COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1126-CR **Cir. Ct. No. 2013CF2480**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP KAREEN GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Phillip Kareen Green appeals the judgment, entered following a jury trial, convicting him of first-degree reckless homicide with the

use of a dangerous weapon contrary to WIS. STAT. §§ 940.02(1) and 939.63(1)(b) (2013-14).[1] Green also appeals the denial of his postconviction motion, in which he argued that his conviction should be vacated because there was insufficient evidence to convict him of first-degree reckless homicide and that he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. We affirm, as there is sufficient evidence to convict him of first-degree reckless homicide, and he is not entitled to a new trial in the interest of justice, as the real controversy was fully tried and justice did not miscarry.

BACKGROUND

¶2 At the jury trial, witnesses presented several different versions of the events surrounding the shooting that led to the criminal charge. The undisputed facts are that on the evening of May 24, 2013, and into the early morning hours, four men, consisting of Green, Nicklaus Gordon, Johntel Henderson, and the victim, Ernest Banks, went out to several bars.[2]

¶3 Gordon testified that he knew Banks because Banks was married to his fiancee's sister. He had known Henderson for several months, having met him at the gym. Henderson worked with Banks. Gordon had known Green for fifteen years; Green was engaged to his sister. Gordon and Henderson had similar recollections of the evening and told the jury that although the four did not arrive at the first bar in the same car, ultimately, the four ended up riding in Gordon's

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] We have used the victim's real name, as the rule found in WIS. STAT. § 809.86 does not apply to homicide victims.

truck during the evening, with Banks driving, Henderson in the front passenger seat, Green sitting behind Banks, and Gordon sitting behind Henderson.

¶4 After going to several bars, the men were on their way to a gentlemen's club when Green indicated, more than once, that he did not want to go and asked to be taken to his car. Gordon recalled Banks then said: "[I]f you go home, I'm going to go home, too." Gordon related that Banks then said he (Banks) had his "shit together" and pointed to Gordon and Henderson and said that they have their "shit together," but pointed at Green and said "I don't know about you." Green replied that he had his "shit together" and said "what['s] … wrong with you?" According to Gordon, both men got loud and exchanged nasty remarks. Gordon and Henderson tried to calm things down, but a couple of seconds later, Banks pulled the truck over. When Gordon was later asked what the two men were arguing about, he replied: "It just come out of no where." Gordon recalled that Banks and Green had "words" three years earlier, but they had been together in social settings since that time without any problems.

¶5 Once Banks pulled over, Gordon tried to open the door, but the child locks prevented him from immediately exiting the vehicle. He saw Banks open Green's door but did not see how Green got out of the car. Once out of the car, Gordon saw Banks throwing a punch at Green. Gordon tried to grab Green, while Henderson tried to grab Banks in an effort to separate them. Gordon claimed to have never seen Green throw a punch at Banks. Shortly after Gordon and Henderson grabbed the two men, Banks and Green got loose. Green was then hit two or three times by Banks and ended up on the ground. Gordon ran in front of Green in order to face Banks, but before he got there, Banks kicked Green in the back. According to Gordon, Banks then backed away and went into a boxing stance.

¶6 Meanwhile, Henderson was attempting to calm Banks down and, according to Gordon, Henderson was either on Banks's side or a little behind him. Gordon continued to be in front of Green, facing Banks. According to Gordon, Green was on the ground and he was blocking Green from Banks. Gordon had his hands and arms extended before him to keep the two apart. Gordon estimated that about five seconds later, he heard a "pop" over the right side of his ear and, believing it to be a gunshot, he began running backwards. He estimated that he was approximately eight feet from Banks with Green behind him when he heard the "pop." Gordon saw Banks extend his arms, but did not see him fall, as Gordon had turned to run. Gordon then ran to his truck and began driving away when Henderson yelled something to him and he pulled over and walked back to the scene. There, he saw the lifeless body of Banks lying in the street. The complaint states that the shooting occurred at 2804 N. 27th Street in Milwaukee.

