COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1433-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEROY K. KUHNKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

DYKMAN, P.J. Leroy Kuhnke appeals from a judgment convicting him of first-degree intentional homicide while using a dangerous weapon, as a repeat offender, contrary to §§ 940.01(1), 939.63 and 939.62, STATS., and an order denying his motion for postconviction relief. Kuhnke argues that: (1) his trial counsel performed ineffectively by failing to move the trial court to strike four

jurors for cause and failing to request an instruction for second-degree homicide, unnecessary force in defense of others; (2) the trial court erroneously refused to give the jury a first-degree reckless homicide instruction; and (3) the trial court erroneously exercised its discretion in sentencing him to life imprisonment without parole. We reject Kuhnke's arguments and affirm.

BACKGROUND

Terry Buskirk and Cynthia Meyer met at a bar on the night of October 5, 1995. They later went to another bar, "On the Rocks," where they met with Leroy Kuhnke. After leaving "On the Rocks," Buskirk drove Meyer and Kuhnke to a party at a private residence, where Kuhnke took a knife from the kitchen sink. Later, during the early morning hours of October 6, Buskirk drove Meyer and Kuhnke to the trailer home where Meyer and Jeffrey McGlin lived. Also living in the trailer at the time were Meyer's daughter, Melissa, and Doreen Anders and her three children.

Meyer stayed in the car, while Kuhnke exited. Kuhnke then went into the trailer, walked down the hallway, went into McGlin's bedroom and turned on the light, and repeatedly stabbed McGlin with the knife he had taken from the party. He then returned to Buskirk's car, and he, Buskirk and Meyer drove away.

Kuhnke was charged, as a repeat offender, with first-degree intentional homicide while using a dangerous weapon. Following a preliminary hearing, Kuhnke was bound over for trial. At the close of evidence, defense counsel requested jury instructions on three lesser-included offenses: second-degree homicide, adequate provocation; perfect defense of others; and first-degree reckless homicide. The trial court denied the request for a lesser-included offense instruction. The jury convicted Kuhnke of first-degree intentional homicide while

using a dangerous weapon, and the court sentenced him to life in prison with no opportunity for parole.

Kuhnke filed a motion for postconviction relief. He requested a new trial because his trial counsel was ineffective for failing to request a jury instruction for second-degree homicide, unnecessary force in defense of others, and for failing to move the trial court to strike four jurors for cause. Kuhnke also requested resentencing on the issue of his parole eligibility. After a hearing, the trial court denied Kuhnke's motion. Kuhnke appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Kuhnke argues that he received ineffective assistance of counsel. First, he argues that his trial counsel performed ineffectively by failing to move the trial court to strike four jurors for cause. Second, he argues that his trial counsel performed ineffectively by failing to request an instruction for second-degree homicide, unnecessary force in defensive of others.

To establish ineffective assistance of counsel, Kuhnke must satisfy a two-pronged test. First, he must show that counsel's performance was deficient. Second, he must show that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If we conclude that the defendant has failed to meet his burden as to either prong, we do not need to address the other. ***Id.*** at 697.

To establish deficient performance, Kuhnke must show that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. With respect to prejudice, the test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Id. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

Whether there has been ineffective assistance of counsel is a mixed question of fact and law. *See* ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). We will not overturn the trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategies unless the findings are clearly erroneous. ***State v. Knight***, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 542 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law that we review *de novo*. ***Id.*** We will address each of Kuhnke's ineffective assistance of counsel arguments in turn.

Juror Bias

Kuhnke argues that his trial counsel performed ineffectively by failing to move the trial court to strike jurors Warren, Boyer, Schroepfer and Cook for cause. Kuhnke contends that each of these four jurors expressed an opinion during voir dire that they could not decide the case fairly on the evidence. Instead of moving the court to strike these jurors for cause, Kuhnke's trial counsel used a peremptory challenge to remove each of the jurors from the panel.

Because Kuhnke used a peremptory challenge to remove each juror in question, he was not deprived of his right to a fair and impartial jury. *See* ***Ross v. Oklahoma***, 487 U.S. 81, 88 (1988). However, he claims that he was still prejudiced by his trial counsel's failure to remove the jurors for cause because he

was deprived of the full use of his peremptory challenges. In support of his argument, he cites ***State v. Ramos***, 211 Wis.2d 12, 564 N.W.2d 328 (1997).

