. He now appeals.

II. DISCUSSION

A. Motion to Produce Police Records.

Prior to trial, Hennings filed a motion for the production of police files, requesting information from the Gang/Crime Unit relative to Bailey and any gang activity in Hennings's neighborhood. Hennings argues that this information would have corroborated his defense theory that Bailey was a member of a street gang which "exacted terror upon the neighborhood" and Hennings's family. Therefore, he continues, this evidence was relevant to Hennings's state of mind when he grabbed a gun and went to confront Bailey. The trial court denied the motion stating in pertinent part:

> Based upon the record in front of me, based upon the information that you brought to my attention and are looking for, I'm going to deny your motion. I believe it's a fishing expedition. I think the right of the defendant to confront his accusers is not impaired by the denial of this motion. I find that any benefit in allowing you to see these reports, records, and files is outweighed by the right of the Milwaukee Police Department Gang Squad to keep these reports confidential.

The trial court concluded that information in the files regarding gang activity and the victim's violent acts would not be relevant to Hennings's state of mind if Hennings did not know of the activity and the acts. Hennings admitted that "it may well turn out that there is nothing in the files."

The trial court did not err in denying this motion. Hennings's motion, although not labeled as such, sought ***McMorris***-type evidence; that is,

evidence to show "what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence …." ***McMorris v. State***, 58 Wis.2d 144, 152, 205 N.W.2d 559, 563 (1973). This evidence is only admissible on the issue of self-defense when the violent acts are within the knowledge of the defendant at the time of the incident. *See* ***id.*** That was not the case here. Hennings's motion requested records of violent acts that he did not have knowledge of at the time of the incident. The trial court correctly analyzed this issue. It was not error to deny the motion.[1]

B. Lesser-Included Offense Instruction.

Hennings claims the trial court erred in refusing to give the additional lesser-included offense instruction on second-degree reckless homicide. We are not persuaded.

A lesser-included offense instruction is required only when reasonable grounds exist in the evidence for the jury to acquit on the greater offense and convict on the lesser offense. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). Our review on this issue is *de novo*. *See* ***id.***

A lesser-included offense instruction should be submitted only if there is a reasonable doubt as to some particular element included in the greater offense. *See* ***id.*** In reviewing the evidence, we conclude that there are no

[1] As noted by the State, the trial court did admit certain ***McMorris*** evidence at trial, including testimony from Hennings regarding specific acts of violence committed by Bailey of which Hennings was aware. Similar evidence was admitted from three additional witnesses.

Further, Hennings failed to request that the trial court conduct an *in camera* inspection of these records, *see* ***State v. S.H.***, 159 Wis.2d 730, 737-38, 465 N.W.2d 238, 241 (Ct. App. 1990), and thus cannot request an inspection for the first time on appeal. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 917-18 (Ct. App. 1983).

reasonable grounds in the evidence to acquit on the greater offense and convict on the lesser.

First-degree reckless homicide is defined as "recklessly caus[ing] the death of another human being under circumstances which show utter disregard for human life." Section 940.02(1), STATS. Second-degree reckless homicide is defined as "recklessly caus[ing] the death of another human being." Section 940.06, STATS. The difference between these two crimes is the "utter disregard for human life" element contained in first-degree reckless homicide, but not second-degree reckless homicide. Therefore, we view the evidence to determine whether there is a reasonable doubt as to this element. In other words, does the record support a finding that Hennings's actions were done with something less than "utter disregard for human life."

In denying Hennings's request for the lesser-included instruction, the trial court summarized the pertinent evidence:

> [H]e did raise his gun and shoot the [victim] who was unarmed, even though it's alleged that he did have his hand under his jacket. At best, assuming he can be found not guilty, but if he's found guilty of any offense, at best it would be first degree reckless homicide. What he did I believe the record clearly shows was showed [sic] utter disregard for human life in shooting a man under those circumstances where there was a verbal dispute going on, and also I think the evidence is that the gun misfired, I think that's his testimony, and then he hit it or played around with it and then fired again. He had time even to think. So there's absolutely nothing in this record that would support giving that as a lesser included offense.

The trial court described the undisputed evidence that when Hennings first tried to shoot Bailey, the gun jammed. Despite this, Hennings found a way to fix the gun and shoot Bailey. The evidence also included eyewitness testimony that Bailey

started running away before Hennings fired the second shot, and that Hennings ran after Bailey, firing additional shots. Based on the record, there was no reasonable ground for acquitting on the first-degree charge. Hennings's conduct, without a doubt, evidenced an utter disregard for human life.

C. Denial of Mistrial Motions.

Hennings also claims the trial court should have granted his motions for a mistrial. Hennings first moved for a mistrial based on comments the prosecutor made during closing argument. Hennings also moved for a mistrial based on the trial court's previous decision denying his request for police files related to the gang activity and the victim's reputation of violence.

