COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1524-CR
98-1955-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL R. BUTTNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

DEININGER, J. Daniel Buttner appeals a judgment convicting him of first-degree murder, as a party to the crime and while armed with a dangerous weapon. He also appeals an order denying his motion for postconviction relief. Buttner claims the trial court erred by: (1) denying his motion to suppress

evidence relating to an oral statement he made to investigators; (2) permitting the State to introduce evidence in support of its theory that Buttner committed the murder using "nunchakus"; (3) admitting "other acts" evidence at trial; and (4) denying his request for an instruction on the lesser included offense of reckless homicide. We are not persuaded that any of the cited trial court rulings constituted error, and accordingly, we affirm the appealed judgment and order.

BACKGROUND

On December 24, 1987, the body of Tommy Bolchen, a thirty-two-year-old, mildly retarded resident of Mauston was found in a city park. He had suffered a severe beating and died of blunt force trauma to the head. Investigation revealed that Bolchen had last been seen around 11:00 p.m. the previous evening, after he had left a tavern where he had been playing dice with several others, including Buttner.

Buttner and several of his relatives and acquaintances were suspected of involvement in Bolchen's murder early on. Statements given to police, however, in particular, those of Buttner's sister, led to another individual being charged. After that prosecution was abandoned in 1988, the investigation into Bolchen's death continued. Local authorities subsequently requested the Division of Criminal Investigation (DCI) of the Wisconsin Department of Justice to become involved. Two special agents of the DCI interviewed Buttner on May 18, 1996, after he had been taken into custody on warrants in unrelated matters.

During the interview, Buttner changed his story about his activities on the night of December 23, 1987, several times. After the agents confronted him with photographs of three sets of footprints leading to the park shelter where the body was found, however, Buttner told them that he and Glenn Jones had

talked about robbing Bolchen of his dice game winnings; that they then pursued Bolchen to the park; that Jones had started to beat Bolchen; that he, Buttner, had attempted to intervene and was knocked unconscious by Jones; that when he awoke, Bolchen was lying dead on the park shelter floor; and that Jones then removed Bolchen's wallet from the body. Jones died in a traffic accident some time after the murder but before Buttner's statements to the DCI agents.

The State charged Buttner with murdering Bolchen, as a party to the crime, and while armed with a dangerous weapon. The State's theory was that Buttner either conspired with, or aided and abetted, Jones in killing Bolchen, or, more likely, that Buttner contributed directly to Bolchen's death by administering blows to Bolchen's head with "nunchakus," a martial arts weapon consisting of two sticks connected end-to-end with a cord or chain, which Buttner was known to possess and brandish about prior to Bolchen's murder.

Prior to trial, the State informed Buttner's attorney that it intended to call as a witness at trial a martial arts expert, who would testify regarding and demonstrate the use of nunchakus. Prior to opening statements, the defense requested that a pair of nunchakus situated on the prosecution table "be put away until such time as some connection to the crime is established." The State outlined the anticipated testimony of the martial arts expert, and the court permitted the prosecution to proceed as outlined, noting that the State would have the obligation to "tie this up with evidence." The martial arts expert testified that several wounds shown on autopsy photographs of Bolchen's head were consistent with those he had seen inflicted by nunchakus in the past. The expert also gave a demonstration of the use of nunchakus before the jury. Buttner objected to the demonstration on the grounds that what the expert "may be able to do with nunchakus is completely different than what Mr. Buttner may have been able to do with nunchakus," and to

the testimony regarding nunchakus as a possible cause of the victim's wounds, because the expert was not "qualified to give the opinion evidence that the wounds on this body are consistent with the use of nunchakus."

The State moved before trial for the admission of certain "other acts" evidence, principally consisting of other assaults or fights Buttner had participated in, including one involving Buttner's use of nunchakus, for which Buttner was convicted and sentenced to prison for endangering safety by conduct regardless of life. The court ruled that the State could not introduce the proffered evidence in its case in chief, but would take up its use in rebuttal after hearing the defense case. During the presentation of its case against Buttner, the State renewed its motion to introduce evidence of three of Buttner's assaults against others. The court declined to allow two of the incidents to be presented, but permitted the State to present evidence of Buttner's attack with nunchakus that resulted in the conviction noted. The court concluded that that incident was relevant to establishing Buttner's identity as Bolchen's assailant, and that "because it happened close in time to the events that are being alleged in this particular case, because it involved similar type of conduct, similar type injuries, similar type weapon, that the probative value is not substantially outweighed by the danger of undue prejudice."

