

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2003

Cornelia G. Clark
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. 02-2528-CR

Cir. Ct. No. 01-CF-1497

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN D. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Ryan Thompson appeals from a judgment convicting him of attempted first-degree intentional homicide, and aggravated battery. The issue is whether the trial court erred by refusing to instruct the jury on a lesser-included offense to the homicide charge. We affirm.

¶2 At Thompson's trial the State presented evidence that someone shot Alfonso Randall in the stomach from a few feet away, and shot him twice more in the back as Randall ran away and the shooter pursued him. Witnesses testified that the shooter fired two guns as he ran, and fired other shots during the pursuit that missed Randall. According to these witnesses, and Randall, the chase ended when Randall collapsed. The shooter then stood over him and spoke to him, but fired no more shots before walking away. Some but not all of the eyewitnesses identified Thompson as the shooter. All agreed, however, that the shooter fired his shots at Randall from a close distance.

¶3 Thompson's primary defense consisted of testimony that someone else shot Randall. At the close of testimony he asked for instructions on first-degree recklessly endangering safety as a lesser-included offense of attempted first-degree homicide. The trial court denied the request, concluding that if Thompson shot Randall, a reasonable jury could only find that the shots were an intentional effort to kill him. The jury then found Thompson guilty of the charged offenses.

¶4 First-degree recklessly endangering safety consists of recklessly endangering another's safety under circumstances which show utter disregard for human life. WIS. STAT. § 941.30(1) (2001-02).¹ It is a lesser-included offense of first-degree intentional homicide. *State v. Weeks*, 165 Wis. 2d 200, 205, 477 N.W.2d 642 (Ct. App. 1991). The distinguishing element is the defendant's intent to kill the victim. *State v. Leach*, 122 Wis. 2d 339, 349, 363 N.W.2d 234 (Ct.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

App. 1984), *reversed on other grounds*, 124 Wis. 2d 648, 370 N.W.2d 240 (1985). Consequently, Thompson was entitled to an instruction on recklessly endangering safety if the evidence, viewed most favorably to him, allowed the jury to find that he shot Randall, but did not intend to kill him. *See State v. Foster*, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995). Whether the trial court properly refused the requested instruction is a question of law, that this court reviews *de novo*. *Id.*

¶5 We conclude that no evidence exists to allow a reasonable inference that Thompson shot Randall without the intent to kill him. The shooter first shot Randall at close range as Randall stood on the street, and then fired several more shots while in close pursuit as Randall ran away. The shooter had two guns and used both of them. Three of the bullets struck Randall's torso. Randall's treating physician testified that any one of them could have proved fatal had it entered at a different angle and followed a different path through his body. As it was, one bullet bruised and narrowly missed penetrating his intestines, a bullet fragment penetrated his lung and caused it to collapse, and a bullet broke two of his ribs.

¶6 A lesser-included instruction on recklessly endangering safety is required when evidence reasonably allows the inference that the defendant did not shoot at the victim's vital parts. *See Leach*, 122 Wis. 2d at 350-51. Here, with three bullets striking Randall's vital areas from close range, the only inference available is that the shooter intended to kill him. The fact that Thompson later passed on the opportunity to fire more bullets at Randall, as he lay helpless on the ground, cannot change the only reasonable inference to be drawn from his earlier conduct.

¶7 We note, in passing, that the State's brief was of limited value to the court because the State did not argue the evidence in a light most favorable to Thompson, as the standard of review requires.

By the Court.—Judgment affirmed.

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

