COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3286-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALONZO PEAVY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed*.

Before Fine and Schudson, JJ., and Michael T. Sullivan, Reserve Judge.

SULLIVAN, J. Alonzo Peavy appeals from a judgment of conviction, after a jury trial, for attempted first-degree intentional homicide while armed with a dangerous weapon, and first-degree intentional homicide while armed with a dangerous weapon—both as a party to a crime. He also appeals from an order denying his motions for postconviction relief. He raises

essentially one issue—whether the trial court erred when it failed to submit alternative jury instructions for lesser-included offenses predicated on imperfect self-defense. We reject Peavy's argument and affirm.

I. BACKGROUND.

The State charged Peavy with offenses arising out of an early-morning double-shooting at a tavern on the City of Milwaukee's north side. The criminal complaint alleged that Peavy shot and wounded Carlton Jackson, a bouncer at the tavern, and shot and killed Tina Terry, the owner of the tavern, shortly after 2:00 a.m. on July 10, 1993.

We focus solely on the evidence viewed most favorably to Peavy's contentions because the sole issue raised is whether the trial court should have granted alternative jury instructions on lesser-included offenses, predicated on Peavy's theory of imperfect self-defense.

Peavy, Peavy's cousin Jamal Purifoy, and Anthony Johnson entered Tina's RTI tavern around 2:00 a.m. According to Peavy's testimony during his direct examination at trial—shortly after the group entered the tavern, Jackson approached Purifoy, while Peavy and Johnson went to the bar to "get drinks." Jackson and Purifoy began arguing; Jackson informed Purifoy that it was "closing time." Peavy next testified that Jackson and Purifoy began "pushing each other." Peavy's version of what occurred next was brought out during his direct examination by his trial counsel:

> A. At the time I had no attention of it, you know, and I turned around, and so-- The dude, the bouncer, he was unzipping his pouch, you know, and that called my attention, you know, and he started pulling something, looked silver like to me, and so I said he was pulling something, you know.
>
> Q. Now, take this real slowly. What happens right after you say that?

A.Right after I said that? Right after I say he's pulling something?

Q.(Nods head affirmatively.)

A.I heard a shot.

Q.Do you know where the shot came from?

A.No.

Q.Do you know-- Did you know at that moment while you were standing there after hearing the shot who had shot who?

A.No.

Q.Okay. What did you next see after you heard the shot?

A.Then after that I seen Carlton and my cousin. They started wrestling, you know.

Q.Let me stop you. They started wrestling. Can you describe that in any further detail?

A.Like he had grabbed my cousin like this--you know. And the pistol was out like this, and he had put his hand on the pistol.

Q.So you saw a pistol at that point? Where was the pistol?

A.It was in Jamal hands. [sic]

Q.Okay. And was the pistol pointed in any direction?

A.Yeah--because he like-- At first he grabbed with both of his hands, you know, and then he took one of his hands, and he grabbed the pistol.

Q.And were they fighting over the pistol?

A.Right.

Q.What direction was the barrel pointing as they were fighting over the pistol?

A.I'd say like he was pulling like--like this way, and he had him like this.

Q.Now, at that moment of time did you know who had shot who?

A.No.

Q.Okay. When you saw the bouncer have your cousin around the neck, what did you do?

A.Well, of course, that's my cousin, you know, and he had him choking him, you know, so I came to his aid.

Q.How did you come to his aid, Alonzo?

A.Well, I ran over there, and then we got to tussling.

Q.Now, wait. We want to be more detailed than that. How were you tussling and with who? That's a multiple question, but answer them one at a time.

A.With Carlton.

Q.You were tussling with Carlton?

A.Right.

Q.Do you know it was Carlton at that time?

A.No.

Q.Okay, you're talking about the bouncer?

A.Right.

Q.Okay, how were you tussling with him?

A.Well, I tried to get him off my cousin.

Q.How did you do that?

A.Well, he had one hand like this, and he had one hand on the pistol. And so I was like trying to get his hand from around my cousin.

Q.Now, while you were struggling with Carlton, did Carlton still have any part of his body on your cousin?

....

Q.Okay, were there any loud noises as you were struggling with him?

A.Yeah.

Q.What kind of--

A.Screaming and yelling and stuff like that, everybody just running, you know.