¶7 Henderson also testified. He knew Banks through work. His account of the early night's events was similar to Gordon's, up until the time that a decision was reached to go to a gentlemen's club and Green said he wanted to go home. Contrary to Gordon's testimony, Henderson said that he was the one who said "if [Green] goes to his car, I was going to go home because [Green's] car is parked in front of my house." Henderson said that Gordon then persuaded Green to accompany them to the strip club, and on the way there, Banks and Green got into an argument. It was his recollection that both Banks and Green were engaged in name calling. Henderson recalled that Green said something like "get your shit together" to Banks and Banks responded that he "got [his] shit together."

¶8 Shortly thereafter, Banks pulled the car over, jumped out of the vehicle, and opened Green's door. Henderson said Green got out of the car without assistance, and the two men were then "nose to nose." Henderson told the

jury that he then pulled Banks inside and began reasoning with him to stay calm and not let anything happen. However, Green continued to mouth off, and Banks then moved Henderson out of the way and Banks got in Green's face. The two men then started fighting. According to Henderson, Banks punched Green, and Green slipped and fell in the street. While Green was on the ground, Banks kicked him in the back. Henderson recalled how Gordon was trying to restrain Green, and he was trying to grab Banks. Eventually, Gordon put himself in between Banks and Green. Green was still on the ground. Unlike Gordon's testimony, Henderson witnessed both men throwing punches at the other. Then, Henderson testified he saw Green get off the ground, with Gordon still between Green and Banks, and he saw Green reach over Gordon and shoot Banks. Henderson then began to run because he did not know if Green was going to continue shooting. Henderson said that Green "had a rage in him."

¶9 On cross-examination, Henderson recalled that during the fight, Green had his vest pulled over his head by Banks, but Banks was not striking him at that time. Banks had assumed a boxing stance and was waiting for the vest to be removed. With regard to the shooting, Henderson estimated that the difference between where Gordon was standing in front of Green and Banks was approximately four feet.

¶10 Green testified in his own defense at the trial. He explained that he had a concealed carry permit for the gun that was used in the shooting, which he obtained the year before this incident.

¶11 His version of the events is markedly different than those of Gordon and Henderson. Green told the jury that he was forty years old at the time of the trial. On the night in question, he met Gordon, Henderson, and Banks at a bar.

Although prior to arriving, he was unaware that Banks and Henderson were with Gordon. Green had one beer before leaving to go to a different bar. At this second bar, he had no alcoholic beverages. The four then rode to a bar on Water Street, where two of the men looked into the bar and returned to the car. All of them got back into the truck. Green claimed he told them to take him back to his car, but he was persuaded to go along.

¶12 According to Green, while riding in the car, Banks was to have said to Green:

> [H]e said fuck this shit. I'm going to the Cheetah Club. And I told him just take me back to my car. And then he was like ain't nobody going to keep - - ain't nobody going to be doing all this shit, you're going with us.

When asked what did Green say to Banks in response, Green said:

> And I was like, okay. And then he was like yeah, I'm going to beat your ass. I've been wanting to beat your ass anyway. And then he's driving. And he was like, as a matter of fact, I'm going to beat your ass now. That's when the truck pulled over.

¶13 Once the truck stopped, Green claimed that Banks started "snatching me out of the vehicle." When he was standing on the roadway, Green said that Banks hit him. Green moved to the rear of the vehicle, where Banks punched him several more times and pulled his vest over his head. Green got up, and with the vest obstructing his view, Green said he could "feel punches and stuff," but he kept his right hand on his gun because he was fearful that Banks might take it. Then he related that:

> When I was trying to get up, he swung me down, punching me. I got up. I was trying to get up. I was on one knee. He was pulling me towards him. That is how we end up toward the front of the store. And

> he was punching me. And all I remember I was just on my back.

The following exchange then ensued between Green and his attorney:

> [Defense Counsel]: Were you able to see what was going on or were you not able to because of your vest?
>
> [Green]: No, I wasn't able to see what was going on.
>
> [Defense Counsel]: At some point did you see Mr. Gordon?
>
> [Green]: Yes. I seen him over to my left.
>
> [Defense Counsel]: What position were you in when you first saw him, when you saw Mr. Gordon?
>
> [Green]: I was getting up off the ground and I saw Mr. Gordon to my left, maybe standing like sideways like this.
>
> ….
>
> [Defense Counsel]: At the point you're getting up off the ground, where was Mr. Banks in relationship to you?
>
> [Green]: In front of me.
>
> [Defense Counsel]: How far away?
>
> [Green]: I estimate it three feet….
>
> [Defense Counsel]: And when you got - - were getting up from the ground, you saw Mr. Banks, what did he do next?
>
> [Green]: Like he was coming toward me.
>
> [Defense Counsel]: And did you see Mr. Henderson?
>
> [Green]: I didn't see him no where.
>
> ….
>
> [Defense Counsel]: As you're getting up the second time, you see Mr. Banks, you had your head on the right side you said?

