COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3362-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OSCAR ANDERSON, JR.

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Oscar R. Anderson, Jr., appeals from the judgment of conviction, following a jury trial, for first-degree intentional homicide. He argues that the trial court erred by not enforcing an alleged agreement he had with a detective who, Anderson claims, promised him that if he confessed he would be charged with second-degree intentional homicide.

Alternatively, Anderson argues that the trial court should have suppressed his statement because it was coerced by the detective's alleged promise of a lesser charge. Anderson also contends that the trial court erred in: (1) admitting other-acts evidence; (2) refusing to submit the lesser-included instruction on second-degree intentional homicide; (3) refusing to submit the lesser-included instruction on second-degree reckless homicide; and (4) declining to instruct the jury on self-defense. We affirm.

I. BACKGROUND

On the evening of November 30, 1995, Anderson and his live-in girlfriend, Mica Beckom, quarreled over their relationship. According to Anderson, at some point during their argument, Beckom threatened him with a butcher knife. Anderson claimed that in response to her threat, he tried to seize the knife. In the struggle that followed, Anderson gained control of the knife and stabbed Beckom more than twenty-five times.

Trial evidence established that before he fled the scene, Anderson bathed, dressed, and telephoned Beckom's employer to inform her that she (Beckom) would not report to work that morning because she had to go to the hospital. On December 4, 1995, Beckom's body was discovered on the bedroom floor of her apartment.

Anderson was arrested on December 20, 1995, and was charged with first-degree intentional homicide. Following a four-day trial, the jury convicted Anderson. On May 21, 1996, Anderson was sentenced to life imprisonment with a parole eligibility date of September 5, 2036.

II. ANALYSIS

Anderson first argues that the trial court erred by not enforcing his alleged agreement with the detective who interrogated him following his arrest. Anderson claims that City of Milwaukee Police Detective Ricky Burems told him that if he gave a statement he would be charged with second-degree intentional homicide, not first-degree intentional homicide. In the alternative, he argues that the trial court should have suppressed his statement because it was given under the mistaken impression that a plea agreement had been made and, therefore, the statement was involuntary. Neither argument has any merit.

At the motion to suppress, Detective Burems testified that after he read Anderson his rights and informed him of the charges, he told him that he did not need to make a statement because there was already sufficient evidence against him. Detective Burems denied ever having told Anderson that if he were to make a statement, he (Burems) would or could reduce the charges. Detective Burems testified that he merely encouraged Anderson to tell his version of the events that preceded the stabbing.

By contrast, Anderson testified that Detective Burems never read him his ***Miranda***[1] rights. He also testified that Detective Burems told him that if he gave a statement, the charges would be reduced and the friends with whom he had been arrested would be released.

At the conclusion of the hearing, the trial court stated:

> I find that the detective did use certain fairly standard techniques for encouraging the defendant to make a

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> statement. These included attempting to build a rapport with the defendant. . . .
>
> At some point the detective encouraged the defendant to take responsibility for what he [had] done. At some point he indicated to him he didn't need to make a statement. I believe that this was done in the context of conveying to the defendant that they had a strong case against him and didn't really need more evidence against him, and primarily included indicating that the defendant—that he was charged with first degree intentional homicide. And that if he were to make a statement, it might result in the case being resolved on some lesser charge. . . .
>
> I find that no specific promises were made. I'm finding that the defendant was not given any specific promise to the effect that some particular charge would result if he cooperated. . . . And to the extent that there may have been evidence of some other particular promises, I'm finding that no specific promises were made.

On appeal, Anderson has not challenged these findings. Consequently, we are bound by them. *See* ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989) (appellate court bound by reasonable findings of trial court); *see also* § 805.17(2), STATS. Therefore, even if specific performance were an appropriate remedy to enforce any promise made by a police detective to obtain a statement, Anderson would not be entitled to the remedy because the trial court explicitly found that no promises were made to him and because Anderson has failed to show that these findings were clearly erroneous.

