COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3002-CR **Cir. Ct. No. 1996CF126**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARRISON FRANKLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM Harrison Franklin appeals from a judgment of conviction of first-degree recklessly endangering safety, armed robbery and bail jumping as a habitual offender, and from an order denying his motion for

postconviction relief. He claims that the trial court erred in refusing to give instructions on lesser included offenses and attempt, that he was entitled to dismissal on the violation of his right to a speedy trial, and that the DNA surcharge should not have been imposed. We affirm the judgment and order in part and reverse that part of the judgment and order regarding imposition of the DNA surcharge. We remand for entry of an amended judgment of conviction.

¶2 In 1996, Franklin entered a liquor store and demanded money from the store clerk. A struggle ensued with the clerk. Store customers tried to help the clerk restrain Franklin. Franklin pulled a knife and the clerk and a customer were stabbed during the struggle. Franklin's 1996 conviction for the related crimes was vacated by the federal appellate court with instructions to the federal district court "to grant Franklin's petition for habeas corpus unless the state institutes proceedings to re-try him within 60 days." ***Franklin v. McCaughtry***, 398 F.3d 955, 962 (7th Cir. 2005).[1]

¶3 Franklin's first appearance in the Kenosha County Circuit Court following the federal appellate court's decision was March 17, 2005. Although the trial court intended to commence the trial within sixty days of the appellate decision, Franklin's newly appointed counsel indicated that he could not be prepared for trial by April 24, 2005. Franklin's jury trial commenced June 6, 2005.

¶4 Franklin argues on appeal that the prosecution should be dismissed because the jury trial was not commenced within sixty days of the federal

[1] The seventh circuit's decision was entered February 24, 2005.

appellate court's decision. His claim is based on his right to a speedy trial "as granted to him by the Seventh Circuit."[2] His claim is a nonstarter. The federal court merely required the State to institute proceedings to re-try Franklin within sixty days. Institute means to start, not complete. The federal court said "proceedings" not trial. If the federal appellate court wanted the trial to be commenced within sixty days, it would have plainly stated so. Further, Franklin did not demand an earlier trial and acknowledged that his counsel could not prepare for an earlier trial.[3] The institution of the proceeding to re-try Franklin satisfied the federal appellate court's direction and Franklin was not entitled to dismissal of the prosecution.

¶5 The theory of defense was that Franklin acted in self-defense and did not use the knife until he was attacked and restrained by people in the store. He asked that the jury be instructed on robbery by use of force as a lesser included offense of armed robbery because the knife was not produced until after the robbery was complete. He also requested that the jury be instructed on attempted robbery since he never took the money out of the store. Based on his claim of self-defense, Franklin argued he could not have acted with utter disregard for human life, an element of first-degree recklessly endangering safety. He requested an instruction on second-degree recklessly endangering safety as a lesser included

[2] The State responds that Franklin has waived this claim because he did not raise it in the trial court. Franklin's motion to dismiss the prosecution based on his right to a speedy trial was constitutionally based and focused on the nine-year gap between his arrest and his second trial. The general rule is that issues not raised in the trial court are deemed waived. ***State v. Polashek***, 2002 WI 74, ¶25, 253 Wis. 2d 527, 646 N.W.2d 330.

[3] We agree with the State's assessment that Franklin's complaint that evidence was destroyed has no bearing on Franklin's claim that the failure to commence the trial by April 24, 2005 was grounds for dismissal. As the State points out, Franklin does not make a claim that the evidence was destroyed following the federal appellate court's mandate.

offense of first-degree recklessly endangering safety. The trial court denied Franklin's requests concluding that the charged crimes were committed in one single transaction.

¶6 Whether the evidence adduced at trial permits the giving of instructions on lesser included offenses is a question of law that we review de novo. ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). A defendant is entitled to an instruction on a lesser included offense only when there exists reasonable grounds in the evidence for both the acquittal on the greater offense and conviction on the lesser offense. ***Id.***; ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). The evidence must be viewed in the light most favorable to the defendant. ***Id.***

¶7 We recognize, as Franklin points out, that there was testimony that he did not pull the knife until he was pinned to the floor in the struggle that ensued after he took money from the cash register. However, that struggle was still part of the robbery because Franklin was trying to get out of the store with the money. Armed robbery encompasses both taking possession of the money and its asportation from the place where it should be. *See* ***State v. Johnson***, 207 Wis. 2d 239, 246, 558 N.W.2d 375 (1997).