In ***Ramos***, the defendant's trial counsel used a peremptory challenge to strike a juror that the trial court erroneously failed to remove for cause. ***Id.*** at 15-16, 564 N.W.2d at 330. The supreme court held that "Ramos was denied his right to exercise all of the peremptory challenges to which he was entitled as a result of the trial court's error," and concluded that "the use of a peremptory challenge to correct a trial court error is adequate grounds for reversal because it arbitrarily deprives the defendant of a statutorily granted right." ***Id.*** at 23-25, 564 N.W.2d at 333-34. Similarly, Kuhnke argues that his trial counsel, by using a peremptory challenge on each of the four jurors instead of moving the trial court to strike the jurors for cause, deprived him of his full allotment of peremptory challenges.

We conclude that this case is distinguishable from ***Ramos*** because Kuhnke has not shown that any of the four jurors should have been removed for cause. Because Kuhnke has not shown that any of the jurors should have been removed for cause, he was not deprived of his right to exercise all of the peremptory challenges to which he was entitled. Therefore, we do not believe that Kuhnke's defense was prejudiced by his counsel's failure to move the trial court to strike the jurors for cause.

If a juror exhibits any bias or prejudice in a case, the juror should be removed from the panel. *See* ***Ramos***, 211 Wis.2d at 16, 564 N.W.2d at 330; § 805.08(1), STATS. The mere expression of a predetermined opinion as to guilt does not disqualify a juror *per se*, however. ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733 (1979). If a prospective juror can lay aside his or her

opinion and render a verdict based on the evidence, then that person can qualify as an impartial trier of fact. ***Id.*** at 33, 280 N.W.2d at 733-34.

At the postconviction hearing, the trial court stated: "The court is not convinced that the responses of, I believe, the four jurors … are such that they express such bias or equivocation that they could not be fair …." Whether a prospective juror is biased depends heavily upon demeanor evidence and rests within the circuit court's discretion. ***Hammill v. State***, 89 Wis.2d 404, 415-16, 278 N.W.2d 821, 826 (1979). Thus, the trial court's determination that the prospective jurors can be impartial should be reversed only if bias is manifest. *See* ***State v. Louis***, 156 Wis.2d 470, 478-79, 457 N.W.2d 484, 488 (1990). After reviewing the transcript of the voir dire examination, we cannot conclude that any of the four jurors exhibited a manifest bias.

Juror Warren told the court during voir dire that she was a friend of the assistant district attorney who was prosecuting the case. Warren was then questioned as follows:

> THE COURT: Would that affect your ability at all to sit on this case and decide the case fairly and impartially on the evidence presented here in court?
>
> JUROR WARREN: No.
>
> THE COURT: Do you believe you could set that aside and decide the case fairly and impartially on the evidence presented here in court?
>
> JUROR WARREN: No.

Kuhnke argues that juror Warren's answer to the second question shows that Warren could not act as a fair and impartial trier of fact.

We would agree with Kuhnke if we were to look at this answer in isolation. However, when viewing this answer along with Warren's answers to

other questions posed by the court, we believe that Warren probably misunderstood this question when answering it. Before Warren gave the answer in question, she stated that her friendship with the assistant district attorney would not affect her ability to decide the case fairly and impartially on the evidence presented in court. And Warren did not answer in the affirmative when the court asked the jurors if any of them had "a feeling of any bias or prejudice for or against either the State of Wisconsin or the defendant, Leroy Kuhnke, in this case." Warren also did not answer affirmatively when the court asked: "Is there any among you who cannot or will not try this case fairly and impartially on the evidence that is given here in court and under the instructions of the court and render a just and true verdict?"

When looking at all of Warren's answers, it appears that she mistakenly answered "no" when asked whether she could set aside her friendship with the assistant district attorney and decide the case fairly and impartially. Considering the entire voir dire transcript, we conclude that Warren did not exhibit a manifest bias that would have required the trial court to strike her from the jury for cause.

Kuhnke also argues that his trial counsel was ineffective for failing to move the court to strike juror Boyer for cause. Boyer indicated to the court that the victim's cousin had been working for her for about a year. The court then asked, "Do you believe that you can set that aside and decide this case based solely upon the evidence presented here in court?" Boyer answered, "It would be difficult." The court followed: "Do you believe you could do it?" And Boyer responded, "I don't think so, not when I see him every day."