In the alternative, Anderson argues that the trial court erred by failing to suppress his statement on the ground that it was involuntary. Anderson claims his statement was involuntary because he mistakenly believed that, in exchange for his statement, he would be charged with a lesser-degree of homicide. We disagree.

"In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). While evidence that police are taking subtle advantage of a person's personal characteristics may be a form of coercion, *see* ***State v. Xiong***, 178 Wis.2d 525, 534, 504 N.W.2d 428, 431 (Ct. App. 1993), "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***Clappes***, 136 Wis.2d at 239, 401 N.W.2d at 767. On review, a trial court's findings of evidentiary or historical fact will not be overturned unless they are clearly erroneous. *See* ***State v. Owens***, 148 Wis.2d 922, 927, 436 N.W.2d 869, 871 (1989). We independently review the facts as found to determine whether any constitutional principles have been offended. *See* ***Clappes***, 136 Wis.2d at 235, 401 N.W.2d at 765.

Here, the trial court found Detective Burem's testimony more credible than Anderson's and determined that no promises were made by the detective. The court also found that Detective Burem's tactics did not consititute impermissible police conduct, but rather, were merely techniques to encourage Anderson to make a statement. The trial court noted:

> There's some point in which deception or trickery or other police pressure rises to the level which renders a confession involuntary.
>
> … I'm satisfied that this interview, while it involved a certain amount of use of techniques here, does not come close to anything that constitutes improper police conduct or pressure that shocks the public consc[ience] about what's appropriate or not appropriate.

We agree. Detective Burem's techniques were well within the ambit of acceptable police conduct. *See* ***United States v. Rutledge***, 900 F.2d 1127, 1130-31 (7th Cir. 1990) (police allowed to play on suspect's ignorance, fears and anxieties; "they

just are not allowed to magnify those fears … to the point where rational decision becomes impossible."); *see also* ***State v. Deets***, 187 Wis.2d 630, 636-37, 523 N.W.2d 180, 182-83 (Ct. App. 1994) ("[a]n officer telling a defendant that his cooperation would be to his benefit is not coercive conduct"). Accordingly, we conclude that Anderson's statement was voluntary.

Anderson next claims that the trial court erred in allowing testimony concerning other-acts evidence regarding an incident in which Beckom's cousin witnessed him fighting with her (Beckom). We disagree.

Questions regarding the admissibility of evidence are addressed to the discretion of the trial court, and the trial court's ruling will be sustained on appeal if it has "a reasonable basis" in the record. *See* ***State v. Kuntz***, 160 Wis.2d 722, 745-746, 467 N.W.2d 531, 540 (1991). Other-acts evidence is admissible under RULE 904.04(2), STATS., if used for a purpose other than to show propensity. *See* ***id.***; *see also* ***State v. Bedker***, 149 Wis.2d 257, 264-265, 440 N.W.2d 802, 804 (Ct. App. 1989) (listing of grounds for admission under RULE 904.04(2) not exclusive). Application of RULE 904.04(2) requires a two-step test: (1) whether the evidence is admissible under RULE 904.04(2); and, if so, (2) whether the probative value of this evidence is substantially outweighed by unfair prejudice. *See* RULE 904.03, STATS.; *see also* ***State v. Johnson***, 121 Wis.2d 237, 252-254, 358 N.W.2d 824, 831-832 (Ct. App. 1984). Implicit in this analysis is the requirement that the evidence is relevant to an issue in the case. *See* ***State v. C.V.C.***, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). Our review of this issue is governed by the erroneous-exercise-of-discretion standard. *See* ***State v. Jones***, 151 Wis.2d 488, 492-493, 444 N.W.2d 760, 792 (Ct. App. 1989).

At trial, Wanda Nichols testified that approximately two months before the murder, she witnessed Beckon running from her apartment, exclaiming that Anderson had kicked her and hit her in the face. According to Nichols, she and Beckom then fled the building, with Anderson pursuing them. She and Beckom then got into Beckom's van, and as they were driving away, Anderson kicked the van and twisted its mirror.

