COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0308-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE L. HAMANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Clark County: EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 VERGERONT, J. Dale Hamann was convicted, following a jury trial, of two counts of first-degree intentional homicide in violation of WIS. STAT. § 940.01(1) (1997-98)[1] for shooting his wife and son.[2] He appeals the judgment of

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

conviction and order denying his postconviction motion, making the following arguments: (1) his statutory right to a full complement of peremptory strikes was violated or, in the alternative, his trial counsel was ineffective for failing to request all of Hamann's peremptory strikes; (2) the trial court erred in denying the motion to move venue due to publicity; (3) the trial court erred by admitting certain photographs of the crime scene that were, Hamann argues, prejudicial and inflammatory; (4) the trial court erroneously refused to instruct the jury on the lesser-included offense of homicide by the intoxicated use of a weapon and the defense of intoxication; and (5) the jury instructions were confusing, misleading and erroneous. We are not persuaded by these arguments and we therefore affirm.

BACKGROUND

¶2 In June of 1997 Hamann and his wife were having marital problems. Hamann found out that his wife was having an affair and he was very upset when his three-year-old son called the other man "Dad." Hamann moved out of the trailer home the three had shared and stayed at his in-laws' house. Several witnesses stated they heard Hamann threaten to kill his wife. She was granted a restraining order that made it illegal for Hamann to come near her.

¶3 On the morning of July 5, 1997, Hamann was arrested for violating the restraining order. He was released on bail later that day. That night he went to the trailer where his wife and son were living. It is undisputed that Hamann shot

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[2] WISCONSIN STAT. § 940.01(1)(a) provides:

> (a) Except as provided in sub. (2) [mitigating circumstances that provide affirmative defenses], whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

his estranged wife three times, in her torso, head and buttocks, and his son once, in his face, killing them both. The circumstances of Hamann shooting his son were disputed. The State presented evidence to support a theory that Hamann ushered the boy to a location near his dead mother and then shot him. In contrast, Hamann testified that after shooting his wife for the second time, he heard a noise, turned, and shot without intending to kill anyone.

¶4 Since the fact that Hamann shot and killed both individuals was undisputed, the jury needed to decide only whether he was guilty of first-degree intentional homicide or a lesser-included offense for each death.[3] With respect to his wife's death, the jury was provided with the lesser-included offense of second-degree intentional homicide, and instructed on the mitigating factor of adequate provocation.[4] With respect to his son's death, the lesser-included offense was first-degree reckless homicide.[5] The jury found Hamann guilty of two counts of

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[3] Of course, the jury also had the option of "not guilty," but Hamann's counsel never argued for such a verdict.

[4] WISCONSIN STAT. § 939.44 provides:

> Adequate provocation. (1) In this section:
>
> (a) "Adequate" means sufficient to cause complete lack of self-control in an ordinarily constituted person.
>
> (b) "Provocation" means something which the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of causing death.
>
> (2) Adequate provocation is an affirmative defense only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide.

[5] WISCONSIN STAT. § 940.02(1) defines first-degree reckless homicide:

> 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.

(continued)

first-degree intentional homicide. The trial court denied his postconviction motions, which raised the issues on this appeal.[6]

DISCUSSION

Peremptory Challenges

¶5 A jury in a felony case consists of twelve persons and, "[w]hen the crime charged is punishable by life imprisonment," each side is entitled to six peremptory challenges. *See* WIS. STAT. §§ 756.06(2) and 972.03. When additional jurors are selected as alternates, "[e]ach side shall be allowed one additional peremptory challenge." Section § 972.03. In this case fourteen jurors were selected (two alternates), but each side was allotted only six peremptory challenges. Neither side requested the trial court to provide them with an additional peremptory challenge. Hamann argues he should be granted a new trial because he was denied his statutory right and, in the alternative, that his trial counsel was ineffective in failing to request an additional peremptory challenge.

¶6 This issue was recently resolved by the supreme court in ***State v. Erickson***, 227 Wis. 2d 758, 596 N.W.2d 749 (1999), *cert. denied*, 120 S. Ct. 987 (2000). In that case, because neither side objected to the erroneous number of peremptory challenges allotted, the supreme court decided the issue was waived. Therefore, it did not automatically grant a new trial under ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997), but rather analyzed the error under the ineffective assistance of counsel standard. *See* ***Erickson***, 227 Wis. 2d at 767-68.

