COURT OF APPEALS
DECISION
DATED AND RELEASED

December 13, 1995

No. 95-0164-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KWEKU FITZPATRICK,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Kweku Fitzpatrick appeals from a judgment convicting him of five felonies and one misdemeanor arising out of a gang-related shooting and from an order denying his motion for a new trial. Because we conclude that the trial court correctly refused to instruct the jury regarding lesser-included offenses and that the prosecutor's reference in closing argument to Fitzpatrick's status as a "convict" did not warrant a mistrial, we affirm.

Fitzpatrick was found guilty by a jury of first-degree reckless homicide,[1] first-degree reckless injury (two counts),[2] first-degree reckless endangerment (two counts),[3] all while armed and as a repeater,[4] and misdemeanor endangering safety by use of a dangerous weapon as a repeater.[5] The shooting took place during the late evening hours of October 16-17, 1993, after a party at Maria "Gracie" Segura's second-floor apartment in Kenosha, Wisconsin. A fight broke out between male gang members concerning an uninvited touching of a young woman earlier in the evening. Fitzpatrick was involved in the fight and lost his shirt or sweater in the process. Anthony Gallegos saw Fitzpatrick go to the trunk of a car after the fight, obtain a gun and fire one shot as he returned to the apartment building. A neighbor, Ronald Olson, testified that he observed a shirtless male firing up the stairs of a neighbor's home. Kristie Martinez testified that several people ran down the only exit from the apartment—a dark staircase with only a small amount of light at the top and bottom. She was on the stairs when she heard people shout, "Run upstairs, he has a gun." She observed an unidentified male at the bottom of the stairs brandishing a gun. She was then shot.

Omar Ruiz testified that he saw Fitzpatrick near a car after the fight and that Fitzpatrick was carrying a gun. Fitzpatrick pointed the gun at Ruiz and then ran around the apartment building. Ruiz then heard several shots. The party's host, Segura, testified that as she was cleaning up beer bottles, she heard someone scream about a gun. She saw Fitzpatrick, shirtless, trying to use his weapon. She saw him fire up the stairs, and he pointed the gun at her as well. Fitzpatrick admitted participating in the fight, but denied involvement in the shooting.

---

[1] Section 940.02(1), STATS.

[2] Section 940.23(1), STATS.

[3] Section 941.30(1), STATS.

[4] Sections 939.63(1)(a)2 and 939.62(1)(b), STATS.

[5] Sections 941.20(1)(c) and 939.62(1)(a), STATS.

The trial court declined to instruct the jury on the lesser-included offenses of second-degree reckless homicide,[6] second-degree reckless injury[7] and second-degree reckless endangerment.[8] Fitzpatrick was found guilty of the first-degree offenses.

We independently review the trial court's refusal to submit a lesser-included offense instruction because a question of law is presented. ***State v. Foster,*** 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). Such an instruction "is proper *only* when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." ***Id.*** (quoted source omitted). A lesser-included offense should be submitted only if there is reasonable doubt regarding some element of the greater charge. ***Id.*** There must be sufficient evidence in the record to support a conviction on the lesser-included charge before such an instruction may be given. ***State v. Wilson,*** 149 Wis.2d 878, 902, 440 N.W.2d 534, 543 (1989). In ruling on a defendant's request for a lesser-included offense instruction, the court must view the evidence in the light most favorable to the defendant and the requested instruction. ***Foster,*** 191 Wis.2d at 23, 528 N.W.2d at 26.

It is undisputed that the second-degree lesser-included offenses requested by Fitzpatrick are included offenses of the first-degree charged offenses. *See* § 939.66, STATS. Therefore, we apply the ***Foster*** analysis to determine whether the trial court erred in declining to instruct the jury on the second-degree offenses.

Common to the first-degree crimes is the element of "utter disregard for human life." *See* §§ 940.02(1), 940.23(1) and 941.30(1), STATS. An instruction regarding second-degree crimes was appropriate only if there was reasonable doubt as to whether Fitzpatrick acted with utter disregard for human life. *See* ***Foster,*** 191 Wis.2d at 23, 528 N.W.2d at 26.

---

[6] Section 940.06, STATS.

[7] Section 940.23(2), STATS.

[8] Section 941.30(2), STATS.

