

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 30, 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(1), STATS.

NOTICE

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No. 95-2338-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNSON W. GREYBUFFALO,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County:
DONALD J. HANAWAY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Johnson Greybuffalo appeals his conviction for first-degree intentional homicide, § 940.01, STATS., after a jury trial.¹ Greybuffalo argues the trial court erred by refusing to submit the lesser-included felony murder instruction to the jury and, therefore, he is entitled to a new trial. We reject Greybuffalo's argument and affirm his conviction.

¹ Greybuffalo was also convicted of misdemeanor escape, armed burglary and operating a motor vehicle without the owner's consent. He has not appealed those convictions.

At trial, it was undisputed that one evening in July 1994, Greybuffalo entered the home of five-year-old Nancy Thao and her family with the intention of burglarizing the residence. It was also undisputed that Nancy was killed that night by multiple stab wounds to her body. At issue was who killed her.

The State's theory at trial was that Greybuffalo was the only burglar in the Thao residence that evening and that he killed Nancy. The State produced evidence that Nancy was found dead in a garbage can inside a storage area next to the garage located next to her home. Shannon Saldana, one of the Thaos' upstairs neighbors and a roommate of Greybuffalo, testified that on the night of Nancy's death, Greybuffalo returned home at about 4 a.m. Saldana testified Greybuffalo stumbled and fell by the refrigerator. She observed that Greybuffalo was sweaty and had blood on his sweatshirt.

Saldana said she heard a knife fall to the floor, picked it up and asked Greybuffalo what had happened. Saldana testified Greybuffalo told her "that he was coming back from his mother's house and that on the way back he got jumped by six black guys and that he stabbed one of them." Saldana said she picked up the knife, saw that it had blood on it and proceeded to wash and boil the knife in water on the stove because "I thought he got jumped by some black guys and I figured it was self-defense and I didn't want him to be in trouble so I washed the knife off." Police later recovered the knife from the residence.

The State also presented physical evidence connecting Greybuffalo to the Thao residence. For example, an expert testified he identified two fingerprints as Greybuffalo's: one lifted from a fan and one lifted from a storm window. Also, it was undisputed that Greybuffalo was apprehended in Madison while driving the Thaos' van.

We note that on appeal, Greybuffalo does not contend the evidence presented at trial was insufficient to convict him of first-degree intentional homicide. Rather, the sole issue is whether the trial court erred by not submitting the lesser-included felony murder instruction to the jury at Greybuffalo's request. Greybuffalo argues such an instruction was appropriate because under Greybuffalo's theory of defense, his roommate, Howard Joe

Cooley, committed the burglary with Greybuffalo and was the individual who stabbed Nancy.

A trial court engages in a two-step analysis in determining whether to submit a lesser-included offense to a jury. *State v. Morgan*, 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App. 1995). First, the court must determine whether the crime is a lesser-included offense of the charged crime. *Id.* at 434, 536 N.W.2d at 442. Next, the court must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. *Id.* If both steps are satisfied, the trial court should submit the lesser-included instruction to the jury if the defendant requests it. *Id.* A trial court commits reversible error if it refuses to submit an instruction on an issue that is supported by the evidence. *Id.* 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. *Id.*

Here, the parties agree that felony murder is a lesser-included offense of first-degree intentional homicide. Therefore, we move to the second step in the analysis: determining whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. *Id.* We need not decide whether there were reasonable grounds for conviction on the requested instruction for felony murder because we conclude there were no reasonable grounds for acquittal on the first-degree intentional homicide charge. See *Jordan v. State*, 93 Wis.2d 449, 468, 287 N.W.2d 509, 517 (1980).

Greybuffalo contends he could have been acquitted of first-degree intentional homicide because he testified he did not stab the victim. Greybuffalo explains that if a jury believed his testimony that he did not directly participate in killing the victim and, in fact, tried to intervene after he realized she was being stabbed, the evidence would be insufficient to convict him of the greater offense of first-degree intentional homicide since there would be no evidence of direct causation or intent to kill. Assuming *arguendo* that Greybuffalo's analysis is correct, we nonetheless reject his argument because we conclude that, after viewing the evidence in a light most favorable to Greybuffalo, there is no reasonable basis in the evidence for a jury to conclude that Cooley committed the murder and to therefore acquit on the greater offense of first-degree intentional homicide.

