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April 13, 2021

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

2020AP396-CR State of Wisconsin v. Tiron Justin Grant (L.C. # 2017CF63)

Before Brash, P.J., Dugan 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).

Tiron Justin Grant appeals from a judgment, entered upon a jury's verdict, convicting him on one count of first-degree reckless homicide with a dangerous weapon and one count of possession of a firearm by a felon. He also appeals from an order denying his postconviction motion. 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 (2019-20).[1] The judgment and order are summarily affirmed.

On January 1, 2017, Milwaukee Police responded to a report of a shooting at a nightclub. Upon their arrival, they found the victim on the floor in a pool of blood, not breathing and without a pulse. Resuscitation efforts failed, and the victim was pronounced dead at the scene.

Investigators reviewed security camera footage of the incident. There were two subjects other than the victim involved in the shooting. One of them was wearing a white dress shirt and was seen throwing a punch at the victim. The second subject then advanced quickly, his right arm outstretched. The victim fell to the floor, and the second subject stood over him with his arm still outstretched. A muzzle flash can be seen at the end of the subject's arm. The surrounding crowd scattered, and the two subjects calmly left the bar.

The individual in the white shirt was identified by the nightclub's security officer as "Petey" and by the nightclub owner as Shanon Grant ("Shanon"). Shanon told police his nickname was "Petey" and identified the other subject as his cousin, Grant.

Grant was arrested and had two interviews with Detective James Hensley. During the first interview on January 3, 2017, Grant was advised of his rights and began speaking with Hensley. The interview was terminated when Grant said he wanted a lawyer. A second interview was conducted the next morning. Grant was again advised of his rights and again spoke with Hensley.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

On January 6, 2017, a criminal complaint charged Grant with one count of first-degree reckless homicide with a dangerous weapon and one count of possession of a firearm by a felon. Grant moved to suppress his statements from his second interview, claiming that Hensley had failed to "scrupulously honor" his assertion of the right to counsel. The trial court held a motion hearing and ultimately denied the motion. Later, the State filed an amended information, charging Grant with first-degree intentional homicide and possession of a firearm by a felon.

The case was tried to a jury, which was instructed not only on first-degree intentional homicide but also on the lesser-included charges of second-degree intentional homicide and first-degree reckless homicide. However, the jury was not instructed on second-degree reckless homicide, despite Grant's request for that instruction. The jury convicted Grant of first-degree reckless homicide and possession of a firearm by a felon. The trial court imposed concurrent sentences, the greater of which was thirty-seven years of initial confinement and ten years of extended supervision.

Grant filed a postconviction motion seeking a new trial in which he alleged that the trial court had erred in denying his suppression motion and in refusing to give the second-degree reckless homicide instruction. The postconviction court denied the motion,[2] ratifying the trial court's original rulings. Grant appeals.

"[O]nce an accused invokes his right to counsel … *the police must cease interrogation until counsel is present* unless the accused himself initiates further communication with the

[2] The Honorable Carolina Stark presided over the suppression motion and trial and will be referred to as the trial court. The Honorable Janet C. Protasiewicz reviewed and denied the postconviction motion and will be referred to as the postconviction court.

police." ***State v. Stevens***, 2012 WI 97, ¶49, 343 Wis. 2d 157, 822 N.W.2d 79 (citing ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981)). When the accused initiates communication with police, "[t]hey may proceed with custodial interrogation if the accused again is given a ***Miranda***[3] warning and again waives his ***Miranda*** rights." ***Stevens***, 343 Wis. 2d 157, ¶52.

There are two inquiries under the ***Edwards*** rule. *See* ***State v. Conner***, 2012 WI App 105, ¶16, 344 Wis. 2d 233, 821 N.W.2d 267. "First, we must determine whether the accused actually invoked his right to counsel." ***Id.*** "Second, if the accused did indicate he wanted an attorney, we must determine whether he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." ***Id.***

On review, we will uphold the trial court's findings of historical or evidentiary fact unless clearly erroneous. *See* ***State v. Hambly***, 2008 WI 10, ¶71, 307 Wis. 2d 98, 745 N.W.2d 48. "Any disputes regarding the factual circumstances surrounding a suspect's statement must be resolved in favor of the trial court's findings." ***State v. Harris***, 189 Wis. 2d 162, 174, 525 N.W.2d 334 (Ct. App. 1994), *aff'd*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996). We independently review the application of constitutional principles to those facts. *See* ***Hambly***, 307 Wis. 2d 98, ¶71; *see also* ***Conner***, 344 Wis. 2d 233, ¶17.