[Green]: Yeah.

[Defense Counsel]: What did you do?

[Green]: I pulled my gun out, my holster.

[Defense Counsel]: And why did you do that?

[Green]: Because I felt threatened for my life after all was going on.

[Defense Counsel]: And at the point you pulled it out, what was Mr. Banks doing?

[Green]: Like coming towards me.

[Defense Counsel]: And what did you do in response to him approaching you again?

[Green]: I took my gun, put it upward and I shot it.

[Defense Counsel]: Had you at that point - - up to that point, had you punched Mr. Banks at all?

[Green]: No. I didn't get a chance to do anything.

[Defense Counsel]: Did you ever have your hands on Mr. Banks?

[Green]: No.

¶14 Green denied shooting over Gordon, in fact, he denied that Gordon was ever between him and Banks. Also, unlike Gordon and Henderson's testimony that Banks was in a boxing stance but not advancing toward Green when Banks was shot, Green told the jury Banks was "coming at me" when he fired his gun. Green testified that after seeing Banks fall, he phoned the police and told them he just shot someone, and he waited for the police to arrive. On cross-examination, Green admitted telling a detective that he punched Banks, and he conceded that during an earlier interview, he never told detectives that Banks was "coming at him" when he shot Banks.

¶15 A witness, Shaquita Glover, lived nearby and saw most of the incident out of her window. Her attention was drawn to the window when she heard a man say "Let me go. Let me go." This was said by the man in the red shirt (identified as Banks). Before this, she heard a car stop, loud music, and men arguing. When she looked out the window, she saw two men "tussling" and two other men trying to break up the fight. She then saw the man in a red shirt being pulled by the man in the vest (identified as Green). She also said Banks was trying to get away from the other man.

¶16 She said the other two men were trying to break up the fight. She claimed the four men were in a "huddle" when the victim got shot. She recalled that after the victim was lying on the ground, the shooter kept saying "Get off me. Get off me." She testified the men were very close when the victim got shot and the two other men were alongside Banks and Green. She did not believe anyone was between the shooter and the victim.

¶17 Also testifying was a Milwaukee detective who took pictures of Green the night of the shooting. She said that she saw that Green had visible redness on his back, but he had no other injuries. The State introduced into evidence a portion of a security video camera recording on one of the buildings near the shooting. Although it did not capture the entire incident, it did reflect that the entire incident took place in one minute twenty-two seconds.

¶18 The deputy chief medical examiner was called to testify. She conducted the autopsy on the victim. She observed that he had been shot in the head, and the gunshot wound caused his death. She estimated that the muzzle of the gun was between eighteen and twenty-four inches from the victim when it was fired.

¶19 The jury returned a verdict of guilty to the original charge. This appeal follows.

ANALYSIS

1. Sufficient evidence was adduced at trial to support the charge of first-degree reckless homicide.

¶20 "[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If there is any possibility that "the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.***

¶21 "In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime." ***Id.*** at 507-08. Rather, "[a]n appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Id.*** at 508.

¶22 The jury is the sole judge of the credibility of the witnesses. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, it is for the jury to determine the weight and credibility to be given to

each, *see* ***id.***, and inconsistencies do not make a witness's testimony inherently incredible, *see* ***Syvock v. State***, 61 Wis. 2d 411, 414, 213 N.W.2d 11 (1973).

