COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP1134-CR **Cir. Ct. No. 2005CF6710**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOMINIQUE D. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY T. WAGNER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Dominique D. Robinson, *pro se*, appeals from a judgment of conviction and order denying postconviction relief. Robinson was charged with several crimes, including first-degree reckless homicide, while armed. A jury found Robinson guilty of the lesser-included offense of first-degree

recklessly endangering safety, while armed. Most of Robinson's appellate arguments hinge on whether the circuit court erred when it instructed the jury on the lesser-included offense of first-degree recklessly endangering safety, while armed. Robinson also contends that the circuit court erroneously exercised its discretion when it imposed the maximum sentence. Because first-degree recklessly endangering safety, while armed, is a lesser-included offense of first-degree reckless homicide, while armed, we reject Robinson's challenges to the jury's verdict. Because Robinson did not include a challenge to the sentence in his postconviction motion, we do not consider that issue. We affirm the judgment of conviction and postconviction order.

BACKGROUND

¶2 Anthony R. Givings and his brother, Theodore, were looking to buy some marijuana. The drug purchase, however, was a set-up, by Robinson and some other men. When Robinson told Anthony he was being robbed, Anthony pulled a gun and tried to leave the car. Robinson fired his gun at Anthony's back as Anthony left the car. Robinson then pointed his gun at Theodore and told him to drive off. Theodore drove Robinson away from the scene, and Robinson told him to drop him off near Roosevelt Boulevard and 21st Street. Before Robinson left the car, he told Theodore that he knew who Theodore was, and warned him not to tell the police what happened.

¶3 Shortly after being shot by Robinson, Anthony shot himself in the head with his gun, killing himself. In addition to the self-inflicted gunshot wound to the head, Anthony was shot in the back.

¶4 When police went to arrest Robinson a few days later, he ran from officers after being handcuffed. He led officers on a foot chase until he was

finally subdued, but not until after kicking at the officers, striking one of them in the face.

¶5 Robinson was charged with first-degree reckless homicide, while armed, attempted armed robbery, resisting an officer, escape from custody, and intimidation of a victim. At trial, Robinson's theory of defense was that the Givings brothers were trying to rob him, and that he fired at Anthony in self-defense. At the close of evidence, the State requested that the circuit court submit first-degree recklessly endangering safety, while armed, as a lesser-included offense of first-degree reckless homicide, while armed. The circuit court did so, and the jury found Robinson guilty of the lesser-included offense. The jury also found Robinson guilty of resisting and escape. The jury found Robinson not guilty of attempted armed robbery and not guilty of intimidation of a victim.

¶6 The circuit court imposed a sentence totaling twenty-three years and six months, comprised of fifteen years and six months of initial confinement and eight years of extended supervision.

DISCUSSION

¶7 As noted above, Robinson's appellate arguments focus on the submission of first-degree recklessly endangering safety, while armed, to the jury, as a lesser-included offense of first-degree reckless homicide. Robinson claims his trial attorney was ineffective because he did not object to the submission of the lesser-included offense. Robinson also contends that the circuit court committed plain error when it submitted the lesser-included offense.

¶8 Robinson's contention that his trial attorney did not object to the submission of the lesser-included offense is defeated by the record. As the State

points out in its brief, Robinson's attorney did object to the submission of the lesser-included offense during the jury instruction conference, arguing that first-degree recklessly endangering safety, while armed, was not a lesser-included offense of first-degree reckless homicide. Therefore, Robinson's contention that his attorney was ineffective for not objecting to the lesser-included offense fails.[1]

¶9 We next address whether the circuit court erred when it submitted first-degree recklessly endangering safety, while armed, as a lesser-included offense of first-degree reckless homicide. Robinson points to WIS. STAT. § 939.66(2) (2007-08),[2] which provides that a lesser-included offense is one "which is a less serious type of criminal homicide than the one charged," and he argues that first-degree recklessly endangering safety, while armed, cannot be a lesser-included offense because it is not a homicide charge.

¶10 Robinson's argument is defeated by another subsection of WIS. STAT. § 939.66, namely, § 939.66(1), which states that a lesser-included offense is one "which does not require proof of any fact in addition to those which must be proved for the crime charged." Under that test, a codification of the "elements-only" test created in ***Blockburger v. United States***, 284 U.S. 299 (1932), an offense is lesser included if all of its statutory elements can be proved without proof of any fact or element in addition to those that must be proved for the greater offense. *See* ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986).

[1] Robinson's related argument that the circuit court erred by not affording him an evidentiary hearing on his claim of ineffective assistance of counsel necessarily fails.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶11 To prove that a person is guilty of first-degree reckless homicide, the State must prove that the defendant caused the death of the victim by criminally reckless conduct which shows an utter disregard for human life. *See* WIS. STAT. §§ 940.02(1), 939.24(1); *see also* WIS JI—CRIMINAL 1022. To prove that a person is guilty of first-degree recklessly endangering safety, the State must prove that the defendant endangered the safety of the victim by criminally reckless conduct which shows an utter disregard for human life. *See* WIS. STAT. § 941.30(1), 939.24(1); *see also* WIS JI—CRIMINAL 1345.

¶12 A crime is a lesser-included offense of another crime if it is "'utterly impossible'" to commit the greater offense without committing the lesser offense. ***Carrington***, 134 Wis. 2d at 274 (citation omitted). We agree with the State that it is impossible to cause the death of a person without first endangering that person's safety. As was stated in ***Hawthorne v. State***, 99 Wis. 2d 673, 299 N.W.2d 866 (1981), "'an unequivocal act which, but for the intervention of some extraneous factors, would have resulted in the death of the victim, endangers the safety of the victim.'" ***Id.*** at 682 (considering whether endangering safety by conduct regardless of life was a lesser-included offense of attempted first-degree murder under the criminal statutes then in effect) (citation omitted); *see also* ***State v. Weeks***, 165 Wis. 2d 200, 205-06, 477 N.W.2d 642 (Ct. App. 1991) (the holding of ***Hawthorne*** applied to the revised crimes of first-degree recklessly endangering safety and first-degree intentional homicide). The circuit court did not err when it submitted first-degree recklessly endangering safety as a lesser-included offense of the charged offense of first-degree reckless homicide.

¶13 Robinson also contends that his due process right to notice of the charges against him was violated by the submission of a lesser-included offense. We disagree. "When a defendant is charged with a crime he is automatically put

on notice that he is subject to an alternative conviction of any lesser[-]included crime; the whole contains all its parts." ***Kirby v. State***, 86 Wis. 2d 292, 299-300, 272 N.W.2d 113 (Ct. App. 1978). "[N]otice and charge on the greater offense as a matter of law includes notice of the included crime. Notice of the whole is notice of the parts." ***Geitner v. State***, 59 Wis. 2d 128, 134, 207 N.W.2d 837 (1973). Robinson's right to due process was not violated.

¶14 On appeal, Robinson also argues that the circuit court erroneously exercised discretion when it imposed maximum consecutive sentences. Robinson did not challenge the sentence in his postconviction motion and, therefore, we decline to address that issue on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 826-27, 539 N.W.2d 897 (Ct. App. 1995) (an issue not raised in the trial court need not be addressed on appeal).

By the Court.—Judgment and order affirmed.

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