

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 10, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2992-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Dietreich Andrew Wilson,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Dietreich Andrew Wilson appeals from the judgment of conviction for first-degree reckless endangering safety while armed,¹ and from the trial court order denying his postconviction motion. He

¹ Wilson also was convicted of possession of cocaine with intent to deliver, while armed. He does not challenge that conviction.

argues that the jury instructions denied him due process of law, that his counsel was ineffective for failing to object to the instructions, and that he deserves a new trial in the interests of justice. We affirm.

Wilson was charged with attempted first-degree intentional homicide while armed for firing at an undercover police officer who was responding to a shootout between rival groups. Wilson's theory of defense was that he acted to protect his brother when he saw a man, who he did not realize was an undercover police officer, pointing a gun at his brother. Wilson maintained that he surrendered when he realized the man was a police officer. The trial court instructed the jury on attempted first-degree intentional homicide while armed, and on two lesser-included offenses: first-degree reckless endangering safety while armed, and second-degree reckless endangering safety while armed. The trial court also instructed on defense of others.

Wilson argues that although the trial court's instructions were correct individually, "the manner in which they were given in this case prevented the jury from considering defense of others with respect to the lesser-included offenses.... This improperly relieved the State of its burden of disproving the defense before it could convict him of either lesser-included offense."

After reading the substantive instructions on first-degree intentional homicide and the two lesser-included offenses, the trial court instructed that before the defendant could be found guilty "of the offense charged in count one of the Information," it would have to "be satisfied beyond a reasonable doubt that any use of force ... was not privileged under the law of defense of others." Wilson argues that the jury could have misinterpreted this to only apply his defense of others theory of defense to the charge of attempted first-degree intentional homicide while armed, and not to the lesser-included offenses.

As we have explained:

Whether jury instructions violate a defendant's right to due process is a question of law subject to *de novo* review.... Relief is not warranted unless the appellate court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury" in the manner asserted by the challenger. Where a criminal defendant claims that the jury instructions violated constitutional due process, the issue is whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the defendant's rights. In making that assessment, we consider the challenged portion of the instructions in context with all other instructions provided by the trial court.

State v. Foster, 191 Wis.2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995) (citations omitted).

Viewing the instructions "as a whole" and considering "the challenged portion of the instructions in context with all other instructions," we conclude that the trial court's instructions accurately stated the law and properly directed the jury. The instructions included explicit references to "*any* of the offenses I have submitted to you on count one," and to the privilege being "a defense to prosecution for *any* crime based on that conduct." (Emphasis added.) The instructions also included countless, consistent implicit references directing the jury's attention to all three possible count one offenses, together.

As the trial court explained in its thorough and thoughtful written decision denying Wilson's postconviction motions:

[T]he reference to "count one of the Information" in the concluding paragraph of the defense of others instruction was merely a "shorthand" reference to the group of offenses which were being submitted to the jury for consideration in connection with the first count of the information, to alert the jury to the fact that the privilege analysis was to be applied to count one

relating to the shooting as distinct from count two relating to the drug possession.

We agree. Therefore, there is no “reasonable likelihood that the jury applied the instruction in a way that violates the defendant's rights.” *Foster*, 191 Wis.2d at 28, 528 N.W.2d at 28.

Wilson's arguments that counsel was ineffective for failing to object to the instructions and that the interests of justice require a new trial are premised on his contention that the instructions misled the jury. Our rejection of his primary contention, however, obviates the need to further address Wilson's additional arguments. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.