During the instructions conference, Buttner requested that the court give an instruction and a verdict form on the lesser included offense of reckless homicide. The court denied the request, concluding that there was not sufficient evidence in the record to justify an instruction and verdict on reckless homicide as a lesser included offense. The jury returned a verdict of guilty on the first-degree murder charge and found that Buttner had committed it while using a dangerous weapon. The court imposed the mandatory life sentence, plus an additional five years of consecutive imprisonment on the weapons enhancer. Buttner moved for

postconviction relief. The trial court denied the motion, and Buttner appeals his conviction and the order denying postconviction relief. Additional facts will be presented in the analysis which follows.

ANALYSIS

I.

When Buttner was interviewed by agents of the DCI, the agents took handwritten notes which they destroyed after completing their final reports of the interview. Buttner argues that the destruction of the agents' notes of the interview deprived him of potentially exculpatory evidence which could not be obtained from the final report of the interview, from cross-examining the agents, or by testifying himself in contradiction to the agents' testimony regarding his statements to them. He asks this court to adopt an "unfair prejudice" rationale for suppressing evidence of his statements to the agents, even in the absence of a showing that their destruction of the notes was done in bad faith. We cannot do so, and we reject Buttner's claim that the trial court erred in denying his motion to suppress the evidence of his statements.

Whether the destruction of evidence by law enforcement officers constitutes a due process violation involves the application of a constitutional standard, and it is thus a question of "constitutional fact" which we review de novo. *See* ***State v. Greenwold***, 189 Wis.2d 59, 66-67, 525 N.W.2d 294, 296-97 (Ct. App. 1994). Our analysis is two-pronged:

> A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.

Id. at 67, 525 N.W.2d at 297 (citing ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988)). Buttner essentially concedes that nothing in the record would support an argument that the notes were "apparently exculpatory," and thus he faces the considerable burden of showing that the officers acted in bad faith in destroying the notes.

Bad faith "can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Greenwold***, 189 Wis.2d at 69, 525 N.W.2d at 298. Buttner does not argue that this showing was made, but that it represents "an unfair burden upon defendant especially in a fact-specific situation as this, where a confession is needed to solve a ten year old homicide." Buttner would have us conclude that the Wisconsin Constitution provides him greater due process protection than does the U. S. Constitution, and that suppression of the evidence of his statement to the agents may be grounded on the "substantial" or "unfair prejudice" he suffered from the agents' destruction of the notes. We have already rejected such a claim, however, *see* ***Greenwold***, 189 Wis.2d at 71, 525 N.W.2d at 298, and we our bound by that determination, *see* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Moreover, as the State points out, the supreme court has concluded that the due process protections afforded by our state and the federal constitutions are "functionally equivalent." *See* ***Reginald v. State***, 193 Wis.2d 299, 306-07, 533 N.W.2d 181, 184 (1995).

Finally, we note that Buttner was able to use the destruction of the notes during cross-examination and in closing argument for the purpose of attacking the credibility of the agents' testimony regarding Buttner's statements to

them. The court instructed the jury as follows regarding its consideration of the statements the agents testified to:

> It is for you, the jury, to determine how much weight, if any, to give to the statement.
>
> In evaluating the statement you should consider 3 things.
>
> First, you must determine whether the statement was actually made by the defendant….
>
> Second, you must determine whether the statement was accurately restated here at trial.

In short, not only has Buttner failed to establish that the destroyed notes were apparently exculpatory, or that they were potentially so and destroyed in bad faith, but it is doubtful that he could show that he was unfairly prejudiced by their absence, even if that were the relevant inquiry.

II.

