COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0213-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN SPINKS,

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. Kevin Spinks appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional homicide while armed, party to a crime, contrary to §§ 940.01(1), 939.63 and 939.05, STATS., and after he pleaded guilty to armed robbery, with a concealed identity, party to a crime, contrary to §§ 943.32(1)(a), 939.641, and 939.05,

STATS.[1] Spinks is appealing only his conviction for first-degree intentional homicide. Spinks claims that the trial court erred by: (1) denying his motion for judgment notwithstanding the verdict because the evidence was insufficient to prove him guilty of first-degree intentional homicide; (2) admitting other-acts evidence of his involvement in another shooting; (3) denying his request for jury instructions on the privilege of self-defense, second-degree intentional homicide based on imperfect self-defense, and the lesser-included offense of second-degree reckless homicide; and (4) granting the State's request for a conspiracy instruction. Spinks also claims that the trial court erroneously exercised its discretion by setting his parole eligibility date at July 7, 2029. We disagree with Spinks's claims and affirm the judgment.

I. BACKGROUND.

This case arises from a shooting which took place in the City of Milwaukee on September 23, 1995. In order to purchase some marijuana, Spinks and two of his friends, Larry Johnson and Lonnie Whitaker, drove to a house at 2555 North 28th Street. The three men parked the car in front of the house and remained inside the vehicle. Corey McDaniels came out of the house, walked to the car and sold some marijuana to Whitaker. Whitaker and McDaniels began to argue about the quantity of the sale and some people from inside the house stepped outside and onto the porch. One of the people on the porch was Keith Sewell, who was considered to be McDaniels's stepfather. As the argument between

[1] The judgment of conviction, while stating that the court found Spinks guilty of armed robbery, fails to list § 943.32(1)(a) in the "WIS STATUE(S) VIOLATED" column. This appears to be an oversight and, on remittitur, the clerk of circuit court shall enter an amended judgment.

McDaniels and Whitaker escalated, Sewell left the porch and approached the car. Sewell then opened the front passenger door and slapped Spinks in the face.

After being slapped, Spinks yelled something to the effect of "[k]ill that motherfucker, kill that nigger." Johnson and Spinks then exited the car, and Spinks again said "[k]ill him, let's kill him," or something similar. Moments later, Sewell was shot. Witnesses gave differing accounts at trial as to who exactly shot Sewell. One witness testified that Spinks shot at Sewell, while other witnesses testified that Whitaker or Johnson did the shooting. Sewell received gunshot wounds to his wrist, thigh and abdomen, and the abdominal wound caused him to bleed to death.

Spinks was arrested and a criminal complaint was filed charging him with first-degree intentional homicide while armed, party to a crime, and with an armed robbery which occurred several weeks after the shooting incident. Spinks pleaded not guilty to both charges and was tried on the homicide charge. At trial, the State introduced evidence of another shooting in the City of Milwaukee which Spinks was involved in only nine days earlier, on September 14, 1995. Roy Lawson testified that on that evening he, Derrick Maiden and Marcus Carter went to a house to sell drugs. As the men were leaving, two young men, one of whom was identified as Spinks, challenged the right of Maiden and Lawson to be walking in that neighborhood. Words were exchanged and then Spinks, and possibly his companion as well, began firing at Lawson, Carter and Maiden. Lawson testified at trial that he saw Spinks fire at him, and that he was shot in the stomach area. Carter also testified that he saw fire flash from the muzzle of Spinks's gun and that he was shot in the leg.

The jury convicted Spinks of first-degree intentional homicide while armed, party to a crime. Spinks then pleaded guilty to the armed robbery charge and was sentenced. Spinks now appeals.

II. ANALYSIS.

A. Sufficiency of the evidence.

Spinks claims that the trial court erred by denying his motion for judgment notwithstanding the verdict because, in Spinks's view, the evidence was insufficient to prove him guilty of first-degree intentional homicide, party to a crime. When reviewing the sufficiency of the evidence, we may only reverse if the evidence viewed most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). In this case, the evidence was sufficient to support Spinks's conviction.

