COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP749-CR **Cir. Ct. No. 2010CF599**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL and ELLEN R. BROSTROM, Judges. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Brian A. Patterson appeals a judgment of conviction, following a jury trial, of first-degree reckless homicide. Patterson also appeals the order denying his postconviction motion. We affirm.

BACKGROUND

¶2 On February 6, 2010, Patterson was charged with first-degree intentional homicide for the shooting death of his cousin, Joseph McGowan. Patterson pled not guilty and the matter proceeded to trial.

¶3 At trial, Patterson testified in his own defense, telling the jury that he acted in self-defense.[1] Patterson stated that on February 2, 2010, he drove to his Milwaukee home with his friend Tommy Wynne and found Tiffany Stephens on his porch. Stephens, McGowan's girlfriend, went to Patterson's home to discuss the tax return Patterson completed for Stephens. Stephens came to the home with McGowan, but McGowan initially remained in the car.

¶4 Patterson testified that he exited his car, stood by the doorway to his home, and talked to Stephens. He then noticed McGowan exiting the car and walking in Patterson's direction. Patterson stated that McGowan's demeanor was "[v]ery aggressive, very belligerent, profane," and that McGowan was "demanding money" while "cussing [and] swearing." McGowan told Patterson to "go into the house and get his money before [Patterson] got shot." Patterson testified that McGowan then "gave me 24 hours to make whatever payment he was demanding." Patterson then went into his house, thinking McGowan was leaving. However, when Patterson went back out onto his porch about one minute later, he heard McGowan tell another cousin, Lonnie Tolbert, that Tolbert should avoid going to Patterson's house because McGowan was going to "shoot the house up" if Patterson did not pay. Patterson interrupted the conversation, telling McGowan: "if you shoot my house up, expect to get shot at in return." Both

[1] The Honorable Dennis R. Cimpl presided over the jury trial.

McGowan and Patterson returned to their respective vehicles and both started to drive away from Patterson's home; however, McGowan's vehicle, driven by Delvin Holmes, blocked Patterson's vehicle so that Patterson could not continue to drive. Patterson and McGowan again came face-to-face. Patterson testified that McGowan then reached under the seat of his car. Believing that McGowan was reaching for a gun, Patterson stated that he (Patterson) pulled his own gun from his pocket, warned McGowan that he would shoot if McGowan did not stop advancing towards him, and then fired four or five shots because McGowan continued towards Patterson. Patterson testified, however, that he never actually intended to kill McGowan, he intended just to halt McGowan by displaying the weapon. Patterson also testified that he shot McGowan with his non-dominant right hand and did not have time to actually aim the gun at McGowan, but rather, just reacted to the perceived threat and started shooting.

¶5 Patterson stated that there had been tension between McGowan and himself in the days leading up to the shooting because McGowan thought Patterson owed Stephens money in connection with Stephens's tax return. Patterson testified that McGowan had previously pulled a gun on him (Patterson), leading Patterson to begin carrying a gun of his own. Patterson also testified that he previously witnessed McGowan shoot another man. Patterson stated that all of these factors, combined with McGowan's aggressive demeanor on February 2, 2010, led him to believe that McGowan posed a legitimate threat.

¶6 At the close of evidence, the State moved to instruct the jury on the offense of first-degree reckless homicide in addition to the original charge of first-degree intentional homicide. Patterson's counsel objected, however the circuit court overruled the objection. The jury found Patterson guilty of first-degree reckless homicide.

¶7 The circuit court sentenced Patterson to thirty-five years' imprisonment, consisting of twenty-five years of initial confinement and ten years of extended supervision.

¶8 Patterson filed a postconviction motion for a new trial, arguing that the circuit court committed plain error when it instructed the jury as to the elements of first-degree reckless homicide. Specifically, Patterson argued that because he presented evidence "that he actually believed that deadly force was necessary to terminate an unlawful interference with his person," he could not have been convicted of first-degree reckless homicide. Patterson also argued that the instruction improperly shifted the burden of proof to him to establish that he was acting reasonably in self-defense. The circuit court denied the motion.[2] This appeal follows. Additional facts are included as necessary to the discussion.

DISCUSSION

¶9 On appeal Patterson puts forth multiple arguments. He contends that: (1) the evidence was insufficient to convict him of first-degree reckless homicide; (2) the circuit court erred in allowing the jury to consider the lesser-included offense of first-degree reckless homicide; (3) the circuit court erred in denying his motion for a new trial on the grounds that the jury instruction on first-degree reckless homicide was plain error; and (4) the circuit court erroneously exercised its sentencing discretion. We address each argument in turn.[3]

[2] The Honorable Ellen R. Brostrom denied Patterson's postconviction motion.

[3] Patterson's brief-in-chief to this court initially includes an argument that the circuit court erred in denying his pretrial motion to allow evidence of multiple prior acts of violence by McGowan. However, Patterson's brief appears to abandon this issue, as it is neither developed nor supported by any case law. We therefore do not address this argument.

