COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0203-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL ADAM WATTS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Michael Adam Watts has appealed from a judgment convicting him of first-degree intentional homicide while armed in

violation of WIS. STAT. §§ 939.63 and 940.01(1) (1999-2000).[1] He was convicted as a party to the crime under WIS. STAT. § 939.05. We affirm the judgment of conviction.

¶2 The sole issue raised by Watts on appeal is whether the trial court committed reversible error when it failed to instruct the jury on the lesser included offense of reckless homicide. Watts cites established case law for the proposition that a lesser included offense instruction must be given when there are reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser charge. *See, e.g.,* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). He contends that a reasonable jury could have found him not guilty of first-degree intentional homicide but guilty of reckless homicide. Watts contends that the trial court erred because it considered only whether he could be convicted of reckless homicide as a party to the crime, and failed to consider whether he could be found guilty of reckless homicide as a principal or direct actor.

¶3 The record indicates that at the close of the evidence, the State requested that the trial court instruct the jury on the offense of first-degree intentional homicide while armed, party to the crime. In addition, it requested that the trial court instruct the jury on the offense of first-degree reckless homicide as a party to the crime in violation of WIS. STAT. § 940.02(1). Watts did not oppose the request, but neither did he join in it. Instead, defense counsel stated that "I would just finish this discussion by saying that if the Court wants to include first-degree reckless homicide as a lesser included offense then pursuant to the arguments that the District Attorney's office made and the facts upon this record,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

then there should be another lesser included offense, that of second degree reckless homicide which also talks about conduct, reckless conduct."

¶4 The trial court then proceeded to discuss the State's request for a reckless homicide instruction. Although the court concluded that the evidence would permit a reasonable jury to acquit on the first-degree intentional homicide charge, it concluded that no reasonable jury could convict Watts of reckless homicide. It therefore denied the State's request for an instruction on first-degree reckless homicide. The jury subsequently returned a verdict finding Watts guilty of first-degree intentional homicide as a party to the crime.

¶5 A defendant waives his or her right to challenge a jury instruction on appeal unless he or she objects to the instruction, or the lack thereof, at the jury instruction conference. *See* ***State v. Smith***, 170 Wis. 2d 701, 714 n.5, 490 N.W.2d 40 (Ct. App. 1992); ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). This rule is rooted in principles of efficient judicial administration. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). "Contemporaneous objection gives the trial court an opportunity to correct its own errors … and thereby works to avoid the delay and expense incident to appeals, reversals and new trials which might have been unnecessary had the objections been properly raised in the lower court." ***Id.*** (citations omitted). "Moreover, the waiver rule prevents a party from deliberately setting up the record for appeal by sitting silently by while error occurs and then seeking reversal if the result is unfavorable." ***Id.***

¶6 The record clearly reveals that defense counsel neither argued that an instruction on first-degree reckless homicide was warranted, nor joined in the State's request for an instruction. The defense also made no independent

argument that an instruction on second-degree reckless homicide was warranted, except to contend that if the trial court granted the State's request for an instruction on first-degree reckless homicide, then it should also give an instruction on second-degree reckless homicide. When the trial court denied the State's request for an instruction on first-degree reckless homicide, Watts made no objection, nor did he request a ruling on whether an instruction on second-degree reckless homicide was required. The trial court was not required to independently address whether the jury should be instructed on second-degree reckless homicide because Watts requested such an instruction only if the trial court instructed the jury on first-degree reckless homicide.

¶7 Because the only issue before the trial court on a threshold basis was the State's request for a first-degree reckless homicide instruction, and because Watts did not join in that request, he cannot be heard to complain about the denial of it on appeal. Under these circumstances, we conclude that Watts has waived his right to object to the trial court's failure to instruct the jury on reckless homicide, whether first- or second-degree.

¶8 Alternatively, but consistent with our determination that waiver occurred, we also note that the issue as presented to the trial court was premised on liability as a party to the crime. The issue of whether the trial court should have instructed the jury on reckless homicide based on Watts's liability as a principal or direct actor is therefore raised by Watts for the first time on appeal.