¶8 ***State v. Grady***, 93 Wis. 2d 1, 286 N.W.2d 607 (Ct. App. 1979), illustrates this point in light of the trial court's determination that a single transaction occurred. In ***Grady***, a radio was taken from a group of students and Grady produced a gun when the students surrounded his car and tried to prevent him from driving away. ***Id.*** at 4. Grady argued that the gun was not used in the commission of an armed robbery because it was not produced until after the radio had been taken from the students. ***Id.*** at 5. The court rejected the notion that

production of the gun was a separate act and prompted only by Grady's fear for his own safety. ***Id.*** at 6-7. The court held that asportation "continues beyond the point in time when the property of another is taken" and since production of the gun assisted asportation of the stolen radio, an armed robbery occurred. ***Id.*** Here, Franklin produced the knife for the purpose of getting out of the store with the stolen money. The weapon was part of the robbery. Franklin was not entitled to an instruction on the lesser included offense of robbery by use of force.

¶9 We also reject Franklin's claim that because he never got out of the store with any stolen money he was entitled to an instruction on attempted armed robbery. The "slightest movement is sufficient to meet the element of asportation." ***Johnson***, 207 Wis. 2d at 246. The trial court's refusal to give the attempt instruction did not usurp the jury's role in determining whether asportation occurred. The evidence was that Franklin put his hand in the cash register and removed cash. There was no possibility that the jury could have found insufficient asportation such that only an attempted crime was committed.

¶10 Regarding the lesser included offense of second-degree recklessly endangering safety the question is whether there is reasonable ground in the evidence for the jury to conclude that Franklin's conduct did not exhibit utter disregard for human life. *See* ***Foster***, 191 Wis. 2d at 23 (lesser-included offense should be submitted only if there is reasonable doubt as to some particular element of the greater crime). Although the jury is charged to consider why the defendant engaged in the offending conduct in determining whether the defendant acted in utter disregard of human life, WIS JI—CRIMINAL 1345, the suggestion that the defendant acted in self-defense is not a free pass to second-degree recklessly endangering safety. A person engaging in unlawful conduct likely to provoke an attack may lawfully act in self-defense only if the person reasonably believed he

or she was in imminent danger of death or great bodily harm. WIS. STAT. § 939.48(2)(a) (2005-06).[4] There was no evidence here that Franklin reasonably believed that attempts to restrain him put him in imminent danger of death or great bodily harm.[5] Additionally, the evidence was that a customer assisting the store clerk in bringing Franklin down was stabbed four times and at least one of the wounds to the man's abdomen required surgery and a seven-day hospital stay. The two stab wounds to the store clerk were described as "quite deep." The multiple wounds and the force with which they were inflicted demonstrate Franklin's utter disregard for human life. There was no reasonable ground to acquit Franklin on the first-degree recklessly endangering safety offense and Franklin was not entitled to an instruction on the lesser included offense.

¶11 The final issue and the one on which we reverse is the imposition of the $250 DNA surcharge in the judgment of conviction. Franklin argues that he should be sentenced under the laws in existence at the time he was originally tried and sentenced in 1996. Despite Franklin's inadequate briefing of this issue, the State discusses and generally concedes that imposition of the surcharge on Franklin violates the Ex Post Facto Clause of the state and federal constitutions because the surcharge is criminal in nature and "makes more burdensome the punishment for a crime."[6] ***State v. Thiel***, 188 Wis. 2d 695, 703, 524 N.W.2d 641

[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[5] Evidence that a female customer attempted to hit Franklin with a wooden billy club does not alone suggest imminent danger of death or great bodily harm.

[6] The State concedes that when Franklin committed his crimes in 1996, the $250 DNA surcharge could not have been applied to him. We appreciate the State's thoughtful discussion of the issue.

(1994). The surcharge should not have been applied to Franklin. We reverse that part of the judgment of conviction imposing the surcharge and that part of the order denying Franklin's postconviction request to vacate the surcharge, and remand with direction that an amended judgment of conviction be entered striking the DNA surcharge.

By the Court.—Judgment and order affirmed in part; reversed in part, and cause remanded with directions.

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