I. Sufficiency of the Evidence.

¶10 Patterson argues that because he acted in a manner that was practically certain to kill McGowan, the State failed to prove the elements of first-degree reckless homicide.

¶11 We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the [S]tate 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).

¶12 In order to prove first-degree reckless homicide, the State must show that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* WIS. STAT. § 940.02(1) (2011-12).[4] The second element requires that the defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the defendant was aware that such conduct created that risk. *See* WIS JI—CRIMINAL 1347. Patterson contends that because he intended to kill McGowan, the jury was precluded from finding Patterson's conduct "reckless." Specifically, Patterson argues that because he believed deadly force was necessary to defend himself, a finding that Patterson was aware that his conduct created an unreasonable risk of death or great bodily harm was not possible.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶13 The test is not whether the jury might have found what it did not, but rather whether sufficient evidence supports the jury's verdict. *See* ***Poellinger***, 153 Wis. 2d at 501. At trial, Patterson stated that he believed McGowan had a gun, though he never saw McGowan with a gun on that particular day, and that he wanted McGowan to stop advancing towards him. However, Patterson admitted that he did not intend to kill McGowan. Patterson stated that as McGowan approached him, Patterson reached into his pocket and pulled out a gun, but only to display the gun in an attempt to halt McGowan. When McGowan did not stop, Patterson, who is left-handed, pulled his gun up to his hip using his right hand and fired with his right hand. Patterson testified that he did not hold the gun in his dominant hand because he never intended to actually use the gun. Once Patterson started shooting, he said, he did not have time to actually aim the gun at McGowan. He admitted to firing the gun four or five times, but stated that he was unsure of whether the bullets were actually hitting McGowan. Patterson testified that he stopped shooting when McGowan turned away from Patterson, but he did not learn of McGowan's death until hours later.

¶14 Based on this evidence, the jury could reasonable conclude that the State failed to prove Patterson intended to kill McGowan (an element of first-degree intentional homicide). The jury could also reasonably conclude that Patterson's conduct, in firing a gun several times in the general direction of an approaching person, was criminally reckless and showed utter disregard for human life. Patterson's own testimony supports the jury's verdict.

II. Lesser-Included Offense.

¶15 Patterson contends that the circuit court erred in instructing the jury on the lesser-included offense of first-degree reckless homicide. Specifically,

Patterson contends that no reasonable view of the evidence supports a finding of first-degree reckless homicide, and that the circuit court "change[d] the fundamental nature of the charge after [Patterson] had defended the case as an intentional crime." Patterson is mistaken.

¶16 "'When a defendant is charged with a crime he is automatically put on notice that he is subject to an alternative conviction of any lesser[-]included crime; the whole contains all its parts.'" ***Kirby v. State***, 86 Wis. 2d 292, 299-300, 272 N.W.2d 113 (Ct. App. 1978) (citation omitted). "[N]otice and charge on the greater offense as a matter of law includes notice of the included crime. Notice of the whole is notice of the parts." ***Geitner v. State***, 59 Wis. 2d 128, 134, 207 N.W.2d 837 (1973). Patterson concedes that first-degree reckless homicide is a lesser-included offense of first-degree intentional homicide. The State requested the lesser-included offense based on Patterson's testimony, which it was entitled to do. *See* ***Moore v. State***, 55 Wis. 2d 1, 7-8, 197 N.W.2d 820 (1972) (After the evidence is presented, the court may allow amendment of the complaint or information to conform to the proof where the amended charge is a lesser-included crime.). Patterson's argument that he would have defended his case differently had he known he could be charged with first-degree reckless homicide is without merit.

III. Jury Instructions.

¶17 Patterson argues that the jury instructions on first-degree reckless homicide given by the circuit court were plain error. Specifically, Patterson contends that the circuit court's instructions shifted the burden of proof to Patterson to prove self-defense and did not instruct the jury that if Patterson actually believed that deadly force was necessary, then he could not be convicted

of first-degree reckless homicide. Patterson did not object to the instruction at trial.

¶18 The Wisconsin Supreme Court has explained that WIS. STAT. § 805.13(3) prohibits this court from reviewing unobjected-to jury instructions. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988). In his reply brief, Patterson concedes that he did not object to the language of the instruction, but requests that we use our discretionary reversal power to find that the real controversy of his case was not fully tried. We exercise our discretionary reversal power "'infrequently and judiciously'" and only in "'exceptional cases.'" *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). Where the evidence sufficiently supports the verdict, and where a review of the record indicates that the circuit court issued the standard jury instructions, we decline to exercise our discretionary reversal power.

IV. Sentencing.

¶19 Finally, Patterson contends that the circuit court erroneously exercised its sentencing discretion by failing to set forth a "nexus between the factors considered and the sentence imposed." Patterson did not raise this issue in his postconviction motion. We need not address issues raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997).

¶20 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment and order affirmed.

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