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[6] In his postconviction motions Hamann also raised other issues not pertinent to this appeal.

Under the prejudice prong of that standard, *see* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984), the court declined to presume prejudice and concluded that the defendant must make a showing of actual prejudice. *See* ***Erickson***, 227 Wis. 2d at 773.

¶7 As in ***Erickson***, Hamann has waived the issue of the denial of his statutory right, and we therefore analyze only the claim of ineffective assistance of counsel. Hamann has not made a showing of actual prejudice in this case. As in ***Erickson***, we would need to "speculate on what would have been the result of his trial had the circuit court not erred," and such speculation does not meet the standard set in ***Strickland***. ***Erickson***, 227 Wis. 2d at 774. We therefore conclude Hamann's counsel was not ineffective for failing to request an additional peremptory challenge.

Change of Venue

¶8 Before trial, Hamann filed a motion to move the trial to another county under WIS. STAT. § 971.22, which provides, in pertinent part:

> **Change of place of trial.** (1) The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county.
>
> ….
>
> (3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had.

In his motion Hamann argued that an impartial jury could not be selected in Clark County due to the pretrial publicity. The trial court reviewed the news articles and TV and radio accounts of the crime and determined they did "not amount to the

type of pretrial publicity which would make it necessary to change the place of trial" and denied the motion. Hamann raises this issue again on appeal.

¶9 Whether the prejudice in a county is such that a fair trial cannot be had is a discretionary determination. *See* ***Briggs v. State***, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977). We will not overturn a discretionary decision if it is based upon the facts in the record, applies the correct law and, using a rational mental process, arrives at a reasonable result. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). However, when reviewing a trial court's discretionary decision denying a change of venue, we must independently evaluate the circumstances to determine whether there was a reasonable likelihood of community prejudice prior to and at the time of trial, and whether the jury selection process evidenced any prejudice on the part of the prospective or empanelled jurors. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 306, 516 N.W.2d 776 (Ct. App. 1994). In doing so, we consider the following factors:

> (1) the inflammatory nature of the publicity, (2) the timing and specificity of the publicity, (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Id.

¶10 The trial court determined that only one article, an editorial on domestic violence that referred to this case, was "designed to arouse community prejudice." That article was in a paper with a circulation of 826 in Clark County, a county with approximately 32,000 residents. Although the details of the crime and, therefore, the reports of the crime were disturbing, from our independent

review of the news coverage of this crime provided in the record, we agree with the trial court that the coverage was generally factual and did not show "an intent to inflame or arouse community feeling against" Hamann. ***Id.*** at 307.

¶11 The second factor, the timing and specificity of the publicity, also supports the trial court's decision to deny the motion to change venue. Over six months had passed between July and August of 1997 (the time of the crime and the publicity) and March 2, 1998 (the trial date). That is sufficient time for the memories and passions of readers to fade. *See* ***State v. Messelt***, 178 Wis. 2d 320, 330, 504 N.W.2d 362 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 254, 518 N.W.2d 232 (1994). Although there were extensive reports in July and August that Hamann shot his estranged wife and son following marital problems, these were not disputed facts at trial. There were also reports that mentioned certain details such as previous domestic violence and a post-arrest suicide attempt. However, in the context of the crime reported and the passage of time since those reports, such details are not so specific to provide a reasonable likelihood of community prejudice.

¶12 In addition the process of selecting the jury did not reveal a prejudiced panel or indicate that there could not be a fair and impartial trial in Clark County. About half of the jury panel remembered reading about the case. Of those, two indicated they had formed impressions based on the publicity. They were questioned individually in chambers so that the rest of the panel did not hear their views, and the court removed both of them for cause. Hamann did not request that any other jurors be removed due to pretrial publicity. There is no evidence in the record of voir dire that the task of selecting a fair and impartial jury was hampered by pretrial publicity.

¶13 Hamann argues that the State's participation in the adverse publicity is a factor here. However, this is not a case in which the State held a press conference to disseminate prejudicial publicity. Instead the press reports were generally based on court proceedings and documents. For example, statements of the district attorney that were published were taken from his comments at the bail hearing.[7] We therefore agree with the trial court that the State did not participate in the dissemination of pretrial publicity and the published comments of the district attorney were minor in amount compared to the other news on the event.