Q.Did you hear any further gunfire as you were struggling with Carlton?

A.I don't think so.

Q.As you're fighting with him, does the gun go off again?

A.That's after I had got the pistol. Somehow I had got the gun and--

Q.How did you get the gun? What do you mean somehow you got the gun? The jury wants to know.

A.Well, when they was wrestling, you know, Carlton, he had his hand on the gun, too.

Q.Were you all trying to get the gun?

A.Right. And so I got the gun, so somehow I heard somebody running behind me, you know, and I just panicked. You know what I'm saying? I turned around, and I felt that my life was in danger, you know, so I turned around, and I--

Q.Now, you say you heard some running behind you. Can you describe what you heard?

A.It was like boom, boom, boom.

Q.Coming up behind you?

A.Yeah, real fast.

Q.Now just as you hear this noise behind you, how many shots have occurred at that point in time?

A.I'd say like one or two.

Q.Did the gun go off again during the struggle, or aren't you certain? Don't guess. Do you know?

A.I think two. I think--

Q.Okay. Now, when you turned-- You heard some noise, and you turned. By the way, Alonzo, how much time has elapsed? Does this happen slowly, fast?

A.Fast. It all happened fast, you know. I had no time to think, you know.

Q.All right. You turned and shot somebody running up behind you. Did you see who you shot?

A.Well, when I turned around, and I shot, and I seen the person fell. That's when I seen where I shot.

Q.You shot Tina, didn't you?

A.Right.

At the close of evidence, Peavy asked for alternative lesser-included offense instructions on second-degree intentional homicide—imperfect self-defense, and attempted second-degree intentional homicide—imperfect self-defense. The trial court denied this request, concluding that there was no evidence to support the lesser-included instructions requested by Peavy. In the end, the trial court gave instructions on attempted first-degree intentional homicide, while using a dangerous weapon, as a party to a crime, for the Jackson shooting; and first-degree intentional homicide, while using a dangerous weapon, as a party to a crime, and the lesser-included offense instruction for first-degree reckless homicide, while using a dangerous weapon, as a party to a crime, for the Terry shooting. The jury convicted Peavy of attempted first-degree intentional homicide for the Jackson shooting and first-degree intentional homicide for the Terry shooting, both as a party to a crime and with the charged penalty enhancers.

Peavy moved the trial court for postconviction relief, arguing, *inter alia*, that he should have received his alternative lesser-included offense instructions. The trial court denied the motion.

II. ANALYSIS.

Peavy argues that the evidence presented at trial supported his requested jury instructions for attempted second-degree intentional homicide—imperfect self-defense and first-degree intentional homicide—imperfect self-defense. We disagree—the trial court properly concluded that the evidence presented at trial did not support such lesser-included instructions.

Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law that we review *de novo*. ***State v. Weeks***, 165 Wis.2d 200, 208, 477 N.W.2d 642, 645 (Ct. App. 1991). We must view the evidence in a light most favorable to the defendant. ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988). Nonetheless, a lesser-included offense instruction is not justified when it is supported by a

mere scintilla of evidence; it must be supported by a reasonable view of the evidence. *See* ***Ross v. State***, 61 Wis.2d 160, 171-73, 211 N.W.2d 827, 832-33 (1973).

"Imperfect self-defense," that is, "unnecessary defensive force," is a partial defense that reduces first-degree intentional homicide to second-degree intentional homicide when the "[d]eath was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." Section 940.01(2)(b), STATS.

Hence, a jury may acquit a defendant of first-degree intentional homicide, and convict the defendant of second-degree intentional homicide instead, if the evidence reasonably shows that: (1) the defendant had a reasonable belief that he was preventing or terminating an unlawful interference with his person; and (2) the defendant had an actual, but unreasonable belief that force was necessary to prevent or terminate the unlawful interference; or (3) the defendant had a reasonable belief that force was necessary to prevent or terminate the unlawful interference but the defendant's actual belief regarding the amount of force necessary was unreasonable. *See* ***State v. Camacho***, 176 Wis.2d 860, 870-73, 882-83, 501 N.W.2d 380, 383-85, 388-89 (1993). Further, a reasonable view of the evidence must show both the objective and subjective prongs of imperfect self-defense before the instruction must be given. Thus, if our review of the evidence shows that either prong was not satisfied in the evidence, we need not address whether the other prong had a reasonable basis in the evidence. Given this standard of review, we next address Peavy's contention with respect to each charge.