The court later returned to Boyer and again asked her if she would be able to set aside her working relationship with the victim's cousin and "decide the case based solely upon the evidence presented here in court." She answered that "[i]t would be difficult" because she knows another relative of the victim. She was then asked:

> THE COURT: … If you were not satisfied that the state had met its burden of proof in this case, would you have trouble returning a not guilty verdict because you knew that you would have future contact with [the victim's relative]?
>
> JUROR BOYER: I don't think so.

Later during voir dire, defense counsel asked Boyer if her difficulty gets to the extent that she "would be uncomfortable returning a not guilty verdict or a guilty verdict, either way?" Boyer responded, "It might, I guess." Counsel then asked: "But even knowing that now, you can set that aside? It isn't going to affect you when you get back in that courtroom or back in the courtroom?" She responded, "I don't think so."

We conclude that Boyer's answers do not show a manifest bias that would require her exclusion from the jury. Although she initially indicated that she did not think she could set aside her relationship with the victim's family and decide the case solely on the evidence presented in court, she later indicated that she did not think that she would have trouble returning a not guilty verdict if she was not satisfied that the state had met its burden of proof. She also later indicated that she did not think her knowledge of the case would affect her in the courtroom. These later responses rehabilitate her earlier answer that she did not think she could decide the case solely on the evidence presented in court.

Kuhnke also argues that his trial counsel was ineffective for failing to move the court to strike juror Schroepfer for cause. During questioning, Schroepfer indicating that she had talked about the case with someone who knows the victim's family. The court then asked her if she could "set that aside and decide this case based solely upon the evidence presented here in court?" She responded, "I don't know. I have a strong opinion about it."

Schroepfer later responded when the court asked if any the jurors had a bias or prejudice against one of the parties in the case. The exchange went as follows:

> THE COURT: … Is there any among you who has a feeling of any bias or prejudice for or against either the State of Wisconsin or the defendant, Leroy Kuhnke, in this case? Miss Schroepfer, you believe that you have a bias or prejudice against one of the parties in this case?
>
> JUROR SCHROEPFER: Yes.
>
> THE COURT: Do you believe that you can set that aside and decide the case fairly and impartially on the evidence presented here in court?
>
> JUROR SCHROEPFER: Probably.
>
> THE COURT: That you can set it aside?
>
> JUROR SCHROEPFER: I think so.
>
> THE COURT: Okay. Is your bias or prejudice based upon the information that you had received on this case from others?
>
> JUROR SCHROEPFER: Yes.
>
> THE COURT: I know you had indicated previously that you had strong feelings. Do you believe that you can set those aside at all and decide this case based solely upon the evidence presented in this court?
>
> JUROR SCHROEPFER: I think I can.

Defense counsel later asked Schroepfer if she would be affected by her extraneous knowledge of the case. She answered: "I don't think it would – I

can set aside what I – I have a strong opinion but I think I can listen and –" At that point defense counsel continued the general examination of the jury.

We conclude that this juror has not shown a manifest bias. We recognize that Schroepfer only indicated that she "probably" could set aside her extraneous knowledge and decide the case fairly and impartially on the evidence presented in court. But the trial court is not required to remove for cause any juror who does not unequivocally express that he or she is impartial and unbiased. Rather, in order to remove a juror for cause, "[t]he circuit court must be satisfied that it is more probable than not that the juror was biased." ***State v. Louis***, 145 Wis.2d 470, 478, 457 N.W.2d 484, 488 (1990). Because Schroepfer stated that she could probably decide the case fairly and impartially, she did not show a manifest bias that required her removal. [1]

[1] Our conclusion is inconsistent with ***State v. Ferron***, 214 Wis.2d 268, 570 N.W.2d 883 (Ct. App.), *petition for review granted*, 215 Wis.2d 421, ___ N.W.2d ___ (1997). In ***Ferron***, the trial court asked a prospective juror named Metzler "whether he could decide the case solely on the evidence presented and not hold it against the defendant if he did not testify," and Metzler answered, "Probably." ***Id.*** at 275-76, 570 N.W.2d at 887. The court of appeals concluded:

> Metzler's response was not sufficient to establish that he could be indifferent and follow the court's instructions and decide the case based on the evidence. Absent a clarification of Metzler's final response, his answer of "Probably" did not establish he could set his feelings aside and be indifferent…. [W]e hold that his answer showed he was not indifferent as required under the statute…. The trial court erroneously exercised its discretion by failing to follow the directive in § 805.08(1), STATS., to excuse a juror who is not indifferent ….