¶14 The offense charged in this case, first-degree intentional homicide, is the most serious offense. But the severe nature of the crime alone does not justify a change of venue, rather it is one of the factors to consider in evaluating whether there was a reasonable likelihood of community prejudice. *See* ***Albrecht***, 184 Wis. 2d at 306.

¶15 The final factor to consider is the nature of the verdict returned. Although the jury found Hamann guilty on both counts, before coming to that conclusion the jury deliberated for three hours and asked to have taped exhibits replayed for them on two occasions. Under these circumstances, the guilty verdict does not indicate that jurors had preconceived impressions of guilt.

¶16 Considering all relevant factors, we conclude there was not a reasonable likelihood of community prejudice prior to and at the time of the trial, and the jury selection process did not reveal such a prejudice in the jury panel.

[7] Hamann referred to one article that quoted the district attorney as saying this was the "most tragic case involving a child that he has seen in Clark county" and "it's one thing for adults to argue, but to simply execute a young child is something I have not had to deal with."

We therefore conclude the trial court did not erroneously exercise its discretion in denying the motion to move the place of the trial to another county.

Admission of Certain Photographs

¶17 Hamann contends the trial court erred in admitting certain "prejudicial and inflammatory photographs" into evidence.[8] Exhibit 3 shows the bodies of Hamann's wife and child lying next to the trailer. Hamann did not object to admission of this photograph. We therefore do not consider this objection on appeal.[9] *See* ***State v. Fawcett***, 145 Wis. 2d 244, 256, 426 N.W.2d 91 (Ct. App. 1988).

¶18 Exhibit 26 is a color photograph of Hamann's wife's body lying on the ground on her stomach. The location of the three gunshot wounds is visible due to soiled clothing in two spots and a circle marking the third spot, but the

[8] Hamann does not clearly state in his briefs exactly what photographs he is referring to. In his initial brief he generally objects to "close-ups of the bodies of the defendant's wife and child" and refers to pages in the transcript where Exhibits 26, 29 and 30 were admitted. Exhibits 29 and 30 are black and white photographs of the boy's hands, taken during the autopsy and used by the pathologist to show the stippling pattern on the hands, which indicates that the boy's hands were by his face when he was shot. Exhibit 26 is a color photograph of Hamann's wife's body laying face down on the ground. In the same brief, Hamann quotes the trial court's comments that were made at a motion hearing in reference to different photographs—color photographs from the autopsy that show the remains of the boy's face—which the court did not allow into evidence. Contrary to the contention in Hamann's brief, the trial judge did not "change[] his mind" and admit those photographs at trial. In Hamann's reply brief he does not argue that autopsy photographs were erroneously admitted, but confines his argument to "photographs of the bodies of his wife and child" and refers to Exhibits 3, 26 and 47. We confine our discussion to these three photographs.

[9] This particular photograph (Exhibit 3) was apparently discussed at a hearing on the State's motion in limine. At that time the court did not make a final decision but indicated that it would consider whether a black and white copy of the picture would be necessary during trial when it was in a better position to decide whether there were adequate reasons for admission. Before the photograph was admitted at trial there was a sidebar conference. However, there is no record of the sidebar and no record of an objection to the photograph's admission. Therefore, there is no record of an exercise of the trial court's discretion for this court to review.

photograph does not show the wounds and is not gruesome. The State used this photograph to ask the pathologist whether the wound channel she observed in Hamann's wife's buttocks would be consistent with the woman being shot as she was lying in that position. The trial court stated the photograph was not inflammatory and admitted it into evidence.

¶19 Exhibit 47 is a color photograph of both bodies lying on the ground. Although the boy is lying on his back, his facial wound is not visible due to the angle of the picture. The photograph shows, by way of numbered markers placed on the ground, the relative position of other evidence recovered at the scene, including the fired cartridge, tissue and blood. The trial court admitted this exhibit over Hamann's objection, but we were not able to locate the court's reasoning or an articulation of Hamann's objection in the record.

¶20 Whether photographs are to be admitted is a matter within the trial court's discretion. ***State v. Lindvig***, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996). We will not disturb the court's discretionary decision unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury. ***Id.*** When the trial court does not set forth its reasoning on the record, we will independently review the record to determine whether it provides a basis for the court's exercise of discretion. *See* ***State v. McAllister***, 153 Wis. 2d 523, 530, 451 N.W.2d 764 (Ct. App. 1989).

