COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0767-CR **Cir. Ct. No. 02CF000016**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RYAN A. BUROKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

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

¶1 PER CURIAM. Ryan Buroker appeals from a judgment convicting him of three counts of first-degree recklessly endangering safety. He claims the trial court should have granted his request to instruct the jury on the lesser included offenses of second-degree recklessly endangering safety. For the reasons discussed below, we disagree and affirm the convictions.

BACKGROUND

¶2 Buroker was charged with five counts of attempted first-degree intentional homicide based on allegations that, in two related incidents which occurred on one winter evening, he had hit people with his car. He was acquitted on two counts arising from the first incident and convicted on three counts of the lesser-included offenses of first-degree recklessly endangering safety based on the second incident.

¶3 It was essentially undisputed that Buroker and his girlfriend, Jenna Olsen, had met up with Joshua Hoiland and Hoiland's girlfriend, Becky Olsen, at a bowling alley earlier in the evening, and had then gone to Buroker's house where they all drank alcohol while playing cards. At some point, following an argument with Becky,[1] Hoiland left Buroker's place. Becky asked Jenna to bring him back. After Jenna returned without Hoiland, Buroker, Jenna, and Becky all set out together in Jenna's car to find Hoiland. Buroker drove the car into a ditch. Jenna got the car out of the ditch, and Buroker took over as driver again, though Jenna complained about his driving. Eventually, Buroker turned the car into a driveway near where they had spotted Hoiland, and Becky and Buroker exited the car to talk to Hoiland.

¶4 Accounts of subsequent events, and particularly the motivation for subsequent events, varied. Taking the view most favorable to the defense, Becky began walking with Hoiland along the sidewalk while Buroker returned to the car. Buroker backed the car out of the driveway and attempted to turn into the next

[1] We refer to the girls by their first names to avoid any confusion.

driveway but lost control and went over the lawn, striking Hoiland. Hoiland, believing that Buroker had hit him on purpose, got up and punched his fist through the driver's window, knocking Buroker's glasses off. Buroker then backed up and drove away.

¶5 Meanwhile, a nearby homeowner, Devorah Yahn, heard the commotion and came outside to see if anyone needed assistance. As Yahn was talking to the police on a mobile phone, Buroker returned and Jenna got out of the car and had a brief confrontation with Becky. After Jenna got back into the car, Buroker again drove up onto the lawn, striking and injuring Hoiland, Becky, and Yahn. Jenna claimed that Buroker had only returned at her request, because she wanted to pick up Becky. Buroker testified, "I remember a part of driving around the block and after that I just remember seeing people in front of the car and putting on the brakes and hitting them."

¶6 The defense requested an instruction on second-degree recklessly endangering safety, which the trial court denied.[2] Following the subsequent guilty verdicts and judgment of conviction, this appeal ensued.

DISCUSSION

¶7 The decision whether to instruct the jury on a lesser-included offense involves two steps. First, the trial court must determine whether the requested instruction relates to an offense that qualifies as lesser-included as a matter of law.

[2] The State contends that Buroker's right to review of the trial court's decision should be restricted to the grounds which Buroker explicitly brought to the trial court's attention. We decline to apply the waiver doctrine in such a limited manner, however. We are satisfied that Buroker preserved the issue sufficiently.

If it does, the court must determine whether the evidence of record provides a reasonable factual basis for acquittal on the greater offense and conviction on the lesser offense. ***State v. Muentner***, 138 Wis. 2d 374, 385, 406 N.W.2d 415 (1987).

¶8 Here, the parties are in agreement that second-degree reckless endangerment is a lesser-included offense of first-degree reckless endangerment. The only issue before us is whether the trial court properly determined that the record provided no reasonable factual basis for acquittal on first-degree reckless endangerment and conviction on second-degree reckless endangerment. We review the sufficiency of the evidence to support instruction on the lesser-included offense de novo. ***State v. Peters***, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300.

¶9 Both first- and second-degree reckless endangerment require proof that the defendant endangered the safety of another human being by reckless conduct. The only element distinguishing the two offenses is that first-degree reckless endangerment is committed "under circumstances which show utter disregard for human life." *Cf.* WIS. STAT. § 941.30(1) and (2).

¶10 Buroker concedes that his conduct recklessly endangered the safety of others. He contends, however, that his testimony that he hit the brakes, if believed, was sufficient to show that he had not acted with utter disregard for human life, relying upon ***Balistreri v. State***, 83 Wis. 2d 440, 265 N.W.2d 290 (1978), and ***Wagner v. State***, 76 Wis. 2d 30, 250 N.W.2d 331 (1977). We agree with the State, however, that neither ***Balistreri*** nor ***Wagner*** stands for the proposition that braking is sufficient, in and of itself, to evince some regard for human life. As we have previously explained:

> In ***Balistreri***, the defendant drove his car at high speeds through a crowded downtown Milwaukee street during rush hour, bypassing red lights and driving the wrong way on one-way streets, at one point forcing three pedestrians to jump back on the sidewalk to safety. The supreme court deemed the evidence insufficient to convict the defendant on the element of "conduct evincing a depraved mind" because he had turned on his headlights, swerved to avoid the pursuing squad car, honked his horn, and braked to avoid a collision. The court reasoned that such actions "show some regard for the life of others." It further noted that the state had offered no evidence that the defendant even saw, let alone was willing to hit, the three pedestrians.

State v. Holtz, 173 Wis. 2d 515, 519-20, 496 N.W.2d 668 (Ct. App. 1992) (internal citations omitted).

> In ***Wagner***, the defendant was involved in a "drag race" with another vehicle on a city street at 11:00 P.M. when he struck and killed a pedestrian. He was charged with second degree murder. There were only two eyewitnesses, both of whom testified that they saw the racing cars "suddenly swerve to the left approximately one-half of a traffic lane" immediately before striking the victim. The court, noting that while the defendant's actions demonstrated a "conscious disregard for safety of another," nonetheless concluded that he could not be convicted of second degree murder because his conduct did not evince a "depraved mind," which the court defined as "a state of mind '... devoid of regard for the life of another....'" The basis for the court's ruling was the undisputed fact that the defendant had swerved to avoid hitting the pedestrian: "his attempt to avoid striking the victim by swerving to the left indicates some regard for the life of the victim."

State v. Spears, 147 Wis. 2d 429, 436-37, 433 N.W.2d 595 (Ct. App. 1988) (internal citations omitted).

¶11 In other words, the focus of ***Balistreri*** and ***Wagner*** was on whether the defendant had taken any appreciable actions to avoid a collision. Here, there was undisputed testimony that Buroker was stopped in the road in the right lane of traffic; that he turned sharply in the direction of Hoiland, Becky and Yahn; that he

crossed a lane of traffic, the driveway and sidewalk; and that he accelerated enough to take the car up a steep incline at the edge of the yard.

In short, nothing in the record supports a reasonable inference other than the Buroker aimed and drove his vehicle directly at the three people standing in the yard, thus showing "utter disregard for human life." Even assuming the jury believed that Buroker had braked immediately before impact, Buroker offered no testimony that the reason he braked was to avoid hitting the people, as opposed to deciding to only bump them rather than run them over or trying not to get stuck on the hill. Like the trial court, we see no other reasonable way to view the undisputed portions of the evidence than as circumstances showing utter disregard for human life.

By the Court.—Judgment affirmed.

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