The jury convicted Spinks of first-degree intentional homicide while armed, party to a crime. The essential elements of first-degree intentional homicide are: (1) causing the death of another person; and (2) doing so with the intent to kill that person. *See* § 940.01(1), STATS. A person is a party to a crime if he or she directly commits the crime, intentionally aids and abets the commission of the crime, or is a party to a conspiracy to commit the crime. *See* § 939.05(2), STATS. Under the conspiracy theory of § 939.05(2)(c), STATS., a person is liable for the crime of another if the parties enter into an agreement to commit a particular crime. *See* ***State v. Nutley***, 24 Wis.2d 527, 555, 129 N.W.2d 155, 167 (1964), *overruled on other grounds*, ***State v. Stevens***, 26 Wis.2d 451, 463-64, 132 N.W.2d 502, 509 (1965). "The fact of agreement imposes liability for the

substantive offense on all conspirators when the crime is consummated by a single perpetrator." ***Nutley***, 24 Wis.2d at 555, 129 N.W.2d at 167. Thus, a jury could convict Spinks of first-degree intentional homicide, party to a crime, if it found beyond a reasonable doubt that Spinks intended to kill Sewell, and entered into an agreement to kill Sewell with another person who caused his death.

Spinks admits that after Sewell slapped him he said, "[k]ill that motherfucker," and that following that comment, someone took out a gun and started shooting. Even so, Spinks argues that it is an "unreasonable stretch" to infer a conspiracy from these facts, because in Spinks's view, there was "no evidence that he intended for anyone to act on his words, nor any evidence that he actually wanted Sewell dead." Spinks is wrong. The admission by Spinks that he said what he did is sufficient evidence for the jury to conclude he intended Sewell to be killed. A jury acting reasonably could choose to disbelieve Spinks's claim that his words were only "rhetorical or angry puffing," as he calls them, and find that he did intend one of his companions to kill Sewell. This is especially true given the fact that one witness, Ronald McDaniels, testified that Spinks actually said, "[s]hoot that mother fucker. Kill that big mother fucker. Shoot him. Kill him, man," and "[s]hoot that nigger, kill him." Also, Erica McDaniels testified that Spinks said, "[f]olks, this nigger hit me. On the 'G,' we're going to kill this nigger." Spinks does not claim that this testimony was inherently or patently incredible. The jury had a right to rely on it, and could reasonably conclude that Spinks intended that Sewell be killed.

Spinks also argues that there was no conspiracy because no conspiratorial conference took place inside the car. Spinks is incorrect because no conspiratorial conference was necessary. All that was needed was a "tacit understanding of a shared goal" between Spinks and his companions. *See* ***State v.***

Hecht, 116 Wis.2d 605, 625, 342 N.W.2d 721, 732 (1984). The fact that either Spinks or one of his companions shot Sewell after Spinks urged someone to kill Sewell is sufficient evidence to prove a tacit conspiracy. The shooter, in effect, voiced his agreement with Sewell's proposal by firing his gun. Thus, the evidence was sufficient to support Spinks's conviction because: (1) there was sufficient evidence that Spinks intended Sewell to be killed; and (2) there was sufficient evidence to conclude that whoever intentionally shot and killed Sewell had tacitly agreed to do so with Spinks.

B. Other-acts evidence.

Spinks also claims that the trial court erred by admitting other-acts evidence that he was involved in a separate earlier shooting. We disagree.

In reviewing evidentiary issues, the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). If a reasonable basis exists for the trial court's determination, it will be upheld. ***Id.*** The admissibility of evidence of prior bad acts is controlled by a two prong test. ***State v. Kuntz***, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must find that the evidence is admissible under one of the RULE 904.04(2), STATS., exceptions.[2] ***Id.*** If the trial court finds that the evidence is admissible

[2] RULE 904.04(2), STATS., reads:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when

(continued)

under RULE 904.04(2), then it must consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. ***Id.***; RULE 904.03, STATS. As with all evidence, other-acts evidence must also be relevant to be admissible. ***Id.***; RULE 904.02, STATS.

The trial court concluded that the other-acts evidence of Spinks's involvement in a prior shooting was admissible to prove identity, and that its probative value was not substantially outweighed by the danger of unfair prejudice. We agree.[3]

To be admissible for the purpose of identity, the other-acts evidence should have such a concurrence of common features and so many points of similarity with the crime charged that it "can reasonably be said that the other acts and the present act constitute the imprint of the defendant." ***State v. Fishnick***, 127 Wis.2d 247, 263-64, 378 N.W.2d 272, 281 (1985). The threshold measure for similarity with regard to identity is nearness of time, place, and circumstance of the other act to the crime alleged. ***Id.*** at 264, n.7, 378 N.W.2d 272, 281 n.7. Whether there is a concurrence of common features is generally left to the sound discretion of the trial court. ***Id.***

In this case, the State identifies three points of similarity between the prior shooting and the instant crime: (1) both shootings were committed with the

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> offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] The trial court also found that the evidence was admissible to prove intent. Our conclusion that the evidence was admissible to prove identity makes an analysis of whether the evidence was admissible to prove intent unnecessary. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if decision on one point disposes of appeal, appellate court need not decide other issues raised).

same gun; (2) witnesses testified that Spinks fired a gun in both shootings; and (3) a victim in both shootings was shot in the abdomen. We agree that these similarities are sufficient to allow the trial court to conclude that the evidence was admissible to prove identity. In addition, both shootings took place in the City of Milwaukee, within only nine days of each other. Therefore, the prior shooting was clearly near enough in time and place to pass the "threshold measure" test.