¶21 We conclude the trial court did not erroneously exercise its discretion in admitting these two photographs. Both were relevant in that they aided the State in showing the jury how the fatal shots were delivered by Hamann. *See* ***State v. Locke***, 177 Wis. 2d 590, 598, 502 N.W.2d 891 (Ct. App. 1993) ("[e]vidence is always admissible to prove an element of the charged crime even if

the defendant does not dispute it at trial"). Neither picture shows the wounds in graphic detail, and it does not appear that either was submitted to inflame or prejudice the jury.

Lesser-Included Offense and the Defense of Intoxication

¶22 Hamann contends the trial court erred in refusing to instruct the jury on the lesser-included offense of homicide by the intoxicated use of a weapon. A trial court must submit a lesser-included offense to the jury only if a reasonable view of the evidence provides grounds for both acquittal on the greater charge and conviction on the lesser. *See* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). Hamann contends that, under a reasonable view of the evidence, a jury could find he was so intoxicated that he was unable to form the requisite intent for first-degree intentional homicide and a jury could, under that same view of the evidence, find he was guilty of the lesser-included offense.

¶23 Hamann also argues the trial court erred in failing to instruct the jury on the defense of intoxication. The State argues Hamann waived this issue by not requesting the instruction before the trial court. Although we agree with the State that this claim is distinct from that of failure to instruct on the lesser-included offense, under the circumstances of this case both claims raise the same issue for review: whether there was sufficient evidence to find Hamann's intoxication could have negated the element of intent in first-degree intentional homicide. Indeed in this case the instruction on the defense of intoxication could be used to explain how the jury could acquit on first-degree intentional homicide and convict on homicide by intoxicated use of a weapon. We therefore consider both of Hamann's contentions together. *Cf.* ***State v. Agnello***, 226 Wis. 2d 164, 173, 593

N.W.2d 427 (1999) (purpose of waiver rule is to ensure that parties and courts have notice of disputed issues and opportunity to address them).

¶24 Whether the evidence at trial supports the submission of a lesser-included offense and whether the intoxication instruction was appropriate are both questions of law, which we review de novo. ***Wilson***, 149 Wis. 2d at 898; ***State v. Holt***, 128 Wis. 2d 110, 126, 382 N.W.2d 679 (Ct. App. 1985). We review the evidence in the light most favorable to Hamann, *see* ***State v. Sarabia***, 118 Wis. 2d 655, 662, 348 N.W.2d 527 (1984), and therefore consider Hamann's testimony of the events leading up to the homicide. *See* ***State v. Strege***, 116 Wis. 2d 477, 483, 343 N.W.2d 100 (1984) (the degree of a defendant's intoxication may be determined from his conduct, his own testimony regarding his condition, and the testimony of witnesses).

¶25 Hamann testified that after he was released from jail on bail, he went to a bar and had ten or eleven drinks and then had drinks at two other bars before returning to his in-laws' house, where he had two more drinks. The trial court found Hamann may have had seventeen to twenty-two drinks over a nine-hour period. Hamann argues that this alcohol consumption and his bizarre and frenzied actions at the time of the shooting could lead a reasonable jury to conclude that he was so intoxicated he was unable to form the intent to kill.

¶26 To be relieved of the criminal responsibility of first-degree intentional homicide, it is not enough for a defendant to show that he was intoxicated. ***Strege***, 116 Wis. 2d at 483-84; *see also* ***State v. Gardner***, 230 Wis. 2d 32, 44, 601 N.W.2d 670 (Ct. App. 1999), *review denied*, 2000 WI 2. In defining the level of intoxication necessary to negate the element of intent, Wisconsin courts have said:

> [It] is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime. … [I]t is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

Strege, 116 Wis. 2d at 483-84 (citation omitted). In ***Strege***, the supreme court also favorably cited similar definitions from other jurisdictions. An Illinois court held "the accused must show that the intoxication was so extreme as to suspend entirely the power of reason," ***id.*** at 489 (citation omitted), and a Missouri court said "evidence must be presented that tends to show defendant was so intoxicated that he did not know what he was doing." ***Id.*** at 490 (citation omitted).

