

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2012AP49-CR

Cir. Ct. No. 2010CF134

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. VOLLBRECHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Chippewa County:
STEVEN R. CRAY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 HOOVER, P.J. William Vollbrecht appeals a judgment of conviction for first-degree intentional homicide.¹ Vollbrecht argues there was

¹ Vollbrecht was also convicted of armed burglary, but he does not appeal that charge.

insufficient evidence to support the conviction. We reject the argument and affirm.

BACKGROUND

¶2 Tammy Clark and Vollbrecht dated sporadically from September 2008 until May 1, 2010. In April 2010, Vollbrecht had moved from Chippewa County to North Dakota for work. Shortly thereafter, Clark started dating Chris Farmer and ended the relationship with Vollbrecht. Vollbrecht learned that Clark was seeing someone and sent her a text message that he would kill whomever she was with. Vollbrecht returned to Chippewa County on May 12. He drove to Clark's residence and found her with her roommate and Farmer. Vollbrecht collected his belongings and left. He testified that he drank all day and into the night.

¶3 Vollbrecht testified that the next morning, he exchanged text messages with Clark and then met at her home and talked for about forty-five minutes. After she told him they were not going to get back together, he went to a bar and started drinking at approximately 10:00 a.m. Vollbrecht continued drinking at various bars throughout the day. Around 5:00 p.m., Clark and Farmer were together at a bar when Vollbrecht arrived. Vollbrecht testified he "decided [he] was going to pick a fight." Vollbrecht sent several threatening text messages to Clark. Clark and Farmer decided to leave the bar. Vollbrecht testified that he taunted Farmer with a nude photo of Clark before he left, and Farmer told him that Clark would not have left him if he had taken better care of her. Vollbrecht responded that he "could tear him apart with ease." Farmer stated he would fight Vollbrecht any time and wrote down his address and phone number and gave it to Vollbrecht.

¶4 After Clark and Farmer left, they drove to Farmer's place for the evening. Vollbrecht continued drinking at various bars and sent several more threatening text messages to Clark. When asked about these messages at trial, Vollbrecht responded, "I was mad enough at the time ... I was mad enough to—I was mad enough to kill somebody." Vollbrecht also text-messaged his mother that evening, stating "I go 2 prison or die 2day," "Wen i kil him i wil cal cus im runin at them with a gun," and "thankx, i kil."

¶5 Vollbrecht continued drinking until approximately midnight. He testified he had suicidal thoughts throughout the day, which continued as he walked to his parents' house. Vollbrecht asserted he stumbled over a rifle in his bedroom and decided to shoot himself, eventually deciding to do so in front of Clark. He proceeded to Clark's home, but did not find her there. Ultimately, he drove to Farmer's residence with the loaded rifle. Vollbrecht testified that "[o]n the way to the door, I jacked a shell in the chamber." The door was unlocked and Vollbrecht went inside and walked upstairs to Farmer's bedroom. Clark testified that she woke up to the sound of Vollbrecht cocking the gun. She saw Vollbrecht about one and one-half feet from the end of the bed, shouldering the gun. Clark then witnessed Vollbrecht shoot Farmer, who was sleeping on his back, in the neck. Clark sat up and saw Vollbrecht put the rifle to his own neck. She got off the bed and pressed her body against Vollbrecht so that he could not cock the gun and pleaded with him not to shoot himself.

¶6 Vollbrecht next called his mother and told her he shot Farmer. He then handed the phone to Clark. His mother called Clark a whore and a slut, and stated that Clark got what she wanted. While Clark was on the phone, Vollbrecht went to the bed and pulled the covers off Farmer. He got on top of Farmer, put his

knees on Farmer's chest, and started jumping up and down, saying, "who's laughing now, mother fucker."

¶7 Clark hung up on Vollbrecht's mother and grabbed the gun. She called 911, ran outside, and threw the gun aside. Clark testified that during the 911 call, Vollbrecht's sister called Vollbrecht on his second phone. Clark heard Vollbrecht tell his sister that he was "standing in front of the whore" and that he "shot Chris [Farmer]." Clark returned to the bedroom and Vollbrecht grabbed her by the throat and started choking her, bringing her to the floor. Clark started to black out when the police arrived. The police told Vollbrecht to release her, and he complied. Approximately two and one-half hours later, Vollbrecht's blood-alcohol content was .183.

¶8 The State charged Vollbrecht with first-degree intentional homicide, strangulation and suffocation, and armed burglary. As to the homicide charge, the jury was presented with lesser-included-offense instructions for second-degree intentional homicide—adequate provocation and first- and second-degree reckless homicide. Vollbrecht was convicted of first-degree intentional homicide and armed burglary, and was acquitted of the strangulation charge. He now appeals.

DISCUSSION

¶9 Vollbrecht argues that there was insufficient evidence to convict him of first-degree intentional homicide and that he should instead have been convicted of a lesser-included offense. He first contends he was suicidal and therefore lacked intent to kill Farmer. Thus, he asserts he should have been convicted of a reckless homicide. Alternatively, Vollbrecht argues he should have been convicted of second-degree intentional homicide because he was adequately provoked into shooting Farmer.

