

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP968-CR

Cir. Ct. No. 2005CF2230

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SAM GWIN, JR.,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Sam Gwin, Jr., appeals a judgment convicting him of first-degree intentional homicide and felon in possession of a firearm. The issue is whether there is sufficient evidence to support the jury's verdict. We affirm.

¶2 When a defendant argues that there is insufficient evidence to support a conviction, we will affirm the jury’s verdict “‘unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.’” *State v. Hayes*, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). We will “‘examine the record to find facts that support upholding the jury’s decision to convict.” *Id.*, ¶57.

¶3 To convict a person of first-degree intentional homicide, a jury must conclude beyond a reasonable doubt that: (1) the person caused the death of the victim; and (2) that the person did so intentionally. *See* WIS. STAT. § 940.01(1) (2011-12).¹ A person has an affirmative defense to first-degree intentional homicide if they act in self-defense. *See* WIS. STAT. § 939.48. The self-defense statute provides that “[a] person is privileged to ... intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.” *Id.* However, the statute provides limitations: the actor “may intentionally use only such force ... as the actor reasonably believes is necessary to prevent or terminate the interference” and “[t]he actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.” *Id.*

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 The crime of first-degree intentional homicide is mitigated to second-degree intentional homicide if a person uses unnecessary defensive force. *See* WIS. STAT. § 940.01(2)(b). This applies in situations where a person had “an *actual belief* that she was in imminent danger of death or great bodily harm and an *actual belief* that the deadly force she used was necessary to defend her against this danger, if *either* of these beliefs was not reasonable.” *State v. Head*, 2002 WI 99, ¶69, 255 Wis. 2d 194, 648 N.W.2d 413.

¶5 The testimony and other evidence adduced at trial showed that Gwin was working at a Walgreens store as a security guard when he shot and killed Alexander Mitchell in the parking lot outside the store. Gwin testified that he stopped Mitchell for leaving the store without paying for some sunglasses. Mitchell became belligerent, and began cursing and arguing. Gwin testified that Mitchell took the sunglasses off, threw them toward the back of the store, and walked toward the door. Gwin said he followed Mitchell, and they continued to argue in the foyer of the store. He then followed Mitchell into the parking lot to see which direction he was going. Gwin testified that Mitchell was part of the way across the parking lot when he turned around and said “I will see you later,” which Gwin took as a threat. As Gwin was dialing the number for the police on his cell phone, Mitchell charged at him, swinging his fists. Gwin testified that Mitchell hit him one time on the left side of his head. Gwin said that he stumbled back and pulled out his gun. Gwin testified that Mitchell then lunged at him, so he shot Mitchell in order to prevent Mitchell from harming him. Gwin said that Mitchell fell down in front of him after he was shot, but then tried to get back up, so Gwin shot him again.

¶6 Cawanda Pearson, a customer, testified that she left the store while Gwin and Mitchell were in the store’s foyer and walked to her car. She saw

Mitchell hit Gwin with his hand, and she saw Gwin stumble back and pull out his gun. Pearson testified that Mitchell stepped back away from Gwin, but Gwin shot him. Pearson testified that she saw Gwin walking around Mitchell as he lay on the ground, and then she saw Gwin shoot Mitchell again. Pearson testified that Gwin shot Mitchell at least two times while he was on the ground.

¶7 Tino Pinkston testified that he was working at the checkout counter when Mitchell was shot, and he had a view from the counter through the doors to the parking lot. Pinkston testified that as Mitchell was leaving the store, he turned and hit Gwin in the face. Gwin stumbled back, but caught his balance. Gwin then pulled out his gun. Pinkston testified that Mitchell started to back away from Gwin. Gwin shot Mitchell as he was backing away. Pinkston testified that Gwin walked up to where Mitchell was laying on the ground, stood right over him, and shot him again.

¶8 Steven Conway, the store manager, testified that he heard three or four shots, about five seconds apart. He went to the front of the store and saw Gwin in the lobby area with a gun in his hand. Conway said that Gwin was extremely agitated and said that Mitchell had hit him. Conway testified that Gwin said, "I shot that mother fucker," "I killed that faggot," and "I got that nigger."

¶9 April Eubanks, another customer, testified that she heard one gunshot, and then she heard two more shots a minute or two later, one right after the other. She said that Gwin came into the store and told her Mitchell had taken some glasses and had punched him in his face, so he had to shoot him. Her husband, Nathaniel Eubanks, testified that he was in the parking lot in his car with his children, waiting for his wife when he heard what sounded like a gunshot. Forty seconds to a minute later, he heard two more gunshots, one right after the

other. He said that after his wife came out and told him what had happened, he went into the store and saw Gwin in the foyer with a gun. Eubanks asked Gwin why he shot the man, and Gwin said, “I bet he won’t be hitting nobody else again.”

¶10 Viewing the testimony and other evidence in the light most favorable to the jury’s conviction, as we are required to do, there was sufficient evidence for the jury to reject Gwin’s claim that he acted in self-defense, and therefore conclude that Gwin was guilty of first-degree intentional homicide. Gwin admitted that he killed Mitchell. Mitchell was not armed when Gwin shot him repeatedly. Although Mitchell hit Gwin in the face during their altercation, Gwin was not injured, and Gwin was moving toward Mitchell, who was backing away, as Gwin shot him. Gwin continued to shoot Mitchell after he fell to the ground. Under these circumstances, the jury could have reasonably concluded it was not reasonable for Gwin to use the amount of force he used in order to prevent Mitchell from harming him, especially because Gwin used force that was likely to cause death or great bodily harm, which is only justified where the actor reasonably believes that amount of force is necessary “to prevent imminent death or great bodily harm to himself.” *See* WIS. STAT. § 939.48.

¶11 Gwin contends that even if the jury concluded that he did not act reasonably, the jury should have concluded that he was guilty of second-degree homicide because he testified that he *actually* believed that he had to shoot Mitchell to prevent Mitchell from harming him. Gwin contends that the State offered no evidence to rebut his testimony that he *actually* believed he had to shoot Mitchell. Gwin overlooks a key point. The jury was free to disregard Gwin’s testimony that he actually believed he had to shoot Mitchell if the jury did not believe that testimony was credible. Based on the trial testimony, the jury

acted reasonably in disregarding Gwin's testimony that he *actually* believed he had to shoot Mitchell in order to prevent death or great bodily harm to himself.

By the Court.—Judgment affirmed.

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