Id. at 276, 570 N.W.2d at 887.

(continued)

Finally, Kuhnke argues that trial counsel was ineffective for failing to move the court to strike juror Cook for cause. Cook indicated to the court that he was a friend of Lieutenant Kneisler of the Waupaca County Sheriff's Department, a potential witness. Cook was then asked: "Would your knowledge of him affect your ability at all to sit on this case and decide the case fairly and impartially on the evidence presented here in court?" He answered, "Probably not."

Cook also stated that he was a good friend of Detective-Sergeant Schmies of the Waupaca County Sheriff's Department, another potential witness. The court then asked him: "Would that affect your ability at all to sit on this case and decide the case fairly and impartially on the evidence presented here in court?" He responded, "I'm not sure. Probably not." The court followed up on its previous question, asking: "Do you believe that you could set aside your relationship with him and decide this case based solely upon the evidence presented here in court and follow the instructions of the court?" Cook responded "Probably."

Cook also mentioned that he had read something about the case shortly after the crime occurred. The court asked him: "Would what you read then affect your ability at all to sit on this case and decide the case fairly and

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We recognize that we may not overrule, modify or withdraw language from ***Ferron***, a published opinion of the court of appeals. *See* ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997). However, we also may not overrule, modify or withdraw language from ***State v. Louis***, 145 Wis.2d 470, 457 N.W.2d 484 (1990), a supreme court decision. *See* ***Cook***, 208 Wis.2d at 189, 560 N.W.2d at 256. "When a court of appeals decision conflicts with a supreme court opinion, we must follow the supreme court opinion." ***Madison Reprographics, Inc. v. Cook's Reprographics, Inc.***, 203 Wis.2d 226, 238, 552 N.W.2d 440, 446 (Ct. App. 1996). Accordingly, we follow ***Louis***, not ***Ferron***.

impartially based solely upon the evidence presented here in court?" He replied, "Probably not."

Later, upon questioning from defense counsel, Cook stated that by nature people are going to believe people that they know more so than others. Defense counsel then asked him: "Can you set that aside though today? Can you say even though he's my friend or even though he's my acquaintance, his testimony carries no more weight than anybody else's until this is all over?" Cook replied: "Oh, I would say it's human nature. I would try to."

We conclude that Cook has not shown a manifest bias requiring his exclusion from the panel. Cook's answers do not indicate that it is more probable than not that he was biased. Moreover, Cook did not answer in the affirmative when the court asked if any of the jurors had a feeling of any bias or prejudice for or against the State or the defendant or when the court asked if any of the jurors could not try the case fairly and impartially. Because Cook stated that he could probably decide the case fairly and impartially, he did not show a manifest bias.

Kuhnke argues that ***State v. Zurfluh***, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986), and ***State v. Traylor***, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), dictate a different result. In ***Zurfluh***, we concluded that the trial court erred in failing to remove a juror for cause. In ***Traylor***, we concluded that trial counsel performed deficiently by failing to move the court to strike one juror for cause and failing to ask appropriate follow-up questions to four other jurors to determine whether they should have been dismissed for cause. Kuhnke argues that the answers given by jurors Warren, Boyer, Schroepfer and Cook are similar to the answers given by the jurors in ***Zurfluh*** and ***Traylor***. We conclude,

however, that the answers given by jurors in question here are distinguishable from the answers given in ***Zurfluh*** and ***Traylor***.

In ***Zurfluh***, a juror indicated that she "might not be able to be fair." ***Zurfluh***, 134 Wis.2d at 439, 397 N.W.2d at 155. When asked whether she would have a problem in making a fair and impartial determination, she answered, "I don't know. I might. I'm afraid I might. I wouldn't want to have; but I'm afraid I might. I'm just being honest." ***Id.*** The trial court refused to excuse the juror for cause. ***Id.*** On appeal, we concluded that, without further clarification of her doubts, the juror should have been excused for cause under § 805.08(1), STATS. ***Id.***

Unlike the juror in ***Zurfluh***, each of the jurors here indicated that they could probably set their prejudices aside and make a fair and impartial determination. Juror Warren indicated that her friendship with the assistant district attorney would not affect her ability to decide the case fairly and impartially, and she did not answer in the affirmative when the court asked if any juror had a feeling of bias or prejudice against the defendant. Juror Boyer stated that she did not think that she would have trouble returning a not guilty verdict if she was not satisfied that the State had met its burden of proof, even though she knew relatives of the victim. Juror Schroepfer indicated that, although she had strong feelings about the case and had a feeling of bias or prejudice against one of the parties, she could probably set that aside and decide the case fairly and impartially. Finally, Juror Cook stated that his friendships with two potential witnesses and his knowledge of the case probably would not affect his ability to decide the case fairly and impartially. We conclude that ***Zurfluh*** is distinguishable.