When determining whether there is a reasonable basis in the evidence to acquit on the greater charge, the key word in the rule is reasonable. *Hawthorne v. State*, 99 Wis.2d 673, 683, 299 N.W.2d 866, 870 (1981). The rule does not suggest some near automatic inclusion of all lesser-included offenses as additional options to a jury. *Id.* At the same time, to protect the defendant from violation of due process or denial of the right to trial by jury, our supreme court has held that neither the trial court nor the appellate court may look to the totality of the evidence. *See id.* at 684, 299 N.W.2d at 871. Rather, the question is whether a reasonable construction of the evidence will support the defendant's theory, viewed in a light most favorable to the defendant. *See id.* Therefore, we do not consider the testimony and physical evidence that points to Greybuffalo as the individual who stabbed Nancy. Instead, we must examine the evidence that supports Greybuffalo's theory of defense.

With these standards in mind, we note that the only evidence supporting Greybuffalo's theory of defense is his testimony. Greybuffalo's version of events is as follows: He was staying with Cooley, Rhae Lynn Delveaux and Saldana in the upstairs residence of a rental property. On the night of Nancy's death, Greybuffalo and Cooley discussed burglarizing the Thao residence, which was located on the first floor of the rental property. Later, they walked around the building trying to find an entry point. Greybuffalo noticed a window was slightly open and indicated to Cooley that they could enter the house through it. Greybuffalo cut the screen with a straight razor he had in his possession. Then, he reached through the opening in the screen and pushed a storm window up. Next, Greybuffalo asked Cooley to help him into the house. Cooley cupped his hands so that Greybuffalo could step on them and lifted him through the window. Greybuffalo crawled through the window and immediately knocked over a guitar case, which he handed out the window to Cooley.

Next, Greybuffalo walked through the bedroom he had entered through the window and went to the living room to let Cooley in through the front door. After Greybuffalo let Cooley in, the two men looked around the living room for things they could take. Greybuffalo saw a large purse and looked through it, finding two smaller purses inside. Greybuffalo eventually found food stamps in the purses, which he took. Greybuffalo also looked around the kitchen area and opened a door to a room at the far end. He saw several people sleeping inside.

After returning to the living room several times, Greybuffalo ultimately heard what he described as a "muffled scream." Greybuffalo saw Cooley in a room and that he was holding something. Greybuffalo walked into the room and saw Cooley "stabbing somebody" with a knife. Greybuffalo pulled the body from the bed, away from Cooley, and "wanted to stop what was happening." Greybuffalo looked at the body and saw that she was very bloody. Greybuffalo told Cooley he was leaving and took the body and a bundle of blankets. Cooley opened the front door for Greybuffalo. Next, Greybuffalo exited the front door, walked toward the garage and set the body down in front of the garage.

Greybuffalo then turned around and went upstairs to his residence. Greybuffalo saw Cooley on the steps and returned to the residence after Cooley. Greybuffalo went upstairs to change and get blood off of him. Then, he changed shirts and left the bloody shirt on the floor of the bathroom. Next, he exited the bathroom and saw Shannon, his roommate, who had just entered the residence. Greybuffalo handed Cooley some food stamps. Then, Shannon stopped Greybuffalo and asked him if he had stabbed anybody. Greybuffalo told her no and proceeded to leave the residence. He had two sets of keys he had taken from the Thao residence and tried the keys in two vans; the keys fit the Thaos' blue van. Greybuffalo took the van and drove away. When asked at trial where he drove, Greybuffalo answered, "I'm -- I'm not sure. I don't recall." Greybuffalo testified he does remember eventually driving to Madison, to the home of his friend, Leon Thomas.

Although Greybuffalo's testimony was that Cooley killed Nancy, he is not automatically entitled to a lesser-included instruction on that basis alone. See *Hawthorne*, 99 Wis.2d at 685, 299 N.W.2d at 871, citing *Brook v. State*, 21 Wis.2d 32, 43-44, 123 N.W.2d 535, 541 (1963) (The issue whether trial court erred by failing to give lesser-included instruction boils down to whether the physical facts brought out by the state contradict the defendant's testimony so as to leave no reasonable basis for a finding of the lesser included offense.). In *State v. Parker*, 55 Wis.2d 131, 197 N.W.2d 742 (1972), our supreme court considered whether a trial court erred by denying the defendant's request for a lesser-included offense instruction on third-degree murder. *Parker* held that:

[S]ince the physical evidence contradicted the defendant's testimony and since his credibility concerning the

entire incident is exceedingly dubious, only an "unreasonable view of the evidence" would give credence to the defendant's version of the shooting and require the submission of a lesser included crime.

State v. Estrada, 63 Wis.2d 476, 483, 217 N.W.2d 359, 363 (1974) (explaining the holding in *Parker*). We conclude the court's reasoning in *Parker* is applicable to this case because the physical evidence contradicts Greybuffalo's testimony and Greybuffalo's credibility concerning the entire incident is exceedingly dubious, and therefore, only an unreasonable view of the evidence would give credence to Greybuffalo's version of the stabbing and require the submission of the lesser-included crime of felony murder.