¶27 Hamann's detailed testimony of the events leading up to the shooting does not reveal this level of intoxication. Hamann testified that after having his last two drinks he went to a spare bedroom/storage room in his in-laws' house where he looked through items, including love letters that reminded him of better times with his wife and made him sad. He then took a .22 caliber rifle off the gun rack that was in that room and shot it into the ceiling two times, loading the cartridge before each shot. Hamann then put that gun down and took his wife's deer rifle, a .30 caliber savage, loaded it with four rounds (three in the clip and one in the chamber), and put some additional shells in his pocket. With the rifle on his lap, he rode his motorcycle to the trailer. Hamann stated that he did not recall much of the ride, but also stated that he did not stop at the stop sign and he was shocked at one point when he came close to the ditch on the side of the road.

¶28 When Hamann arrived at the trailer, he first went to the north door with the rifle in his hands and tried the knob, pounded on the door and leaned on it with his shoulder. When he could not get in, he ran around to the south door and began ripping pieces of the bottom of the door up until the opening was large enough to climb in. He crawled through the opening holding the rifle in front of him. He saw that his wife was on the phone and he heard her tell their son, who was crying, to go to a friend's house. When his wife left the trailer, Hamann went "out after her" while his son stayed in the trailer.

¶29 From the landing just outside the door, Hamann shot at his wife who was approximately twenty-two feet away at that time. He saw her go down, chambered another round, went over to her, nudged her body with his foot, and shot her again in the back of the head from about eighteen inches away. After again chambering another round, Hamann heard a noise that sounded like someone running across the granite. He turned and shot at the noise, and saw that he had shot his son. Hamann stated that he did not intend to shoot his son, but he also acknowledged that he did not check to see if his son was alive or to call for help. Instead, he chambered another round, went back to his wife's body and fired another shot into her buttocks "out of anger." After the shootings, Hamann went into the trailer and used the phone to leave a message on a friend's answering machine asking for forgiveness for "what I've done." He then took off running with the gun.

¶30 This testimony, which is the evidence most favorable to Hamann, is not reasonable evidence that he was not able to form intent due to his level of intoxication. His detailed testimony of the events leading up to the shooting recounts several examples of intent and purposeful actions to carry out that intent: he took the gun off the rack, loaded it and repeatedly chambered new rounds; he

drove his motorcycle to the trailer with the gun in his lap; he tried several different ways to enter the trailer until he finally gained access by breaking a door; he followed his wife out the door, shot at her, and hit his target from a distance of twenty-two feet; and he shot her two more times, with time between each shot fired.[10] We therefore conclude the trial court did not err in denying Hamann's request to instruct the jury on the lesser-included offense of homicide by intoxicated use of a weapon and we conclude there was no evidence to support an instruction on the defense of intoxication.

Confusing Jury Instructions

¶31 Hamann asserts the trial court misspoke when reading the jury instructions on the dangerous weapon enhancer.[11] He contends the misstatement confused and misled the jury by equating intentional homicide with reckless homicide in a case where the jury's understanding of the distinction between the two crimes was critical to Hamann's defense in the death of his son. The State argues this issue is waived because it was not objected to at trial, and in the alternative, there was not a reasonable likelihood the jurors were misled by the misstatement.

¶32 The trial court correctly instructed the jury on the separate and distinct crimes of which they could find Hamann guilty for the death of his son—first-degree intentional homicide and first-degree reckless homicide. In addition

[10] It is undisputed that the fourth shot was fired fifty-eight seconds after the first.

[11] If a person commits a crime using a dangerous weapon, the maximum term of imprisonment may be increased under WIS. STAT. § 939.63(1)(a). The jury in this case found that Hamann committed both crimes using a dangerous weapon, but the court declined to impose additional years on the two consecutive life sentences.

to providing the jury with separate definitions and separate verdict forms for each crime, the court stated, "The crimes referred to as first degree intentional and first degree reckless homicide are different types of homicide." However, when instructing the jury on the weapon enhancer for the death of Hamann's wife, a crime for which the jury had been instructed on first and second-degree intentional homicide, the transcript reveals that the court instructed the jury with the following italicized misstatements:

> If you find the Defendant guilty, and only if you find the Defendant guilty, of either the first or second degree intentional homicide, then you must answer the following question, Did the defendant commit the crime of first degree *reckless* homicide or second degree *reckless* homicide while using a dangerous weapon. Before you may answer the question yes you must be satisfied beyond a reasonable doubt that the Defendant committed the crime while using a dangerous weapon. A dangerous weapon is any firearm, whether it's loaded or unloaded.
>
> If you are satisfied beyond a reasonable doubt that the Defendant committed the crime of first degree or second degree *reckless* homicide while using a dangerous weapon, then answer the question yes underneath the appropriate finding in your verdict. If you are not so satisfied, you must answer no.

