

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2004

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. 03-0635-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000390

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY T. GREENE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jeremy Greene appeals from a judgment convicting him of first-degree intentional homicide, armed robbery, and armed burglary. The issue is whether the trial court erred when it refused to give a jury instruction on felony murder as a lesser-included offense to the homicide charge. We affirm.

¶2 The State charged Greene in the stabbing death of Kyle Hachmeister. At his jury trial, the State presented testimony from accomplices that Greene and three others planned to rob Hachmeister. They went to his house where two remained in a car while Greene and Corey Ellis broke into the home and entered Hachmeister's bedroom. According to the testimony, Greene returned to the car with a bloody knife and announced that he had stabbed Hachmeister seven times.

¶3 Greene presented an alibi defense and attacked the credibility of his testifying accomplices. At the close of evidence, he requested an instruction for first-degree reckless homicide, and for felony murder, both as lesser-included crimes of first-degree intentional homicide. The trial court denied those requests, reasoning that the nature and number of the stab wounds demonstrated “compelling evidence that whoever did it acted with an intent to kill or with the state of mind that their conduct was practically certain to cause death.... If there is a reasonable ground to acquit Mr. Greene of first degree intentional homicide, it lies in the alibi, not the absence of intent.”

¶4 Felony murder requires proof that the defendant was a party to one of several crimes including armed robbery, and that the commission of the underlying crime was a substantial factor in causing the victim's death. WIS. STAT. § 940.03; *State v. Krawczyk*, 2003 WI App 6, ¶¶14-15, 259 Wis. 2d 843, 657 N.W.2d 77, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 101 (Wis. April 22, 2003) (No. 02-0156-CR). Intent to kill is not an element of felony murder. *State v. Briggs*, 218 Wis. 2d 61, 66, 579 N.W.2d 783 (Ct. App. 1998).

¶5 On appeal Greene argues that the trial court should have instructed on felony murder because there was evidence that even if Greene participated in

the armed robbery, it was Ellis, acting alone, who stabbed Hachmeister. However, Greene did not present that theory to the trial court, arguing for a felony murder instruction solely on the grounds that the jury could find Greene guilty of stabbing Hachmeister, but without the intent to kill him. We do not reverse a trial court's decision based on theories presented for the first time on appeal. *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). Greene's request for the instruction, on other grounds, was insufficient to preserve his issue. The appellant must "articulate each of its theories to the trial court to preserve its right to appeal." *Id.* at 829. We therefore deem waived the argument Greene presents to this court.

By the Court.—Judgment affirmed.

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

