COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. **98-1057-CR**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN LIEBZEIT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. Jonathan Liebzeit appeals a judgment convicting him of first-degree intentional homicide and hiding a corpse.[1] He also appeals an

[1] Liebzeit does not raise any issues concerning the conviction for hiding a corpse.

order denying his motion in which he alleged ineffective assistance of trial counsel due to counsel's failure to object when the court gave each party too few peremptory strikes.[2] At trial, Liebzeit argued that he did not intend to kill Alexander Schaefer and therefore the homicide was reckless rather than intentional. The trial court instructed the jury on both intentional and reckless homicide and it read the pattern transition instruction that told the jury how it should deliberate on the greater offense before it considered the lesser offense. Without objection, the court later gave an impromptu capsulization of the transition instruction stating "if you find that Jonathan Liebzeit was not guilty of first-degree intentional homicide, you'd indicate not guilty on the form and go to the second one and determine whether he's guilty or not on that form and indicate." Liebzeit argues that this impromptu instruction confused the jury because it made them believe they must unanimously acquit Liebzeit of intentional homicide before considering reckless homicide. Because we conclude that there is no reasonable likelihood that the impromptu instruction misled the jury, we affirm the judgment and order.

When considering whether a challenged instruction might have misled the jury, we consider the instructions as a whole. *See* ***Barrera v. State***, 109 Wis.2d 324, 330, 325 N.W.2d 722, 725 (1998). The trial court read the pattern transition instruction that correctly stated:

[2] In a supplemental brief, Liebzeit also argues that he is entitled to a new trial based on his counsel's failure to object to the reduced number of peremptory strikes. After he filed his brief, the Wisconsin Supreme Court held that a defendant must establish prejudice from the denial of his peremptory strikes when that issue was not preserved by objection at trial and the issue is analyzed under the ineffective assistance of counsel standard. *See* ***State v. Erickson***, 227 Wis.2d 758, ___, 596 N.W.2d 749, 752 (1999). Because Liebzeit has not established any actual prejudice, we need not further review this issue.

> You should make every reasonable effort to agree unanimously on the charge of party to a crime of first-degree intentional homicide before considering the offense of party to the crime of first-degree reckless homicide. However, if after full and complete consideration of the evidence you conclude that further deliberation would not result in unanimous agreement on the charge of party to a crime of first-degree intentional homicide, you should consider whether the defendant is guilty of party to the crime of first-degree reckless homicide.

Copies of that instruction were also sent to the deliberation room. Later, when the court paraphrased the instruction, it simply failed to repeat the portion that told the jury what to do if it could not agree on the greater offense. In this context, it is not reasonable to conclude that the jury would believe that it first had to unanimously agree to acquit Liebzeit of first-degree intentional homicide before considering first-degree reckless homicide.

During deliberations, the jury twice returned with questions for the court. The jury first asked, "Are we going to be asked one by one what our decision or reason for our decision/verdict was, and if so—can we decline to answer." After the court answered that the jury would be polled, the jury sent a second question: "If all jury members say yes to, Is this the verdict of the jury?, but a couple say no to, Is this your verdict?, (they have decided to go with the majority), will this cause a mistrial? Or is this acceptable?" The court answered that the verdict would not be accepted if someone said "no" when polled, and the case would be returned to the jury for more deliberations. Liebzeit argues that the jury's questions show that it was confused by the court's impromptu instruction. Nothing in the questions suggests that the incomplete paraphrasing of the transition instruction led to the jury's questions. The jury did not question whether it had to unanimously agree to acquit on the greater charge before considering the lesser included offense.

By the Court.—Judgment and order affirmed.

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