COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP351-CR **Cir. Ct. No. 2007CF2154**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY LAMONT JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Tony Lamont Jackson appeals the trial court's judgment entered after a jury found him guilty of second-degree reckless

homicide, contrary to WIS. STAT. § 940.06(1) (2007-08),[1] and of being a felon in possession of a firearm, contrary to WIS. STAT. § 941.29(2)(a). He also appeals the trial court's order denying his postconviction motion. More specifically, Jackson alleges that: (1) the trial court should have suppressed his confession because he was in custody when he confessed and he had not been read the ***Miranda*** warnings; and (2) the trial court erred in failing to instruct the jury on the lesser-included offense of homicide by negligent handling of a dangerous weapon. We affirm the trial court.

BACKGROUND

¶2 On May 2, 2007, the State filed a criminal complaint charging Jackson with first-degree reckless homicide and of being a felon in possession of a firearm. The complaint alleged that on April 29, 2007, Milwaukee police were dispatched to 701 West Maple Street in the City of Milwaukee in response to a call of "shots fired." Upon arrival, police determined that Anicka Labourgeois had been shot and she was transferred to the hospital.

¶3 Shortly after arriving on the scene, in an effort to determine what happened and identify additional witnesses, Milwaukee Police Detective Erik Gulbrandson spoke with Jackson, a witness to the crime, who was Labourgeois's boyfriend and the father of her unborn child. Detective Gulbrandson testified that

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

his purpose in speaking with Jackson was to question him as a witness to the shooting. To that end, Detective Gulbrandson spoke with Jackson for approximately two hours—from 12:00 a.m. until 2:00 a.m. The interview took place in an unmarked police car, with Jackson seated in the front passenger's seat and Detective Gulbrandson in the driver's seat. Jackson was not handcuffed or otherwise restrained.

¶4 While seated in the car, Jackson told Detective Gulbrandson about a fight that occurred just prior to the shooting, involving several females. Detective Gulbrandson then asked Jackson if he would come down to the police station to look at photographs and help identify the individuals involved in the fight. Jackson agreed and Detective Gulbrandson arranged for another officer to transport Jackson to the station while Detective Gulbrandson remained at the scene to assist in the investigation. Detective Gulbrandson informed the transporting officer that Jackson was not in custody and while Jackson was transported to the police station he was not restrained in any manner.

¶5 After Jackson was transported to the police station, Detective Gulbrandson learned that Labourgeois had died. Between approximately 2:30 a.m. and 2:45 a.m., Detective Gulbrandson returned to the police station. Once back at the station, Detective Gulbrandson attempted to identify the individuals who Jackson had described at the scene and participated in a briefing with detectives on the next shift. Meanwhile, Jackson was waiting for Detective Gulbrandson in an interview room, with concrete walls and no windows other than

one in the door, which was locked from the inside.[2] Detective Gulbrandson testified that the room was locked, not because Jackson was in custody, but "because there are people [in the police station] that actually are in custody, and we can't allow people to roam the halls free, as they would be able to open the other rooms and it puts them at risk as well as other people in the building at risk." However, Detective Gulbrandson stated that routine checks of the room were made and that if Jackson had expressed a desire to leave he would have been able to do so.

¶6 At 4:17 a.m., Detective Gulbrandson was able to continue his interview with Jackson with another detective present. Detective Gulbrandson began the interview by introducing the other detective, going over the story that Jackson had previously provided, and asking a few follow-up questions. Approximately twenty minutes into the interview, Jackson asked how Labourgeois was doing. Detective Gulbrandson informed Jackson that Labourgeois had passed away. Jackson began to cry and asked Detective Gulbrandson if he was serious. When Detective Gulbrandson assured Jackson that he was, Jackson continued to cry and admitted that he had accidentally shot Labourgeois. At the time of Jackson's admission he was not handcuffed or restrained in any manner. Detective Gulbrandson testified that after Jackson's confession he and the other

[2] In his brief, Jackson cites to Detective Gulbrandson's testimony in support of Jackson's assertion that a police officer was "standing guard" outside the interview room. However, that was not Detective Gulbrandson's testimony. Rather, Detective Gulbrandson testified that when he returned to the police station he spoke with the police officer who had transported Jackson to the police station and that the police officer "was in the immediate area" of and "right around the corner from" the interview room in which Jackson had been placed. That the officer happened to be in the immediate vicinity of the interview room when Detective Gulbrandson spoke with him does not mean that he was "standing guard." And Jackson does not provide us with a citation to the record demonstrating otherwise.

detective immediately stopped the interview. They subsequently obtained a recording device and escorted Jackson into another interview room.

