COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP208-CR **Cir. Ct. No. 2009CF465**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW J. WIRTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Andrew J. Wirth appeals a judgment of conviction entered on a jury's verdict finding him guilty of two counts of homicide by negligent handling of a dangerous weapon and an order denying his motion for postconviction relief. The issue presented is whether the circuit court

erroneously exercised its discretion in admitting other acts evidence. We need not reach this issue because we conclude that, assuming without deciding that the court erred, such error was harmless. Accordingly, we affirm.

BACKGROUND

¶2 Wirth was charged with two counts of first-degree intentional homicide for the deaths of Gregg Peters and Jennifer Luick following a confrontation at Vinnie's Rock Bottom Saloon in Jefferson.

¶3 The following facts are taken from the trial. Before going to Vinnie's Rock Bottom Saloon, Wirth and a friend went to the Filling Station Bar in Fort Atkinson. While there, Wirth got into a confrontation with a patron of the bar, Scott Zins. Wirth and Zins dispute what started the confrontation. Regardless how the confrontation began, it is undisputed that Wirth grabbed Zins by the throat and pushed him into a wall, causing the drywall to crack. Wirth was asked to leave the bar.

¶4 Wirth and his friend drove to Vinnie's Rock Bottom Saloon in Jefferson. Soon after arriving, Luick approached Wirth from behind and, according to Wirth, "grabbed his ass" and pushed her finger "towards the crack of [his] butt." Wirth became upset and irritated and told Luick, "[D]on't fucking touch me." Wirth claimed that Luick seemed very upset by his strong reaction to her "grabbing" action. Shortly after, Luick's boyfriend, Peters, approached Wirth, tapped him on the shoulder, and asked him to go outside. Once outside, Peters told Wirth to apologize to Luick, who was standing next to Wirth. Wirth refused to apologize. Peters took a step closer to Wirth, coming within two feet of Wirth's face. Peters lifted his left arm as if to touch Wirth and, according to Wirth, reached behind his back. Wirth testified that Peters' movements led Wirth to

believe that Peters was going to pull out a knife and stab him. Wirth grabbed Peters by the throat with his left hand, pulled out his loaded gun with his right hand and pointed the gun at Peters' head. Wirth discharged three rounds from his gun: one round struck Peters' chest, resulting in his death; one round grazed Peters' neck and struck Luick's chest, resulting in her death. Wirth claimed that he could not recall shooting the gun but "figured [Peters] was shot." Wirth did not believe that anyone else had been shot.

¶5 Wirth fled the scene. Later that night, after Wirth left a friend's house with, Wirth alleged at trial, the intent to turn himself in to the police, the police stopped and arrested him. Following his arrest, Wirth was questioned by police who later informed him that Peters and Luick had died.

¶6 Prior to trial, the State moved for the admission of other acts evidence, specifically, evidence regarding the earlier confrontation at the Filling Station Bar, which ended in Wirth grabbing a bar patron by the throat and pushing him into a wall. The court admitted the other acts evidence under the three-part analytical framework of ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), based on the following reasoning: (1) the other acts evidence was offered for the permissible purpose of establishing Wirth's state of mind at the time of the shootings and to rebut the defense's theory that Wirth acted in self-defense; (2) the other acts evidence was relevant; and (3) the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice.

¶7 At trial, the parties did not dispute that Wirth discharged the gun three times or that Peters and Luick died as a result of Wirth's firing the gun. The central dispute at trial was whether Wirth acted in self-defense.

¶8 At the close of evidence, the court instructed the jury on first-degree intentional homicide as well as four lesser included crimes—second-degree intentional homicide, first- and second-degree reckless homicide, and homicide by negligent handling of a dangerous weapon. The court instructed the jury to consider the privilege of self-defense in deciding "which crime, if any, the defendant has committed." The jury found Wirth guilty of two counts of homicide by negligent handling of a dangerous weapon, and the court denied Wirth's postconviction motion for relief. Wirth appeals.

DISCUSSION

¶9 Wirth contends that the trial court erroneously admitted evidence relating to the Filling Station Bar incident as other acts evidence. However, we need not resolve Wirth's challenge to the Filling Station Bar evidence because we conclude, assuming without deciding that the court erroneously exercised its discretion in admitting this evidence, that the error was harmless.