With regard to the second prong of the test, Spinks argues that the probative value of the evidence was substantially outweighed by the danger that the jury would convict him because of the image created by the prior shooting that he was a "lawless, gun-toting gangster." While we agree that evidence that Spinks had shot another individual, only a week earlier, in the abdomen had the potential to be unfairly prejudicial, we cannot say that the danger of unfair prejudice *substantially* outweighed the significant probative value of the evidence. The trial court's determination that the evidence should be admitted under RULE 904.03, STATS., had a reasonable basis, and therefore, it will be upheld.

C. Spinks's requests for self-defense, imperfect self-defense and second-degree reckless homicide instructions.

Spinks claims that the trial court erred by denying his requests for instructions on self-defense, second-degree intentional homicide based on imperfect self-defense, and the lesser-included offense of second-degree reckless homicide. We disagree.

A trial court is justified in declining to give a requested instruction in a criminal case if it is not reasonably required by the evidence. ***State v. Hilleshiem***, 172 Wis.2d 1, 9-10, 492 N.W.2d 381, 384 (Ct. App. 1992). In determining whether the instruction was reasonably required, we view the

evidence in the light most favorable to the accused. *See* ***id.*** The privilege of self-defense applies when the defendant reasonably believed that: (1) he was preventing or terminating an unlawful interference with his person; (2) force or threat of force was necessary to prevent or terminate the interference; and (3) the actual amount of force used was necessary to prevent or terminate the interference. *See* ***State v. Camacho***, 176 Wis.2d 860, 869, 501 N.W.2d 380, 383 (1993). Additionally, a defendant may not "intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself." Section 939.48(1), STATS.

In this case, viewing the evidence in the light most favorable to Spinks, a self-defense instruction was not reasonably required. Spinks, as a party to a crime, used deadly force to kill Sewell. In order to justify a self-defense instruction, Spinks must have reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself. Spinks could not have reasonably believed, however, that he was in danger of imminent death or great bodily harm. The only evidence in his favor was that: (1) he had been slapped; (2) a crowd had gathered; and (3) he feared some "drama" might occur. There was no evidence that Sewell had a weapon or in any way posed a serious threat to Spinks. These facts could not support a reasonable belief that deadly force was necessary. Therefore, the trial court correctly denied Spinks's request for a self-defense instruction.

The trial court also properly denied Spinks's request for a second-degree intentional homicide instruction on an imperfect self-defense theory. The evidence reasonably requires a second-degree intentional homicide instruction based on imperfect self-defense when the defendant: (1) actually believed that he

or she was in imminent danger of death or great bodily harm; and (2) actually believed that the amount of force used was necessary to defend himself or herself; (3) if either of the defendant's beliefs were unreasonable. *See* § 940.01(2)(b), STATS. In this case, an imperfect self-defense instruction was unwarranted because a jury, acting reasonably, could not find that Spinks actually believed he was in imminent danger of death or great bodily harm.

If a defendant's statement that he or she actually believed an imminent threat of death or great bodily harm was present were enough to justify giving an imperfect self-defense instruction, the instruction would always be required whenever the evidence included such a statement by the defendant, and whenever requested. Obviously, then, a defendant must present the trial court with some objective evidence which a jury could reasonably rely on to find that the defendant actually believed that he or she was in imminent danger of death or great bodily harm. In this case, Spinks did tell the police that, before the shooting, he got out of the car in order not to be a "sitting duck." Spinks admitted, however, that he yelled something like "[k]ill the mother fucker," and other witnesses testified that he yelled, "[s]hoot that mother fucker. Kill that big mother fucker. Shoot him. Kill him, man," and "[s]hoot that nigger, kill him." Additionally, at the time that Spinks urged someone to shoot Sewell, Sewell was not armed and had not displayed a weapon. Besides testimony regarding Sewell slapping Spinks, there was no evidence that he was a serious threat to Spinks. Therefore, after considering the objective evidence, the trial court properly determined it would be unreasonable for a jury to conclude that at the time that Spinks urged his companions to shoot Sewell he actually believed that he was "in imminent danger of death or great bodily harm." As a result, the judge's discretionary decision to

deny Spinks's request for an imperfect self-defense instruction must also be upheld.

