COURT OF APPEALS DECISION DATED AND FILED

June 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **§ 808.10 and RULE 809.62, STATS.**

No. 97-1716-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DORIAN V. NEAL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Dorian V. Neal appeals from a judgment convicting him as party to first-degree intentional homicide and two counts of first-degree recklessly endangering safety, all while using a dangerous weapon, and from an order denying his postconviction motion for a new trial. We affirm

the trial court's refusal to sever Neal's trial from that of a codefendant or to instruct the jury regarding lesser included offenses.

SEVERANCE

Pretrial, Neal moved the trial court to sever his trial from that of a codefendant, Martise Odems, because Odems gave statements identifying Neal as the person who shot the victim. Severance can be appropriate when the State "intends to use the statement of a codefendant which implicates another defendant in the crime charged." Section 971.12(3), STATS. Although the State possessed statements made by Odems, the State advised that it did not intend to introduce those statements in its case-in-chief.[1] In light of the State's intention not to introduce Odems' statements, there was no reason to sever the trials. The trial court did not misuse its discretion when it declined to sever the trials. *See* ***State v. Nelson***, 146 Wis.2d 442, 455, 432 N.W.2d 115, 121 (Ct. App. 1988).

The State followed through on its stated intention and did not introduce in its case-in-chief Odems' statements that Neal shot the victim. However, during the joint defense case, Odems testified that he did not know who shot the victim, contrary to a previous statement in which he identified Neal as the person who shot the victim. In rebuttal, the State, through the testimony of Michelle Noll, introduced Odems' prior inconsistent statement to impeach him. Noll testified that she spoke with Odems on the telephone a few hours after the shooting and Odems told her that Neal shot the victim. Neal did not object, renew his motion to sever or seek a mistrial in response to the presentation of Odems' prior statements regarding the crime.

[1] It was the State's theory that Odems shot the victim, not Neal. The theory was based on the testimony of the victim's girlfriend who witnessed the shooting.

We first conclude that Neal has waived his appellate challenge to the failure to sever the trials based upon the admission of Odems' prior inconsistent statements because he did not object when the State offered those statements in its rebuttal case. *See* ***Nelson***, 146 Wis.2d at 457, 432 N.W.2d at 122; *see also* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 917 (Ct. App. 1983).

Even if Neal had objected, severance would not have been necessary. Section 971.12(3), STATS., ensures compliance with ***Bruton v. United States***, 391 U.S. 123 (1968), "which held that use of a nontestifying codefendant's extrajudicial statements in determining a defendant's guilt violates the right of cross-examination provided by the confrontation clause of the sixth amendment to the United States Constitution." ***State v. Smith***, 117 Wis.2d 399, 411, 344 N.W.2d 711, 716 (Ct. App. 1983). However, not all codefendant statements are precluded by ***Bruton***. *See* ***id.*** Where, as here, the codefendant (Odems) testified, Neal was able to confront him on cross-examination. Therefore, evidence on rebuttal of Odems' statements inculpating Neal did not present the confrontation problem addressed by ***Bruton***.

LESSER INCLUDED OFFENSES

Neal argues that the trial court erred in not submitting lesser included offenses to the jury for its consideration. In particular, Neal wanted the jury to consider first-degree reckless homicide, § 940.02, STATS., as a lesser included offense of first-degree intentional homicide, § 940.01, STATS., and second-degree recklessly endangering safety, § 941.30(2), STATS., as a lesser included offense of first-degree recklessly endangering safety, § 941.30(1). The trial court declined to instruct the jury on the proposed lesser offenses because the evidence did not warrant such instructions.

Whether a lesser included offense instruction should be given requires determining whether the lesser offense is included in the greater offense and whether the evidence warrants an instruction on the lesser offense, *i.e.*, there must be "reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser offense." *See* ***State v. Martin***, 156 Wis.2d 399, 402, 456 N.W.2d 892, 894 (Ct. App. 1990) (quoted source omitted), *aff'd*, 162 Wis.2d 883, 470 N.W.2d 900 (1991). The evidence is viewed in the light most favorable to the defendant. *See* ***State v. Jenkins***, 168 Wis.2d 175, 202, 483 N.W.2d 262, 272 (Ct. App. 1992). We independently review whether a lesser offense should have been submitted to the jury. *See* ***id***.