¶23 Whether the evidence is sufficient to support the conviction is a question of law that we review *de novo*. *See* ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶24 Green was charged with first-degree reckless homicide. First-degree reckless homicide, as defined in WIS. STAT. § 940.02(1) of the Criminal Code of Wisconsin, is committed by one who "recklessly causes the death of another human being under circumstances which show utter disregard for human life." The trial court read the following instructions to the jury:

> The defendant in this case is charged with the charge of first-degree reckless homicide. And you must first consider whether the defendant's guilty of that offense.
>
> If you are not satisfied the defendant is guilty OF [sic] first-degree reckless homicide, you must consider whether or not the defendant's guilty of second-degree reckless homicide, which is a less serious degree of criminal homicide.
>
> The crimes referred to as first and second-degree reckless homicide are different degrees of homicide.
>
> Homicide is the taking of the life of another human being. The degree of homicide defined by the law depends on the facts and circumstances of each particular case.
>
> Although the law separates homicides into different types of degrees, there's certain elements which are common to each crime.
>
> First and second-degree reckless homicide requires that the defendant acted recklessly. First-degree reckless homicide requires proof of one additional element. That the circumstances of the defendant's conduct showed utter disregard for human life.

It will also be important for you to consider the privilege of self-defense in deciding which crime, if any, the defendant has committed.

The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference of his person by another person.

However, he may intentionally use only such force as he reasonably believes is necessary to prevent or terminate the interference.

He may not intentionally use force which is intended or likely to cause death unless he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself.

As applied to this case, the effect of a law of self-defense is the defendant is not guilty of any homicide offense if the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person and reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

The defendant is guilty of first-degree reckless homicide if the defendant caused the death of a person by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life.

The defendant is guilty of second-degree reckless homicide if the defendant caused the death of Ernest Banks by criminally reckless conduct.

You'll be asked to consider the privilege of self-defense in deciding whether the elements of first and second-degree reckless homicide are present.

Because the law provides that it is the State's burden of proof to prove all the facts necessary to constitute [a] crime beyond a reasonable doubt, you will not be asked to make a separate finding on whether the defendant acted in self-defense. Instead, you will be asked to determine whether the State has established the necessary facts to justify a finding of guilty of first or second-degree reckless homicide.

If the defendant [sic] has not satisfied you that those facts are present or established by the evidence, you'll be instructed to find the defendant not guilty.

The facts necessary to constitute each crime is [sic] going to be defined for you in greater detail.

First-degree reckless homicide, as defined by the Criminal Code of Wisconsin, is committed by one who recklessly causes the death of another human being under the circumstances -- under the circumstances that show utter disregard for human life.

Before you may find the defendant guilty of first-degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:

One, that the defendant caused the death of Ernest Banks. "Caused" means that the defendant's act was a substantial factor in producing the death.

Two, that the defendant caused the death by criminally reckless conduct. "Criminally reckless conduct" means the conduct created a risk of death or great bodily harm to another person. And that the risk of death or great bodily harm was unreasonable and substantial and that the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

Three, the circumstances of the defendant's conduct showed utter disregard for human life.

In determining whether the circumstances of the conduct showed utter disregard for human life, consider these factors:

What the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and all other facts and circumstances relating to the conduct.

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life.

Consider also the defendant's conduct after the death to the extent it helps you decide whether or not the

> circumstances showed utter disregard for human life at the time the death occurred.

The trial court also gave the following jury instruction on self-defense:

> As I stated to you - - stated to you, self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person, and the defendant believed the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference and the defendant's beliefs were reasonable.
>
> The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.
>
> A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.
>
> There is no duty to retreat; however, in determining whether or not the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat to safety, whether such retreat was feasible, and whether the defendant knew of the opportunity to retreat.
>
> The State must prove by evidence which satisfied you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of Ernest Banks by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life, and the

> defendant did not act lawfully in self-defense, you should find the defendant guilty of first-degree reckless homicide.

¶25 Green contends there is insufficient evidence to convict him of first-degree reckless homicide because the State failed to prove the "utter disregard for human life" element. Green relies principally on ***State v. Miller***, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, for his position that the State failed to prove that his conduct showed utter disregard for human life.

¶26 The facts in ***Miller*** differ dramatically from those here. First of all, Miller was charged with first-degree reckless injury while armed, not first-degree reckless homicide. *See* ***id.***, ¶15. The facts in the ***Miller*** case are that Miller invited several people he met in a gas station to come to his house for a beer. ***Id.***, ¶3. They came and brought Calvin Nakai, a man they had offered to drive home after his friends left him at the bar they had just been in. ***Id.***, ¶¶2-3.

