COURT OF APPEALS
DECISION
DATED AND RELEASED

October 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2624-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY KEY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed*.

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

PER CURIAM. Troy Key appeals from a judgment of conviction of first-degree homicide. He argues that the jury instruction contained errors on the elements of self-defense, that plain error occurred with respect to certain evidentiary matters and trial counsel's request for a circumstantial evidence instruction, and that his motion for dismissal should have been granted because the prosecution failed to prove intent to kill. We reject his claims and affirm the judgment.

Key stabbed bartender Rick Blundon as Blundon was escorting Key from a bar. Key had been involved in a fight at the bar earlier in the evening which Blundon had broken up. Key had returned to look for something, and Blundon was expelling him and telling him to never come back to the bar. As Key had one hand on the door, he swung backward with his free hand. He made contact with Blundon's chest. Blundon realized he had been stabbed and sought assistance. Blundon died from the single stab wound because the knife pierced his heart.

Key argues that the jury was misguided when the trial court omitted references in the jury instruction to the requirement that the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person. He contends that the jury was led to believe that it was not necessary to consider whether Key was preventing or terminating an unlawful interference with his person, a mitigating circumstance in the entire crime.

In his presentation of this issue, Key has misrepresented the trial court's action with respect to the jury instruction on self-defense.[1] Key's brief would lead us to believe that the trial court sua sponte modified the pattern instruction on self-defense. In fact, the trial court gave the pattern instruction published at the time of Key's trial, November 1993.[2] *See* WIS J I—CRIMINAL

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[1] Appellate counsel's misrepresentation surpasses the bounds of advocacy. It violates SCR 20:3.3 (1996).

[2] The pertinent portions of the instruction as given are as follows:

> As applied to this case, the effect of the law of self-defense is that if the defendant reasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is not guilty of any homicide offense.
>
> If the defendant caused the death of Ricky A. Blundon with the intent to kill and actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, but the belief or the amount of force used was unreasonable, the defendant is guilty of second degree intentional homicide.
>
> If the defendant caused the death of Ricky A. Blundon with the intent to kill, and did not actually believe the force used was necessary to prevent

1017 (1991). The defect in Key's argument is that he compares the instruction given to the pattern instruction published in 1994 which accounts for the decision in ***State v. Camacho***, 176 Wis.2d 860, 501 N.W.2d 380 (1993). *See* WIS J I—CRIMINAL 1017 (1994).

There was no objection at trial to the giving of the then published pattern instruction on self-defense. Key has waived his right to object to the instruction given. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

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> imminent death or great bodily harm to himself, the defendant is guilty of first degree intentional homicide.
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> ....
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> The third element requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:
>
> One, that the defendant did not actually believe that he was in imminent danger of death or great bodily harm; or:
>
> Two, that the defendant did not actually believe that the force used was necessary to prevent imminent danger of death or great bodily harm to himself.
>
> While first degree intentional homicide -- when, or rather when first degree intentional homicide is considered, the reasonableness of the defendant's belief is not in issue. You are to be concerned only with what the defendant actually believed, whether the belief is reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of Ricky A. Blundon, with the intent to kill, and that the defendant was not acting with the actual belief that the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of first degree intentional homicide.

Even though the instruction given did not instruct on the objective threshold element of self-defense recognized in ***Camacho,*** Key was not prejudiced by the omission. The instruction used in Key's case reflected that any actual, subjectively held belief by the defendant of the need to act in self-defense mitigated an intentional homicide, whether or not that belief was reasonable. ***Camacho*** held that the purely subjective view was incorrect.[3] The jury instruction was revised to reflect this holding by adding the phrase where needed "that the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person."[4] *See* Committee

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[3] In ***State v. Camacho***, 176 Wis.2d 860, 881, 501 N.W.2d 380, 388 (1993), the court held that in order to prevail with a claim of self-defense, the defendant must show as an objective threshold element a reasonable belief that he was preventing or terminating an unlawful interference with his person.

[4] Portions of the revised instruction corresponding to those portions of the instructions given as quoted in note 2 are reprinted here. The additional language is noted by italics.

> As applied to this case, the effect of the law of self-defense is that if the defendant reasonably believed *that he was preventing or terminating an unlawful interference with his person and* reasonably believed the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is not guilty of any homicide offense.
>
> If the defendant caused the death of (name of victim) with the intent to kill, *reasonably believed that he was preventing or terminating an unlawful interference with his person,* and actually believed the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of second degree intentional homicide.
>
> If the defendant caused the death of (name of victim) with the intent to kill and *did not reasonably believe that he was preventing or terminating an unlawful interference with his person, or* did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself, the defendant is guilty of first degree intentional homicide.
>
> ....
>
> The third element requires that the defendant did not *reasonably believe that he was preventing or terminating an unlawful interference with his person or did not* actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This

Comment, WIS J I—CRIMINAL 1017, at 13 n.13 (1994). As the comment to the instruction explains, because the instruction emphasizes what the State must do

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requires the State to prove *any one of the following*:

1) *that the defendant did not reasonably believe he was preventing or terminating an unlawful interference with his person; or*

2) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or

3) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to himself.