¶10 Where a defendant challenges the sufficiency of the evidence, we may not reverse “unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990). “If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we must affirm “even if [we] believe[] that the trier of fact should not have found guilt based on the evidence before it.” *Id.* at 507.

¶11 Vollbrecht first argues he lacked intent to kill Farmer because he instead intended to kill himself. Vollbrecht cites evidence that he was suicidal on the day of the shooting and that he intended to go shoot himself in front of Clark. Additionally, he relies on a significant discrepancy in Clark’s testimony. While Clark testified at trial that she observed Vollbrecht shoulder the weapon and shoot Farmer, she admitted telling police that she was asleep and had awakened to the sound of the gunshot. Vollbrecht, on the other hand, testified that he accidentally fired the gun. In addition to being intoxicated, he asserted he had a serious pre-existing injury to his hand and unintentionally fired when he stumbled after becoming weak in the knees upon seeing Farmer and Clark sleeping together.

¶12 Vollbrecht’s argument fails on two fronts. First, consistent with *Poellinger*, the jury was permitted to accept Clark’s revised version of events and reject Vollbrecht’s tenuous explanation of what occurred at the time of the shooting. It was similarly free to reject both parties’ testimony and merely infer that the homicide was intentional based on, among other things, Vollbrecht’s prior threats, his very presence in Farmer’s bedroom, and, ultimately, the improbable fact that the bullet lodged in Farmer’s neck rather than harmlessly flying off in

another direction. As set forth in the background section, there was not merely sufficient, but ample, evidence in support of Vollbrecht's conviction—much of it coming from him.

¶13 Second, Vollbrecht's alleged suicidal tendencies are irrelevant. Even if the jury accepted Vollbrecht's proffered suicide evidence, we are left asking: So what? Homicide and suicide are not mutually exclusive by any extent of the imagination.

¶14 Vollbrecht's alternative argument is even weaker than his first. He asserts that the jury should have instead found him guilty of second-degree intentional homicide because Farmer adequately provoked Vollbrecht into shooting him.² Vollbrecht cites Farmer's actions at the bar approximately six hours prior to the shooting. Specifically, Vollbrecht refers to Farmer's statements that Vollbrecht would not have lost Clark if he had taken better care of her and that he would fight Vollbrecht any time, and Farmer's simultaneous provision of his address and phone number on a piece of paper. Vollbrecht argues, "This challenge to [his] manhood and proposed duel, couple[d] with the amount of alcohol consumed by Vollbrecht throughout the day created a perfect storm of adequate provocation."

¶15 Adequate provocation is defined as follows:

(a) "Adequate" means sufficient to cause complete lack of self-control in an ordinarily constituted person.

² In his adequate provocation argument, Vollbrecht repeats his assertion that the gun fired accidentally. While homicide and suicide are not mutually exclusive, it seems to us that being provoked into accidentally committing an intentional offense is a patently inconsistent theory.

(b) “Provocation” means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.

WIS. STAT. § 939.44(1).³ Thus, adequate provocation includes both subjective and objective components. *See State v. Schmidt*, 2012 WI App 113, ¶7, ___ Wis. 2d ___, ___ N.W.2d ___. Further, as the definition sets forth, the alleged provocation must originate with the victim. Vollbrecht’s self-induced intoxication, therefore, does not factor into the calculation.

¶16 Additionally, Farmer’s alleged provocation occurred well before the homicide. This cooling-off period militates against a finding that the provocation actually caused a complete lack of self-control at the time of the shooting or that the provocation would have been sufficient to do so in an ordinarily constituted person. In fact, Vollbrecht’s own testimony significantly undercuts his claim that he was subjectively provoked by Farmer’s conduct at the bar. When asked if Farmer threatened him, Vollbrecht responded:

I was not threatened by Chris Farmer in no [sic] way. Anything he said to me I did not consider it a threat. ... He was not a threat. I did not view him as a threat nor anything he said to me as a threat. In fact, I just ignored it.

¶17 Neither could Farmer’s sleeping with Clark constitute further provocation at the time of the shooting. It is unreasonable to expect that an ex-girlfriend would not have relations with other men, and there is nothing about that situation that could constitute provocation on Farmer’s behalf. In fact, when

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

asked at trial, Vollbrecht agreed that just prior to shooting Farmer “there was nothing that [Farmer] did that could have in any way provoked [Vollbrecht] to action.”

¶18 We further observe that it was Vollbrecht who instigated Farmer’s alleged provocation at the bar. Vollbrecht commenced the interaction with Farmer and Clark by sending threatening text messages. They reacted by getting up to leave the bar. Vollbrecht, however, called Farmer over and showed him a naked photograph of Clark on his phone, pointing out that Clark sent it after she started dating Farmer. Only then did Farmer engage Clark. Thus, Vollbrecht was clearly the provocateur. A defendant cannot bait a homicide victim and then legitimately argue that the victim’s reciprocal provocation should mitigate culpability under the guise of adequate provocation. *Id.*, ¶44. A reasonable person in Vollbrecht’s position would have expected—at least—the response that Farmer made. *See id.*

¶19 The evidence of adequate provocation here was so weak that the issue arguably should not have been presented to the jury in the first place. In any event, viewing the evidence in the light most favorable to the conviction, there was ample evidence to prove that Vollbrecht was not adequately provoked by Farmer.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

