

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 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. 98-0162-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS DORTCH, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

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

PER CURIAM. Curtis Dortch appeals from a judgment convicting him of first-degree recklessly endangering safety while armed and misdemeanor bail jumping, as a repeater, and from an order denying his motion for a new trial. Dortch argues that the trial court should have instructed the jury on the lesser-

included offense of second-degree recklessly endangering safety and that his attorney should have requested that the court do so. We disagree and affirm.

After an argument with several people, Dortch repeatedly fired a gun in the middle of a city street. Three witnesses testified that many people were nearby when the gun was fired. Dortch testified that the street was empty when he fired the gun. At the close of evidence, the jury was instructed on the elements of first-degree recklessly endangering safety, the crime with which Dortch was charged. Dortch's counsel did not request that the jury be instructed on second-degree recklessly endangering safety. Dortch was convicted of first-degree recklessly endangering safety.

Whether the evidence presented at trial permits the trial court to instruct the jury on a lesser-included offense is a question of law. *State v. Wilson*, 149 Wis.2d 878, 898, 440 N.W.2d 534, 541 (1989). The trial court should submit a proposed jury instruction where there is a reasonable basis in the evidence for the jury to acquit on the greater charge and convict on the lesser charge. *State v. Muentner*, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). In making this decision, the evidence must be viewed in the light most favorable to the defendant and the requested instruction. *State v. Foster*, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

The elements of first-degree recklessly endangering safety are: (1) the defendant endangered the safety of another human being; (2) the defendant did so by "criminally reckless conduct;" and (3) the circumstances of the defendant's conduct showed "utter disregard for human life." WIS JI—CRIMINAL 1345 (1993). In determining whether conduct shows "utter disregard for human life," the trier-of-fact should consider what the defendant was doing, why he or she was

doing it, how dangerous the conduct was, how obvious the danger was and whether the conduct showed any regard for human life. *Id.* The elements of second-degree recklessly endangering safety are identical, except that the defendant's conduct need not have shown "utter disregard for human life."

Dortch argues that there was a reasonable basis in the evidence for the jury to acquit him on the greater offense of first-degree recklessly endangering safety, but convict him on the lesser charge of second-degree recklessly endangering safety. He contends that the jury could have chosen to believe him when he said he did not see anyone nearby when he fired the gun.

We conclude there is no reasonable view of the evidence which would support the conclusion that Dortch's conduct did not show "utter disregard for human life." Even if the street had been empty when Dortch fired the gun, his action was likely to harm someone, either a passerby, someone in a car, or someone in a building. Dortch fired the gun in anger. Randomly firing a gun in a residential area of a city in anger shows utter disregard for human life. An instruction on the lesser-included offense of second-degree recklessly endangering safety was not supported by the evidence.

Dortch next argues that his trial counsel was ineffective for failing to request the jury instruction on second-degree recklessly endangering safety. We have concluded that the jury instruction was not supported by the evidence. Thus, counsel's performance was not deficient.

By the Court.—Judgment and order affirmed.

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