¶7 Upon entering the new room, Detective Gulbrandson advised Jackson of the ***Miranda*** warnings. Detective Gulbrandson testified that when he asked Jackson if he understood the warnings, Jackson said "yes," and that he then asked Jackson if he wanted to talk and Jackson replied: "[Y]eah, we can talk." This post-***Miranda*** interview at the police station is not part of Jackson's present appeal.

¶8 Jackson filed a motion to suppress his confession,[3] arguing that there was no evidence that Jackson waived the ***Miranda*** warnings after they were read to him in the second interview room.[4] A hearing was held on May 27, 2008, at which Detective Gulbrandson was the only witness. The trial court denied the motion.

¶9 A jury trial was held on May 28 through June 2, 2008, after which, the jury found Jackson guilty of the lesser-included offense of second-degree reckless homicide and of being a felon in possession of a firearm.

¶10 On November 18, 2009, Jackson filed a motion for postconviction relief, contending that: (1) he was in custody when he confessed to the shooting and should have been read the ***Miranda*** warnings; and (2) the trial court erred in

[3] After being appointed counsel, Jackson filed a *pro se* motion to suppress with the trial court. His appointed counsel later filed a formal motion to suppress. Both motions were addressed by the trial court.

[4] Jackson has not raised this issue on appeal. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

denying his request to include a lesser-included offense jury instruction for homicide by negligent handling of a dangerous weapon. The trial court denied the motion. Jackson appeals.

DISCUSSION

¶11 Jackson raises two claims on appeal: (1) that the trial court should have suppressed his confession because when he admitted to shooting Labourgeois he was in custody and had not been read the ***Miranda*** warnings; and (2) that the trial court erred in failing to instruct the jury on the lesser-included offense of homicide by negligent handling of a dangerous weapon. We address each contention in turn.

I. Jackson was not in custody when he confessed to shooting Labourgeois.

¶12 Jackson first argues that the trial court should have suppressed his confession because at the time it was given he was in custody and he had not been read the ***Miranda*** warnings. The State disagrees and further argues that Jackson waived his custody claim when he failed to argue it before the trial court during the initial suppression hearing. While it is true that Jackson did not raise the custody claim in his initial suppression motion, he did raise it in his postconviction motion, giving the parties and the trial court an opportunity to address it at the trial level. Accordingly, we will exercise our discretion to address Jackson's custody claim on appeal. *See* ***State v. McMahon***, 186 Wis. 2d 68, 93, 519 N.W.2d 621 (Ct. App. 1994).

¶13 "In ***Miranda*** [***v. Arizona***, 384 U.S. 436 (1966)], the United States Supreme Court held that law enforcement officers conducting a custodial interrogation must employ procedural safeguards sufficient to protect a

defendant's Fifth Amendment and Fourteenth Amendment privilege against compelled self-incrimination." ***State v. Armstrong***, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999) (citations and quotation marks omitted). Police are required to read those procedural safeguards, commonly known as the ***Miranda*** warnings, to suspects in custody and under interrogation.[5] ***Id.*** at 351-52. Here, the parties agree that Jackson confessed to shooting Labourgeois before being read the ***Miranda*** warnings, but the State argues that ***Miranda*** warnings were not necessary because Jackson was not yet in custody. We agree.

¶14 Whether a person is in custody for ***Miranda*** purposes is a question of law we review *de novo*. ***State v. Buck***, 210 Wis. 2d 115, 124, 565 N.W.2d 168 (Ct. App. 1997). To determine whether Jackson was in custody at the time he confessed to shooting Labourgeois, we look at the totality of the circumstances, *see* ***State v. Gruen***, 218 Wis. 2d 581, 593-94, 582 N.W.2d 728 (Ct. App. 1998), and ask if a reasonable person would have considered himself in custody, *see* ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984); ***State v. Koput***, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988).

¶15 When determining whether under the totality of the circumstances "a reasonable person would have considered himself in custody" we look at such factors as the "defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint." ***Gruen***, 218 Wis. 2d at 594. When exploring the degree of restraint, we can consider as relevant factors:

[5] Because the parties do not address whether the police were interrogating Jackson at the time he confessed and because we conclude that the issue of custody is dispositive, we do not address the issue of interrogation.

> (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a ***Terry*** frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved.

Id. at 594-96 (footnotes and citations omitted). The burden is on the State to disprove custody by a preponderance of the evidence. *See* ***Armstrong***, 223 Wis. 2d at 351.

¶16 Jackson first argues, without explanation, that he was in custody, and therefore should have been read the ***Miranda*** warnings, at the scene of the crime when he was interviewed by Detective Gulbrandson in the front passenger's seat of the unmarked police car. The facts do not support his assertion.

