COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1996

NOTICE

No. 95-0339-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SMITH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Michael Anthony Smith, *pro se*, appeals from a judgment convicting him of attempted first-degree intentional homicide while using a dangerous weapon. *See* §§ 940.01(1), 939.32, and 939.63(1)(a)(2), STATS. Smith also appeals from an order denying him post-conviction relief. Smith claims: (1) that he was entitled to a jury instruction on the affirmative defense

of voluntary intoxication; and (2) that he was denied effective assistance of counsel. We affirm.

Smith was convicted of trying to kill Dennis Wilder. Smith fought with Wilder in a residence that Smith had shared with Smith's girlfriend. During the fight, Smith threatened to kill Wilder, got a knife and stabbed Wilder in the chest, chased Wilder as he fled outside, and then fought with Wilder again. The fight ended after an ambulance happened into the area and took Wilder to the hospital.

Smith was initially charged with first-degree reckless injury while armed and criminal damage to property. After the preliminary examination, however, the prosecutor charged Smith with attempted first-degree intentional homicide while using a dangerous weapon as well as criminal damage to property. Defense counsel did not object to the new charge. At trial, Smith requested an instruction on the defense of voluntary intoxication, which was denied by the trial court. The jury found Smith guilty of attempted first-degree intentional homicide while using a dangerous weapon but found him not guilty of criminal damage to property.

Smith filed a motion for post-conviction relief arguing the same issues he raises in the present appeal. The trial court denied Smith's motion for post-conviction relief and also denied his motion for reconsideration.

First, Smith argues that the trial court erred in refusing to instruct the jury on the defense of voluntary intoxication. A person who drinks to the point of intoxication is criminally responsible for his conduct unless the intoxication is so extreme that it renders him or her "utterly incapable" of forming a specific intent that is an element of the offense. ***State v. Strege***, 116 Wis.2d 477, 483–484, 343 N.W.2d 100, 104 (1984). Mere intoxication is insufficient. ***Id.***, 116 Wis.2d at 484, 343 N.W.2d at 104. Whether evidence requires a specific jury instruction is a question of law that we review independently of the trial court's determination. ***State v. Holt***, 128 Wis.2d 110, 126, 382 N.W.2d 679, 687 (Ct. App. 1985).

Although evidence was presented at trial of Smith's drinking, drug use, and intoxication, there was no evidence that his mental process was so impaired by alcohol or drugs to render him incapable of forming the requisite intent. Rather, there was evidence that Smith was sober enough to threaten Wilder's life, to follow and stab him, and to chase him out onto the street after wounding him. Under such circumstances, the trial court did not err in refusing to instruct the jury on voluntary intoxication.

Smith also argues that defense counsel was ineffective for: (1) not objecting to the post-preliminary examination charge of attempted first-degree intentional homicide; and (2) failing to request lesser-included offense instructions.

Strickland v. Washington, 466 U.S. 668 (1984), sets forth the two-pronged test for ineffective assistance of counsel. First, counsel's performance must be deficient. ***Id.***, 466 U.S. at 687. Second, the deficient performance must prejudice the defendant. ***Id.***

Smith argues that counsel was ineffective for failing to object to the attempted first-degree intentional homicide charge that was filed after the preliminary examination. "`A district attorney is permitted to file an information containing such charges as the facts adduced at the preliminary hearing warrant.'" ***State v. Hooper***, 101 Wis.2d 517, 537, 305 N.W.2d 110, 120 (1981) (citation omitted). The elements of attempted first-degree intentional homicide are that the actor intended to cause the death of a person and that the actor's acts demonstrate unequivocally under all the circumstances that he intended to and would have caused the death, except for the intervention of some other person or some other extraneous factor. WIS J I—CRIMINAL 580 and 1010. At the preliminary examination, Wilder testified that he got into a fight with Smith, and that Smith repeatedly threatened to kill him. Wilder also testified that Smith stabbed him with a knife and then continued to pursue him, threatening his life again. Wilder also testified that an ambulance came by and took him to the hospital before Smith could hurt him again. This testimony evidences an intent to kill that sufficiently supports a charge of attempted first-degree intentional homicide while armed. *See* ***State v. Williams***, 198 Wis.2d 479, 489, 544 N.W.2d 400, 404 (1996) (prosecution may charge an offense not wholly unrelated to the evidence adduced at the preliminary examination).