When first degree intentional homicide is considered, the reasonableness of the defendant's believe is *an issue only with respect to the belief that the defendant was preventing or terminating an unlawful interference with his person. The reasonableness of that belief must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. The standard is what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.*

With respect to the belief that the unlawful interference presented an imminent danger of death or great bodily harm and the belief that the force used was necessary to prevent or terminate such danger, the reasonableness of the belief is not an issue. You are to be concerned only with what the defendant actually believed. Whether these belief[s] are reasonable is important only if you later consider whether the defendant is guilty of second degree intentional homicide.

If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) with the intent to kill and that the defendant *either did not reasonably believe that he was preventing or terminating an unlawful interference with his person or* did not actually believe that the force used was necessary to prevent imminent death or great bodily harm to himself, you should find the defendant guilty of first degree intentional homicide.

WIS J I—CRIMINAL 1017 (1994).

to establish guilt, the addition of the threshold requirement "gives the [S]tate another option in meeting its burden to prove that the defendant was not acting under the mitigating circumstances referred to as imperfect self-defense." ***Id.*** Thus, the instruction used in Key's case was more favorable to him. The language Key suggests should have been included actually gives the prosecution another avenue of disproving self-defense by demonstrating that Key could not reasonably believe that he was terminating an unlawful interference with his person. *See* ***id.*** The error, if any, was harmless.

Under the plain error rule, § 901.03, STATS., Key contends that trial counsel's failure to object to the presentation to the jury of his "mug shot," failure to object to testimony of bar patron David Duranceao, stipulation to blood and hair lab results, and request for a circumstantial evidence instruction contributed to a lack of reliability in the trial.[5] He claims that these errors distracted the jury from the real issue of whether intent to kill existed.

Plain error is one that is so fundamental that a new trial must be granted. ***State v. Vinson***, 183 Wis.2d 297, 303, 515 N.W.2d 314, 317 (Ct. App. 1994). The error must be both obvious and substantial, and there must be a likelihood that the error has deprived the defendant of a basic constitutional right. ***Id.*** Key does not suggest any constitutional dimension to the individual errors he raises. Rather, his argument is that the combination of errors deprived him of his right to a fair trial. We disagree.

Key's "mug shot" was admitted as part of the photo array shown to a witness. Key argues that publication of the photo to the jury was highly prejudicial because it suggested that Key had been arrested before. The jury was not, however, given the sole impression that Key's photo was available because he had been arrested before or had prior convictions. On cross-

[5] This issue is raised for the first time on appeal and should have been raised before the trial court in a postconviction motion raising either plain error or ineffective assistance of trial counsel. *See* ***State v. Smith***, 170 Wis.2d 701, 714 n.5, 490 N.W.2d 40, 46 (Ct. App. 1992), *cert. denied*, 507 U.S. 1035 (1993). *See also* § 974.02(2), STATS.; ***State v. Monje***, 109 Wis.2d 138, 153-54, 325 N.W.2d 695, 327 N.W.2d 641 (1982) (on motion for reconsideration) (only sufficiency of the evidence or issues previously raised may be appealed by filing a notice of appeal without a postconviction motion under RULE 809.30, STATS.). However, waiver may be overlooked if indeed plain error exists. *See* ***State v. Neuser***, 191 Wis.2d 131, 140, 528 N.W.2d 49, 53 (Ct. App. 1995).

examination, the detective who displayed the photo array explained that the photos in the array could have been taken for purposes other than arrest, i.e., the person was a cab driver or bartender. Moreover, identity was not an issue. Key's theory of defense was that he lacked intent to kill. The photo did not bear on that issue.

Duranceao testified that after a fight between Key and another man had been broken up by the victim, another bar patron said, "[L]et's get out of here before he comes back with a knife or a gun." Key argues that the statement was highly prejudicial. The record reflects that Duranceao's testimony was a surprise to the prosecution because it was not responsive to the question posed about whether anyone made any racial slurs during the fight incident. The statement was also ambiguous as to who might come back with a knife or gun. The prosecution made no attempt to use the statement to suggest that Key had a propensity to use a knife or gun. There was no highly prejudicial error from admission of the statement.

At trial, the jury heard a stipulation regarding results of lab tests on blood stains and hair on a towel found in Key's car. Key argues that because the stipulation implied that the blood and hair were that of the victim, the stipulation was highly prejudicial. Although the stipulation indicated that the victim could have been a source of the blood and hair recovered on the towel, it explicitly indicated that the lab results were inconclusive. The lab results did not prejudice Key on the disputed element of intent to kill.