Buttner contends that "the State should have been precluded from introducing its nunchakus theory." He concedes that the State's expert "was a qualified martial arts expert that had seen similar wounds inflicted by nunchakus," but argues that "the State's theory was purely speculative and solely based on the defendant's past activities and experience with said weapon." And, although Buttner also concedes that the State "cannot be limited to go forward with its theory of the case," he claims that in this case, the nunchakus evidence should have been excluded under § 904.03, STATS., because its prejudicial effect outweighed its probative value.

In support of this argument, Buttner cites ***Thompson v. State***, 83 Wis.2d 134, 144, 265 N.W.2d 467, 472 (1978), where the supreme court quoted with approval the following language from a California case: "When the

prosecution relies … on a specific type of weapon, it is error to admit evidence that the other [different] weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." ***Id***. (citation omitted). The citation to ***Thompson*** does not appear particularly relevant to the present facts, inasmuch as the State's theory was that Buttner committed the offense with a "specific type of weapon" and set about to establish links between *that* weapon and the victim's injuries, as well as between the weapon and Buttner.

There is, however, a larger problem with Buttner's contention that it was error for the trial court to permit the State to introduce any evidence in support of its nunchakus theory: the lack of a proper objection at or before trial. Buttner cites only his objection prior to opening statements as a basis for this claim of error. At that time, Buttner's counsel told the court:

> I notice a pair of nunchakus just placed on the prosecution table, again, I don't believe there is going to be any link as to these being any possible murder weapon, as they were in police custody for 6 months before the event. I also think it will be very difficult to connect to any type of weapon of this type, I guess I don't want prosecution waving these things around and would ask they be put away until such time as some connection to the crime is established.[1]

Asking that a specific piece of physical evidence not be shown to the jury until its relevance had been established is a far cry from asking the court to preclude the State from advancing its theory of Buttner's involvement in the crime. Buttner does not point to any place in the trial record where he asked the

[1] The nunchakus in question had been confiscated from Buttner approximately six months prior to Bolchen's murder, when Buttner was arrested in connection with the "other act" nunchakus assault we discuss below.

court to weigh the probative value of the nunchakus evidence against its prejudicial effect, or to preclude the State from pursuing its theory of the crime.[2] "[I]n order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection unless its basis is obvious from its context … so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." ***State v. Agnello***, No. 96-3406-CR, slip op. at 7 (Wis. May 20, 1999) (citations omitted). Thus, we conclude the issue is not properly before us. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983) ("The defendant failed at trial to request the court to balance the value of the evidence against its prejudicial effect.… We will not find an abuse of discretion where the defendant failed to ask the trial court to exercise its discretion.") (citations omitted).

Even if we were to consider the present claim on its merits, however, Buttner would not prevail. Similar to his concession to this court, Buttner told the trial court during argument on his postconviction motion that "the State and the prosecution is free to go down the nunchaku theory road if they wanted to." We agree and fail to see how the State could pursue its theory of the crime without presenting evidence in support of it.

[2] Buttner did raise the issue in his postconviction motion in the trial court, making arguments similar to those he advances on appeal. Objecting postconviction, however, does not cure Buttner's failure to bring the issue to the trial court's attention at a time when the court could have excluded evidence, limited it in some ways, given cautionary instructions, or required the State to more fully lay out its evidence in support of the "nunchakus theory" outside the jury's presence before ruling on whether to admit all or some of it. As we have noted, Buttner did object to certain aspects of the martial arts expert's testimony, and to his demonstration of the use of nunchakus. These objections, however, were on relevance and foundation grounds, not prejudice.

Moreover, it appears from the record that the State's theory that Buttner inflicted blows to the victim's head with nunchakus was not nearly so speculative as Buttner maintains. At the postconviction hearing, the trial court summarized the State's evidence connecting Buttner, nunchakus and the victim's injuries, and commented on its relevance, as follows:

> I would just briefly point out that the information in this case alleges that Mr. Bolchen was killed by a dangerous weapon … and I thought it would have to be established that the nunchakus were, in fact, some dangerous weapon. I think the record indicates that they are not a common type of weapon that's familiar to all members of society, and … [jurors] were entitled to a demonstration as to whether or not nunchakus were, in fact, a dangerous weapon. If that could not be established, that would be a significant factor in the case.
>
> … I think the nunchaku demonstration was controlled. The State was not allowed to do everything it requested to do with the nunchakus. The number of blows … was limited. The use of the weight head was limited, and using the nunchakus generally was limited in the court proceedings.
>
> … [T]he nunchakus were also admissible related to issues as to whether or not the defendant could have had them or had practiced with them, whether or not he had used them in the past, but there was also evidence that the defendant was observed carrying something similar to nunchakus on the night in question. In fact, some witnesses saw him with nunchakus.
>
> He was placed by his own statement to the DCI personnel that he was at the scene of the crime. One of the parties at that scene was observed carrying an object similar to nunchakus. There was testimony from Dr. Huntington and others that the injuries to Mr. Bolchen were consistent with the use of nunchakus … or the type that the defendant especially manufactured of a different size than the ones … that one could procure commercially.

Our review of the record indicates that the trial court's summary is a fair account of the State's evidence on the "nunchakus theory." The court's postconviction conclusion that the nunchakus evidence was relevant, probative and not unfairly prejudicial, does not represent an erroneous exercise of discretion.

III.

Eric Melby was permitted to testify at trial to the following incident, which occurred some six months before Bolchen's murder. Melby had previously been married to a woman who then dated, and later married, Buttner. On May 31, 1987, he and Buttner got into an altercation at a Mauston tavern. Buttner was very intoxicated, and the two came to blows, after which Melby went home. As Melby was preparing for bed, Buttner broke through his front door carrying nunchakus. Buttner whirled the nunchakus toward Melby's head, and Melby deflected the weapon with his hand, resulting in a fractured metacarpal. During the attack, Buttner threatened, "I'm going to kill your ass." A fight ensued and the two struggled through several rooms. Mauston police broke up the fight at a point where Buttner was on top of Melby in Melby's daughter's bedroom.

Following Melby's testimony, the court instructed the jury that it should consider Melby's testimony "only on the issue of identity," and that it may not "be used to conclude that the defendant is a bad person, for that reason is guilty of the offense charged." The instruction basically followed the pattern of WIS J I—CRIMINAL 275, and was repeated with the final instructions to the jury at the close of the trial.

Buttner claims that it was error for the court to permit Melby's testimony because the State's "nunchakus theory" was pure speculation, there were few similarities between the Melby incident and Bolchen's death, and the "other act" demonstrated only Buttner's propensity for violence and for using nunchakus. Thus, according to Buttner, the Melby testimony was neither relevant nor probative. Additionally, he argues that the evidence was unfairly prejudicial because it followed the martial arts expert's demonstration of the use of

nunchakus, and that it served solely to "provoke the jury's sympathy, horror and outrage." We conclude, however, that the trial court did not err in admitting Melby's testimony.

In reviewing evidentiary issues, the question is not whether this court would have permitted the evidence, but whether the trial court appropriately exercised its discretion. *See* ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). We will not set aside a discretionary ruling of the trial court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

The Wisconsin Supreme Court recently outlined the three-step analysis required when determining whether evidence of other acts of a criminal defendant should be admitted at trial:

> (1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (RULE) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § (RULE) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (RULE) 904.03.

State v. Sullivan, 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998) (footnote omitted). We conclude that the trial court properly applied this analysis to the facts before it, and that it did not erroneously exercise its discretion in deciding to admit the evidence of Buttner's attack on Melby with nunchakus.

The State proffered, and the trial court admitted, Melby's testimony for the purpose of establishing identity, that is, to show that Buttner directly participated in Bolchen's death by hitting the victim with nunchakus. Identity is among the enumerated examples of purposes for which "other crimes, wrongs or acts" may be admitted under § 904.04(2), STATS. The identity of Bolchen's assailant or assailants was very much at issue in Buttner's trial. Buttner defended against the murder charge by arguing that the State's case was entirely circumstantial. His counsel told the jury during closing arguments:

> [T]he reason there was no evidence back in 1987 because nobody put Mr. Buttner back in 1987 at the park because he didn't do it … is there any ambiguity to the fact that Mr. Bolchen was murdered, no, but beyond that that is about the only fact we know. I don't believe the state proved to you what he was murdered with, why he was murdered, who murdered him, who is part of the conspiracy.