The physical evidence contradicts Greybuffalo's testimony. For example, no physical evidence was found that linked Cooley to the crime scene. The fingerprint expert who made 1,277 examinations of fifty-three pieces of evidence compared the prints on the evidence to Cooley's fingerprints and concluded that none of the fingerprints collected at the scene matched his fingerprints.

The police also found in the yard next to the building a folding chair with footprints on it. One expert testified five of the prints on the chair were consistent with the shoes Greybuffalo was wearing on the night of Nancy's death. When asked about the chair and the prints on it, Greybuffalo testified that he did not put the chair under Nancy's window and did not recall stepping on a chair.

In addition to the physical evidence contradicting Greybuffalo's testimony, Greybuffalo's credibility concerning the entire incident is exceedingly dubious. Greybuffalo testified that he "might have told [Thomas] that I was jumped on the west side of Green Bay somewhere." He testified he does not recall if he told anyone else the story about being jumped by a group of men, which was an alibi Greybuffalo testified he and Cooley discussed before they burglarized the Thao residence. Greybuffalo said that if he was stopped, his plan was to "tell the police or anybody who stopped me that I was going to my mother's house and that I had been jumped." When asked at trial what that

story was supposed to accomplish, Greybuffalo responded, "You could say alibi on my part."

Greybuffalo's testimony regarding this alibi is exceedingly dubious because the story, which Greybuffalo claims he created before the burglary, anticipates that Greybuffalo would appear to have been involved in a fight and would need to explain his bloody appearance. Yet, Greybuffalo testified that he and Cooley planned only to burglarize the Thao residence, that he intended to use the razor solely to enter the house, and that he did not know Cooley had a knife on him. It is unreasonable that Greybuffalo would create an alibi about being jumped before the burglary, with its unexpected bloody consequences, took place.

Greybuffalo also testified at trial that he had lied several times during the investigation. Greybuffalo said when he was first apprehended by police in Madison, he told them his name was Saldana. Also, Greybuffalo stated at trial that he told police in a statement during the investigation that Cooley was not in the Thao residence the night of Nancy's death. Conversely, his testimony at trial was that Cooley was not only inside the residence, but also killed Nancy. Greybuffalo also admitted he lied to his friend, Thomas, when he told Thomas the van he was driving belonged to his aunt.

Additionally, Greybuffalo was able to remember in detail some events, but claimed not to remember other events. For example, he testified he does not remember going to his stepmother's house early the morning after the burglary, shopping at a grocery store with food stamps, returning to his stepmother's house with groceries, and visiting an ex-girlfriend. However, Greybuffalo acknowledged at trial that it is possible he visited both his stepmother and his ex-girlfriend. Greybuffalo also testified he left Nancy's body outside the garage door, but stipulated at trial that the body was found in a garbage can inside a storage area next to the garage. Greybuffalo testified he did not believe Cooley hid the body in the garbage can.

In sum, we conclude the physical evidence contradicts Greybuffalo's testimony and Greybuffalo's credibility concerning the entire incident is exceedingly dubious. Therefore, only an unreasonable view of the evidence would give credence to Greybuffalo's version of the stabbing and require the submission of a lesser-included crime. See *Estrada*, 63 Wis.2d at 483,

217 N.W.2d at 363. There was no reasonable basis in the evidence for a jury to acquit Greybuffalo of first-degree intentional homicide, and, therefore, the lesser-included felony murder instruction need not have been given. *See Morgan*, 195 Wis.2d at 434, 536 N.W.2d at 442 (in second step of analysis, court must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense). Thus, we reject Greybuffalo's challenge to his conviction for first-degree intentional homicide.

Because we conclude the lesser-included instruction need not have been offered because Greybuffalo's testimony was contrary to the physical evidence and his credibility was exceedingly dubious, we do not consider the State's alternative arguments in support of the trial court's decision to deny Greybuffalo's request for the lesser-included instruction.²

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

² The State offers a number of alternative theories for affirming the trial court's decision to deny Greybuffalo's request for a lesser-included offense instruction, including: (1) as a matter of law, homicide was the natural and probable consequence of the armed burglary, which, according to Greybuffalo, was the crime he and Cooley intended to commit; (2) no reasonable ground exists in the evidence to conclude other than that the homicide was the natural and probable consequence of the armed burglary; and (3) Greybuffalo has not demonstrated that there exists a reasonable ground in the evidence for acquittal of first-degree reckless homicide.