**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

OCTOBER 18, 1995



**No. 94-1989-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**VICTOR VILLALOBOS,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Racine County: NANCY E. WHEELER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Victor Villalobos appeals from a judgment of conviction for second-degree intentional homicide while armed with a dangerous weapon contrary to §§ 940.05(1)(a) and 939.63, STATS. We conclude that there was not a scintilla of evidence to support lesser included offense instructions on first- and second-degree reckless homicide. Accordingly, we affirm the judgment of conviction.

Villalobos was charged with the first-degree intentional homicide[1] of his wife, Roseann Villalobos. When the police arrived at the Villalobos residence, they found Roseann lying on the basement floor in a large pool of blood. It was determined that Roseann was dead at the scene and an autopsy revealed that she had died as a result of blood loss from three deep cuts to her neck which severed the carotid artery and jugular vein. An officer also found Victor lying on the floor, suffering from self-inflicted stab wounds.

The couple's daughter, Nichole, told the police that she had been at the residence at the time of the stabbing. She had heard her parents arguing and the knife block rattling and had observed her father and mother struggling. She called 911. When Nichole returned to where her parents had been, she observed her mother lying on the floor at the bottom of the basement stairs. Nichole stated that her father told her that he would have to go to prison and was going to kill himself.

The pathologist who performed the autopsy testified that it would take "a large amount of force" to inflict the cuts to Roseann's neck. When asked if "the wounds [the pathologist] described could have been caused by movement of the victim against a knife being held stationary," the pathologist stated that it was possible. According to Villalobos, the pathologist's testimony supported the scenario that Roseann's wounds were caused by her body falling with considerable force against one or more knives.

[1] Section 940.01, STATS., provides: "[W]hoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony."

At trial, Villalobos requested lesser-included offense instructions on second-degree intentional homicide[2] and first[3]- and second[4]-degree reckless homicide. The defense had two theories which it believed supported these instructions: (1) that Villalobos acted in self-defense and (2) that the act was not intentional but reckless. The trial court rejected the request for instructions on first- and second-degree reckless homicide, stating that the rejected instructions were inconsistent with Villalobos's position that he was acting in self-defense.[5] Villalobos was convicted of second-degree intentional homicide. He appeals.

Villalobos asserts that a defendant who gives partially or wholly exculpatory testimony is entitled to an instruction inconsistent with that testimony if, under a reasonable but different view of the record, the evidence

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[2] Section 940.05, STATS., provides:

> (**1**) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:
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> (a) In prosecutions under s. 940.01, the state fails to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist as required by s. 940.01(3); or
>
> (b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01(2) did not exist. By charging under this section, the state so concedes.

[3] Section 940.02(1), STATS., provides: "Whoever recklessly causes the death of another human being under circumstances which show utter disregard for human life is guilty of a Class B felony."

[4] Section 940.06, STATS., provides: "Whoever recklessly causes the death of another human being is guilty of a Class C felony."

[5] Under ***State v. Sarabia***, 118 Wis.2d 655, 348 N.W.2d 527 (1984), the trial court's reasoning was wrong. The court in ***Sarabia*** held that a defendant "may request and receive lesser included offense instructions, even when the defendant has given exculpatory testimony, if under a reasonable but different view of the record, the evidence and any testimony other than that part of the defendant's testimony which is exculpatory supports acquittal on the greater charge and conviction on the lesser charge. ***Id.*** at 663, 348 N.W.2d at 532.

and any testimony other than part of the defendant's testimony which is exculpatory support acquittal on the greater charge and conviction on the lesser charge. ***State v. Sarabia***, 118 Wis.2d 655, 662-63, 348 N.W.2d 527, 532 (1984), supports Villalobos's assertion.[6] *See also* ***State v. Wilson***, 149 Wis.2d 878, 899-900, 440 N.W.2d 534, 542 (1989).