A. Carlton Jackson shooting.

Peavy argues that he should have received the lesser-included offense instruction for attempted second-degree intentional homicide—imperfect self-defense, for the Carlton Jackson shooting. He argues the jury should have received this instruction because there was evidence presented that he thought Jackson was pulling a gun on either him or Purifoy and that would

justify him to reasonably believe that force was necessary to prevent or terminate an unlawful interference with his person or Purifoy.

The State at oral argument reluctantly conceded that a reasonable, if unlikely, view of the evidence would support a view that Peavy thought Jackson was pulling a gun from the pouch and that his or Purifoy's life was in danger. Indeed, Peavy testified that he saw Jackson "unzipping his pouch" and "started pulling something, looked silver like to me." Given the circumstances of being in a tavern in a relatively high crime area in the City of Milwaukee, during the early morning hours, a reasonable person could reach the conclusion that Jackson was pulling a gun and that his or her life was in danger.

The State argued at oral argument, however, that even if we assume the objective prong was met by the evidence, there was *no* evidence to support the subjective prong—that is, there was no evidence that Peavy actually believed it was necessary to shoot Jackson in self-defense or defense of another. There was no testimony from which to impute Peavy's actual belief that it was necessary to shoot Jackson. Indeed, Peavy testified that he did not shoot Jackson. Given the lack of any evidence to support this subjective prong of the ***Camacho*** self-defense test, the trial court properly refused to give the attempted first-degree intentional homicide—imperfect self-defense jury instruction.

B. Tina Terry shooting.

Peavy next argues that the jury should have received the lesser-included offense instruction for second-degree intentional homicide—imperfect self-defense, for the Terry shooting. He argues that factual scenario with respect to this shooting was similar to that presented in ***State v. Gomaz***, 141 Wis.2d 302, 414 N.W.2d 626 (1987). In ***Gomaz***, a defendant claimed she held a knife in front of her when the victim approached her with his hands outstretched toward her neck, in what she perceived to be a life-threatening manner. ***Id***. at 306, 414 N.W.2d at 628. She told the victim to stay away, but he pushed himself on to her and the knife. ***Id***. at 306, 414 N.W.2d at 628-29. The supreme court held that the trial court should have given a self-defense instruction.

> [T]his case presents a situation in which the defendant admitted that she intentionally threatened the use of self-defense, did not deny that [the victim] died as a result of a stab wound from the knife that she wielded, but claimed that she did not intentionally thrust the knife into the deceased. To distinguish the intentional conduct of threatening use of force from the ultimate unintentional act resulting from the actions taken in self-defense such as to create an inconsistency would be to impose a fictional distinction upon what was essentially one continuous act.

Id. at 311, 414 N.W.2d at 631.

Peavy argues that here he admitted that "he took the initial steps of grabbing the weapon, turning around and pointing it at the victim, but claimed that he did not intentionally fire the weapon." Thus, he argues that similar to ***Gomaz***, it was "essentially one continuous act," and thus the trial court should have given the lesser-included instruction because in one continuous act he grabbed the weapon, turned around because he heard footsteps approaching from behind, felt that his life was in danger, and then the gun just went off.

Once again Peavy's argument fails, because even reviewing the evidence most favorably to Peavy, there is no evidence that Peavy grabbed the gun because of the threat approaching from behind. Peavy's testimony clearly shows that he had the gun in hand before he heard Terry approaching. The fact that the gun was in his hand had no connection to a perceived threat. Thus, unlike the defendant in ***Gomaz***, Peavy did not have the subjective self-defense state of mind, necessary under ***Camacho***, when he grabbed the gun. The defendant in ***Gomaz*** intentionally threatened use of force and then the victim ran into the knife—an unintentional act on the part of the defendant. Here there was no intentional threat of force—that is, Peavy did not intentionally brandish the gun at Terry to show a threat of force; Peavy already had the gun and in one motion turned towards Terry. This crucial fact distinguishes this case from ***Gomaz***. Accordingly, the trial court could properly refuse to give the requested lesser-included offense instruction.

In short, we conclude that the trial court properly denied Peavy's requested jury instructions. Accordingly, the judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.