¶10 It is well established that, "[e]rror in admitting other acts evidence is subject to harmless error analysis." ***State v. Thoms***, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). An error is harmless if the beneficiary, here the State, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. In alternative wording, an error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.***, ¶43. To determine whether the error contributed to the verdict, we must consider the error in the context of the entire trial record. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶11 Wirth contends that the admission of the other acts evidence was not harmless because the jury may have concluded based on that evidence that "Wirth was a violent man who deserved to be found guilty." According to Wirth, the admission of evidence showing Wirth's propensity for violence had a great danger of influencing the jury's thinking on whether he acted in self-defense. The State responds that there is no reason to believe the admission of the other acts evidence influenced the jury's decision because "the amount of evidence against [Wirth] was overwhelming and substantial." We agree with the State.

¶12 To prove homicide by negligent handling of a weapon, the State was required to show that: (1) Wirth operated or handled[1] a dangerous weapon; (2) Wirth operated or handled a dangerous weapon in a manner constituting criminal negligence; and (3) Wirth's operation or handling of a dangerous weapon caused the deaths of Peters and Luick. *See* WIS. STAT. § 940.08(1) (2011-12)[2]; WIS JI—CRIMINAL 1175. There is no dispute that Wirth operated and handled a dangerous weapon, his gun, and that Wirth caused the deaths of Peters and Luick. The question, then, turns to whether Wirth operated or handled the weapon in a manner constituting criminal negligence.

[1] "Operate" and "handle" have been defined by the Wisconsin Supreme Court, adopting dictionary definitions for each word, in a case involving a charge of homicide by negligent handling of a dangerous weapon. "Operate" is defined as "[t]o perform a function; work …. To control the functioning of; run: *operate a sewing machine*…." "Handle" is defined as "[t]o operate with the hands; manipulate." ***State v. Bodoh***, 226 Wis. 2d 718, 730-31, 595 N.W.2d 330 (1999) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 1268, 819 (3d ed. 1992)).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶13 To prove criminal negligence, the State was required to show that: (a) Wirth's operation or handling of a dangerous weapon created a risk of death or great bodily harm; (b) the risk of death or great bodily harm was unreasonable and substantial; and (c) Wirth should have been aware that his operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm. *See* WIS. STAT. § 939.25(1); WIS JI—CRIMINAL 1175. We address each element in turn.

A. Operating or Handling of a Dangerous Weapon Creating a Risk of Death or Great Bodily Harm

¶14 It is undisputed that Wirth aimed his gun at Peters from close range and discharged three rounds, and that one round entered Peters' chest, resulting in his death. It is also undisputed that Wirth discharged one round from his gun that grazed Peters' neck and entered Luick's chest, resulting in her death. Wirth testified that he did not know where Luick was standing when he discharged his gun at Peters. This evidence plainly establishes that Wirth's operation *and* handling of his gun, as defined above, not only created a risk of death or great bodily harm, but, in fact, caused the deaths of two people.

B. Substantial and Unreasonable Risk of Death or Great Bodily Harm

¶15 An unreasonable and substantial risk of death or great bodily harm exists when the negligent conduct "create[s] a risk of serious consequences, e.g., death or great bodily harm" and there is a "'high probability that the [serious] consequences will result from' the conduct." ***State v. Schutte***, 2006 WI App 135, ¶21, 295 Wis. 2d 256, 720 N.W.2d 469 (quoted source omitted). Importantly, the risk that death or great bodily harm will result from the conduct must be greater than that which is required to find ordinary negligence in a civil case. ***Id.*** The

probability that death or great bodily harm will result from the conduct must be "considered great by the ordinary person, *having in mind all the circumstances of the case*, including the seriousness of the probable consequences." ***Id.***

¶16 Here, the same evidence that establishes the first element of criminal negligence supports the element that the risk of death or great bodily harm was unreasonable and substantial. As we have established, it is undisputed that Wirth pointed and discharged his gun at Peters' neck and chest and that this resulted in the deaths of Peters and Luick. Considered alone, this evidence plainly establishes that the manner by which Wirth operated and handled his gun created an unreasonable and substantial risk of death. However, we must consider the evidence in relation to Wirth's claim that he acted in self-defense to determine whether the risk of death or great bodily harm was unreasonable and substantial under the circumstances.