Villalobos cites ***State v. Muentner***, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987), for the proposition that whether a lesser-included instruction should be given is a two-step process. A court must first decide whether the offense was a lesser-included one, and secondly, whether there is a reasonable basis in the evidence for acquittal on the greater and conviction on the lesser. ***Id.*** Villalobos focuses the issue as follows: "[W]hether there are reasonable grounds in the evidence for acquittal on the charges of first- and second-degree intentional homicide and conviction on the charge of first- and second-degree reckless homicide."

We must decide whether there was evidence to support a lesser included offense instruction. Whether a lesser included offense instruction should be submitted to a jury is a question of law which we review de novo. ***State v. Salter***, 118 Wis.2d 67, 83, 346 N.W.2d 318, 326 (Ct. App. 1984). Such an instruction is not justified when it is supported by a mere scintilla of evidence. *See* ***Ross v. State***, 61 Wis.2d 160, 171, 211 N.W.2d 827, 832-33 (1973). It must be

[6] We certified this issue to the supreme court asking that the court revisit the line of cases allowing for a lesser included instruction which is inconsistent with a defendant's theory of defense. The supreme court denied certification. Therefore, we are bound by the court's holding in ***Sarabia***, 118 Wis.2d at 662-63, 348 N.W.2d at 532.

supported by a reasonable view of the evidence. *See* ***id.*** at 171-173, 211 N.W.2d at 833. There must be some appreciable evidence supporting the lesser included offense instruction. ***Id.*** at 172, 211 N.W.2d at 833. A lesser included offense instruction is not warranted when it is supported by mere conjecture. *See* ***id.*** at 172, 211 N.W.2d at 833 (quoted source omitted). Additionally, "the evidence is to be viewed in the most favorable light it will 'reasonably admit of from the standpoint of the accused.'" ***Id.*** (quoted source omitted).

Villalobos argues that the evidence reasonably supported the view that he acted recklessly. He states that the evidence raises a doubt as to whether he acted with intent to kill and provided grounds for conviction on reckless homicide. Additionally, he argues that he "was entitled to an instruction on second degree reckless homicide because the jury could have reasonably concluded that the circumstances of his conduct did not show utter disregard for human life."

We disagree. After a careful review of the record, it is clear to this court that there was not even a scintilla of evidence to support instructions on the lesser included offenses of first- and second-degree reckless homicide. *See* ***Ross***, 61 Wis.2d at 171, 211 N.W.2d at 832-33. Rather, Villalobos propounded various theories to the trial court at the time of the jury instruction conference under which his conduct could be viewed as a lesser included offense of either first- or second-degree reckless homicide. We agree with the State that while there was sufficient evidence to convict Villalobos of the lesser-included crimes of first- and second-degree reckless homicide, there is no reasonable view of the

evidence that would support acquittal on first-degree and second-degree intentional homicide.

The pathologist's testimony upon which Villalobos relies provides no affirmative support for his argument that he did not intentionally kill his wife. In fact, the pathologist testified that the cuts on Roseann's hands were defensive type injuries:

> These are cuts in a characteristic pattern that we would typically describe as defensive type injuries. These are cuts that are over portions of the hands. … These injuries are characteristic of an attempt of that individual to grab a sharp object and in doing so the tips of the fingers as well as the base of the thumb become cut by the sharp object.

The record is devoid of support for Villalobos's theory that Roseann fell with considerable force against one or more knives. We agree with the State that the pathologist's statement that it "was possible" that Roseann fell repeatedly against one or more knives, when taken in context, provides no affirmative support for Villalobos's argument that he did not act with intent to kill or harm Roseann.[7]

We further conclude that the serologist's testimony that the blood

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[7] The pathologist was questioned as follows:

> Q[C]an you, a forensic pathologist, can you envision a scenario where there was a struggle going on and a person because the person is moving against the knife is slashed in the neck in the same place 3 times, at least 3 times?
>
> AIt would be my opinion that it would be possible but highly unlikely.

on the west wall of the basement stairs was Roseann's provides no appreciable support for the theory that Roseann sustained her injuries while falling down the stairs. Viewing the evidence in a light most favorable to Villalobos, there was no reasonable basis upon which to instruct the jury on the lesser included offenses of first- and second-degree reckless homicide. Therefore, we affirm the conviction.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.