COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 7, 1996

No. 95-2345-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL BARTZ,

Defendant-Appellant.

APPEAL from a judgment and orders of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Michael Bartz contends that the trial court erred in refusing to submit a jury instruction on assisting suicide, § 940.12, STATS., as a lesser-included offense of first-degree intentional homicide. Section 940.01, STATS. We affirm since there is no reasonable evidence to permit a jury to acquit on the charge of first-degree intentional homicide and convict on

the offense of assisting suicide. We also conclude that Bartz has failed to properly preserve his objections to his parole eligibility date of forty years from the date of sentencing. Therefore, we affirm Bartz's conviction and sentence.

Bartz appeals from a judgment of conviction for first-degree intentional homicide in the death of Don Scott and an order denying his postconviction motion for a new trial on the grounds that the trial court erred in refusing to give a lesser-included offense instruction. He also appeals the trial court's establishment of a parole eligibility date of forty years and the order denying his motion for a modification of sentence in lieu of a new trial.

In resolving Bartz's principal issue on appeal, we will use the same two-step analysis used by the trial court. We first decide if assisting suicide is a lesser-included offense of first-degree intentional homicide. Next, we weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and convict on the lesser offense. *See* ***State v. Morgan,*** 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App. 1995). It is not necessary for us to answer the first question if we can conclude, after reviewing the evidence in a light most favorable to the defendant, that there is no reasonable evidence to support the lesser-included offense instruction. *See* ***Ross v. State***, 61 Wis.2d 160, 171-72, 211 N.W.2d 827, 833 (1973). We conduct our review de novo because the question of whether a lesser-included offense instruction should have been submitted to the jury is a question of law. *See* ***State v. Salter***, 118 Wis.2d 67, 83, 346 N.W.2d 318, 326 (Ct. App. 1984). In this appeal, we do not have to engage in the first step of this analysis since we conclude that the

physical evidence rebuts Bartz's testimony and evidence which he argues offers a reasonable basis for submission of the lesser-included offense instruction.[1]

The evidence Bartz relies upon to support his argument that the trial court should have given the lesser-included offense instruction of assisting suicide includes several contradictory statements he gave, his trial testimony and the testimony of other defense witnesses. We summarize this evidence from the record of the trial. In the early morning hours of August 1, 1993, Bartz called "911" and reported the suicide of Scott to the Walworth County Sheriff's Department. Sergeant Timothy Schiefelbein was the first officer on the scene, and Bartz told him that he had gone with Scott into the field and Scott had shot himself. Shortly after this statement, Bartz told Schiefelbein that he was holding the gun for Scott but that Scott pulled the trigger. In demonstrating this version of the incident, Bartz said he held the gun and placed his thumb over Scott's thumb; Schiefelbein, who played the role of Scott, testified that Bartz exerted pressure on his thumb during the demonstrations. After these demonstrations, Bartz was placed under arrest.

In a statement made to Detective Todd Wiese, Bartz repeated his story that Scott had shot himself. As the interview progressed, Bartz changed his story to indicate that he had held the gun for Scott. In the final version of the story, he admitted that he had killed Scott. In this statement Bartz described

[1] Bartz assumes that under § 939.66(2), STATS., assisting suicide is a lesser-included offense of first-degree intentional homicide. Although the physical evidence in this case does not support the instruction and we do not have to address this argument, we do note that we have strong reservations about Bartz's assumption.

how he and Scott walked into the field together and were both carrying a duffel bag with the shotgun ammunition and took turns carrying the sawed-off shotgun. According to Bartz, Scott fired what he believed to be all of the ammunition and then Bartz loaded a shell he had kept in his pocket, pointed the gun at Scott and pulled the trigger. Bartz also admitted (to a social services worker) that he shot Scott and that he tried to make the incident look like suicide.

Bartz was the first defense witness at the trial. He testified that Scott carried the shotgun and they took turns carrying the duffel bag into the field. While walking into the field, Scott fired the shotgun and had difficulty ejecting the shell; according to Bartz, they both tried to eject the shell and finally Scott was successful. Bartz testified that he was hallucinating from a combination of LSD, marijuana and alcohol and thought he heard a third person running through the field. Bartz testified that he loaded the shotgun with a shell he had in the neck of his shirt. He remembered shaking hands with Scott but could not remember who was holding the gun. He remembered seeing a flash and saw Scott's silhouette. According to Bartz, Scott fell slowly to Bartz's right, and his body turned as it fell.

Bartz testified that Scott was despondent over the possibility that his probation was going to be revoked and he could face six years in prison. Bartz told the jury that Scott wanted to commit suicide and had brought a duffel bag and sawed-off shotgun to Bartz's trailer where Scott acted out his planned suicide. Scott's probation agent confirmed that because his urine analysis had been positive for the presence of drugs, his probation was going to be revoked.

Scott's father and stepbrother testified that Scott was despondent over his dirty urine test and talked about suicide.

In addition to presenting evidence that Scott contemplated suicide because of a pending revocation of his probation, Bartz presented evidence from two members of the Wisconsin State Crime Lab. The sum and substance of this evidence was that an anatomic absorption spectrometry test performed on Bartz was negative and no evidence of blood could be found on his clothing.

