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DISTRICT I

December 15, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP1473-CR State of Wisconsin v. Timothy E. Durley, Jr. (L.C. # 2017CF5754)

Before Brash, P.J., Donald and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Timothy E. Durley, Jr., appeals the judgment convicting him of second-degree reckless homicide with use of a dangerous weapon and possessing a firearm as a felon. Durley argues that there was insufficient evidence to sustain his homicide conviction because the evidence shows he killed the victim intentionally rather than recklessly. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Upon review, we summarily affirm.

Durley was involved in what both parties describe as a "road rage" incident on November 30, 2017, that ended with Durley shooting the victim in the chest. The victim died as a result of the gunshot wound. The State subsequently charged Durley with one count of second-degree reckless homicide with use of a dangerous weapon and one count of possession of a firearm by a felon. A jury found him guilty of both charges, and the trial court sentenced him to a combined total of nineteen years of initial confinement and ten years of extended supervision.

On appeal, Durley argues that the evidence was insufficient to support the jury's finding that he was guilty of second-degree reckless homicide. Durley contends the evidence revealed that, from several feet away, he pointed a gun at the victim's chest and fired. According to Durley, "[t]he only reasonable inference is that Durley intended to kill [the victim]." Because the state of mind for "intent to kill" is different than the state of mind for "criminal recklessness," Durley argues that the evidence was insufficient to convict him of second-degree reckless homicide. The premise of Durley's argument—i.e., that a finding of intent to kill precludes a finding of criminal recklessness—is incorrect.

The standard for reviewing the sufficiency of the evidence to support a conviction is highly deferential to the jury's verdict. ***State v. Beamon***, 2013 WI 47, ¶21, 347 Wis. 2d 559, 830 N.W.2d 681. We will "not reverse a conviction unless the evidence, viewed most favorably to

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The defendant bears the "heavy burden" of showing that the evidence could not have reasonably supported a finding of guilt. ***Beamon***, 347 Wis. 2d 559, ¶21.

To prove second-degree reckless homicide, the State had to show: (1) Durley caused the victim's death; and (2) Durley caused the death by criminally reckless conduct. *See* WIS. STAT. § 940.06(1). "Criminally reckless conduct" means that the conduct created a risk of death or great bodily harm to another person; the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. WIS. JI—CRIMINAL 1060; *see* WIS. STAT. § 939.24(1).

First, the evidence supports the finding that Durley caused the victim's death. At trial, two witnesses testified that Durley shot the victim in the chest. The doctor who performed an autopsy on the victim testified that the gunshot wound caused the victim's death.

Second, the evidence supports the finding that Durley caused the victim's death by conduct that was criminally reckless. The jury could reasonably conclude that when Durley shot a gun at the victim's chest, he created an unreasonable and substantial risk of death or great bodily harm and was aware of that risk. *See* WIS. STAT. § 939.24(1).

Moreover, recklessness and intent to kill are not mutually exclusive. Second-degree reckless homicide is a lesser included offense of first-degree intentional homicide. *See* WIS. STAT. § 939.66(2)[2]; *see also* ***State v. Chapman***, 175 Wis. 2d 231, 241, 499 N.W.2d 222 (Ct. App. 1993) (noting "[t]he general principle is that every degree of homicide is a lesser included offense of first-degree intentional homicide").

An offense is "lesser" in relation to another if it carries a lower maximum penalty. *See* ***State v. Smits***, 2001 WI App 45, ¶¶26-28, 241 Wis. 2d 374, 626 N.W.2d 42. An offense is "included" within another if it is "'utterly impossible to commit the greater crime without committing the lesser.'" ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986) (one set of quotation marks and citations omitted). As such, if—as Durley argues—the evidence supported a conviction for first-degree intentional homicide, then it necessarily supports his conviction for second-degree reckless homicide.

This outcome is borne out in ***Lasecki v. State***, 190 Wis. 274, 208 N.W. 868 (1926), a case where the appellant presented the same argument that is now before us. Lasecki "urge[d] that, if the evidence establishe[d] that he shot [the victim], the judgment must be reversed because the

[2] WISCONSIN STAT. § 939.66 provides, in relevant part, as follows:

> **Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> ….
>
> **(2)** A crime which is a less serious type of criminal homicide under subch. I of ch. 940 than the one charged.

First-degree intentional homicide is found at WIS. STAT. § 940.01 and second-degree reckless homicide is found at WIS. STAT. § 940.06 in subchapter I of chapter 940.

shooting occurred under such circumstances that he was guilty of first[-]degree murder [and not second-degree murder, as found by the jury], if guilty of any offense."[3] ***Id.*** at 278. Despite Durley's attempts to distinguish ***Lasecki*** on its facts, we deem it controlling. Our supreme court affirmed Lasecki's conviction and applied the common-sense rule that "[i]f the proof warrants a finding of guilty of first[-]degree murder, the defendant is in no position to object because the jury ha[s] found him guilty of a lesser degree of homicide." ***Id.*** at 281.

In light of the forgoing, we conclude that the evidence was sufficient to support the jury's verdict and affirm. *See* ***Poellinger***, 153 Wis. 2d at 508 (explaining that "[a]n appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered").

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] First-degree intentional homicide has since replaced first-degree murder. *See* Judicial Council Note, 1988, WIS. STAT. § 940.01. And, first-degree reckless homicide is the approximate equivalent of what was previously second-degree murder. *See* Judicial Council Note, 1988, WIS. STAT. § 940.02(1).