In ***Traylor***, one juror, Ms. Schoenecker, indicated that she did not think she could be impartial or fair because she considered a defendant guilty "right away." ***Traylor***, 170 Wis.2d at 397-98, 489 N.W.2d at 628. When asked whether she would be able to follow the law regardless of her beliefs and presume the defendant innocent unless proven guilty beyond a reasonable doubt, she answered that she "would try." ***Id.*** at 398, 489 N.W.2d at 628. Schoenecker also commented on the defendant's right to remain silent, stating that "she would feel that the defendant was probably hiding something if he did not want to speak out." ***Id.*** On appeal, we concluded that trial counsel was ineffective for failing to move to strike the juror for cause. ***Id.*** at 399, 489 N.W.2d at 628.

We conclude the answers of jurors Warren, Boyer, Schroepfer and Cook are distinguishable from the answers of juror Schoenecker. The jurors in this case indicated that they could probably make a fair and impartial determination, while Schoenecker did not. Because the jurors here indicated that they could probably make a fair and impartial determination, the trial court was not required to strike them for cause. *See* ***Louis***, 145 Wis.2d at 478, 457 N.W.2d at 488.

In ***Traylor***, we also concluded that trial counsel was ineffective for failing to ask four other jurors follow-up questions "to conclusively determine whether the juror would follow the law as instructed by the trial court instead of following his or her own concept of justice." ***Traylor***, 170 Wis.2d at 399, 489 N.W.2d at 628. "[I]f counsel failed to receive a satisfactory answer, [counsel] should have moved to reject the juror for cause." ***Id.*** at 399-400, 489 N.W.2d at 628.

One of the jurors, Ms. Swoboda, raised her hand when defense counsel asked if anyone believed that a person arrested for a crime had probably done something wrong. Defense counsel asked two follow-up questions, and the court did not intervene to question this juror. ***Id.*** at 398, 489 N.W.2d at 628. Three other jurors indicated that the defendant's invocation of the right to remain silent may reflect negatively upon the defendant. One juror, Mr. Perkins, commented, "If he's trying to prove that he's not guilty of anything I think it would be in his benefit to try to help himself." ***Id.*** When asked whether he would keep the defendant's failure to testify in mind during deliberations, the juror answered that it would depend on the rest of the evidence. ***Id.*** Another juror, Mr. Battisti, stated that the defendant should tell his version if there is a lot of evidence against the defendant. ***Id.*** A third juror, Mr. Held, said, "I'm thinking myself if I were ever charged with something like this and I felt I was charged falsely I'd want to scream and holler at the top of my lungs to anyone that would hear me that I wasn't guilty." ***Id.*** Defense counsel did not pose any follow-up questions to jurors Battisti or Held. ***Id.***

Unlike in ***Traylor***, follow-up questions were asked of the four jurors in question here. Jurors Boyer, Schroepfer and Cook were all asked specific follow-up questions after they gave answers that indicated they might have some bias toward the defendant. And after juror Warren gave her answer in question, the court asked the jury as a whole whether any of them had a feeling of bias or prejudice against the defendant or was incapable of deciding the case fairly and impartially on the evidence. Because the jurors' answers to the follow-up questions here show that none of them had a manifest bias that required their exclusion, we conclude that ***Traylor*** is distinguishable.

Kuhnke has not proven that the trial court would have removed any of the jurors for cause had his trial counsel moved the court to strike the jurors in question. Therefore, we conclude that Kuhnke was not prejudiced by his counsel's failure to move the court to strike the jurors. Accordingly, we conclude that Kuhnke received effective assistance of counsel in this regard.