¶17 When Jackson was questioned by Detective Gulbrandson at the scene of the shooting, Jackson sat in the front passenger's seat of the unmarked police car, as opposed to the back of the police car where those individuals in custody are typically held. Jackson was not handcuffed or otherwise restrained and there is no evidence that he could not have exited the car at any time. Moreover, Jackson was in the car because police had been told Jackson had just witnessed a serious crime. There is simply no evidence to support the assertion that Jackson was in custody when Detective Gulbrandson talked to him at the scene.

¶18 In the alternative, Jackson contends that he was in custody at 4:17 a.m. when Detective Gulbrandson first questioned him at the police station. Jackson asserts that a reasonable person would believe he was in custody at that time because: (1) he was taken from the scene to the police station in a marked police car; (2) he was placed in a locked interview room at the police station for

two hours and seventeen minutes; and (3) the room was made of cinder block walls and had no windows except for one in the door. In short, when these factors are placed in context with the other circumstances surrounding Jackson's confession, we are not persuaded that Jackson was in custody.

¶19 First, while Jackson was taken from the scene in a marked police car, he went voluntarily. Jackson had consented to Detective Gulbrandson's request that Jackson go to the police station to try to identify some of the individuals that he claimed he saw fighting with Labourgeois the night she was shot. The fact that Detective Gulbrandson remained at the scene while Jackson rode with another officer indicates Jackson was not a suspect. That the car used to transport Jackson to the police station was a marked police car does not mean Jackson was in custody because Jackson went down to the police station under his own volition to assist the police in identifying possible suspects.

¶20 Second, Jackson does not argue that he knew that the room in which he was sitting at the police station was locked and even if he did know, Detective Gulbrandson sufficiently explained why the door was locked:

> The reason for the room being secured is because there are people that actually are in custody, and we can't allow people to roam the halls free, as they would be able to open the other rooms and its puts them at risk as well as other people in the building at risk.

Moreover, Jackson was not in the room unduly long. He was in the room for only two hours and seventeen minutes while Detective Gulbrandson wrapped up other matters—including surveying the scene and briefing the next shift of detectives—and Jackson was routinely checked on while he waited.

¶21 Third, while the accommodations were perhaps a little sparse, Jackson was not restrained, and sparse accommodations are hardly enough to establish custody.

¶22 Consequently, we agree with the trial court that Jackson was not in custody until after he confessed to shooting Labourgeois. Up until that moment, Jackson had voluntarily come to the police station as a citizen witness to a crime. He presented no evidence that he was aware that he was in a locked interview room. And the State has shown that the room was locked for Jackson's own safety and the safety of those in the building. Simply stated, a reasonable person in Jackson's position would not have believed he was in custody.

II. The trial court did not err in failing to instruct the jury on the lesser-included offense of homicide by negligent handling of a dangerous weapon.

¶23 Next, Jackson argues that the trial court erred in denying his request for a jury instruction on the lesser-included offense of homicide by negligent handling of a dangerous weapon. The State argues that the trial court did not err because reasonable grounds did not exist for both acquittal of the second-degree reckless homicide charge and conviction of homicide by negligent handling of a dangerous weapon. We agree.

¶24 "A trial court engages in a two-step analysis in determining whether to submit a lesser-included offense jury instruction." ***State v. Morgan***, 195 Wis. 2d 388, 433-34, 536 N.W.2d 425 (Ct. App. 1995). First, the trial "court must determine whether the crime is a lesser-included offense of the charged crime." ***Id.*** at 434. Then, the trial "court must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense." ***Id.*** If both steps are satisfied and if the defendant requests it, the trial

court should then submit the lesser-included offense instruction to the jury. ***Id.*** "A trial court commits reversible error if it refuses to submit an instruction on an issue that is supported by the evidence." ***Id.*** Whether a trial court should have instructed the jury on a lesser-included offense is a question of law that we review *de novo*. ***Id.*** "In addition, we must view the evidence in a light most favorable to the defendant." ***Id.***

¶25 Here, the parties agree that homicide by negligent handling of a dangerous weapon is a lesser-included offense of second-degree reckless homicide. Accordingly, our analysis turns on whether there is a reasonable basis in the evidence for the jury to acquit on second-degree reckless homicide and to convict on homicide by negligent handling of a dangerous weapon.

¶26 When faced with the same question, the trial court concluded that no reasonable basis existed for a conviction on homicide by negligent handling of a dangerous weapon, founding its decision on Jackson's defense—that he was shooting at a passing vehicle, purportedly in self-defense, and did not mean to hit Labourgeois.[6] The trial court held as follows:

> With respect to that instruction, and I too find it difficult to accept one version of events; that the defendant somehow feared for his safety, and that is the reason why he intentionally fired the gun, then to say that somehow this was a negligent handling of a dangerous weapon. There is

[6] We can only assume that the testimony that Jackson was shooting at a passing car when one of the stray bullets hit Labourgeois is included in the audiotaped confession he made to police officers after being read the ***Miranda*** warnings. The record we received included neither the audiotaped confession (which was played to the jury) nor a transcript of the audiotape, and the parties do not cite to *any* evidence demonstrating that Jackson was shooting at a passing car. What limited information we have is reduced to that portion of the trial court's findings set forth above. However, because the parties agree that Jackson's defense was that he was shooting at a passing car and hit Labourgeois by mistake, we accept this fact as true for purposes of appeal.