A trial court's decision denying a mistrial is discretionary and will be reviewed subject to the erroneous exercise of discretion standard. *See* ***Haskins v. State***, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980). We cannot conclude that either denial constituted an erroneous exercise of discretion.

The first mistrial motion was based on the following comments made by the prosecutor during rebuttal closing:

> I can walk through all of the things that the defense attorney told you, he used some of the typical methods that are used in these cases.
>
> ….
>
> [Defense counsel is] representing the defendant. It is his job in this courtroom. To attempt to get the defendant off.
>
> ….
>
> Well ladies and gentlemen, if Martians came down, maybe all of [the defense] theories would fit.

When prosecutorial misconduct is alleged, the test to be applied is whether the remarks of the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) (citation omitted). We cannot say that the above challenged comments fit this test.

The remarks were directly responsive to defense counsel's closing argument. Defense counsel's closing provided in pertinent part:

> And lawyers don't win cases. That's a bunch of nonsense. Wins and losses. We're not here to win anything. We're here to see that justice is done. [The prosecutor], who I have just a great deal of respect for, Detective, Milwaukee Police Department investigated this case perfectly. There's no game playing going on.…
>
> Now Mr. Bailey is dead and that's tragic. But it didn't happen as a person leaving a home to go kill somebody. And none of the events that one would expect of somebody wanting to do that are present in this case.
>
> Now [the prosecutor], who has a great deal of experience in this business, very capable, very forthright, very straightforward, has a job to do. We are here because [the prosecutor] has brought us here by informing this court that this man committed first degree murder, and he said to the 12 of you, I will prove it to you beyond a reasonable doubt. This is his task to do. We're not here because of a vote. We're not here because of a happening. We're here because of a decision [the prosecutor] made and that is his right and responsibility, duty and obligation to do. But it doesn't make him infallible. He is saying based upon what I know, this young man does not deserve the entitlement to self-defense. It wasn't there and therefore I'm going to work to get him convicted of first degree intentional homicide.
>
> And that's fine. That's what prosecutors are supposed to do. Defense lawyers are supposed to not let that happen. Their job in a courtroom is number [sic] of jobs. First of all, they're an officer of the court. Secondly, their obligation is protect [sic] their client, but more than anything, their obligation is to help you folks do your job. And by helping you do your job, the best lawyer in the world is the one who when it's all over with, the jury says

> you know what, that person helped me do my job, I can go about my business because I made the best decision I can make. And that's what I know I have done. I haven't tried to fool anybody. I haven't tried to hide anything. I tried to get questions answered that I thought might help you.

The prosecutor's comments constituted a reasonable response to defense counsel's remarks and, therefore, it is unlikely that the jury was led astray. *See* ***United States v. Young***, 470 U.S. 1, 12 (1985). In light of defense counsel's remarks, the prosecutor's remarks regarding defense counsel's "job" were responsive and not inappropriate. They constituted fair comment and did not form the basis for a mistrial.

After submission of the case to the jury, Hennings moved for a mistrial based on the trial court's earlier decision denying his motion for production of police documents. We have previously concluded that the trial court did not err in denying Hennings's motion seeking production of police reports. Therefore, it logically follows that if the trial court did not err in denying the motion, a mistrial cannot be based on that decision. Therefore, the trial court did not erroneously exercise its discretion in denying Hennings's motion for a mistrial.

D. Sentencing.

Hennings's final argument is that the trial court imposed an excessive and unduly harsh sentence. We are not persuaded.

We review a challenge to the trial court's sentence under the erroneous exercise of discretion standard. *See* ***State v. Wuensch***, 69 Wis.2d 467, 480, 230 N.W.2d 665, 672-73 (1975). In imposing sentence, the trial court must consider three primary factors: "the gravity of the offense, the character of the

offender and the need to protect the public." ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984).

The record reflects that the trial court considered the three primary factors. It noted the extremely serious nature of the offense, "particularly the defendant's actions after he initially put the gun down to try to get it to fire again and the fact that he chased the victim." The trial court found these to be aggravating factors that weighed against the fact that Hennings was educated and employed. The trial court also reflected upon Hennings's character, noting the positive points. Finally, with regard to the protection factor, the trial court stated that this was an extremely reckless act which took the life of another human being. Based on the foregoing, we cannot conclude that the trial court erroneously exercised its discretion in imposing the maximum forty-year sentence.

Further, we cannot conclude that this sentence was excessive or unduly harsh. A sentence is harsh and excessive when 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). The sentence imposed here is not shocking to public sentiment. Hennings brought a gun to confront a known violent person. He tried to shoot Bailey once, but the gun jammed. Instead of walking away, he fixed the gun and shot Bailey twice at close range. He proceeded to chase the victim, fired additional shots, and then left the scene. Although the trial court imposed a harsh sentence when giving Hennings the maximum, the sentence was not *unduly* harsh.

By the Court.—Judgment and order affirmed.

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