COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3657-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY BLACKWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON and JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. Tony Blackwell appeals from the judgment of conviction, following a jury trial, for second-degree intentional homicide and attempt first-degree intentional homicide. He also appeals from an order denying his motion for post-conviction relief. Blackwell claims that the trial court: (1)

erred in failing to instruct the jury on lesser-included offenses, and (2) erroneously exercised sentencing discretion. We affirm.

Blackwell was convicted of stabbing his roommate, Michael Boris, to death, and stabbing and bludgeoning his other roommate, Kevin Vine, almost killing him. With respect to the first-degree intentional homicide count, the trial court instructed the jury on the lesser-included offense of second-degree intentional homicide but denied Blackwell's request to also instruct on the lesser-included offenses of first-degree and second-degree reckless homicide.

Blackwell's theory of defense was self-defense. He concedes that he "present[ed] wholly exculpatory testimony as to the charged offense but request[ed] a lesser included offense instruction which is directly contrary to [his] version of the facts." He argues, however:

> [T]he jury in this case could have rejected his claim that he was acting in self-defense, but could have concluded either that the knife was not under his direct and conscious control at the time that he and Michael Boris were falling down the stairs, or, contrariwise, that his actions in stabbing Michael Boris, although intentional in nature, were done with the intent to get the victim off of him, not to kill him.

Thus, Blackwell contends, under ***State v. Wilson***, 149 Wis.2d 878, 440 N.W.2d 534 (1989), the trial court should have instructed on first-degree and second-degree reckless homicide. We disagree.

In ***Wilson***, the supreme court reiterated the *de novo* standard of reviewing the denial of a lesser-included instruction, *see* ***id.*** at 898, 440 N.W.2d at 541, and then elaborated on the application of that standard to essentially the same issue Blackwell presents:

> A circuit court has the duty to accurately give to the jury the law of whatever degree of felonious homicide the

> evidence tends to prove and no other. It is error for a court to refuse to instruct on an issue which is raised by the evidence or to give an instruction on an issue which finds no support in the evidence. The submission of a lesser-included offense instruction is proper *only* when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense.
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> ….
>
> A special situation arises … where the defendant presents wholly exculpatory testimony as to the charged offense but requests a lesser-included offense instruction which is directly contrary to the defendant's version of the facts. In such a situation, we have concluded that in viewing the evidence in the most favorable light it will reasonably admit from the standpoint of the accused, we must take into account the fact that the jury could reasonably disbelieve the defendant's version of the facts. Consequently, we have held that a defendant or the state may request and receive a lesser-included offense instruction, even when the defendant has given exculpatory testimony, if a reasonable but different view of the record, the evidence, and any testimony other than part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge.

Id. at 898-900, 440 N.W.2d at 541-42 (citations omitted). Thus, consistent with ***Wilson***, we must determine whether Blackwell was entitled to the reckless homicide instructions by evaluating whether a reasonable view of the evidence, excluding the wholly exculpatory testimony he offered, would have supported acquittal on the greater offense and conviction on the lesser. *See* ***id*** at 900-01, 440 N.W.2d at 542-43. We conclude that it would not.

The evidence included the testimony of Vine that he awoke to hear fighting and see Blackwell and Boris after they had tumbled down the stairs to the landing. Vine testified that Blackwell then said he was going to kill him (Vine), attacked him (Vine) with a knife, and repeatedly stabbed him and bludgeoned him with a bat, splitting his head and breaking his arm. The evidence also included testimony from Dr. John Teggatz, Deputy Chief Medical Examiner for Milwaukee

County, who testified that Boris had sustained ten stab wounds, including four deep ones that perforated the lungs and heart, and other "defensive" cuts to the hand. The evidence also included Blackwell's testimony, excluding those portions that were wholly exculpatory, confirming that he had stabbed Boris. Finally, the evidence established that Blackwell was apprehended about two months later in Minneapolis where he was using a false identity.