¶27 At the time Miller arrived back at his trailer, his roommate, several of his roommate's cousins, and a friend were sleeping. ***Id.***, ¶4. Shortly thereafter, the people who had been invited to the house left, leaving Nakai behind. ***Id.*** Miller and Nakai talked. ***Id.***, ¶5. During the conversation with Miller, Nakai became angry and slapped Miller across the face. ***Id.*** Miller tried to placate Nakai, but he remained agitated. *See* ***id.***, ¶¶5-6. This occurred after Nakai had been at Miller's trailer for about forty-five minutes. ***Id.***, ¶5. At one point, Nakai picked up a large screwdriver and said in a threatening manner: "'Do you know what I could do with this?'" ***Id.*** ¶6.

¶28 Miller then offered to drive Nakai home, but he refused. ***Id.***, ¶7. Nakai again slapped Miller. ***Id.*** Miller then offered Nakai a blanket and pillow but Nakai said he did not want to go to sleep. ***Id.*** Nakai then started walking

down the hallway to the bedrooms where the men were sleeping. ***Id.***, ¶8. Once inside one of the bedrooms, Nakai slapped one of the men. ***Id.*** Miller testified that Nakai was "'pretty much out of control … getting more and more violent,'" and acting crazy. ***Id.*** Miller called 911. ***Id.***

¶29 While on the phone, Miller heard one of the men call out in pain and he saw one of his friends curled up in a ball on the floor with Nakai standing above him. ***Id.***, ¶9. When his friend tried to get up, Nakai hit him. ***Id.*** Nakai then shoved Miller and smacked Miller across the face for the third time. ***Id.*** Nakai charged at Miller and they fought. ***Id.***, ¶10. Nakai again threatened Miller with the large screwdriver. ***Id.*** Miller testified he was afraid for his life, and it was then that he decided to get his shotgun. ***Id.***, ¶¶10-11. He believed it was his only option to defend himself and his friends. ***Id.***, ¶11.

¶30 Miller got his shotgun and returned to the kitchen. ***Id.***, ¶¶10-11. He could not see his two friends who had been there before he left the room. ***Id.***, ¶12. Miller pointed the gun at Nakai and yelled at him to leave. ***Id.*** When Nakai did not react, Miller, who aimed for his thigh, shot him in the hip. ***Id.***

¶31 Miller was charged with first-degree reckless injury and aggravated battery. ***Id.***, ¶15. He was convicted by a jury of both counts, but the convictions were vacated at a postconviction motion hearing. The State appealed to this court. ***Id.***, ¶19. We affirmed the vacation of the first-degree reckless injury with the use of a dangerous weapon conviction, but reinstated the charge of aggravated battery. *See* ***id.***, ¶¶1, 64. We found that Miller's conduct, when viewed under a totality of the circumstances, was "inconsistent with conduct evincing utter disregard." ***Id.***, ¶40.

¶32 Green's reliance on ***Miller*** for his claim that there was insufficient evidence produced at his trial to support his conviction for first-degree reckless homicide is unavailing, as significant differences exist between the facts in ***Miller*** and the facts here.

¶33 First, as noted, Miller was not charged with a homicide. Second, the incident in ***Miller*** lasted almost an hour, whereas here, the incident from the time the car was stopped to the shooting lasted one minute twenty-two seconds. During the time of the incident in the ***Miller*** case, Miller called for help by dialing 911 twice. Green asked no one for help or assistance. As a matter of fact, there was testimony that he resisted his friends' attempt to break up the fight. Miller tried to placate Nakai with the promise of a ride home and an offer for a place to sleep, and Miller never responded when he was slapped across the face by Nakai three times. Here, Green continued to engage Banks after the physical fight started. Moreover, Green never attempted to leave the area or enlist the help of his friends to end the fight. Indeed, when asked why he did not run away, Green said "Why would I run? I don't think I did anything wrong." Miller only armed himself after Nakai repeatedly ignored Miller's pleas to leave the trailer. In contrast, Green never warned Banks that he had a gun and was prepared to shoot him.