The parties agree that the proposed lesser offenses are legally includable in the greater offenses. Therefore, we turn to whether the evidence warranted instructing the jury on the lesser offenses. We agree with the trial court that it did not. The trial court observed that the victim was shot numerous times, suggesting that such conduct was intentional rather than reckless. Seven cartridge casings were found at the scene. All seven shots struck the victim. According to the forensic pathologist, six of the seven shots hit the right upper body and chest area of the victim and two of those were fatal: one penetrated the heart and one penetrated the liver and the pancreas.

Section 940.01(1), STATS., first-degree intentional homicide, describes the offense as causing the death of a human being "with intent to kill that person." Section 939.23(4), STATS., defines "with intent to" in two ways: the defendant either "has a purpose to do the thing or cause the result specified" or "is aware that his or her conduct is practically certain to cause that result." We focus on the latter definition in this case.

There was evidence that multiple shots entered the victim's right upper body area, including the area of the heart and other vital organs. ***State v. Weeks***, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), is instructive here. In ***Weeks***, one of the tavern owners came upon a robbery and shut the door between her apartment and the tavern. From a distance of no more than three feet, the codefendant quickly turned and blindly fired through the door, injuring the tavern owner. The court concluded that the codefendant was aware that shooting at such close range was "'practically certain' to cause [the owner's] death." *See **id***. at 210, 477 N.W.2d at 646. In this case, the gun was fired at the victim numerous times, negating any possibility that the gunman was unaware that his conduct was practically certain to kill the victim. On this evidence, the jury would not have acquitted of first-degree intentional homicide.

Neal argues that there was evidence that the shooting was reckless and demonstrated utter disregard for human life. *See* § 940.02, STATS. He points to evidence that the gunman was moving away from the victim while he was firing the gun and to conflicting evidence about the position of the victim and the gunman and the gunman's identity. We see these circumstances as largely akin to ***Weeks*** where the codefendant blindly fired the gun at the tavern owner who had just shut her door. Here, the gunman fired seven shots all of which hit the victim. Moreover, in order to give a lesser included offense instruction there must be a reasonable basis in the evidence for acquittal on the greater offense. Because there was no ground for acquitting on the greater intent-based offense, there was no reason to give the lesser offense to the jury.

We turn to Neal's last argument that the court should have instructed the jury on second-degree recklessly endangering safety as a lesser included offense of first-degree recklessly endangering safety. The two charges against

Neal as party to the crime arose out of the fact that a woman and her child were standing in the doorway behind the victim when the victim was shot. The woman testified that she and her daughter were standing within two to three feet of the victim when he was shot seven times. The State claimed that in firing seven shots at the victim, two of which actually passed through the victim's body, the gunman engaged in conduct showing utter disregard for human life and endangered the safety of the woman and the child, warranting an instruction on first-degree recklessly endangering safety.

Neal argues that the jury should have been instructed on second-degree recklessly endangering safety because there was conflicting evidence as to whether the mother and her child (the bystanders) were standing in the doorway during the shooting. Neal contends that if the bystanders were inside the residence, their safety could not have been endangered by the shooting.

First-degree recklessly endangering safety requires conduct showing "utter disregard for human life." *See* § 941.30(1), STATS. This element is missing from the second-degree crime. Had the bystanders been in the apartment away from the shooting, there would have been a basis for acquitting on both degrees of reckless endangerment because the bystanders' safety would not have been in jeopardy and the gunman's conduct would not have been reckless because he would not have created a risk of death or great bodily harm to the bystanders and would not have been aware that the bystanders were at risk. *See* § 939.24(1), STATS.

Finally, Neal argues that evidence that the victim provoked the shooting could negate a finding that the circumstances showed utter disregard for human life (first-degree reckless endangerment) and would have warranted

instructing on the second-degree crime. Neal does not cite any persuasive or mandatory authority for this proposition. In this case, we are hardpressed to see a connection between any alleged provocation by the victim prior to the shooting and the reckless endangerment charges relating to the bystanders.

By the Court.—Judgment and order affirmed.

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