COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1030-CR **Cir. Ct. No. 2011CF4152**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICKY L. PERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ricky L. Perry appeals from a corrected judgment of conviction entered after a jury found him guilty of second-degree reckless homicide by use of a dangerous weapon. *See* WIS. STAT. §§ 940.06(1) &

939.63(1)(b). Perry also appeals the order denying his postconviction motion for a new trial. We affirm.

I. BACKGROUND

¶2 Initially Perry was charged with second-degree recklessly endangering safety by use of a dangerous weapon arising out of the death of William Roberson. The charge against Perry was later amended to second-degree reckless homicide by use of a dangerous weapon.

¶3 The case proceeded to a jury trial where the evidence revealed that Perry was involved in a dispute with Roberson over a drug purchase. Perry testified that Roberson punched him twice in the face, which caused Perry's knees to buckle. At that point, Perry pulled out a knife and stabbed Roberson in the abdomen. Perry watched Roberson run away and then collapse.

¶4 Roberson died as a result of the stabbing. Perry argued that he acted in self-defense.

¶5 At the State's request, and with Perry's agreement, in addition to being instructed on the crime of second-degree reckless homicide by use of a dangerous weapon, the jury was also instructed on the lesser offense of homicide by negligent use of a dangerous weapon. Additionally, the jury was instructed on the privilege of self-defense as to both offenses. For this, the trial court used the standard self-defense instruction, *see* WIS JI—CRIMINAL 801, and neither party objected.

¶6 The jury found Perry guilty of second-degree reckless homicide by use of a dangerous weapon. He was sentenced to eighteen years in prison

consisting of twelve years of initial confinement and six years of extended supervision.

¶7 Perry filed a postconviction motion seeking a new trial on grounds that the jury instruction on self-defense was plainly erroneous because it failed to inform the jury that it was the State's burden to prove that Perry was not acting in self-defense. In the alternative, Perry alleged that his trial lawyer gave him constitutionally deficient representation for failing to object to the defective instruction.

¶8 The trial court denied the motion without a hearing.

II. DISCUSSION

¶9 On appeal, Perry argues: (1) the evidence was insufficient to support his conviction; (2) the trial court committed plain error when it instructed the jury in a manner that shifted the burden of proof and persuasion to him concerning self-defense; and (3) if we conclude that the instruction was erroneous, but that it did not amount to plain error, we should remand this case for an evidentiary hearing on his claim of constitutionally deficient representation by his trial lawyer.[1] We address each claim in turn.

(1) *Sufficiency of the evidence*

¶10 Perry asserts: "The evidence at trial established that Perry stabbed Roberson in a vital part of his body from a position where the two men were 'face-to-face.' The only available inference is that Perry intended to kill Roberson."

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

From this, Perry submits that because his intent to kill Roberson "was undisputed," there was insufficient evidence to support his conviction for second-degree reckless homicide by use of a dangerous weapon. We disagree with Perry's assessment of the evidence.

¶11 When reviewing the sufficiency of the evidence, we look at whether "'the evidence, viewed most favorably to the [S]tate 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 1018, 669 N.W.2d 762, 769 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 758 (1990)). "'If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.'" ***Ibid.*** (quoting ***Poellinger***, 153 Wis. 2d at 507, 451 N.W.2d at 758 (1990)).

¶12 Here, the evidence at trial revealed that it was far from undisputed that Perry intended to kill Roberson. As summed up by the State:

> Neither the State nor the defense presented any evidence that Perry deliberately or intentionally aimed the knife at a vital part of Roberson's body. Rather, the evidence shows that Perry pulled a knife from his pocket during a physical altercation with Roberson, and simply stuck out the knife. There is no evidence that Perry even knew where or whether he had actually wounded Roberson until he saw Roberson collapse in the street moments later. Perry's shock and dismay when he saw Roberson was hurt, and when he later learned he had died, is inconsistent with a deliberate stabbing to a vital part of the body, bespeaking intent to kill or knowledge that such conduct is practically certain to cause death.

We agree. The jury could reasonably have concluded that Perry was guilty of second-degree reckless homicide by use of a dangerous weapon.[2]

(2) ***Plain Error***

¶13 Next, Perry claims that the trial court erred when it instructed the jury because the jury was never told that the State had the burden of proving beyond a reasonable doubt that he was not acting in self-defense. Although he did not object, Perry claims he is entitled to relief because the instruction was plain error. *See* ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 153–154, 754 N.W.2d 77, 84–85 ("The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object."). As support, Perry points to our decision in ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, which was released almost a year and one-half after Perry's trial. There, we reversed and remanded for a new trial in the interests of justice after we concluded that the jury instructions given in that case, which followed the pattern suggested by WIS JI—CRIMINAL 801, were deficient because they did not specifically tell the jury that the State had to disprove self-defense beyond a reasonable doubt. *See* ***Austin***, 2013 WI App 96, ¶¶16–18, 349 Wis. 2d at 754–755, 836 N.W.2d at 838.

¶14 "Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time."