Second-Degree Homicide, Unnecessary Force in Defense of Others Instruction

Kuhnke also argues that his trial counsel performed ineffectively by failing to request a jury instruction for second-degree homicide, unnecessary force in defense of others, also known as imperfect self-defense. Second-degree intentional homicide, unnecessary force in defense of others, is a lesser-included offense of first-degree intentional homicide. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). Whether the trial court should have submitted a lesser-included offense is a question of law that we review *de novo*. ***State v. Borrell***, 167 Wis.2d 749, 779, 482 N.W.2d 883, 894 (1992).

In ***Foster***, we set forth the test for determining whether an instruction on a lesser-included offense should have been submitted to the jury:

> "The submission of a lesser-included offense instruction is proper *only* when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." In determining the propriety of a defendant's request for a lesser-included offense instruction, the evidence must be viewed in the light most favorable to the defendant and the requested instruction. Further, "the lesser-included offense should be submitted only if there is a reasonable doubt as to some particular element included in the higher degree of crime." "If the court improperly fails to submit the requested lesser included offense to the jury, it is prejudicial error and a new trial must be ordered."

Foster, 191 Wis.2d at 23, 528 N.W.2d at 26 (citations omitted). A lesser-included offense instruction is not justified when it is supported by a mere scintilla of evidence, however. Rather, it must be supported by a reasonable view of the evidence. *See* ***Ross v. State***, 61 Wis.2d 160, 171-73, 211 N.W.2d 827, 832-33 (1973).

The offense of second-degree intentional homicide, unnecessary force in defense of others, is set forth in § 940.01(2)(b), STATS. This section states:

> (2) MITIGATING CIRCUMSTANCES. The following are affirmative defenses to prosecution under this section which mitigate the offense [of first-degree intentional homicide] to 2nd-degree intentional homicide under s. 940.05:
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> ….
>
> (b) *Unnecessary defensive force*. Death was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable.

In ***State v. Camacho***, 176 Wis.2d 860, 501 N.W.2d 380 (1993), the supreme court construed § 940.01(2)(b), STATS. The court concluded that this offense contains an "objective threshold element requiring a reasonable belief that the defendant was preventing or terminating an unlawful interference with his person" or the person of another. ***Id.*** at 883, 501 N.W.2d at 388. The reasonableness of that belief must be determined from the standpoint of the defendant at the time of his acts. *See* ***State v. Hampton***, 207 Wis.2d 369, 382, 558 N.W.2d 884, 890 (Ct. App. 1996), *cert. denied*, 117 S. Ct. 1720 (1997). After this threshold has been met, a defendant is entitled to be convicted under § 940.01(2)(b) if:

> (1) [the defendant] had an actual, but unreasonable, belief that force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm; or (2) [the defendant] possessed a reasonable belief that force was necessary because the unlawful interference resulted in an imminent danger of death or great bodily harm but his belief regarding the amount of force necessary was unreasonable.

Camacho, 176 Wis.2d at 883, 501 N.W.2d at 388-89 (footnote omitted).[2]

Kuhnke argues that he reasonably believed that he was preventing Jeff McGlin from unlawfully interfering with the person of Cynthia Meyer. In support of his argument, he points to evidence which shows that McGlin had previously been abusive toward Meyer. After McGlin's death, Meyer told a nurse at the Brown County Mental Health Center that she had been physically abused by McGlin. At trial, Kuhnke testified that Meyer had received several black eyes at the hands of McGlin. Kuhnke also testified that in the summer of 1993, he saw welt marks on Meyer's lower back, which Meyer allegedly attributed to McGlin.[3] According to Kuhnke, Meyer told him that McGlin had threatened to kill her if she ever tried to leave him.

Kuhnke further testified that in September 1995, he went to a party at McGlin's trailer, at which he and McGlin got into an altercation. Kuhnke testified that McGlin said to him, "you're going to hit me and you better hope you kill me because if you don't kill me, I'm going to kill everybody in the trailer." Other witnesses corroborated the fight, but did not hear McGlin's threat. Two

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[2] Kuhnke argues that ***Camacho*** was incorrectly decided. Even were we to disagree with ***Camacho***, we are without the authority to overrule Wisconsin Supreme Court decisions. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997). Accordingly, we follow ***Camacho***.

[3] During her testimony, Meyer denied ever showing Kuhnke welt marks on her back.

witnesses, Roger Griffin and Stacy Delrow, were still at the trailer that same night when McGlin and Meyer began to argue. Delrow testified that McGlin came out of a bedroom "raging" and hit Meyer with a piece of wood while she sat in a chair. McGlin then picked Meyer out of the chair and threw her on the floor. Griffin also testified that McGlin hit Meyer on the head with something, slapped her and threw her on the floor.