Viewing the evidence in the light most favorable to Fitzpatrick and the requested instruction, we conclude that the evidence and the reasonable inferences therefrom are insufficient to (1) support a conviction on the proposed second-degree offenses or (2) sustain a reasonable doubt that Fitzpatrick acted with utter disregard for human life. There is insufficient evidence that Fitzpatrick merely acted recklessly when he fired into the stairwell.

The State was required to prove that Fitzpatrick had "utter disregard for human life," which is analogous to the former "depraved mind" standard. *See* ***State v. Holtz,*** 173 Wis.2d 515, 519 n.2, 496 N.W.2d 668, 670 (Ct. App. 1992). The State did not have to prove that Fitzpatrick had a particular state of mind; rather, the State had to prove that he engaged in *conduct* imminently dangerous to another evincing a depraved mind. *See* ***State v. Blanco,*** 125 Wis.2d 276, 280-81, 371 N.W.2d 406, 409 (Ct. App. 1985).

Fitzpatrick argues that he showed regard for human life in the following ways. He obtained a .22 caliber semi-automatic weapon and returned to the building where he had been involved in a fight. He pointed the weapon at one individual but did not shoot him. Several people were running up and down the dark stairwell when Fitzpatrick pointed the weapon. During that time, Segura was able to run on the stairs, push past Fitzpatrick and yell at him not to shoot. Fitzpatrick pointed the gun at her but did not shoot her. He then fired four or five shots into the dark stairwell.

He further suggests that because the staircase was dark, it is possible that the shots were fired to scare people on the stairs or in the apartment. He also had some difficulty loading bullets and this may have resulted in some unintended shots. Fitzpatrick contends that "[h]e was not firing at the people near him when the opportunity presented itself and his firing was complicated by a dark and tumultuous scene with possibly a malfunctioning weapon."

Fitzpatrick's argument that he showed some regard for human life relies upon two cases, ***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), for support. In ***Balistreri,*** the defendant, while avoiding police, drove through downtown Milwaukee in rush-hour traffic at high speed, traveled the wrong way on a one-

way street, forced pedestrians to run for safety and ran several lights before striking another car. ***Balistreri,*** 83 Wis.2d at 452-54, 265 N.W.2d at 295-96. Balistreri was charged with endangering the safety of another, an element of which was conduct evincing a depraved mind regardless of human life. *See* ***id.*** at 454, 265 N.W.2d at 296. Balistreri argued that he demonstrated some regard for human life because he turned on his headlights, swerved to avoid a car, honked his horn and braked to avoid a collision. ***Id.*** at 457, 265 N.W.2d at 298. The supreme court relied on this evidence in reversing Balistreri's conviction because these actions showed some regard for the lives of others. ***Id.*** at 458, 265 N.W.2d at 298.

In ***Wagner,*** the defendant was drag racing when he struck and killed a pedestrian. ***Wagner,*** 76 Wis.2d at 32-33, 250 N.W.2d at 333-34. Because Wagner swerved in an attempt to avoid striking the pedestrian, the supreme court concluded that he had demonstrated some concern for the lives of others. ***Id.*** at 47, 250 N.W.2d at 340.

Based on these cases, Fitzpatrick argues that he demonstrated regard for human life. We disagree. Rather, we agree with the State that this case is controlled by ***Holtz.*** In ***Holtz,*** the defendant repeatedly swung an axe at his wife, nearly missing her and their son several times before he finally relinquished the axe to his son. ***Holtz,*** 173 Wis.2d at 516-17, 496 N.W.2d at 669. The defendant was charged with first-degree recklessly endangering safety and cited ***Wagner*** and ***Balistreri*** as support for his contention that he demonstrated some regard for human life.[9] ***Holtz***, 173 Wis.2d at 518-19, 496 N.W.2d at 669-70. The ***Holtz*** court disagreed. It concluded that in ***Wagner*** and ***Balistreri,*** "the actions the supreme court found to evince concern for the life of the victim were taken *during* the commission of the act." ***Holtz,*** 173 Wis.2d at 520, 496 N.W.2d at 670. In ***Holtz,*** however, the defendant demonstrated no regard for human life while he chased his wife and son with the axe. ***Id.*** Although he voluntarily desisted from the attack, the defendant did so only after having shown no regard for life and safety. ***Id.***

[9] An element of the charged crime is that Holtz acted under circumstances which showed utter disregard for human life. *See* § 941.30(1), STATS., 1991-92.