Thus, the admission of evidence tending to identify Buttner as one of Bolchen's assailants, was not only a proper purpose under § 904.04(2), STATS., but also satisfies the "first consideration" of relevance identified by the supreme court in ***Sullivan***: "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." ***Sullivan***, 216 Wis.2d at 772, 576 N.W.2d at 33.

As to the second consideration, "whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence," ***id***., we conclude that the Melby

incident did have the tendency to make it more probable that Buttner was the person who attacked Bolchen in the park on the night of the murder. When offered to prove identity, there should be "such a concurrence of common features and so many points of similarities between the crimes charged that it can be said that the other acts and the present act constitute 'the imprint of the defendant.'" ***State v. Murphy***, 188 Wis.2d 508, 518-19, 524 N.W.2d 924, 928 (Ct. App. 1994) (citation omitted). The threshold inquiry when other acts are offered to prove identity is their nearness in time, place and circumstances to the crime to be proved. *See* ***id***. at 519, 524 N.W.2d at 928.

The State presented testimony at trial showing that Buttner had expressed animosity toward Bolchen, had threatened him on a past occasion, and had lost money to him in a bar dice game on the night of the murder. It was also established that Buttner owned and manufactured nunchakus, and had carried them with him and brandished them in taverns, and there was testimony that he was carrying them in a pouch on his waistband on the night of the murder. Buttner told the DCI agents that he and Jones followed Bolchen to the park on the night of the murder, and a witness who passed by the park shelter at about the time the murder was thought to have occurred, testified that one of two men he saw there had the back of his coat bunched up by what could have been nunchakus. The State's pathologist testified that certain of the victim's lacerations could have been inflicted with nunchakus, and the martial arts expert said the wounds were consistent with those he had seen inflicted with that weapon.

Thus, before the jury was evidence that would allow it to conclude that Bolchen had been beaten with nunchakus, at a time when Buttner was present and likely carrying that weapon, following an evening on which Buttner had encountered Bolchen and lost money to him while drinking at a bar. Given

Buttner's denial of participation in the beating, the jury had to decide who inflicted the blows that killed Bolchen—Jones, Buttner, both of them, or, possibly, neither of them. Buttner's attack on Melby in the latter's home some six months earlier had occurred after Buttner had become heavily intoxicated, experienced a negative encounter with Melby in a Mauston bar, pursued him to another location, and then engaged in an unprovoked attack, employing nunchakus as a weapon. The "common features" and numerous "points of similarities" between the Melby incident and the attack on Bolchen provided a reasonable basis for the trial court to conclude that the Bolchen murder bore Buttner's "imprint," and hence the prior incident was admissible to establish his identity as having participated in the attack on Bolchen. *See* ***Murphy***, 188 Wis.2d at 519-20, 524 N.W.2d at 928.

We thus conclude that evidence of Buttner's actions in the Melby incident was probative on the issue of who inflicted the fatal blows on Bolchen on the night of December 23, 1987, in that it tended to identify Buttner as Bolchen's assailant. The fact that Buttner had attacked Melby in a drunken rage with nunchakus to settle a score, after following Melby home from a bar in May of 1987, tends to make it more probable that it was Buttner who, after losing money to Bolchen in a bar dice game, attacked Bolchen with nunchakus after following him to the park, than would be the case without that evidence.

We also conclude that it was not unreasonable for the court to have concluded that the probative value of the Melby incident was not outweighed by unfair prejudice, or any of the other considerations cited in § 904.03, STATS. The probative value of the Melby incident was substantial in that, as we have discussed, it was near in time, place and circumstances to the crime to be proved. *See* ***State v. Speer***, 176 Wis.2d 1101, 1118, 501 N.W.2d 429, 434 (1993). Evidence is not unfairly prejudicial simply because it is adverse to a party; rather,

evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *See* ***State v. DeSantis***, 155 Wis.2d 774, 791-92, 456 N.W.2d 600, 608 (1990). The trial court determined that the evidence was not "unfairly prejudicial," and we agree. Evidence that Buttner had gotten drunk and attacked his girlfriend's ex-husband is not the type of shocking, inflammatory, or scandalous information that would excite the jury's passions against him. Moreover, the trial court twice instructed the jury to consider the evidence only on the issue of identity, and these limiting instructions alleviated the danger of unfair prejudice. *See* ***Speer***, 176 Wis.2d at 1118-19, 501 N.W.2d at 435.

