COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1976-CR **Cir. Ct. No. 2012CF19**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KOU YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Kou Yang appeals a judgment convicting him of first-degree reckless homicide, first-degree reckless injury, and possession of a firearm by a felon, all as a repeater. We conclude that there is no reasonable

likelihood that the jury applied the instruction on the utter-disregard-for-human-life element in an unconstitutional manner. We also conclude that the court properly exercised its discretion in ordering restitution. We affirm.

¶2 Yang shot two men at close range in a confrontation in a Wal-Mart parking lot. Pheng Lee was killed; Chenglung Moua survived shots to his jaw and thigh. After the shooting, Yang sped away in his car with his wife[1] and a friend, Peter Chang, stopping along the way near a grassy ditch, ostensibly to urinate. Although after midnight, he then drove to another friend's house, told Chang not to say anything, and asked the friend to swap cars. The friend declined. The handgun never was found. Yang did not report the shootings or summon medical help. The next day, he denied to police that he had been at the Wal-Mart. The store's surveillance camera showed otherwise.

¶3 Yang ultimately claimed self-defense. He contended that, while in the store, he heard Moua telephone someone to meet him, and as he, Yang, went to his car, a group of four men approached him. Not knowing they were unarmed and worried they were the ones responsible for firing shots into his house the month before, Yang drew his loaded gun. They continued to advance. Fearing for his and his wife's safety, he fired at the men and fled. He lied to police about his involvement because he feared retaliation from the victims' associates.

¶4 The jury rejected Yang's claim of self-defense and found him guilty.[2] After a hearing, the trial court concluded that the requested funeral

[1] Yang and Cha Xiong are not legally married but the Hmong culture recognizes them as husband and wife.

[2] Yang already had pled no contest to possession of a firearm by a felon.

expenses comported with Hmong culture and traditions and ordered $36,429.80 in restitution. Yang appeals.

¶5 For each of the recklessness crimes, the State had to prove that the circumstances of Yang's conduct showed utter disregard for the victims' lives. *See* WIS JI—CRIMINAL 1020 and 1250 (2012). The pattern instructions explain:

> In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors: what the defendant was doing, why the defendant was engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for life, and all other facts and circumstances relating to the conduct.

Id. Over Yang's objection, the trial court also included in its instruction for each crime the following paragraph from WIS JI—CRIMINAL 1020 and 1250:

> Consider also the defendant's conduct after the death [great bodily harm] to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death [great bodily harm] occurred.

Yang contends that there is a reasonable likelihood that the jury applied this legally accurate instruction ("the instruction") in an unconstitutional manner.

¶6 A defendant is entitled to a new trial if there is a reasonable likelihood that the jury applied an instruction in a manner that violates the constitution. ***State v. Badzinski***, 2014 WI 6, ¶35, 352 Wis. 2d 329, 843 N.W.2d 29. A jury is unconstitutionally misled if it is reasonably likely that the jury applied the instruction so as to deny the defendant a meaningful opportunity to have the jury consider the defendant's defense to the detriment of his or her due process rights. ***State v. Burris***, 2011 WI 32, ¶50, 333 Wis. 2d 87, 797 N.W.2d 430. Whether the jury "improperly applied [a] legally correct jury instruction[] in a manner that denied the defendant due process raises a question of constitutional

fact that this court reviews de novo." ***Id.***, ¶24. "We examine the challenged jury instruction[] in light of the proceedings as a whole, keeping in mind that [trial] courts have broad discretion in deciding which instructions to give." ***Id.*** A jury applies the instruction properly if, in assessing whether the defendant acted with utter disregard for human life, the jury understood that it should consider the totality of the circumstances, including the defendant's relevant conduct before, during, and after the crime. ***Id.***, ¶51.

¶7 Yang objected at trial that "I don't know that throwing the gun in the field or … not going immediately to the police or lying to the police is relevant to utter disregard for human life." He contends here that the instruction was misleading as it left the jury to figure out how, if at all, his after-the-fact conduct related to the State's burden of proving utter disregard for human life.

¶8 Yang's post-shooting conduct is relevant to that element. *See* ***id.***, ¶39 (as part of totality-of-circumstances analysis, fact-finder should consider defendant's conduct occurring within reasonable period of time after crime). The State argued that his actions showed utter disregard for human life. Yang testified that fear motivated his actions. The weight to be given such evidence is for the trier of fact. ***Id.***, ¶38.

¶9 Yang further argues that placing the instruction immediately before the self-defense instruction suggested that *the court* believed the instruction could assist his self-defense theory, but failed to instruct them that *they* could believe the after-the-fact conduct supported a self-defense theory. A litigant who fails to request a particular instruction has no right to complain on appellate review. ***Hayes v. State***, 39 Wis. 2d 125, 136, 158 N.W.2d 545 (1968). We also know of

no rule that requires instructions to be given in any prescribed sequence. ***Heldt v. Nicholson Mfg. Co.***, 72 Wis. 2d 110, 117, 240 N.W.2d 154 (1976).

¶10 Beyond that, a "jury-focused" instruction was unnecessary. Each side was free to—and did—argue what it believed the post-shooting events meant. The State argued that Yang's flight, failure to summon medical help, and lying to police indicated utter disregard for the victims' lives. Yang argued that those same actions sprang from a rational response to fear of both immediate harm and later retaliation to him and his family due to the combination of Moua's summoning backup, the menacing approach of the men in the parking lot late at night, and the recent events at his home. The instruction to consider Yang's post-death/injury conduct and "all other facts and circumstances relating to the conduct" did not favor either side.

¶11 We see no error. WIS JI—CRIMINAL 1020 and 1250 accurately reflected the law. Yang's conduct was relevant to proving the utter-disregard element and was not misleading. Viewed in light of the entire proceedings, Yang has not shown that there is a reasonable likelihood that the jury applied the instruction in an unconstitutional manner. A new trial is unwarranted.

¶12 Yang alternatively argues that the $36,429.80 restitution ordered was unreasonable. We disagree here as well.

¶13 When determining whether to order restitution and the amount thereof, the trial court must consider the loss a victim suffered as a result of the crime; the defendant's financial resources, present and future earning ability, and the needs and earning ability of his or her dependents; and any other factors the

court deems appropriate. *See* WIS. STAT. § 973.20(13)(a) (2011-12).[3] The order may require the defendant to "pay an amount equal to the cost of necessary funeral and related services under s. 895.04 (5)." Sec. 973.20(4). A family may recover "the reasonable cost of … funeral expenses, including the reasonable cost of a cemetery lot, grave marker and care of the lot." WIS. STAT. § 895.04(5). When the sentencing court's authority to order restitution is not in dispute, we review the restitution order for an erroneous exercise of discretion. ***State v. Kayon***, 2002 WI App 178, ¶5, 256 Wis. 2d 577, 649 N.W.2d 334.

¶14 Lee's family sought expenses for a twelve-day period. They presented a Hmong culture expert's testimony and documented expenses associated with the traditional several-day-long Hmong funeral and bringing friends, family, and relatives in from around the country for preparation and support. None of the expenses were covered by insurance. The court found that the $36,429.80 in expenses was reasonable.

¶15 The trial court plainly had the authority to order restitution for these demonstrably "necessary funeral and related services under s. 895.04(5)." WIS. STAT. § 973.20(4). It did not erroneously exercise its discretion in ordering restitution for these expenses.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

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