

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2011

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. 2010AP637-CR

Cir. Ct. No. 2008CF4692

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSICA R. CODY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Jessica Cody appeals from a judgment of conviction for two counts of second-degree recklessly endangering safety while

armed. WIS. STAT. §§ 941.30(2) and 939.63 (2007-08).¹ Cody argues on appeal that the circuit court erred when it allowed the State to use video-taped deposition testimony at trial, and when it denied her request for a lesser-included offense jury instruction. Because we conclude that the circuit court properly allowed the taped testimony and correctly denied the requested instruction, we affirm.

¶2 Cody was charged with two counts of first-degree recklessly endangering safety while armed for having used a pocket-knife to injure two women in a bar fight. The jury found her guilty of the lesser-included offense of second-degree recklessly endangering safety while armed. The court imposed and stayed a sentence of four years of initial confinement and four years of extended supervision, and placed her on three years of probation with one year in the House of Correction as a condition of probation.

¶3 Cody's first argument on appeal is that the circuit court erred when it allowed the State to use the video-taped testimony of one of the victims, Janel Higgs. Cody argues that the State did not make efforts to secure Higgs' presence at trial, and therefore Higgs was not "unavailable" within the meaning of WIS. STAT. § 967.04. Cody also argues that the circuit court did not make a "specific finding of unavailability" or a specific finding that the State made any effort to secure Higgs' presence at trial.

¶4 Prior to trial, the State moved the circuit court to be allowed to use Higgs' videotaped testimony. In the motion, the State represented that Higgs was going to be studying abroad, was leaving in early January, and would not return

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

until the summer. The trial was scheduled for January 21. The court granted the motion on the grounds that the request was to accommodate both the defendant's interest in a speedy trial and the State's interest in having the witness's testimony presented at trial.

¶5 We review the decision of the circuit court to allow the use of videotaped testimony for an erroneous exercise of discretion. See *State v. Wachsmuth*, 166 Wis. 2d 1014, 1024, 480 N.W.2d 842 (Ct. App. 1992). Videotaped testimony may be used when the witness is unavailable to attend trial and the testimony is material. WIS. STAT. § 967.04(1). If a witness is not, in fact, unavailable, or if the State has not made a good-faith effort to secure the witness's presence at trial, then video-taped deposition testimony is inadmissible. *State v. Temby*, 108 Wis. 2d 521, 525, 322 N.W.2d 522 (Ct. App. 1982). In *Temby*, the witness testified that he was unavailable because he was going to be at a real estate convention in Las Vegas on the day of trial. *Id.* at 526. We held that “[s]uch a temporary absence does not amount to unavailability” within the meaning of the statute. *Id.*

¶6 We conclude that the circuit court properly exercised its discretion when it allowed the State to use the video-taped testimony. Cody does not dispute that Higgs was, in fact, unavailable on the date of trial. Unlike in *Temby*, however, Higgs' absence was not temporary but was quite lengthy. Cody argues that the court should have postponed the trial until Higgs' return during the summer. Cody, however, had invoked her right to a speedy trial. The circuit court allowed the use of video-taped testimony in order to accommodate both Cody's interest in having a speedy trial and the State's interest in presenting the testimony of one of the victims.

¶7 Cody also argues, without citation to any authority, that the use of video-taped testimony violated her constitutional right to confront a witness. We will not consider an argument that is not supported by legal authority. *See Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W. 2d 794 (Ct. App. 1990).²

¶8 Cody next argues that the circuit court erred when it refused to give the jury an instruction on the offense of endangering safety by use of a dangerous weapon as a lesser-included offense of second-degree recklessly endangering safety while armed. The decision whether to give a lesser-included offense instruction is a question of law that we review de novo. *State v. Fitzgerald*, 2000 WI App 55, ¶7, 233 Wis. 2d 584, 608 N.W.2d 391. When deciding a request for a lesser-included offense instruction, the court first determines if the offense is, as a matter of law, a lesser-included offense of the charged crime. *Id.*, ¶8. If it is, the court considers the second prong of the test, which is whether there are reasonable grounds in the evidence upon which a jury could acquit on the greater offense and convict on the lesser offense. *Id.*

¶9 Assuming without deciding that the offense of endangering safety by use of a dangerous weapon is a lesser-included offense of second-degree recklessly endangering safety while armed, we conclude that the circuit court properly denied the request for the instruction based on the evidence. An element of the crime of endangering safety by use of a dangerous weapon is that the defendant used a dangerous weapon in a criminally negligent manner. WIS JI—

² We note, however, that in *State v. Thomas*, 144 Wis. 2d 876, 890, 425 N.W.2d 641 (1998), the supreme court stated that the videotaped testimony of a child witness under § 967.04(7)-(10) was “the functional equivalent of live testimony and ensures the fundamental protections of the confrontation clause, namely the right of cross-examination, the observation of witness demeanor and the requirement of testimony under oath.”

CRIMINAL 1320. Cody's defense at trial was that she was acting in self-defense. Cody admitted that she intentionally swung the knife at the victims to get them to "stay clear." Given Cody's testimony at trial and her argument that she acted in self-defense, there are not reasonable grounds upon which a jury could acquit on a charge of second-degree recklessly endangering safety while armed and convict on a charge of endangering safety by use of a dangerous weapon. The circuit court correctly applied the law when it refused to give the jury the instruction on endangering safety by use of a dangerous weapon. For the reasons stated, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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