Key's final claim of plain error is trial counsel's request that a circumstantial evidence instruction be given because the wound-inflicting knife was never recovered. Key contends that the instruction aided the prosecution in proving its case and waived his right to a jury trial on the issue of whether he was in possession of a dangerous weapon.

The plain error rule does not apply to the claim of instructional error as it is restricted to evidentiary questions. ***Schumacher***, 144 Wis.2d at 402, 424 N.W.2d at 677. However, the instruction was warranted by the evidence, and the trial court properly exercised its discretion in giving the instruction. *See* ***State v. Vick***, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981) (trial court exercises discretion in issuing jury instructions based on the facts and

circumstances of the case). Moreover, the instruction did not take from the jury the determination of whether Key was in possession of a dangerous weapon. The instruction made no specific reference to there only being circumstantial evidence as to the possession of a knife.

Each of Key's claims of plain error lacks merit. The collective effect of the non-errors does not give rise to plain error. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976).

Key makes an additional claim of evidentiary error. He argues that the admission of autopsy photographs was more prejudicial than probative.[6] Whether photographs should be seen by the jury is a discretionary determination for the trial court. ***State v. Thompson***, 142 Wis.2d 821, 841, 419 N.W.2d 564, 571 (Ct. App. 1987). The trial court's decision should be guided by consideration of whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by the exhibit's submission, and whether the exhibit could be subjected to improper use by the jury. *See* ***State v. Jensen***, 147 Wis.2d 240, 260, 432 N.W.2d 913, 921-22 (1988). We will uphold the trial court's discretionary determination unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury. ***Thompson***, 142 Wis.2d at 841, 419 N.W.2d at 571.

Here, the trial court determined that although Key did not dispute that the cause of death was a knife, the manner in which the wound was inflicted, its depth and shape, and the force necessary to inflict it were relevant to whether there was an intentional homicide. It found that each photograph had probative value that outweighed its prejudicial effect. Indeed, efforts were made to reduce the prejudicial effect by cropping one of the photographs to eliminate the victim's face.

We conclude that the trial court engaged in the proper balancing. Under § 904.03, STATS., relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice ...." This

[6] Objections were made to the admission of autopsy photographs. Key argued that the photographs were not necessary because he was willing to stipulate to the cause of death.

balancing test first requires that the trial court determine the probative value of the evidence, which is generally a product of the relevance and need for the evidence in the context of the trial. *See* DANIEL D. BLINKA, WISCONSIN EVIDENCE 91 (1991). Here, the prosecution was obligated to prove all elements of the crime. *See* ***State v. Plymesser***, 172 Wis.2d 583, 594, 493 N.W.2d 367, 372 (1992) (prosecution must prove all the elements of a crime even if the defendant does not dispute all the elements). Moreover, the nature of the wound was particularly relevant to the element of intent in terms of force and effect of use of the knife.

The balancing test of the probative value and danger of unfair prejudice favors admissibility. *See* ***Lievrouw v. Roth***, 157 Wis.2d 332, 350, 459 N.W.2d 850, 856 (Ct. App. 1990). "Unfair prejudice does not mean damage to a party's cause. ... Rather, unfair prejudice results where the proffered evidence ... would have a tendency to influence the outcome by improper means ...." ***State v. Mordica***, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992) (citation and quoted source omitted). The trial court considered whether the gruesome nature of the photos would unduly influence the jury and determined that it would not. The trial court properly exercised its discretion in admitting the autopsy photos.

Key's final argument is that the evidence was insufficient on the element of intent to kill. He contends that the prosecution failed to establish his subjective awareness that death was practically certain to result because the prosecution never established that he intended to stab the victim in the heart. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992).

It was not necessary for the prosecution to prove that Key intended to stab the victim in the heart. Intent may be inferred from the act of stabbing another, particularly in the chest area. ***Zebrowksi v. State***, 50 Wis.2d 715, 722, 185 N.W.2d 545, 549 (1971). *See also* ***State v. Dix***, 86 Wis.2d 474, 483, 273 N.W.2d 250, 254 (presumption of intent to kill when there is an assault with a deadly weapon), *cert. denied*, 444 U.S. 898 (1979).

There was medical testimony that the victim suffered a stab wound to the center of his chest which nicked the heart. It was opined that a moderate to great force was used in the stabbing. Further, several witnesses testified that Key was looking at the victim when he struck at his chest. It was for the jury to determine the weight of the contrary testimony which Key relies on as exhibiting a lack of intent. We must accept the reasonable inferences drawn from the evidence by the jury. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990). Here, the evidence supports an inference that Key acted with intent to kill.

By the Court.—Judgment affirmed.

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