Terry Buskirk testified that when she, Meyer and Kuhnke were at "On the Rocks," Meyer accused McGlin of hitting her and throwing her pet iguana against a fireplace. Kuhnke testified that Buskirk told him that McGlin was beating Meyer every day and had even hit Meyer on the head with a club. After leaving "On the Rocks," Buskirk showed Kuhnke Meyer's bruise from the club and continued to tell him about Meyer's injuries. Kuhnke testified that he "was thinking that [Meyer] was going to die."

We conclude that this evidence is insufficient to support a jury instruction on second-degree homicide, unnecessary force in defense of others. In ***Thomas v. State***, 53 Wis.2d 483, 488, 192 N.W.2d 864, 866 (1972), the supreme court concluded that when an assault against a third person has ended and the third person was out of danger of any harm, the defendant could not reasonably believe he was then defending the third person. Similarly, even when viewing the evidence in the light most favorable to the defendant, Kuhnke could not reasonably believe that he was preventing or terminating McGlin's unlawful interference with Meyer at the time he killed McGlin.

No evidence was adduced at trial to show that McGlin was unlawfully interfering or about to unlawfully interfere with Meyer when Kuhnke entered the trailer and stabbed him. Meyer never entered the trailer with Kuhnke.

Meyer was nowhere near McGlin when the stabbing occurred. Because no reasonable view of the evidence would support a finding that Kuhnke reasonably believed that he was defending Meyer at the time of the stabbing, Kuhnke was not entitled to a jury instruction on second-degree intentional homicide, unnecessary force in defense of others. Accordingly, we conclude that Kuhnke's trial counsel did not perform ineffectively by failing to request such an instruction.[4]

FIRST-DEGREE RECKLESS HOMICIDE INSTRUCTION

Kuhnke argues that the trial court erred when it denied the defense's request for a jury instruction on first-degree reckless homicide. The offense of first-degree reckless homicide is contained in § 940.02(1), STATS., which states: "Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony."

First-degree reckless homicide is a lesser-included offense of first-degree intentional homicide. ***State v. Morgan***, 195 Wis.2d 388, 436, 536 N.W.2d 425, 443 (Ct. App. 1995). Thus, we must determine whether the evidence was such that a reasonable jury could have acquitted Kuhnke on the greater charge and convicted him on the lesser-included offense of first-degree reckless homicide. *See* ***Foster***, 191 Wis.2d at 23, 528 N.W.2d at 26. Again, this is a question of law that we review *de novo*. ***Borrell***, 167 Wis.2d at 779, 482 N.W.2d at 894.

[4] Kuhnke also argues that, even if we conclude that trial counsel was not ineffective for failing to request a jury instruction on second-degree intentional homicide, unnecessary force in defense of others, we should grant a new trial in the interest of justice because the real controversy was not tried. *See* ***State v. Wyss***, 124 Wis.2d 681, 732-43, 370 N.W.2d 745, 769-74 (1985); § 752.35, STATS. Because we have concluded that Kuhnke was not entitled to a jury instruction on this lesser-included offense, we cannot conclude that the real controversy was not tried. Therefore, we reject Kuhnke's argument.

At trial, Kuhnke testified that he intended to confront McGlin when he, Meyer and Buskirk went to McGlin's trailer on the morning of October 6, 1995. He stated that when they arrived at McGlin's trailer, Meyer said "don't make me go in there" and appeared to be terrified. At that time, he "just went numb" and felt "completely filled with rage." He entered the trailer, went into McGlin's bedroom and saw him lying there, and "just snapped." According to Kuhnke, the next thing he remembers is hearing Meyer's daughter, Melissa. He looked at Melissa, then looked back at McGlin, who was covered in blood. Kuhnke then pulled the knife out of McGlin's hand and left. Kuhnke argues that this evidence, viewed in the light most favorable to the defense, could support a finding that Kuhnke never intended to kill McGlin, but instead acted recklessly and in utter disregard for McGlin's life.

