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DISTRICT IV

November 22, 2023

To:

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Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

Nancy A Dowling
Clerk of Circuit Court
Crawford County Courthouse
Electronic Notice

Jeffrey W. Jensen
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1961-CR

State of Wisconsin v. Lee J. Kennedy (L.C. # 2019CF108)

Before Kloppenburg, P.J., Blanchard, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lee Kennedy appeals a judgment of conviction. The issue is whether the evidence was sufficient to support the convictions. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.¹ We affirm.

At a jury trial, Kennedy was found guilty of one count each of first-degree reckless injury, first-degree recklessly endangering safety, and endangering safety by use of a dangerous

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

weapon.² We affirm the verdict “unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force” that no reasonable trier of fact “could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact to decide, not this court. *Id.* at 504.

Kennedy argues that the evidence was insufficient to prove that he fired the shots that formed the basis for all three charges. If he were to prevail on this argument, it would require reversal of all three convictions. We conclude that the evidence was sufficient.

Specifically, there was evidence that three shots were fired, in the form of testimony by a witness who heard three shots, and by the presence of three spent shell casings. Forensic analysis linked the shell casings to a firearm found at the scene. The firearm was registered to Kennedy’s stepson, but Kennedy was known to generally be the person who possessed it. A case for a firearm of that brand was found in the recreational vehicle that Kennedy was occupying that night, along with a box of ammunition that matched the brand and caliber of the shell casings. At the time the shots were heard, at least one bullet struck a vehicle that was occupied by two people who had just left Kennedy’s company.³ Apart from the victim who was struck by a bullet

² The judgment of conviction identifies this third count as “Endanger Safety/Reckless Use of Firearm,” but the jury instruction used was for an intent-based offense, intentionally discharging a firearm into a vehicle, WIS. STAT. § 941.20(2)(a).

³ The State asserts on appeal that two bullets struck the vehicle. However, none of the State’s record citations show that two separate bullets were recovered, or otherwise directly support that assertion. The State appears to be inferring that the bullet fragments recovered from the head of the male victim in the vehicle were from a different bullet than the bullet recovered from the frame of the vehicle itself. However, the course of events described at trial suggests the following: a bullet traveled through a window of the vehicle, struck the victim’s head, continued on to perforate, from below, the headliner material of the vehicle the victim was riding in, and finally came to rest within the vehicle frame. The following was undisputed testimony describing recovery of the bullet:

(continued)

in the vehicle, the other people known to be in the area at the time testified that they did not fire the shots.

Together, this evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Kennedy fired the shots from a firearm he was generally known to possess, and possessed ammunition for, at a time when he was the only person in the area known to be awake and not in the vehicle that was struck. This evidence could reasonably be understood as showing beyond a reasonable doubt that Kennedy, as opposed to any of the other people known to be in the area at the time, fired the shots.

Separately, Kennedy argues that, even if he fired the shots, there is not sufficient evidence to support a finding that he engaged in criminally reckless conduct that demonstrated utter disregard for human life. Kennedy argues that the evidence fails to support those findings because there is no evidence of the specific circumstances in which he fired the shots.

These showings were necessary to support the charges of first-degree reckless injury and first-degree recklessly endangering safety. The jury was instructed on those counts that

We examined the truck and, on the headliner, kind of above where the driver would have been seated, was a cone shaped red-brown stain, which I believed to be blood. There was also a perforating defect through the headliner, meaning that something had gone through the headliner. Then once we had taken the headliner off of the vehicle, we saw little scrapes and dents in the ... underside of the roof that we used a trajectory rod to ... give us the trajectory or path of this object that had gone through there. It appeared to have gone through the headliner, kind of skimmed across the top of the truck and then, as we came to learn, a bullet had become lodged in the A-pillar, ... the front passenger frame of the vehicle.

In closing argument, the prosecutor presented the theory we describe above: “And of course, it makes sense that there would be this impact kind of damage on the bullet if it went all the way through that A-frame and before that, it went a little bit through [the victim’s] head and before that, it went through the rear window.” This theory contrasts with the State’s current theory on appeal.

“criminally reckless conduct” means that the conduct created a risk of death or great bodily harm to another person; the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. The instruction further stated that, in determining whether the circumstances of the conduct showed utter disregard for human life, the jury should consider factors: what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and all other facts and circumstances relating to the conduct.

We conclude that the evidence was sufficient. The fact that three shots were fired was sufficient to support a finding that the firing was a volitional act, rather than an accident. Beyond that, the fact that at least one of the bullets struck the vehicle—indeed, struck the driver of the vehicle—which it could reasonably be inferred had its lights on at that time, was sufficient to show that the shooter was reckless as to the direction in which the firearm was volitionally discharged. That is, it was reasonable for the jury to conclude that the discharge in the direction of the vehicle created an unreasonable and substantial risk of death or great bodily harm, and to infer that an adult with experience with firearms, such as Kennedy, was aware that the discharge in the direction of the vehicle created the unreasonable and substantial risk of death or great bodily harm. Similarly, it was reasonable to conclude that this recklessness, with an instrumentality as dangerous as a firearm, showed utter disregard for human life.

Separately, as to the third count, Kennedy argues that the evidence was insufficient to show that he intentionally fired the weapon into the vehicle. On this charge of endangering safety by use of a dangerous weapon, the jury was instructed in part that it must find that the defendant intentionally fired the weapon into a vehicle, meaning that he acted with the purpose

to shoot the gun and to shoot it into the vehicle. Kennedy argues that the record fails to show that he shot at the vehicle intentionally.

We conclude that the evidence on this intent issue was also sufficient. We have already explained why it was reasonable to conclude that the shooting was a volitional, that is, purposeful act. Beyond that, the fact that at least one of the shots struck the vehicle from relatively close range at the moment when the driver was attempting to leave the property is sufficient to prove that the shooter had the purpose to shoot into the departing vehicle. The jury, which heard evidence about the location of shell casings and therefore had a basis to make findings about where Kennedy was standing when he fired the gun, had every reason to find that this particular round traveled directly from the gun in Kennedy's hand to the rear window of the truck at the location of the driver, and did not first ricochet off some other object. Kennedy argues that the shooter's intent cannot be based on this record. We disagree. Under these circumstances, it is reasonable to infer that the weapon was intentionally pointed at whatever was struck, even if that is not the only conceivable explanation for what occurred.

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals