COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP480-CR **Cir. Ct. No. 2010CF3431**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP STEVEN MORA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Philip Steven Mora appeals a judgment of conviction entered after a jury found him guilty of five felonies. He contends that the circuit court erred by refusing his request to instruct the jury on felony murder

as a lesser-included offense of first-degree intentional homicide while armed. We affirm.

BACKGROUND

¶2 The State charged Mora with two counts of first-degree intentional homicide while armed, two counts of attempted armed robbery as a party to a crime, and one count of possessing a firearm as a felon. *See* WIS. STAT. §§ 940.01, 939.63(1)(b), 943.32(2), 939.32, 939.05, 941.29(2) (2009-10).[1] According to the State, Mora intentionally shot and killed two people that he and his accomplice attempted to rob. The matter proceeded to a jury trial.

¶3 At trial, the State presented unrefuted evidence that, on January 23, 2010, Benjamin Nunez was killed by a gunshot to the head, and Salvador Chavarin was killed by a gunshot to the heart at close range. Mora stipulated that he was a felon on that date, and, through counsel, he expressly conceded that "he tried to rob two people and he killed them both." The State also presented Mora's statement to police explaining that he and an accomplice planned to rob the first person they saw leaving a local tavern. This person, who turned out to be Nunez, did not cooperate with Mora's demand for "everything" and struggled with Mora instead. Mora told police that he then pulled out his gun and, as the struggle continued, the gun went off. Mora said that he next began fighting with a second man, later identified as Chavarin. According to Mora, he used his gun to hit Chavarin, but Mora kept his finger on the trigger and ultimately shot Chavarin

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

multiple times. Mora next went through the victims' pockets, but he found nothing to steal and left the scene.

¶4 At the close of the evidence, the State asked the circuit court to instruct the jury on first-degree reckless homicide while armed as a lesser-included alternative to the charges of first-degree intentional homicide while armed. The circuit court agreed to do so, but rejected Mora's requests to instruct the jury on two additional lesser-included homicide offenses, namely, second-degree reckless homicide and felony murder. The jury found Mora guilty of one count of first-degree intentional homicide while armed in the death of Chavarin, one count of first-degree reckless homicide while armed in the death of Nunez, two counts of attempted armed robbery as a party to a crime, and one count of possessing a firearm while a felon. Mora appeals, challenging only the circuit court's decision not to instruct the jury on felony murder.

DISCUSSION

¶5 "The test for submitting a lesser-included offense is whether 'there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense.'" ***State v. Fitzgerald***, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391 (citation omitted). The circuit court must consider the evidence in the light most favorable to the defendant. ***Id.*** Whether the evidence supports the submission of a lesser-included offense presents a question of law for our *de novo* review. ***Id.***

¶6 Pursuant to WIS. STAT. § 939.66(2), an included crime may be "a less serious type of criminal homicide than the one charged." ***Id.*** First-degree reckless homicide and felony murder are both lesser-included offenses of first-degree intentional homicide. *See* ***State v. Morgan***, 195 Wis. 2d 388, 436 n.24,

536 N.W.2d 425 (Ct. App. 1995) (observing that all forms of homicide are lesser-included offenses of first-degree intentional homicide).

¶7 A person commits first-degree reckless homicide while armed by, *inter alia*, recklessly causing the death of another human being under circumstances that show utter disregard for human life, while using a dangerous weapon. *See* WIS. STAT. §§ 940.02(1), 939.63(1). A person commits felony murder by causing the death of another human being while committing or attempting to commit another of certain specified crimes, including, as relevant here, armed robbery pursuant to WIS. STAT. § 943.32(2). *See* WIS. STAT. § 940.03. The circuit court agreed that the evidence of Mora's actions in the deaths of Nunez and Chavarin supported instructing the jury on both of these lesser-included offenses, and the circuit court decided to instruct the jury on first-degree reckless homicide while armed. The circuit court declined, however, to instruct the jury on felony murder for reasons that the circuit court did not make entirely clear.

¶8 In this court, the State does not seek to clarify or defend the circuit court's rationale for denying Mora a jury instruction on felony murder. Instead, the State offers an independent basis for affirming the circuit court's decision. We may sustain a ruling of the circuit court on grounds that it did not consider. *See* ***State v. Amrine***, 157 Wis. 2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990). For the reasons that follow, we agree with the State's analysis.

¶9 When a circuit court has decided to instruct the jury on a lesser-included degree of homicide, the defendant must show that reasonable grounds exist for acquittal of "all greater degrees of homicide on which the [circuit] court plans to instruct the jury, before defendant may secure an instruction on the next

lesser degree." *See* ***Harris v. State***, 68 Wis. 2d 436, 441, 228 N.W.2d 645 (1975). Moreover, "for homicide it is irrelevant that a less serious type of homicide requires proof of an additional fact not required to be shown for the more serious type." ***Id.*** The State contends that application of the ***Harris*** rule defeats Mora's claim. Felony murder, the State argues, is a less serious type of homicide than both first-degree intentional homicide and first-degree reckless homicide. Because the circuit court determined that it should instruct on first-degree reckless homicide, Mora was required to show a reasonable ground for acquittal of that offense before he was entitled to an instruction on felony murder. *See* ***id.*** The State argues that Mora failed to make such a showing, and an instruction on felony murder was, accordingly, unwarranted.

¶10 Mora did not file a reply brief in this matter, and thus he offered no response to the State's assertion that felony murder is a less serious offense than first-degree reckless homicide. We therefore take that point as conceded.[2] *See* ***State v. Baldwin***, 2010 WI App 162, ¶42, 330 Wis. 2d 500, 794 N.W.2d 769

[2] We view as well-founded Mora's implicit concession that felony murder is a less serious type of homicide than first-degree reckless homicide while armed. We determine whether one homicide offense is less serious than another by comparing the maximum penalties that the defendant faces upon conviction. *See* ***State v. Davis***, 144 Wis. 2d 852, 859-61, 425 N.W.2d 411 (1988). At the time of these offenses, first-degree reckless homicide while armed carried a maximum prison sentence of sixty-five years. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), 939.63(1)(b). Felony murder carried a maximum prison sentence of fifteen years in addition to the maximum term of imprisonment provided by law for the crime or attempted crime that the defendant was engaged in when he or she committed the murder. *See* WIS. STAT. § 940.03. Thus, the maximum penalty that Mora would have faced upon a conviction for felony murder in this case was thirty-five years of imprisonment, determined by adding fifteen years to the maximum twenty-year prison sentence that Mora faced for attempted armed robbery. *See* WIS. STAT. §§ 940.03, 943.32(2) (armed robbery a class C felony); 939.50(3)(c) (class C felony carries maximum of forty years in prison); 939.32(1g)(b)1. (maximum imprisonment for attempted felony is one-half the maximum term of imprisonment for completed felony). Accordingly, as the State contends, felony murder in this case was a less serious offense than first-degree reckless homicide while armed.

("arguments not refuted are deemed conceded"). We turn to whether Mora demonstrated a reasonable basis in the evidence for acquittal of first-degree reckless homicide while armed.

¶11 The elements of first-degree reckless homicide while armed are: (1) the defendant caused the death of another human being; (2) the defendant caused the death by criminally reckless conduct; (3) the circumstances of the defendant's conduct showed utter disregard for human life; and (4) the defendant committed the crime while using a dangerous weapon. WIS JI—CRIMINAL 1020; WIS JI—CRIMINAL 990. The evidence viewed in the light most favorable to Mora does not offer a reasonable basis for acquittal of this offense as to the death of either Nunez or Chavarin.

¶12 Mora admitted that he shot and killed both Nunez and Chavarin. Thus, no genuine dispute existed as to the first and fourth elements of first-degree reckless homicide while armed.

¶13 As to the second element, '"criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." WIS. STAT. § 939.24. Here, Mora introduced a loaded gun into violent conflicts with both Nunez and Chavarin. Such conduct has long been recognized as criminally reckless because it "demonstrate[s] a conscious disregard for the safety of another and a willingness to take known chances of perpetrating injury." *See* ***Lofton v. State***, 83 Wis. 2d 472, 489, 266 N.W.2d 576 (1978); *see also* ***State v. Echols***, 152 Wis. 2d 725, 741, 449 N.W.2d 320 (Ct. App. 1989) (fighting over gun presents unreasonable risk and high probability of death or great bodily harm).

¶14 As to the third element, the defendant must cause death under circumstances showing "utter disregard for human life." WIS. STAT. § 940.02(1). This standard is objective. *See* ***State v. Jensen***, 2000 WI 84, ¶23, 236 Wis. 2d 521, 613 N.W.2d 170. The element may "be established by evidence of heightened risk ... or evidence of a particularly obvious, potentially lethal danger." ***Id.***, ¶17. "Utter disregard for human life" may also be demonstrated by the defendant's actions and statements before, during, and after the crime. *See* ***id.*** When analyzing this element, '"[w]e consider whether the totality of the circumstances showed any regard for the victim's life.'" ***Id.***, ¶24 (citation omitted).

¶15 In this case, although Mora told police that he did not intend to fire his gun, the evidence showed that the weapon was loaded, he brandished it while fighting with the victims, he used it as a club, and he kept his finger on the trigger. Ultimately, he shot Nunez through the head and Chavarin through the heart. Mora's actions were obviously likely to be lethal. *See* ***State v. Davis***, 144 Wis. 2d 852, 863-64, 425 N.W.2d 411 (1988) (no reasonable basis to acquit a defendant of a crime in which utter lack of concern for life is an element where defendant points a gun at a vital part of the victim's body). Moreover, in ***Davis***, our supreme court concluded: "an utter lack of concern for the life and safety of the woman Davis robbed was evidenced by his decision to flee the scene though he knew she had fallen after his gun went off." ***Id.*** at 864. Mora similarly took no action to assist the men he shot. Instead, he callously searched their pockets for something to steal, and then he fled. The totality of these circumstances does not permit a conclusion that Mora acted with any regard for human life.

¶16 In sum, no reasonable basis existed to acquit Mora of first-degree reckless homicide while armed in the death of either Nunez or Chavarin.

Accordingly, we agree with the State that the circuit court did not err by refusing to instruct the jury on the lesser offense of felony murder in these matters. *See* ***Harris***, 68 Wis. 2d at 441. We affirm.

By the Court.—Judgment affirmed.

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