This is the situation here. Fitzpatrick did not demonstrate any regard for human life when shooting into the stairwell. It is precisely the fact that Fitzpatrick fired into a dark stairwell where he knew or should have known individuals were gathered which enhances, rather than detracts from, the conclusion that he acted with utter disregard for human life. That Fitzpatrick elected not to shoot individuals at close range does not mitigate his conduct when he fired the weapon. We conclude that Fitzpatrick's conduct at any time before he began shooting is not at issue.

Viewing the evidence in the light most favorable to Fitzpatrick and the requested instruction, we conclude that there was no reasonable doubt that Fitzpatrick acted with utter disregard for human life. Therefore, there was no basis to submit instructions to the jury on the lesser-included reckless conduct offenses.

The fact that Fitzpatrick denied involvement in the shooting does not mandate a different outcome. If a defendant denies involvement in the crime but requests a lesser-included offense instruction, the court must "reject the defendant's wholly exculpatory testimony" and "examine his [or her] remaining testimony and the other evidence to determine whether it supports an acquittal on the greater charge and conviction on the lesser charge." ***State v. Simpson,*** 125 Wis.2d 375, 380, 373 N.W.2d 673, 676 (Ct. App. 1985). Here, there was testimony regarding the manner in which the gunman fired into the stairwell. This testimony was sufficient to support the trial court's decision not to instruct on second-degree crimes.

Fitzpatrick's last appellate argument focuses on the prosecutor's description of him as a "convict" during her initial closing argument and rebuttal. Fitzpatrick objected on both occasions; however, the trial court declined to grant a mistrial. Fitzpatrick argues that the prosecutor's comments prejudiced him, infected his trial with unfairness and denied him due process.

Where a prosecutor goes beyond reasoning from the evidence and suggests that the jury should reach a verdict by considering factors other than the evidence, the line between permissible and impermissible argument has been crossed. *See* ***State v. Neuser,*** 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). The test is whether the prosecutor's remarks "so infected the trial

with unfairness as to make the resulting conviction a denial of due process." ***Id.*** (quoted source omitted). This determination is made by viewing the statements in context. ***Id.***

Evidence of Fitzpatrick's prior convictions was admitted pursuant to § 906.09, STATS. This rule states that evidence that the witness has been convicted of a crime is admissible to attack his or her credibility. *See* § 906.09(1). The jury was instructed that evidence of Fitzpatrick's prior convictions bore upon his credibility as a witness and could not be used for any other purpose.

Credibility was an issue in the case. Fitzpatrick testified that he did not discharge a firearm into the stairwell. Other witnesses testified that he did. It was for the jury to resolve the conflict. ***Wilson,*** 149 Wis.2d at 894, 440 N.W.2d at 540.

It is evident from the record that the prosecutor's comments were made to challenge Fitzpatrick's credibility. As we have already stated, prior convictions are admissible and can be used to attack the credibility of a witness. Additionally, Fitzpatrick's closing argument to the jury focused largely on character and credibility issues involving the State's witnesses. Several of the witnesses had prior criminal records, and several were gang members. Defense counsel acknowledged that Fitzpatrick had a prior record, but stressed that his record could only be considered on the question of credibility. Considering Fitzpatrick's argument, the applicability of § 906.09, STATS., and the trial court's instructions, we see no error in the prosecutor's reference to Fitzpatrick as "a convict."

Fitzpatrick's reliance upon ***State v. Grinder,*** 190 Wis.2d 541, 527 N.W.2d 326 (1995), is misplaced. In ***Grinder,*** the supreme court determined that the circuit court improperly referred to Grinder as "the prisoner" in front of the jury. The statement was made because Grinder was late in coming to court from jail. ***Id.*** at 554, 527 N.W.2d at 331. However, the supreme court went on to hold that the reference did not jeopardize Grinder's right to a fair trial and was harmless based on the totality of the record. ***Id.*** Here, in contrast, the prosecutor's statements were made while she was arguing the evidence and the credibility of the witnesses. This is not a ***Grinder*** case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.