In summary, we conclude that the trial court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). The court's admission of evidence of the Melby incident was not an erroneous exercise of its discretion.

IV.

Buttner's final claim of error is that the court should have granted his request to instruct the jury on the lesser included offense of reckless homicide. The Wisconsin statutes applicable at the time of the murder provided that "[w]hoever causes the death of another human being with intent to kill that person or another" is guilty of the Class A felony of first-degree murder. *See* § 940.01(1), STATS., 1985-86. The requested lesser offense, "homicide by reckless conduct," a Class C felony, encompassed a death caused by "reckless conduct," which was defined as follows:

> (2) Reckless conduct consists of an act which creates a situation of unreasonable risk and high probability of death or great bodily harm to another and which demonstrates a conscious disregard for the safety of another

> and a willingness to take known chances of perpetrating an injury. It is intended that this definition embraces all of the elements of what was heretofore known as gross negligence in the criminal law of Wisconsin.

Section 940.06, STATS., 1985-86.

The trial court declined to instruct on reckless homicide as a lesser included offense because it found that "there is not sufficient evidence in this record to justify the court authorizing lesser included offense of reckless conduct" as defined in the statute cited above. Whether a trial court erred in its refusal to submit a lesser included offense instruction presents a question of law which we review de novo. *See* ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). A lesser included offense instruction should be submitted only when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense. *See* ***id***. In making the determination, the evidence must be viewed in the light most favorable to the defendant and the requested instruction, and the lesser included offense should be submitted only if there is reasonable doubt as to some particular element included in the higher degree of crime. *See* ***id***.

Buttner asserts that the trial court's apparent willingness to consider an instruction on second-degree murder indicates that the court "felt that acquittal of first degree was a possibility."[3] But acquittal on a charged crime is always a "possibility," given the State's burden to prove its commission beyond a

[3] The trial court asked both parties whether either desired an instruction on the lesser included crime of second-degree murder. Both Buttner and the State declined. Second-degree murder, a Class B felony, was defined as causing the death of another human being either by "conduct imminently dangerous to another and evincing a depraved mind, regardless of life," or "as a natural and probable consequence of the commission of or attempt to commit a felony." *See* § 940.02, STATS., 1985-86.

reasonable doubt. The question here is whether there exists reasonable grounds in the evidence for conviction on the lesser offense. As we have noted, Buttner's defense at trial was primarily that the State had not proven his involvement in Bolchen's murder at all, not that the death resulted from recklessness rather than an intent to kill the victim. The State argues that "[t]he number and severity of the blows to Bolchen conclusively show that whoever assaulted him did so with the specific intent to kill him…. One does not inflict at least eight severe blows to the area of the head leaving his victim in a pool of blood, rob him, leave him for dead, and call it 'gross negligence.'" We agree and conclude that there were no reasonable grounds in the evidence for both acquittal on the charge of first-degree murder and conviction on homicide by reckless conduct.

Buttner also contends that the evidence, in particular his statement to the DCI agents, taken in the light most favorable to him, showed that while he may have plotted to rob Bolchen, he then stepped in to protect the victim from blows perpetrated by Glenn Jones. From this, Buttner apparently wishes us to conclude that the jury could have deemed his involvement in Bolchen's death unintentional but reckless. As the State points out, however, the jury was instructed on the defense of withdrawal, and if the jury accepted the version of the events at the park shelter related by Buttner to the DCI agents, he should have been acquitted of all crimes, not convicted of reckless rather than intentional homicide.[4]

---

[4] The trial court instructed the jurors as follows:

> A person withdraws [from the conspiracy] if he voluntarily changes his mind, no longer desires the crime be committed, and notifies the others of his withdrawal far enough before the commission of the crime to allow the other parties to withdraw also.

(continued)

CONCLUSION

For the reasons discussed above, we reject Buttner's claims of trial court error and affirm his conviction and the order denying postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

A person who withdraws from a conspiracy is not held accountable to the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.