Spinks also claims that the trial court erred by denying his request for an instruction on the lesser-included offense of second-degree reckless homicide. We disagree.

Whether the evidence at trial permits the giving of a lesser-included instruction is a question of law which we decide de novo. ***State v. Borrell***, 167 Wis.2d 749, 779, 482 N.W.2d 883, 894 (1992). The submission of a lesser-included offense instruction is proper only when there exist reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. ***Id.***

In this case, the trial court did instruct the jury on first-degree reckless homicide but refused to instruct on second-degree reckless homicide. The court did so because it found that the jury could not reasonably find the defendant guilty of second-degree reckless homicide but not guilty of first-degree reckless homicide. We agree with the trial court.

A person is guilty of first-degree reckless homicide when he or she "recklessly causes the death of another human being under circumstances which show utter disregard for human life." Section 940.02(1), STATS. A person is guilty of second-degree reckless homicide if he or she "recklessly causes the death of another human being." Section 940.06, STATS. Thus, the only difference between the two crimes is that second-degree reckless homicide does not require that the defendant act "under circumstances which show utter disregard for human life."

Sewell was shot at least three times at close range. No jury could reasonably conclude that shooting a person three times at close range is not conduct occurring "under circumstances showing an utter disregard for human life." Thus, no jury could reasonably conclude that Spinks's involvement as a party to a crime in the shooting was reckless, but did not occur "under circumstances showing an utter disregard for human life." Therefore, the trial court correctly refused to give the lesser-included instruction of second-degree reckless homicide.

D. State's request for conspiracy instruction.

Spinks also claims that trial court erred by granting the State's request for an instruction on the conspiracy alternative of party to a crime. Spinks is wrong. As stated earlier, no conspiratorial conference was needed. The jury could conclude that by stating, "[k]ill the motherfucker," or some words to that effect, Spinks was proposing that someone kill Sewell. The jury could have also reasonably found that the shooter signaled his acceptance of the proposal by shooting Sewell. Thus, the evidence supported the existence of a tacit conspiracy, and giving the conspiracy instruction was proper. *See* ***Hecht***, 116 Wis.2d at 625, 342 N.W.2d at 732 (express agreement among parties not necessary to prove conspiracy—"tacit understanding of a shared goal" is sufficient).

E. Parole eligibility date.

Finally, Spinks claims that the trial court erred by setting his parole eligibility date at July 7, 2029. Spinks claims that the trial court should have set his parole eligibility date approximately twelve years earlier, at July 30, 2017.

The setting of the parole eligibility date, as part of a trial court's sentencing determination, is a matter within the trial court's discretion. *See* ***Borrell***, 167 Wis.2d at 767, 482 N.W.2d at 889. Our review is limited to determining whether the trial court erroneously exercised its discretion. ***Id.*** at 781, 482 N.W.2d at 895. To obtain relief on appeal, the defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***Id.*** at 782, 482 N.W.2d at 895. The primary factors a court should consider when sentencing a defendant are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Sarabia***, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984). The court may also properly consider the vicious or aggravated nature of the crime; the defendant's past record of criminal offenses; any history of undesirable behavior patterns; the defendant's personality, character and social traits; the results of a presentence investigation; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance and cooperativeness; the defendant's need for rehabilitative control; the right of the public; and the length of pretrial detention. ***State v. Harris***, 119 Wis.2d 612, 623-24, 350 N.W.2d 633, 639 (1984).

Spinks does not dispute that the trial court considered each of the three primary factors. Instead, Spinks contends that the trial court gave inadequate consideration to his age, upbringing and demonstrated remorse. The weight to be given to any one sentencing factor is a determination particularly within the trial court's wide discretion. ***Harris v. State***, 75 Wis.2d 513, 520, 250 N.W.2d 7, 11 (1977). The trial court's decision to set the parole eligibility date ten years later than Spinks would prefer was not unreasonable and will therefore be upheld.

III. CONCLUSION.

In conclusion: (1) the evidence was sufficient to support Spinks's conviction; (2) the trial court properly admitted other-acts evidence of his involvement in a prior shooting; (3) the trial court properly denied Spinks's requests for perfect and imperfect self-defense instructions, and for a second-degree reckless homicide instruction; (4) the trial court properly granted the State's request for a conspiracy instruction; and (5) the trial court properly set Spinks's parole eligibility date. Therefore, we affirm Spinks's judgment of conviction.

By the Court.—Judgment affirmed.

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