COURT OF APPEALS
DECISION
DATED AND RELEASED

June 3, 1997

NOTICE

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.

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

No. 96-1911-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL E. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Michael E. Williams appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide, party to a crime. Williams claims that the trial court: (1) erred in denying his request for a lesser-included offense instruction; and (2) erroneously exercised discretion by

failing to either conduct a hearing regarding a juror's hearing impairment or designate that juror as the alternate. We affirm.

I. LESSER-INCLUDED OFFENSE

The events underlying this case were the result of a long-standing vendetta between Williams and the victim, Jonathan Simmons. In November 1992, Simmons shot Williams in the leg. According to trial testimony in the instant case, Simmons shot Williams because he believed that Williams was going to attack him for identifying his (Williams's) brother as the perpetrator of a crime. Simmons was charged with the 1992 shooting, but Williams failed to honor the subpoena to testify at the trial.

On July 27, 1994, Williams received information that Simmons was sitting outside an abandoned grocery store on the corner of North 38th and West Clarke Streets. Williams, along with his brother and two other accomplices, armed themselves with guns and confronted Simmons. Williams asked him, "What's up now nigger?" Then, according to some of the trial testimony, Williams shot Simmons in the leg from a distance of about three feet. Williams, however, testified that he did not shoot Simmons in the leg but, rather, hit him in the head with the gun when he saw Simmons reach into his waistband as if he were going for a gun. Williams testified that after hitting Simmons with the gun, it accidentally discharged, firing a bullet into the air. Simmons then jumped up and ran away from the men. When Simmons fled, Williams and his accomplices fired at him. Simmons was hit by five bullets and died at the scene.

The three accomplices each pled guilty to first-degree reckless homicide, party to a crime. At Williams's trial, all four assailants testified that

they had never discussed killing Simmons, and each claimed that they fired the guns merely to frighten Simmons, not kill him.

Williams first claims that the trial court erred by denying his request for submission of the lesser-included offense instruction of first-degree reckless homicide, party to a crime. Williams contends that "there was a reasonable basis for the jury to find that he and his co-actors did not act with an intent to kill Jonathan Simmons; but rather, that their actions towards Mr. Simmons were criminally reckless." We disagree.

Whether the evidence at trial supports submission of a lesser-included offense is a question of law, which we review *de novo*. ***State v Kramar***, 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). In determining the appropriateness of submitting a lesser-included offense, the reviewing court must apply a two-step test. ***State v. Morgan***, 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App. 1995). First, the court must determine whether the lesser offense is, as a matter of law, a lesser-included offense of the crime charge. ***Id.*** at 434, 536 N.W.2d at 434. If it is, then the court must determine whether the instruction is justified. ***Id.*** This requires the court to decide whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. ***Id.*** Further, the reviewing court must view all the relevant evidence in a light most favorable to the defendant and the requested instruction.[1] ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988). A verdict on a lesser offense should not be submitted, however, simply because a jury could convict the

[1] Williams argues, and the State implicitly concedes, that the trial court weighed the evidence and, therefore, applied the wrong legal standard in denying the lesser-included offense instruction. We agree that the trial court applied the wrong standard. The trial court's error, however, does not dictate the outcome on appeal because our standard of review is *de novo.*

defendant of the lesser crime. ***Hayzes v. State***, 64 Wis.2d 189, 195, 218 N.W.2d 717, 720-21 (1974). An alternative verdict should be submitted, therefore, only if there is some basis in the evidence for a reasonable doubt as to an element necessary for conviction of the charged offense. ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

First-degree reckless homicide is a lesser-included offense of first-degree intentional homicide. ***Morgan***, 195 Wis.2d at 440, 536 N.W.2d at 445. Thus, we must determine whether the trial evidence was such that a jury could have acquitted on the greater charge and convicted on the lesser-included offense of first-degree reckless homicide. ***Id***. We conclude that, viewing the evidence most favorably to Williams, a reasonable jury could not have acquitted him of first-degree intentional homicide.

Overwhelming evidence established that Williams and his accomplices intended to kill Simmons. When Williams and his accomplices confronted Simmons, their guns were drawn. When Simmons tried to run away, Williams and the others fired at him. Eyewitnesses testified that Simmons was forced to run a gauntlet of gunfire from the corner of 38th and Clarke to the alley halfway down the block. It was undisputed that all four assailants fired numerous shots in the direction Simmons was running, that police removed thirty-three spent bullet casings at the scene, and that five bullets struck Simmons. An autopsy revealed that the fatal bullet entered Simmons's back and went through his stomach, liver, and heart before exiting his chest. Simmons also was shot in his lower left arm, the inside of his left thigh, the rear of his lower right leg, and the top of his right thigh.

Evidence also established that Williams and his companions did not just aim *in the direction of Simmons*, as Williams claims on appeal, but that they shot *at him.* In fact, when questioned by the prosecutor, Williams even admitted that he shot *at* Simmons.

> PROSECUTOR: And, in fact, everyone started shooting at [Simmons] as he was running away, isn't that right?
>
> DEFENDANT WILLIAMS: Yes.

Although Williams contends that he and his companions never intended to kill Simmons, their actions indicate otherwise. *See* ***Jacobs v. State***, 50 Wis.2d 361, 366, 184 N.W.2d 113, 116 (1971) (intent may be ascertained by defendants' acts); *see also* ***State v. Weeks***, 165 Wis.2d 200, 206-07, 477 N.W.2d 642, 644-45 (Ct. App. 1991) (a defendant has intent to kill when he is aware that his conduct is practically certain to cause the proscribed result). The four assailants had to know that their conduct was practically certain to cause Simmons's death. In fact, one of Williams's accomplices testified that he knew they had killed Simmons: "Because so many shoots [sic] was fired in his direction, I figured he was dead." Thus, under no reasonable view of the evidence could the jury acquit Williams of first-degree intentional homicide. *See* ***State v. Muentner***, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). Accordingly, we conclude that Williams was not entitled to a lesser-included instruction.

II. HEARING IMPAIRED JUROR

Simmons next argues that the trial court erred either by not conducting a hearing regarding a juror's hearing impairment or by not granting the defense's request to designate him as an alternate. We disagree.

During voir dire, the trial court asked whether any members of the panel suffered a hearing impairment. One responded affirmatively, and was excused. No others indicated any hearing impairment. After jury selection and the court's preliminary instructions, one of the jurors interjected that he had had trouble hearing one of the defense attorneys. He added that he had had no problem hearing anyone else and could hear defense counsel when he spoke clearly and into the microphone. The juror also stated he would alert the court if he had any further difficulty hearing the court, counsel, or the witnesses.

During the trial, the court instructed each witness to speak clearly and directly into the microphone. When the attorneys dropped their voices, the trial court reminded them to speak up. At no time did the juror say that he was having difficulty hearing.

Williams now argues that the trial court "abused its discretion by failing to conduct a hearing regarding [the juror's] hearing impairment." Williams, however, never requested such a hearing. In fact, the only indication that the juror might not have heard some testimony came when, during the jury view of the scene, he asked the judge whether it was still light out when the shooting took place, even though there had been some testimony to that effect. After learning of this inquiry, Williams chose not to inquire further but, instead, simply requested that the juror be the alternate. When the trial court denied the request, defense counsel dropped the issue, stating that "there's been a sufficient record on that issue." We will not find an erroneous exercise of discretion if a defendant fails to ask the trial court to exercise discretion. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983). Accordingly, we conclude that Williams has waived the issue, and that the trial court carefully and properly considered and accounted for the juror's hearing problem.

By the Court.–Judgment affirmed.

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