COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2267-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNY IGNASIAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Kenny Ignasiak appeals from a judgment of conviction of attempted first-degree intentional homicide and first-degree recklessly endangering safety by use of a dangerous weapon. He also appeals

from an order denying his motion for postconviction relief. Two issues are addressed in this appeal: whether the criminal court lacked jurisdiction over the endangering safety charge because Kenny was a juvenile and waiver of juvenile court jurisdiction was not obtained, and whether a new trial should be granted because of instructional error.[1] We conclude that jurisdiction exists and that a new trial should be granted in the interests of justice. *See* WIS. STAT. § 752.35 (1997-98).[2] We affirm the judgment and the order as to the recklessly endangering safety conviction, reverse the attempted homicide conviction and remand for a new trial only on the attempted homicide charge.

¶2 Ignasiak was convicted for firing his .22 rifle at Keith Gauthier, striking Gauthier in the leg. Gauthier had a fight with Ignasiak's sister the night before the shooting and had threatened to kill Ignasiak and his family. Ignasiak's confrontation with Gauthier took place at a gas station where Ignasiak had gone to assist his sister. Gauthier threatened Ignasiak again at the gas station. Ignasiak thought Gauthier was reaching for a weapon and fired the shot. Gauthier's friend was sitting in a car within the line of fire. Ignasiak was fifteen years old at the time of the incident.

¶3 A juvenile delinquency petition was filed charging Ignasiak with one count of reckless endangerment and waiver of juvenile jurisdiction was sought. Then the petition was withdrawn and a criminal complaint filed against Ignasiak. Ignasiak argues that the criminal court lacked jurisdiction over the recklessly

[1] Ignasiak also argues that trial counsel was ineffective for not objecting to instructional error, but we do not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

endangering charge because it is not a crime for which a juvenile may be charged directly in criminal court.[3] Ignasiak cites the subsequent amendment to WIS. STAT. § 938.183(2)(a) (1995-96) as evidence that prior to the amendment juvenile courts, in the absence of waiver of jurisdiction, retained exclusive jurisdiction over offenses which could not be charged in criminal court.[4]

¶4 WISCONSIN STAT. § 938.183(2)(a) (1995-96) includes the provision that a juvenile subject to the exclusive original jurisdiction of a criminal court "is subject to the procedures specified in chs. 967-979." WISCONSIN STAT. § 971.12(1) permits charges to be joined which arise out of the same act or transaction. In ***State v. Karow***, 154 Wis. 2d 375, 382, 453 N.W.2d 181 (Ct. App. 1990), the court held that once jurisdiction has vested in the criminal court, the prosecutor has discretion to charge other related offenses. Ignasiak correctly notes that ***Karow*** was a waiver case and the holding is based in part on the authority granted by WIS. STAT. § 48.18(9) (1989-90) that "[i]f waiver is granted, sub. (1) does not restrict the authority of the district attorney to charge the offense he or she deems is appropriate …." However, the holding is also consistent with the

[3] We recognize that what is really at issue is the trial court's competency to proceed. *See* ***State v. Schroeder***, 224 Wis. 2d 706, 719, 593 N.W.2d 76 (1999). However, we will use "jurisdiction" as the operable term because the parties have used that term.

[4] WISCONSIN STAT. § 938.183(2)(a) (1995-96) gives criminal courts exclusive original jurisdiction over a juvenile fifteen years or older charged with attempted homicide offenses. The statute was amended effective May 13, 1998, to provide:

> Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction also have exclusive original jurisdiction over a juvenile specified in the preceding sentence who is alleged to have attempted or committed a violation of any state law in addition to the violation alleged under the preceding sentence if the violation alleged under this sentence and the violation alleged under the preceding sentence may be joined under s. 972.12(1) [971.12(1)].

1997 Wis. Act 205, § 44. Ignasiak was charged before the effective date of this amendment.

legislative policy that the consequences of criminal behavior should be removed from children only when "consistent with the protection of the public interest." ***Karow***, 154 Wis. 2d at 381 (quoted source omitted).

¶5 The considerations given heed in ***Karow*** equally apply in this situation where the criminal court has original jurisdiction because of the attempted homicide charge. The recklessly endangering safety charge is related and adjudication in one court is in the public interest. The joinder statute, WIS. STAT. § 971.12(1), and ***Karow*** establish that at the time Ignasiak was charged the criminal court had jurisdiction over the recklessly endangering safety charge.[5]

¶6 Ignasiak's theory of defense was self-defense. His request for an instruction on self-defense was granted. In response, the State requested and obtained, over Ignasiak's objection, an instruction on the lesser-included offense of attempted second-degree intentional homicide—imperfect self-defense. The State concedes that the instructions given did not accurately state the law because they permitted the jury to find Ignasiak guilty of attempted first-degree intentional homicide without finding the absence of imperfect self-defense.[6] The State suggests that Ignasiak was not prejudiced by the error because he utilized an "all-or-nothing" theory of defense and had objected to the instruction on attempted second-degree homicide. The State suggests that because Ignasiak did not want

[5] In light of the then-existing authority for joinder of related offenses, we need not consider legislative motives for the amendment.

[6] In instructing the jury on attempted first-degree homicide, the trial court did not utilize WIS JI—CRIMINAL 1014, which is designed for circumstances like this involving first-degree homicide, self-defense, and second-degree homicide. *See* ***Shawn B.N. v. State***, 173 Wis. 2d 343, 368, 497 N.W.2d 141 (Ct. App. 1992).

the jury to consider imperfect self-defense, the resulting instructions gave him exactly what he wanted.

¶7 We reject the State's "waiver" argument. Once the trial court determined that the evidence made possible a conviction on the lesser-included offense under the law of imperfect self-defense, the jury should have been correctly instructed on the alternative offense. More importantly, as the State concedes, the error in the instruction relieved the State of its burden to prove an essential element of the offense—the absence of imperfect self-defense. We conclude that the error in the instructions resulted in the real controversy not being fully tried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). We reverse the attempted homicide conviction without regard to whether a probability of a different result exists on retrial. *See* ***id.*** at 16-17. On remand, Ignasiak shall be afforded a new trial on the attempted homicide charge.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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