¶34 Miller was confronted by an angry, menacing, bizarre-acting, and unknown man. Contrast this with Green, who was in a fist fight for less than a minute and a half with Banks, whom he knew, when he decided to shoot him.

¶35 To be sure, there is conflicting testimony in the record. However, the jury was free to believe some, but not all, of a witness's account. Here, the jury could have believed the accounts of Gordon, Henderson, and Glover that Gordon and Henderson were attempting to stop the fight. Further, the jury could

have accepted Gordon's and Henderson's testimony that Henderson was behind Banks, grabbing him, while Gordon was between Green and Banks when Green shot Banks over Gordon's shoulder. Also, the jury may have discounted Green's insistence that Banks was coming at him (which he forgot to tell the detectives), and, instead, accepted Gordon's and Henderson's testimony that Banks was in a boxing stance but was not advancing on Green when he was shot.

¶36 This scenario supports the charge of first-degree reckless homicide. Green was engaged in a brief fist fight, with his friends trying to intercede, including one of the friends protecting Green by placing himself between Green and Banks, when Green, without retreating and without warning, pulled out his gun and shot Banks in the head from a relatively short distance. These circumstances support a finding of "utter disregard for human life," as death was a near certainty given the locations of Green and Banks, and the fact Green shot Banks in the head. That Green called 911 and remained at the scene was commendable, but does not erase Green's earlier conduct.

2. The real controversy has been fully tried, and justice has not miscarried.

¶37 Green submits that he is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35, which permits this court to order a new trial on either of two grounds: (1) the real controversy was not fully tried; or (2) justice has miscarried. He argues both prongs apply to his conviction and provide him with a right to a new trial.

¶38 "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795

N.W.2d 456 (citation omitted). We only exercise our power to grant discretionary reversal in exceptional cases. ***See id.***

¶39 We may conclude that justice has miscarried if we determine that "there is a substantial degree of probability that a new trial would produce a different result." *See* ***State v. Darcy N. K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (citations and multiple levels of quotations omitted).

¶40 Here, Green argues that he is entitled to a new trial because the real controversy was not fully tried due to the failure of the jury instructions to explain that "imperfect self-defense would negate 'a finding of utter disregard for human life'" and because a full picture of Green's fear was never presented. As to the claim that justice has miscarried, Green points to conclusions a new jury might reach had there been "better instruction, additional information, and context." Thus, he argues there exists a substantial probability of a different result. We disagree.

¶41 Whether a jury instruction is appropriate, under the facts, is a legal issue subject to independent review on appeal. ***State v. Groth***, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W. 2d 163, *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. The instructions given by the court were approved by Green's attorney and they correctly set forth the law concerning first-degree and second-degree reckless homicide. The instruction on self-defense correctly put the burden on the State to disprove Green's affirmative self-defense claim. There was no need for the trial court to enter the thicket of "imperfect self-defense … negat[ing] … 'utter disregard'" jury instructions.

¶42 Moreover, as the State points out, the instruction given here on the elements of first-degree reckless homicide and the explanation of "utter disregard" closely tracks the pattern instruction for first-degree reckless injury that was approved in ***State v. Jensen***, 2000 WI 84, ¶24, 236 Wis. 2d 521, 613 N.W. 2d 170.

¶43 Next, Green argues "key testimony was not placed into context and a key fact was never introduced." Green conjures up a fanciful interpretation of the evidence which has Green wondering if "the point of the drive was to go clubbing or to find a place for Banks to take out his dislike on Green by beating and seriously injuring him," and questioning whether Green might have been set up. Further along in this distortion of the record, Green argues that the jury should have been told that he was being driven "against his will … to an isolated place that would make it easier for Banks to do him great harm" and in a car that "offered no opportunity for escape." The alleged key fact that was missing from the record was that the Cheetah Club's address, which was the original destination, was never made known to the jury, so the jury did not know it was in an isolated location. What has been argued is not key testimony, nor is the address of the Cheetah Club a key fact.

¶44 Finally, there has been no miscarriage of justice in this case. The jury heard the testimony of the two surviving friends and a citizen witness. Their accounts soundly defeat Green's testimony that he shot Banks because he feared for his life as Banks was "coming at" him. Although Green's brief paints a different picture of the night's events, this jury, and any future jury, would not render a different verdict.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.