(Emphasis added.) Hamann argues that due to the trial courts erroneous use of the term "reckless homicide" when referring to the death of his wife, the jury "may have believed that there is no legal difference between intentional and reckless homicide," and that such a misunderstanding would preclude the jury from accepting his defense in the death of his son—that he acted recklessly rather than intentionally.

¶33 The State's waiver argument is based on WIS. STAT. § 805.13(3) which states that "[f]ailure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions or verdict," and the case law

applying that statute. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 401, 408-09, 424 N.W.2d 672 (1988).[12] Hamann contends § 805.13(3) applies only to alleged errors not objected to at the jury instruction conference, and does not encompass the situation here—where the agreed upon instruction was incorrectly read by the trial court. Neither party cited § 805.13(4), which states in pertinent part: "Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error." We assume without deciding that subsec. (4) does apply and the issue was not waived, and, therefore, we address the merits of Hamann's argument.

¶34 Since both parties concede that the trial court's reference to "reckless homicide" when explaining the weapon enhancer for the death of Hamann's wife was erroneous,[13] we move directly to a harmless error analysis.[14] When error is present, we must set aside the verdict unless we are sure the error did not influence the jury or had such a slight effect as to be *de minimis*. ***State v. Dyess***, 124 Wis. 2d 525, 540-43, 370 N.W.2d 222 (1985). The test for whether an error is harmless is "whether there is a reasonable possibility that the error contributed to the conviction." ***Id.***

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[12] The State also cites ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994), which does not directly refer to WIS. STAT. § 805.13(3), but does cite ***State v. Schumacher***, 144 Wis. 2d 388, 424 N.W.2d 672 (1988).

[13] The State suggested that the error could have been made by the court reporter, rather than the trial court, but it accepted for purposes of this appeal that the trial court erred.

[14] Both parties suggest that we apply the test from ***State v. Lohmeier***, 205 Wis. 2d 183, 193-94, 556 N.W.2d 90 (1996)—whether "there is a 'reasonable likelihood' the jury was misled" by the instruction "in light of the proceedings as a whole." However, ***Lohmeier*** did not involve an erroneous instruction; rather the question in ***Lohmeier*** was "whether the interplay of challenged jury instructions violated a defendant's constitutional rights by misleading the jury." ***Id.*** at 192. We generally apply harmless error analysis to determine whether reversal is required in cases involving erroneous jury instructions. ***Id.***

¶35 We are convinced this was a harmless error. Even in its misstatement, the court did not state or imply that intentional and reckless homicide are one and the same. The misstatement was not made during instructions on the two crimes for which the jury could find Hamann guilty for the death of his son (intentional and reckless homicide); rather it occurred during instructions on an enhancer for either first or second-degree intentional homicide for the death of Hamann's wife. Throughout the rest of the jury instructions and on the verdict forms the court clearly distinguished between the two crimes. The court provided the jury with definitions of the two separate crimes and stated the elements for each. We conclude there is not a reasonable possibility that the misstatement during the weapon enhancement instruction confused the jury regarding their distinct options related to the death of Hamann's son—intentional or reckless homicide—because those options were clear from the rest of the jury instructions and from Hamann's defense.[15]

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[15] In closing argument, Hamann's attorney argued "there was no intent at all to shoot Dwayne." And he also argued:

> The reckless homicide instruction that the Court gave you I think describes what happened here to the T. The Defendant's conduct created an unreasonable and substantial risk of death or great bodily harm to another person and that the

(continued)

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

Defendant was aware that his conduct created such a risk. I think that's evident from when you have a gun in your hand and that's what you do. It doesn't matter whether you intended to or not. If you have a gun in your hand, that's reckless, to be wheeling it with your finger on the trigger, and that's what Dale did.