¶17 We begin with the jury instructions on the privilege of self-defense. A defendant may threaten or intentionally use force against another only if: (1) he or she believed that there was an unlawful interference; (2) he or she believed that the amount of force used was necessary to prevent or terminate the unlawful interference; and (3) his or her beliefs were reasonable. WIS JI—CRIMINAL 805; *see also* ***State v. Camacho***, 176 Wis. 2d 860, 869-70, 501 N.W.2d 380 (1993).

¶18 We next consider the evidence surrounding the circumstances of the shooting to determine the strength of Wirth's self-defense claim.

¶19 On the night of the shooting, Wirth was at Vinnie's Rock Bottom Saloon with a friend for some drinks. Shortly after arriving at the saloon, Luick,

according to Wirth, "grabbed"[3] his butt and moved her finger toward the "crack of [his] butt." Wirth became angry and irritated and told Luick to not "fucking touch [him]." According to Wirth, Luick was upset by Wirth's reaction to her touching him and walked away angry. A few minutes later, Peters approached Wirth, tapped Wirth on the shoulder, and asked him to step outside. Wirth surmised that Peters wanted to talk with him about Luick's grabbing action and he followed Peters outside the bar. Wirth walked outside, with Peters walking in front of him and Luick behind him. Once outside, Wirth was boxed in, with Peters standing in front of Wirth and Luick standing to Wirth's right. Peters told Wirth to apologize to Luick. Wirth refused to do so because, he testified, he "didn't do anything wrong." Tensions between the two men quickly escalated.

¶20 Wirth testified that after he refused Peters' demand to apologize to Luick, Peters moved toward Wirth, while lifting his left arm as if to touch Wirth and moving his right arm behind his back. Wirth believed that Peters was reaching for a knife when Peters reached behind his back. Wirth claimed that he pulled out his gun and pointed it at Peters' head in order to prevent Peters from stabbing him. Wirth testified that he never saw Peters with a knife and the record shows that no knife was found on Peters or at the crime scene. At that point, Wirth testified, he "blacked-out" such that he could not remember anything that happened until his friend walked out of the bar. At that point, he "snapped into it," and saw that the hammer on his gun was cocked back, indicating to him that he had fired the gun.

[3] Two of Luick's friends who were at Vinnie's Rock Bottom Saloon on the night of the shooting testified that Luick was in a very good mood, and that lightly "pinching" the butts of the other patrons, whether she knew them or not, was her way of expressing her good mood.

¶21 Wirth's own account of the shooting incident undermines his claim that he was acting in self-defense. As we indicated, Wirth testified that he never saw a knife. Rather than wait until he saw a knife, or whatever else Peters might have been reaching for, if anything, Wirth chose to reach for his gun, point it at Peters' head and discharge the weapon at Peters three times. There is no evidence, even from Wirth, that Peters had a weapon or that Peters struck out at Wirth in any fashion. All the jury had was Wirth's unsupported statement of belief that Peters had a knife behind his back and was reaching for it. In our view, Wirth presented no evidence from which a jury could reasonably find that shooting Peters in the neck and in the chest was necessary to prevent or terminate Peters' alleged unlawful interference.

¶22 However, there is strong evidence to support the State's position that Wirth was not acting in self-defense when he shot and killed Peters and Luick. A patron of Vinnie's Rock Bottom Saloon who witnessed the end of the confrontation testified that he observed Wirth point the gun at Peters' neck using his right hand, while Wirth held on to Peters in Peters' chest area with his left hand. The patron testified that he heard Wirth say to Peters twice while holding the gun to Peters' neck, "[S]top being so fucking stupid." The patron also testified that he did not observe Peters with a knife.

