COURT OF APPEALS
DECISION
DATED AND FILED

September 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2272-CR **Cir. Ct. No. 2009CF3158**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT JOSEPH GRANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Robert Joseph Grant appeals from a judgment of conviction entered upon his guilty plea to second-degree reckless homicide. *See* WIS. STAT. § 940.06(1). He also appeals from an order denying his postconviction motion for resentencing. He contends that his twenty-year term of imprisonment

reflects the circuit court's reliance on a mistake of fact, namely, that he sought to minimize his culpability for the victim's death when he described his conduct as an accident. We disagree and affirm.

I.

¶2 Grant killed an acquaintance by firing a single shot at close range that pierced the victim's brain. Both Grant and the victim were intoxicated at the time of the shooting and both had cocaine in their blood systems. According to the criminal complaint, Grant called police to his home stating that "he had shot a female in the head by accident." Police arrested Grant. He gave a statement reiterating that "what happened was an accident," but he added: "I pulled the gun, pulled the trigger and it went off.... I put it up to her head, just teasing, knowing the gun wasn't loaded. The next thing I know, I pulled the trigger pow, pow, I said oh hell no."

¶3 In a later statement, Grant told the police that he and the victim were arguing about her request for money to buy cocaine and that he displayed a gun to prevent her from continuing to pester him for $10. Grant explained in his second statement that he and the victim were struggling over control of the gun and "the gun then went off." Grant admitted, however, that he "was pointing the gun at the victim and that the gun was pointed under her chin when he pulled the trigger."

¶4 At sentencing, the State told the circuit court that Grant improperly characterized the shooting as an accident "because it is [] Grant who goes and gets this gun.... He certainly escalates an argument to a dangerous, reckless situation when he introduces a weapon into the mix." Grant's lawyer responded that Grant used the term "accident" in order "to explain that this was as far from what he wanted to happen as anything in the universe."

¶5 The circuit court explained that it agreed with the State and did "n[o]t view this as being mitigated." The circuit court found that "[t]his involves introduction of a firearm into what otherwise should have been an argument or disagreement" and that "any reasonable person would realize [or] understand that that's done with a purpose; that is, potentially that a firearm may be ultimately used in some fashion." The circuit court determined that the sentence must be sufficient both to deter Grant and others from making similar decisions to brandish firearms when quarrelling and to punish Grant for his conduct. Therefore, the circuit court imposed eleven years of initial confinement and nine years of extended supervision.

¶6 In postconviction proceedings, Grant argued that the circuit court misunderstood his use of the word "accident" as an effort to minimize his culpability. He sought resentencing as a remedy. In a written order denying the motion without a hearing, the circuit court agreed that "it did consider that the defendant may have been minimizing the degree to which he was wielding the gun at the time of the argument." The circuit court found that its conclusion was warranted, ruling that "the degree of culpability moved beyond accident status when the defendant introduced a gun into the argument." Grant appeals.

II.

¶7 On appeal, Grant renews his request for resentencing. In his view, the sentence imposed is excessive because it reflects the circuit court's allegedly erroneous conclusion that he sought to minimize culpability and responsibility for the shooting by describing it as an accident. The State contends that the legal premise of Grant's appeal is that he was sentenced on the basis of inaccurate information. Our review of Grant's appellate brief persuades us that the State

accurately frames the issue. Moreover, Grant did not file a reply brief, so we take the State's contention as conceded. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 771, 738 N.W.2d 578, 588 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶8 "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3. To earn resentencing based on a violation of this right, a defendant has the burden to show both that the information was inaccurate and that the circuit court actually relied on the information in making its sentencing decision. ***Id.***, 2006 WI 66, ¶26, 291 Wis. 2d at 192–193, 717 N.W.2d at 7. On appeal, our review is *de novo*. ***Id.***, 2006 WI 66, ¶9, 291 Wis. 2d at 185, 717 N.W.2d at 3.

¶9 Grant acknowledges that he used the word "accident" numerous times to describe the events culminating in a fatal shooting. Further, he expressly concedes that "the events in question here cannot be called 'an accident.'" Grant asserts, however, that he used the term "accident" to convey that he "didn't mean for this [death] to happen" and to "acquaint the court with his state of mind rather than to minimize his culpability." Thus, Grant argues that the circuit court drew the wrong inference from his descriptions of the shooting as an accident.

¶10 The circuit court may base a sentence on facts in the Record and on inferences reasonably drawn from those facts. ***State v. Gallion***, 2004 WI 42, ¶19, 270 Wis. 2d 535, 549–550, 678 N.W.2d 197, 203. "The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact [that] is binding upon an appellate court." ***State v. Friday***, 147 Wis. 2d 359, 370,

434 N.W.2d 85, 89 (1989). This court may not reject a factfinder's reasonable inference. ***Id.***, 147 Wis. 2d at 370–371, 434 N.W.2d at 89.

¶11 The circuit court could reasonably infer that Grant sought to minimize his culpability and responsibility for committing reckless homicide by describing his conduct as an accident. Conduct is criminally reckless when it creates an unreasonable and substantial risk of death or great bodily harm to another person, and the defendant is aware that the conduct creates that risk. *See* WIS. STAT. § 939.24(1); *see also* WIS JI—CRIMINAL 1060. A defendant on trial for a crime involving reckless conduct may offer the defense of accident to defeat the mental state of awareness of risk necessary to prove guilt. *See* WIS JI—CRIMINAL 772 & n.2. Thus, the circuit court could reasonably construe Grant's insistence that the shooting was an accident as a claim that he lacked the necessary mental state to commit a crime.

¶12 Moreover, Grant made more than one statement suggesting that he was not fully to blame for the victim's death. He denied knowing that his gun was loaded. Further he suggested that the victim had some responsibility for the shooting because she struggled with him for control of the gun. The circuit court could reasonably infer that Grant also sought to minimize his responsibility when he described his conduct as an accident. While another inference might also be reasonable, we must accept the reasonable inference drawn by the circuit court. *See* ***Friday***, 147 Wis. 2d at 370–371, 434 N.W.2d at 89.

By the Court.—Judgment and order affirmed.

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