Second, Smith argues that trial counsel was ineffective for requesting certain instructions on offenses that are, as a matter of law, not lesser-included offenses to attempted first-degree intentional homicide while using a dangerous weapon. Trial counsel requested a jury instruction on first-degree reckless injury and reckless use of a weapon. The trial court determined that first-degree reckless injury and reckless use of a weapon are not lesser-included offenses to attempted first-degree intentional homicide while using a dangerous weapon. We agree. First-degree reckless injury requires the element of "utter disregard" for human life, *see* § 940.23(1), STATS.; attempted first-degree intentional homicide while using a dangerous weapon does not. First-degree reckless injury is not, therefore, a lesser-included offense to attempted first-degree intentional homicide while using a dangerous weapon. *See* ***Blockburger v. United States***, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932) ("an offense is a `lesser included' one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the `greater' offense"). Reckless use of a weapon requires that the operation or handling of a dangerous weapon be reckless conduct that endangers another's safety. ***State v. Carrington***, 134 Wis.2d 260, 268, 397 N.W.2d 484, 488 (1986). The elements of first-degree intentional homicide while using a dangerous weapon do not require a dangerous weapon to be used to endanger the safety of another. *See* § 940.01, STATS. Reckless use of a weapon, therefore, is not a lesser-included offense to attempted first-degree intentional homicide while using a dangerous weapon. Although we agree with Smith that defense counsel requested inappropriate instructions, Smith was not prejudiced by counsel's improper request for an instruction that could not be given.

Third, Smith argues that trial counsel was ineffective for failing to request instructions on the following offenses: (1) "attempted second-degree murder while armed";[1] and (2) first-degree recklessly endangering safety while armed. Submission of a lesser-included offense instruction is proper only when the crime is a lesser-included offense of the charged crime and when, looking at the evidence in a light most favorable to the defendant, there are reasonable grounds in the evidence both for the acquittal on the greater charge and conviction on the lesser offense. ***State v. Sarabia***, 118 Wis.2d 655, 661, 348

[1] "Attempted second-degree murder" is not a charge under current Wisconsin law. *See generally* Walter Dickey et al., *The Importance of Clarity in the Law of Homicide*: *The Wisconsin Revision*, 1989 WIS. L. REV. 1323. We believe that Smith is referring to attempted second-degree intentional homicide or attempted second-degree reckless homicide. *See* §§ 940.05 and 940.06, STATS. We will examine both of these offenses in regard to Smith's argument.

N.W.2d 527, 531 (1984). Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law. ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988). There is no question but that attempted second-degree intentional homicide is a lesser-included offense of first-degree intentional homicide. *See* § 939.66(2), STATS. We conclude, however, that an instruction would be inappropriate on attempted second-degree intentional homicide since there was no evidence of mitigating circumstances, as is required to prove attempted second-degree intentional homicide. *See* § 940.05(1), STATS. Mitigating circumstances that reduce attempted first-degree intentional homicide to attempted second-degree intentional homicide include: (1) adequate provocation; (2) unnecessary defensive force that the defendant unreasonably believed was necessary to prevent "death or great bodily harm"; (3) prevention of a felony; and (4) coercion; necessity. *See* § 940.01(2), STATS. No facts were raised at trial to support the existence of any of the above defenses. An instruction on attempted second-degree reckless homicide would be equally inappropriate because a reasonable view of the evidence does not support giving this instruction. There was no evidence adduced as to Smith's recklessness, as is required to prove second-degree reckless homicide. *See* § 940.06, STATS. The evidence indicates that Smith threatened Wilder's life, stabbed Wilder in the chest and then chased Wilder as he fled for his life. From this evidence, there is no likelihood that the jury would have acquitted Smith of attempted first-degree intentional homicide while using a dangerous weapon and convicted Smith of second-degree reckless homicide.

Smith also cites error in trial counsel's failure to request an instruction on first-degree recklessly endangering safety while armed. The elements of first-degree recklessly endangering safety while armed are that the actor endangered the safety of another human being, that he did so by criminally reckless conduct which created an unreasonable and substantial risk of death or great bodily harm to another and that the actor was aware that his conduct created such a risk, and that the circumstances of the actor's conduct showed utter disregard for human life. *See* §§ 941.30 and 939.24, STATS. Although there was ample evidence that Smith's conduct showed "utter disregard for human life," there were no reasonable grounds to acquit on the attempted first-degree intentional homicide while using a dangerous weapon charge; it was undisputed that the stabbing was intentional. We conclude that Smith's counsel's failure to request the additional lesser-included instruction was not prejudicial because the evidence did not reasonably support submission of first-degree recklessly endangering safety while armed.

By the Court.—Judgment and order affirmed.

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