The trial court admitted this evidence on the ground that it was admissible to give the jury "some idea of the kind of relationship that existed [between the victim and Anderson.]" The court also found that the evidence related to the issues of motive and intent. The court noted:

> I recognize that a crime such as this can occur in the context of any relationship that is a continuously violent one, a continuously argumentative one; perhaps even in the context of any relationship that was totally nonviolent and totally loving and noncontentious up until the moment of the crime. But I think the jury is entitled to some idea of the kind of relationship that existed…. I do not see this as evidence that's offered simply to show that the person had a certain character. I think it does go to some degree to issues of motive and intent.

We agree. Evidence that Anderson committed intentional acts of violence against the victim was relevant not only to Anderson's intent but also to his relationship with Beckom. *See* ***State v. Shillcutt***, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Additionally, the evidence was probative of whether his actions at the time of the murder were intentional or merely reckless, *see* ***State v. Kuta***, 68 Wis.2d 641, 644-45, 229 N.W.2d 580, 582 (1975) (evidence of defendant's threat to victim relevant to whether defendant acted with a depraved mind two months later), and to refute his claim of self-defense, *see* ***State v. Fishnick***, 127 Wis.2d 247, 254, 378 N.W.2d 272, 276 (1985) (other-acts evidence admissible where defendant claims self-

defense and other-acts evidence shows defendant was aggressor in prior altercation with victim).

Finally, Anderson claims that the trial court erred in failing to instruct the jury on second-degree intentional homicide/unnecessary defensive force and second-degree intentional homicide/adequate provocation. We are not persuaded.

Whether the evidence at trial supports submission of a lesser-included offense presents a question of law, which we review *de novo*. *See* ***State v. Kramar***, 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). In determining the appropriateness of submitting a lesser-included offense, the reviewing court must apply a two-step test. *See* ***State v. Morgan***, 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App. 1995). First, the court must determine whether the lesser offense is, as a matter of law, a lesser-included offense of the crime charged. *See* ***id.*** at 434, 536 N.W.2d at 442. If it is, then the court must determine whether the instruction is justified. *See* ***id.*** This requires the court to decide whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. *See* ***id.*** Further, the reviewing court must view all the relevant evidence in a light most favorable to the defendant and the requested instruction. *See* ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988). A verdict on a lesser offense should not be submitted, however, simply because a jury could convict the defendant of the lesser crime. *See* ***Hayzes v. State***, 64 Wis.2d 189, 195, 218 N.W.2d 717, 721 (1974). An alternative verdict should be submitted only if there is some basis in the evidence for a reasonable doubt as to an element necessary for conviction of the charged offense. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

Second-degree intentional homicide is a lesser-included offense of first-degree intentional homicide because it is a less serious form of criminal homicide. *See* § 939.66(2), STATS. Therefore, we need only address whether there was a reasonable basis in the evidence for the jury to acquit Anderson of first-degree intentional homicide and convict him of second-degree intentional homicide. *See* ***State v. Muentner***, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). Further, under Wisconsin law, the trial court need not instruct on a lesser-included offense unless one of the parties requests it. *See* ***State v. Meyers***, 158 Wis.2d 356, 364, 461 N.W.2d 777, 780 (1990). Therefore, no error occurs if neither party requested that the trial court so instruct. *See* ***id.*** at 364, 461 N.W.2d at 781.

Here, the record established that defense counsel never requested an instruction on second-degree intentional homicide/adequate provocation, either in the proposed jury instructions submitted to the trial court or during the instructions conference at the end of the trial. Rather, he only requested second-degree intentional homicide/unnecessary defensive force, first-degree reckless homicide and second-degree reckless homicide.[2] Consequently, we need not address his claim concerning the trial court error regarding second-degree intentional homicide/adequate provocation. *See* ***Myers***, 158 Wis.2d at 364, 461 N.W.2d at 780-81 (no error when a trial court fails to instruct *sua sponte* on a lesser-included offense).