[2] Additionally, we are unpersuaded by Perry's analogy between the circumstances presented in this case and those presented when one fires a shot with a weapon aimed at a vital part of the body. *See* ***Smith v. State***, 69 Wis. 2d 297, 304, 230 N.W.2d 858, 862 (1975) ("One is presumed to intend the natural and probable consequences of pointing and discharging a gun at a vital part of another's body."). Moreover, even if this presumption was applicable here, it is not conclusive. *See* ***ibid.***

Jorgensen, 2008 WI 60, ¶21, 310 Wis. 2d at 154, 754 N.W.2d at 85 (citation and internal quotation marks omitted). The error must be both "'obvious and substantial.'" *See* ***ibid.*** (citation omitted). We must use the plain error doctrine sparingly. *See* ***ibid.***

¶15 The relevant portions of the instructions that were read to the jury in this case were as follows:

> Second-degree reckless homicide: The definition of second-degree reckless homicide in Chapter 940 of the Criminal Code of Wisconsin is committed by one who recklessly causes the death of another human being.
>
> The burden of proof: Before you may find the defendant guilty of second-degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present:
>
> The elements the State must prove are as follows: (1), the defendant caused the death of William Roberson. Cause means the defendant's act was a substantial factor in producing the death. (2), the second element is that the defendant caused the death by criminally reckless conduct.
>
> Criminally reckless conduct means the conduct created a risk of death or great bodily harm to another person, and the risk of death or great bodily harm was unreasonable and substantial, and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.
>
> Your decision: If you are satisfied beyond a reasonable doubt that the defendant caused the death of William Roberson by criminally reckless conduct, you should find the defendant guilty of second-degree reckless homicide. If you are not so satisfied, you must not find the defendant guilty of second-degree reckless homicide, use of a dangerous weapon.
>
> ….
>
> Presumption of innocence: Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be

innocent. This presumption requires a finding of not guilty unless, in your deliberations, you find it is overcome by evidence that satisfies you beyond a reasonable doubt that the defendant is guilty.

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a guilty verdict, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty. If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a not guilty verdict.

….

Self-defense: Self-defense is an issue in this case. In deciding whether the defendant's conduct was criminally reckless or criminally negligent conduct, you should also consider whether the defendant acted lawfully in self-defense.

The law of self-defense allows the defendant to threaten or intentionally use force against another only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person, and the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference and, finally, the defendant's beliefs were reasonable.

The defendant may intentionally use force, which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is that [sic] what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's belief must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the view point of the jury now.

You should consider the evidence relating to self-defense and in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant

> was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another.

(Emphasis added.)

¶16 When instructing the jury on self-defense, the trial court relied on the pattern instruction, WIS JI—CRIMINAL 801, which was revised by the Wisconsin Criminal Jury Instructions Committee in 2001 and remained unchanged until only recently.[3] *See* WIS JI—CRIMINAL 801 (Rel. No. 52, Apr. 2014). Consequently, even if the pattern instruction was flawed at the time of Perry's trial, we are not convinced that the error was "obvious" as required by the plain error doctrine.

¶17 Additionally, we are not convinced that the purported error was substantial. "A jury instruction is erroneous if it fails to clearly place the burden of proving all elements of the offense on the State." ***State v. Patterson***, 2010 WI 130, ¶53, 329 Wis. 2d 599, 631, 790 N.W.2d 909, 924. In this case, we agree with the State's assessment that "[t]he instruction does not misstate the burden of proof or expressly place the burden of proof on the defendant. The flaw, if it exists, is that it does not take the extra step of specifying that the State has the burden to disprove self-defense." On review, however, "we must 'examine the jury instruction as a whole [ ] to determine whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on' insufficient proof." ***Ibid***. (citations omitted; brackets in ***Patterson***). Here, the entire set of instructions, when considered as a whole, told the jury that "[t]he burden of establishing every fact necessary to constitute guilt is upon the State."

[3] WIS JI—Criminal 801 has since been revised to reflect this court's decision in ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833.

¶18 Because we are not convinced that Perry has shown plain error, our inquiry ends. *See* ***Jorgensen***, 2008 WI 60, ¶23, 310 Wis. 2d at 155, 754 N.W.2d at 85 ("If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, [then] the burden then shifts to the State to show the error was harmless.").

(3) ***Constitutionally Deficient Representation***

¶19 Alternatively, Perry asserts that if we conclude that the instructions on self-defense were defective, but that the defect did not amount to plain error, then we should remand for a ***Machner*** hearing on whether his trial lawyer gave him constitutionally deficient representation by not objecting to the use of WIS JI—CRIMINAL 801.

¶20 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both aspects of the ***Strickland*** test if the defendant does not make a sufficient showing on one. *See* ***id.***, 466 U.S. at 697.

¶21 There was no deficient performance requiring a remand for a hearing because a reasonable lawyer's actions are viewed under the circumstances as they existed at the time of trial. *See* ***State v. Koller***, 2001 WI App 253, ¶8, 248 Wis. 2d 259, 270, 635 N.W.2d 838, 844–845 ("'Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight.'") (citation omitted). At the time of Perry's trial, the pattern instruction was as the trial court read it to the jury, and Perry concedes that "defense counsel could not be faulted for not recognizing the error" in the pattern instruction.

By the Court.—Judgment and order affirmed.

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