We reject Kuhnke's argument because no reasonable view of the evidence could support an acquittal on the first-degree intentional homicide charge and a conviction of first-degree reckless homicide. At trial, Paul Webb, an employee of "On the Rocks," testified that Kuhnke was already at the bar when Meyer and Buskirk arrived just after 1:00 a.m. on October 6, 1995. Webb overheard Kuhnke tell Meyer, "If I had my hands on [McGlin] right now, I'd kill him." Debra Howland, a friend of Kuhnke, was also at "On the Rocks" on the night in question and heard Kuhnke say, "I'll fucking kill him," in reference to McGlin. Howland also attended the party that Kuhnke, Meyer and Buskirk attended after leaving the bar. There, Howland heard Kuhnke say, "he's a dead man," although she did not know to whom Kuhnke was referring. Joseph Lienhard, who was also at the party, testified that he overheard Kuhnke say "that he was going to kill" someone, but he also did not know to whom Kuhnke was referring. Kuhnke admitted that he probably said, "I'll kill the little fucker."

When asked whether the stabbing was intentional, Kuhnke responded, "Knife didn't fall out of my hands."

No reasonable jury, when hearing this evidence, could conclude that Kuhnke did not intend to kill McGlin when he entered his trailer and stabbed him eighteen times. Therefore, we conclude that the trial court did not err in refusing to give the jury an instruction on first-degree reckless homicide.

SENTENCING

Kuhnke argues that the trial court erroneously exercised its discretion in sentencing him to life imprisonment with no possibility for parole. The factors that the trial court considers in determining parole eligibility are the same factors that the court considers in sentencing. ***State v. Setagord***, 211 Wis.2d 397, 416, 565 N.W.2d 506, 514 (1997). The primary factors considered in sentencing are the gravity of the offense, the character of the offender and the need to protect the public. ***State v. J.E.B.***, 161 Wis.2d 655, 662, 469 N.W.2d 192, 195 (Ct. App. 1991). The trial court also may consider the following:

> [T]he vicious and aggravated nature of the crime; the 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. Echols, 175 Wis.2d 653, 682, 499 N.W.2d 631, 640-41 (1993).

The weight to be given each factor is a matter within the trial court's discretion. ***J.E.B.***, 161 Wis.2d at 662, 469 N.W.2d at 195. We review the trial

court's parole eligibility date determinations for an erroneous exercise of discretion. ***Setagord***, 211 Wis.2d at 416, 565 N.W.2d at 514.

First, Kuhnke argues that the crime in this case is not the type for which the legislature intended to impose no possibility for parole. We disagree. The trial court's authority to sentence Kuhnke to life without parole stems from § 973.014(1)(c), STATS. This section provides that "when a court sentences a person to life imprisonment," the court shall make a parole eligibility determination and may, among other things, decide that "[t]he person is not eligible for parole."[5] This section unambiguously applies to all sentences of life imprisonment. Kuhnke was sentenced to life in prison. Therefore, we conclude that Kuhnke's crime was the type for which the legislature intended § 973.014(1)(c) to apply.

Kuhnke also argues that this crime had important mitigating factors, such as his motivation to stop McGlin's violence against Meyer and his intent to only confront, but not kill, McGlin. In sentencing Kuhnke to life without parole, the trial court considered a multitude of factors. It considered the gravity of the offense. The court determined that the crime involved several aggravating factors. The court considered that, at the time of the murder, the victim was defenseless, likely sleeping in his own bed. The court also noted that a young child lived in McGlin's residence and ultimately observed the stabbing, an event that would undoubtedly scar her for the rest of her life. Furthermore, the court observed that

[5] The court may also decide that the person is eligible for parole under § 304.06(1), STATS., or that the person is eligible for parole on a date set by the court. Section 973.014(1)(a)-(b), STATS. The life without parole option applies only to sentences imposed for crimes committed on or after August 31, 1995. *See* § 973.014(1)(c).

Kuhnke's conduct was premeditated, thereby giving Kuhnke the time to consider the consequences.

The court also considered the character of the offender. It noted that Kuhnke had exhibited no remorse and, when he has committed other crimes, has failed to accept responsibility. The court mentioned Kuhnke's fairly significant criminal history. Finally, the court considered the need to protect the public. The court noted that past correctional efforts in the community were not successful in deterring Kuhnke from committing other crimes. Kuhnke had resorted to various forms of violence in past confrontations with his landlord, his father, police officers and correctional officers, and with the general populace.

The trial court considered all of the proper factors in sentencing Kuhnke to life imprisonment without the possibility for parole. Therefore, we conclude that the trial court properly exercised its sentencing discretion.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.