Denying the request for the reckless homicide instructions, the trial court stated "that all of the evidence points to intentional conduct." The trial court was correct. It is undisputed that Blackwell killed Boris by stabbing him at least ten times and that many of the stabs were deep and to vital areas of the body. *See* ***State v. Kramar***, 149 Wis.2d 767, 793, 440 N.W.2d 317, 328 (1989) (intent to kill may be inferred from nature of victim's wounds).[1] Blackwell's contention that the jury could have rejected his account and instead concluded that the "knife was not under his direct and conscious control" or that "his actions in stabbing Michael Boris, although intentional in nature, were done with the intent to get the victim off of him" is entirely speculative and inconsistent with the physical evidence. Thus, while Blackwell's testimony could have provided the jury a basis for accepting his self-defense theory, the balance of the evidence provided absolutely no reasonable basis for concluding that Blackwell lacked intent. Thus, the trial court's denial of the reckless homicide instructions was appropriate.[2]

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[1] Although ***State v. Kramar***, 149 Wis.2d 767, 440 N.W.2d 317 (1989), dealt with a requested instruction on second-degree murder under § 940.02 STATS. (1985-86), the Judicial Council Note to the 1988 revision of that statute indicates that first-degree reckless homicide is analogous to the prior offense of second-degree murder.

[2] Our conclusion that the trial court correctly denied the instruction on first-degree reckless homicide obviates the need to further examine the denial of second-degree reckless homicide. *See* ***State v. Truax***, 151 Wis.2d 354, 363-65, 444 N.W.2d 432, 436-37 (Ct. App. 1989).

(continued)

Blackwell also argues that the trial court erroneously exercised discretion in sentencing him to consecutive forty-year sentences. He contends:

> [T]he sentence … improperly reflected the trial court judge's dissatisfaction with the jury's verdict; improperly took into account, as an aggravating factor supporting the imposition of a more severe sentence, the jury's alleged "finding" that [he] had exercised unnecessary defensive force; improperly took into account an attempt by two of the jurors to impeach their own verdict; and was based upon an impermissible consideration of [his] lack of remorse for his actions.

In sentencing, a trial court must consider the gravity of the offense, the character of the offender, and the protection of the community. *See* ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971). Additionally, the court may consider numerous other factors, including a defendant's remorse, *see* ***Harris v. State***, 75 Wis.2d 513, 519, 250 N.W.2d 7, 11 (1977), and give weight to each factor as it deems appropriate, *see* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). In this case, we are satisfied that the trial court considered the appropriate criteria and lawfully exercised discretion in sentencing Blackwell.

The trial court emphasized the gravity of the offenses, referring to Blackwell's "rage" and "brutality," the fatal consequences to one victim, and the near-fatal consequences to the other. The trial court considered that Blackwell's criminal record was "not the worst," but observed that he had "mediocre compliance on parole at best." The court concluded that his "extreme danger" to

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Explicitly, Blackwell only challenges the denial of the lesser-included offense instructions on the homicide count. Included in his brief, however, are references to the attempt homicide count and the trial court's denial of a lesser-included instruction on endangering safety by conduct regardless of life. If Blackwell is also challenging that ruling, our analysis would be similar. Vine's testimony, together with the physical evidence of his very substantial injuries, would preclude a reasonable jury from concluding that the evidence did not establish intent.

the community necessitated the longest possible sentences. Although Blackwell said he was sorry, the trial court reasonably observed that Blackwell had demonstrated "no acceptance of responsibility" or "acknowledgment and understanding of the seriousness of the offense[s] and the nature and depth of [his] problems such as the drug abuse."

The court's conclusions were sound. Both the trial evidence and the sentencing statements conveyed the brutality of Blackwell's crimes, the serious problems in his character, the danger he continued to present, and the devastating consequences for the victims and their families. The court commented eloquently on the tragic death of Mr. Boris and the permanent injuries suffered by Mr. Vine. The court's perception that Blackwell failed to understand and accept responsibility was confirmed by Blackwell's own words to the court. Together with various statements of sorrow and regret, he offered numerous self-excusing comments and even declared, "I feel I was just as much a victim in this. I think I used poor judgment in how to handle the situation, but I do feel victimized in this also because I didn't ask this to happen."

The court acknowledged that "[t]he jury found self-defense" and "accept[ed] the verdict of the jury." The court understandably commented, however, that it could not "ignore the nature and seriousness of the injuries that were sustained because [the jury] found that the force used was excessive, was unreasonable and it was not necessary to take the life to prevent whatever perceived danger to [Blackwell] that morning." The court mentioned that "[t]here's evidence about a compromised verdict" based on information from the prosecutor that two jurors had advised her that a single juror had held-out against finding Blackwell guilty of first-degree intentional homicide. Blackwell offers no authority, however, to establish any impropriety in the trial court's mere mention

of "a compromised verdict." Accordingly, we conclude that the trial court correctly exercised discretion in sentencing Blackwell.

By the Court.—Judgment and order affirmed.

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