Regarding Anderson's claim that the trial court erred in refusing to submit an instruction on second-degree intentional homicide/unnecessary

[2] The trial court instructed the jury on first-degree intentional homicide and first-degree reckless homicide.

defensive force, we conclude that the trial court correctly denied this request. To submit an instruction on this offense, the trial court would have had to conclude that there were grounds in the evidence to show that Anderson held three different beliefs: (1) a reasonable belief that he was preventing or terminating an unlawful interference with his person; (2) that he was in imminent danger of death or great bodily harm; and (3) that the use of force was necessary to defend against that danger. *See* WIS JI—CRIMINAL 1014.

The record refutes Anderson's claim that a jury could have found that he held any of these beliefs. Dr. John Teggatz, Deputy Chief Medical Examiner for Milwaukee County, testified that Beckom died of "exsanguination or loss of blood due to these multiple stab wounds and cutting wounds." He told the jury that she had been stabbed over twenty-five times and that, although a number of her wounds were superficial, three were deep wounds, puncturing her liver and lungs. He also testified that Beckom's body exhibited numerous defensive wounds to her arms and hands, indicating that she was the victim, not the attacker. Evidence also showed that Anderson had suffered only minor cuts on his hands during the incident, and abrasions which had healed by the time he was arrested.

Testimony also established that during the early hours of December 1, 1995, two tenants in Beckom's building heard Beckom's cries for help. Starr Fecteau testifed that, on at least two occasions that morning, she heard a woman "scream for her life" and call out "[p]lease don't kill me." Miranda Hendricks testified that she heard a woman and a man quarreling that morning. Hendricks testifed that she heard the woman yell, "Stop, you're trying to kill me" to which the man replied, "Bitch, I'll kill you."

Trial evidence also included Anderson's testimony. Anderson testified that Beckom entered the bedroom with a knife at her side; that when he saw the knife, he asked her what she was going to do with it; that Beckom responded by telling him to leave her alone. Anderson testified that he then asked Beckom whether she intended to cut him. Beckom then raised the knife, "like she was fit'n to stab me," at which time he grabbed her and the two began to struggle over the knife. He testified that he had no recollection of what occurred after he gained control of the knife.

Accepting Anderson's testimony in the light most favorable to the submission of the instruction, we nevertheless conclude that no evidence exists which would require the second-degree intentional homicide/unnecessary defensive force instruction. It is undisputed that Anderson killed Beckom by stabbing her at least twenty-five times including at least three deep stabs to vital body parts. While Anderson contends that his actions were in self-defense, the evidence provides no reasonable basis for concluding that he reasonably believed he had to stab Beckom repeatedly to protect himself. Anderson never claimed that he feared Beckom, only that he was mad at her. Moreover, Anderson admitted he was the aggressor. When Beckom told him to leave her alone, he failed to heed her warning. Instead of leaving the scene, Anderson antagonized Beckom, which resulted in their struggle for control of the knife. Further, no evidence supports a reasonable belief that once Anderson wrested the knife out of Beckom's hands he held the belief that his life was in danger. Nor was there evidence that, once he gained control, Anderson actually or reasonably believed there was an unlawful interference with his person or that the force used against the victim was

necessary. Accordingly, we conclude that the trial court did not err by not giving the second-degree intentional homicide/imperfect self-defense instruction.[3]

By the Court.—Judgment affirmed.

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

[3] For the same reasons an instruction on imperfect self-defense was not warranted, we conclude that an instruction on perfect self-defense was not required. *See* ***State v. Truax***, 151 Wis.2d 354, 360-64, 444 N.W.2d 432, 436-37 (Ct. App. 1989). No reasonable ground in the evidence exists on which the jury could have found that Anderson reasonably believed that the force he used against Beckom was necessary to prevent death or great bodily harm to himself.