Bartz argues that if this evidence is considered in the most favorable light, it establishes a reasonable basis to conclude that a jury would acquit him of first-degree intentional homicide and convict him of assisting Scott in committing suicide. We acknowledge that the evidence is to be viewed in the light most favorable to Bartz, and if it can be concluded that there is a reasonable basis for acquittal on the greater charge and for conviction on the lesser, the requested instruction must be given. However, this does not mean that the trial court erred in refusing to give the lesser-included offense instruction.

Many appellate decisions have pointed out that it is error to instruct on lesser-included offenses when the evidence does not support the instruction:

> The evidence must throw doubt upon the greater offense. Juries cannot rightly convict of the lesser offense merely from sympathy or for the purpose of reaching an agreement. They are bound by the evidence and should be limited to those included crimes which a *reasonable* view of the evidence will sustain and does

> not convince beyond a reasonable doubt the additional element of the greater crime existed.

State v. Melvin, 49 Wis.2d 246, 253, 181 N.W.2d 490, 494 (1970) (emphasis added). "The key word in the rule is 'reasonable.' The rule does not suggest some near automatic inclusion of all lesser but included offenses as additional options to a jury." ***State v. Bergenthal***, 47 Wis.2d 668, 675, 178 N.W.2d 16, 20 (1970), *cert. denied*, 402 U.S. 972 (1971).

The lesser-included offense instruction is not to be given where the physical evidence leads to only one conclusion:

> Where a defendant's testimony appears to offer a reasonable basis for submission of instructions on a lesser offense, but the physical evidence contradicts that testimony so as to leave no reasonable basis for a finding of the lesser offense, the refusal to give such instructions is not error.

Boyer v. State, 91 Wis.2d 647, 669, 284 N.W.2d 30, 39 (1979). This is the difficulty that Bartz faces in this case. No matter how favorably to Bartz the evidence is considered, it would be unreasonable to conclude that Bartz assisted Scott in committing suicide.

The State's firearms expert testified that the sawed-off shotgun was held between three and six inches from Scott's face. The medical examiner testified to a reasonable degree of professional certainty that Scott died instantaneously from the gun shot. When the first law enforcement officer reached the scene, he and an emergency medical technician found Scott lying face down with his hands hidden from view. Approximately one hour later, a

detective observed the body and found that both of Scott's hands were in the pants of his shorts up to his wrists. An examination of the hands and wrists of the victim failed to reveal any blood stains on the hands. The medical examiner was certain that it would be impossible for a person who died instantaneously from a shotgun blast to the head to put his or her hands into his pockets after the wound was inflicted.

We are satisfied that this uncontradicted physical evidence leaves no reasonable basis for a jury to acquit Bartz of first-degree intentional homicide and convict him of assisting in the suicide of Scott. The only reasonable view of the physical evidence is that Scott was facing Bartz with his hands in his pockets when Bartz pulled the trigger of the sawed-off shotgun he was holding less than six inches from Scott's head. The blast from the shotgun killed Scott instantly and he fell to the ground landing on his face with his hands still in his pockets. It would be unreasonable to assume that Bartz was holding the shotgun and Scott pulled the trigger and was able to put both hands in his pockets before he died instantaneously from the shotgun blast. Therefore, we conclude that the trial court acted properly in refusing to give a jury instruction on the lesser-included offense of assisting suicide.

The second issue Bartz raises on appeal is that the trial court abused its discretion is setting his parole eligibility date for forty years from the date of sentencing. In his postconviction motion filed under § 809.30, STATS., Bartz sought a modification of sentence on the grounds that the original sentence was based on irrelevant and prejudicial information and that it was

excessive. In argument to the court, postconviction counsel said, "And I would also reiterate the facts regarding sentencing and I believe that at sentencing under all the facts in this case, were excessive." In denying the motion, the trial court held that Bartz had failed to offer any evidence of irrelevant and prejudicial information being considered at sentencing and that argument that the sentence was excessive was only the opinion of the defendant and his counsel.

We decline to review Bartz's challenge to his sentence for two reasons. First, sentencing and consideration of motions to modify sentences are highly discretionary acts and we will defer to the trial court unless the defendant meets his or her burden of showing an erroneous exercise of that discretion. *See* ***State v. Hillesheim***, 172 Wis.2d 1, 22-23, 492 N.W.2d 381, 390 (Ct. App. 1992), *cert. denied*, 509 U.S. 929 (1993). It is the defendant's burden to show in the record an unreasonable or unjustifiable basis for the exercise of the trial court's discretion. *See* ***id.*** The motion and argument made to the trial court are devoid of any attempt by Bartz to meet his burden and are woefully inadequate to preserve either of the issues highlighted in his motion for appellate review. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

Second, in his appellate brief, Bartz limits his argument that the sentence was excessive to comparing his sentence to sentences in several reported appellate decisions. If this argument is an attempt to argue that his sentence denied him equal protection, we decline to review this argument

because it was not presented to the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980).

By the Court. – Judgment and orders affirmed.

Not recommended for publication in the official reports.