> nothing negligent about intentionally pulling the trigger and firing the gun. The only negligent aspect of it is that the defendant was intending to shoot at some other target and not necessarily the victim in this matter, but that doesn't necessarily make this a negligent handling case.
>
> And although the parties are correct in that [homicide by negligent handling of a dangerous weapon] is a lesser included [offense], the facts in the case do not support that; namely, because the defendant, in essence, is asking for the instruction of self-defense. And even though the defendant may have believed that the force was necessary, or even if that belief was mistaken, that is sort of the argument in the case, and not that it was just a negligent handling of a dangerous weapon because it is clear from the testimony thus far, the evidence offered, that the defendant intended to fire the gun.

We agree with the trial court that Jackson's defense—that he was intentionally shooting at a moving vehicle in self-defense and hit Labourgeois by mistake—is inconsistent with a finding of guilty on the homicide-by-negligent-handling-of-a-dangerous-weapon offense.

¶27 In order for a jury to find a defendant guilty of homicide by negligent handling of a dangerous weapon, it must be satisfied beyond a reasonable doubt that: (1) "[t]he defendant operated or handled a dangerous weapon"; (2) "[t]he defendant operated or handled a dangerous weapon in a manner constituting criminal negligence"; and (3) "[t]he defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of [the victim]." WIS JI—CRIMINAL 1175.

¶28 In ***Lofton v. State***, 83 Wis. 2d 472, 266 N.W.2d 576 (1978), the supreme court affirmed the trial court's decision not to give a lesser-included instruction on homicide by negligent handling of dangerous weapon. In ***Lofton***, the defendant brought out a loaded gun in an attempt to convince her brother-in-

law to move his car during a heated argument and later alleged she shot him accidentally. ***Id.*** at 477, 488-89. The supreme court concluded that:

> by wielding a gun in this situation the defendant demonstrated more than ordinary negligence to a high degree—she demonstrated a conscious disregard for the safety of another and a willingness to take known chances of perpetrating injury. This was not a situation of people calmly discussing a problem and casually examining a weapon. It is because of the violent situation in which the defendant brought out the gun that her actions constitute reckless conduct rather than a high degree of negligence.

Id. at 489.

¶29 Similarly, when Jackson made a conscious decision to pick up a gun and shoot at a vehicle on a public street he "demonstrated more than ordinary negligence to a high degree." *See* ***id.*** Instead, Jackson's actions "demonstrated a conscious disregard for the safety of another and a willingness to take known chances of perpetrating injury." *See* ***id.*** While Jackson may not have intended to cause Labourgeois harm, he certainly intended to cause *someone* harm. And by choosing to effectuate that harm by shooting at a moving vehicle on a public street he demonstrated something more than negligence.

¶30 Jackson contends that ***Lofton*** is inapplicable because the defendant in ***Lofton*** "pulled out a gun and shot the victim at point blank range. The victim was the defendant's intended target." Jackson asserts that because he intended to shoot someone other than the victim he could be found merely negligent. We fail to see how it matters for purposes of conviction of homicide by negligent use of a dangerous weapon *who* a bullet hits when the intent of the shooter was to hit a *person*. If anything, the defendant in ***Lofton*** puts forth a better case for negligence than Jackson because the defendant in ***Lofton*** alleged that she did not intend to

shoot the gun at all, as opposed to claiming that she intended to shoot someone else and missed.

¶31 Moreover, Jackson argues that by interpreting the homicide-by-negligent-use-of-a-dangerous-weapon statute in this manner "a person who intentionally uses a dangerous weapon could never be guilty of negligent homicide." According to Jackson, under our interpretation:

> [t]he statute would be reserved for those persons who, for example, were in possession of a loaded gun and dropped the weapon on the ground accidentally, causing the gun to discharge and kill somebody. The defense would not be available to the person at the shooting range with poor eyesight or a lousy marksman. Indeed, Jackson appears to fall into this latter category.

We find the comparison of Jackson—who intentionally shot at a moving vehicle on a public street, presumably to injure whoever was inside—to a lousy marksman at a shooting range—who aims his weapon in a location designated for such a purpose and with the intent to hit an inanimate object—to be disingenuous at best. Jackson picked up a gun with the intent to hit a person in a moving vehicle, that Jackson injured the wrong person was the tragic risk he took when firing the shot. His actions were not negligent, and, therefore, the trial court did not err in refusing to submit an instruction on negligence to the jury.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.