¶9 Generally, an appellant is limited on appeal to raising the same arguments he or she raised in the trial court. *See* ***State v. Bustamante***, 201 Wis. 2d 562, 571, 549 N.W.2d 746 (Ct. App. 1996). An objection or theory is waived on appeal unless it is raised with sufficient clarity to accurately inform the trial

court of the nature of the objection or argument. *See* ***State v. Rogers***, 196 Wis. 2d 817, 828-29, 539 N.W.2d 897 (Ct. App. 1995). This court will not "blindside trial courts with reversals based on theories which did not originate in their forum." ***Id.*** at 827.

¶10 Watts was charged as a party to the crime of first-degree intentional homicide based upon the shooting death of a police officer, Dale TenHaken. Although Watts was present at the time of the shooting, it was undisputed that his companion, Jason Halda, was the lone shooter.

¶11 At trial, the State proceeded on the theory that Watts either aided and abetted Halda or conspired with him in the first-degree intentional homicide. However, it also requested an instruction on first-degree reckless homicide, contending that a reasonable jury could find Watts guilty as a party to the crime of reckless homicide. The discussion of the propriety of a reckless homicide instruction was premised entirely on the question of whether a reasonable jury could find that Watts aided and abetted or conspired to commit reckless homicide, not on whether he could be found guilty of reckless homicide as a direct actor or principal.

¶12 This limitation is apparent throughout the State's argument requesting the instruction:

> [S]pecifically, we believe that a reasonable view of this evidence is that Mr. Watts participated as a party to the crime in the first degree reckless killing of Officer TenHaken.
>
> ….
>
> [W]e also believe that a reasonable, another reasonable view of this evidence is that [Watts] recklessly as a party to the crime participated in this killing.

> ….
>
> I think the other thing that makes this a little complicated is party to the crime.
>
> ….
>
> I think in a common sense basis you can have a case where two people can be looking at something, *one can be intentionally acting and a person who is either agreeing with or aiding and abetting somehow, can be recklessly acting*. (Emphasis added.)

¶13 Watts never argued to the trial court that he could be found guilty of reckless homicide as a direct actor or principal, rather than as an aider and abettor or co-conspirator under WIS. STAT. § 939.05, the party to the crime statute.[2] In denying the instruction, the trial court clearly viewed the question before it as whether Watts could be found guilty of reckless homicide as a party to the crime based upon conspiracy or aiding and abetting. It stated:

> On the other hand if [Watts] believed that conduct was going to occur even if it was going to be reckless conduct, under the case law in this state he's a party to the crime and he's a party to the crime that is committed, and in this case that crime is first degree intentional homicide.

¶14 The trial court did not address whether the jury could have convicted Watts of committing the crime of reckless homicide as a direct actor or principal. Because that issue was never expressly or clearly raised, the trial court was not required to address it, and the issue was waived for purposes of appeal.

[2] We recognize that a party to the crime includes a person who directly commits the crime, as well as a person who intentionally aids and abets its commission, or who conspires with another to commit it. *See* WIS. STAT. § 939.05(2). However, simply referring to the party to the crime statute did not put the trial court on notice that Watts was claiming that he could be found guilty of reckless homicide as a direct actor, when the party to the crime discussion was premised on aiding and abetting or conspiring. If Watts wished to raise that issue, he was required to present it with sufficient clarity that the trial court would understand it.

¶15 When a defendant waives an objection to a jury instruction, this court may grant relief based upon the alleged error in the instructions if the defendant establishes that he or she is entitled to a new trial pursuant to WIS. STAT. § 752.35. *See* ***Smith***, 170 Wis. 2d at 714 n.5; ***Marcum***, 166 Wis. 2d at 916. Pursuant to § 752.35, this court may exercise its discretion to reverse a judgment if it concludes that the real controversy has not been tried. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Where an instruction or the lack of an instruction obfuscates the real issue or arguably caused the real issue not to be tried, reversal is available to this court in its discretion under § 752.35. *See* ***Vollmer***, 156 Wis. 2d at 22. Under this standard, this court need not first determine that the outcome would be different on retrial. *See* ***id.*** at 19.

¶16 We are not persuaded that the real issue was obfuscated by the instructions as given, which were premised upon the State's theory that Watts aided and abetted or conspired with Halda to shoot TenHaken, and upon Watts's position that he did not know of Halda's intent and did not intend to join in the shooting. Regardless of whether the evidence conceivably could have supported a reckless homicide instruction, we are not convinced that failure to give it prevented the real issue from being tried in this case, nor is our confidence in the outcome of the case undermined. We therefore decline to exercise our discretion to order a new trial.

By the Court.—Judgment affirmed.

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