¶23 There was also evidence that Wirth pulled his gun out from his holster while walking out of the bar and not when Peters allegedly confronted Wirth after Wirth refused Peters' request that Wirth apologize to Luick. The holster was found by a bar patron near the front door to the bar. The confrontation occurred along the wall of the building housing the bar, to the right of the bar doors. During closing argument, the State argued that this suggested that Wirth pulled out the gun before Peters confronted Wirth.

¶24 There was other evidence that the jury heard that undermined Wirth's self-defense claim. At trial, Wirth conceded that he first claimed to be acting in self-defense after the police informed him that two people had been injured during the confrontation, although he had the opportunity to tell three of his friends and his parents, all of whom he talked to prior to being arrested. The jury heard evidence that when police first questioned Wirth about what had happened to cause the confrontation, Wirth told police that, "mother fucker tried touching me, life happens" and that Peters "want[ed] to fuck with me, that's life." These statements suggest that Wirth pointed his gun at Peters based on the fact that Peters had upset him by attempting to touch him and do not support a reasonable inference that Wirth reasonably believed that the amount of force he used was necessary to prevent an unlawful interference.

¶25 Testimony from a volunteer emergency medical technician for the City of Jefferson was additionally damaging to Wirth's self-defense claim. Robert DeWolfe testified that, upon his arrival at the bar following a dispatch of a possible stabbing there, he attended to Peters, who was lying on the floor of the bar between the inside and the outside doors to the bar. He testified that Peters told him that, "He shot me three times. I begged him not to, but he shot me three times." This evidence stands in stark contrast to Wirth's assertion that he shot Peters in self-defense.

¶26 Finally, Wirth's self-defense claim is undermined by a reasonable inference of consciousness of guilt. Wirth testified at trial that he fled the scene of the crime and did not immediately turn himself in to the police. Although Wirth indicated that he had later decided that he would turn himself in to the police, and that he was on his way to the police station to do so when he was stopped by a police officer, there was reason to discredit this testimony. As the State points out,

Wirth had driven by three police stations before he was stopped and arrested. Wirth had an opportunity to turn himself in to the police after fleeing the scene of the crime, but did not do so. The jury could have understood this testimony as undermining his claim of self-defense.

C. Objective Standard

¶27 Finally, we address whether, under the facts of this case, Wirth should have been aware that his operation and handling of a dangerous weapon created an unreasonable and substantial risk of death or great bodily harm. The standard for criminal negligence is an objective one, in which "a defendant's acts are measured against whether a normally prudent person under the same circumstances should reasonably have foreseen" that his or her conduct created an unreasonable and substantial risk of death or great bodily harm. ***State v. Barman***, 183 Wis. 2d 180, 199, 515 N.W.2d 493 (Ct. App. 1994).

¶28 We conclude that the evidence plainly established that a normally prudent person should reasonably have foreseen that the conduct displayed by Wirth created a substantial and unreasonable risk of death or great bodily harm. Wirth, acting as a normally prudent person, would have foreseen that a loaded and dangerous weapon, when handled in the way that Wirth did, had the capacity to kill or cause great bodily harm to another. A normally prudent person would be aware that taking out a loaded gun during a confrontation and pointing it directly at another person's head while others are nearby carries an unreasonable and substantial risk of death or great bodily harm to anyone in the area where the confrontation took place.

¶29 Here, Wirth was standing directly in front of Peters with his gun pointed at Peters' head. Wirth was aware that Luick was in the area when the

three of them walked out of the bar. Wirth testified that Luick stood to his right, boxing him in, but that he lost sight of Luick after pointing his gun at Peters. A reasonable person, under these circumstances, would have foreseen that operating and handling a gun in the manner that Wirth did here would create an unreasonable and substantial risk of death to anyone in the vicinity of the confrontation.

¶30 In sum, the only significant dispute at trial was whether Wirth acted in self-defense. As we have explained, the evidence showing that Wirth operated and handled the weapon in a manner constituting criminal negligence, and not in self-defense, was overwhelming. When we view the other acts evidence of the altercation at the Filling Station Bar in the context of the entire trial, it is clear beyond a reasonable doubt that a rational jury would have found Wirth guilty even if the other acts evidence had been excluded. For that reason, we affirm.

By the Court.—Judgment affirmed.

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