Here, there is no dispute that, at the start of Grant's first custodial interview, he was advised of his rights, then waived them and spoke with Hensley. There is also no dispute that when Grant later invoked his right to counsel during the first interview, the interrogation

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

stopped. The point of contention is what happened subsequently, and whether Grant re-initiated discussions with Hensley.

Both Grant and Hensley testified at the suppression hearing; unsurprisingly, their testimony diverged. Based on that testimony and a video of the second interview, the trial court made the following findings of fact. Grant was advised of his ***Miranda*** rights at the start of the first interview; he understood them and waived them. After about an hour and eleven minutes, Grant said, "I need a lawyer or I need to talk to my wife first or something." Hensley informed Grant that he could not talk to his wife right at that moment, but "[i]f you want a lawyer, then you and I have to be done talking. That is up to you." Grant responded by saying, "I want a lawyer." Hensley responded, "okay, all right," then stepped out momentarily for Grant to finish drinking his water. A few minutes later, Hensley returned to move Grant from the interrogation room to a holding cell.

At the holding cell, Grant asked if he could call his wife. Hensley responded that he could not do so from the building they were in, but he would be able to call when he was moved to the county jail. Grant then told Hensley that he wanted to think about talking to the detective. Hensley answered that because Grant had invoked his right to counsel, police would not return to ask if he wanted to speak again; Grant would have to inform someone that he wanted to talk. Grant then asked Hensley to come back later and check on him. Hensley answered that he would be working the next morning and could return then if Grant wanted. Grant said yes.

The next morning, Hensley returned to Grant's holding cell. He asked Grant if he had time to think and wanted to speak. Grant said he wanted to speak. Hensley took Grant back to the interrogation room. Once there, the pair "interacted in a calm and polite fashion," first

making what amounts to small talk. Grant then confirmed that he had asked Hensley to check on him and that, when Hensley arrived, Grant told the detective he wanted to talk. Hensley advised Grant of his ***Miranda*** rights for a second time. When asked if he understood the rights, Grant made a sound and gave a "slight up-and-down head nod in an affirmative motion." When asked if Grant still wanted to talk, he answered, "Yes." From these facts, the trial court concluded that it was Grant who initiated further discussions with police by asking Hensley to return the following morning. The trial court also found that Grant had knowingly and intelligently waived his right to counsel for the second interview. Thus, the trial court denied the suppression motion.

In his postconviction motion and on appeal, Grant contends that had he wanted to speak with Hensley again, he could have informed another staff member, like the person who brought him breakfast. He asserts that, by visiting Grant without "any other clear indication by Grant that Grant wanted to re-initiate contact with the police, Hensley failed to scrupulously honor Grant's right to counsel."[4]

We disagree. Grant had no reason to inform another jail staffer of his desire to speak with Hensley, because Hensley had already agreed to return at Grant's request. The trial court's findings of fact are not clearly erroneous, and we agree with its application of the law to the facts as found. Therefore, the trial court did not err in denying the motion to suppress and the postconviction court did not err in rejecting Grant's postconviction challenge to that ruling.

[4] In his postconviction motion and on appeal, Grant also argued that "[o]vernight solitary confinement"—placing Grant in a holding cell by himself, with no outside communication available—"was a coercive atmosphere that penalized Grant for requesting counsel." However, this argument was not made in the original suppression motion, nor was it argued at the suppression hearing. We therefore agree with the State that Grant has forfeited this argument. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612. This argument is also undeveloped, and we need not consider such arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Grant also complains that the trial court erred when it declined to instruct the jury on second-degree reckless homicide as a lesser-included offense. "A criminal defendant is entitled to a lesser-included offense instruction if requested when reasonable grounds exist in the evidence both for acquittal on the greater offense and conviction on the lesser offense." ***State v. Miller***, 2009 WI App 111, ¶48, 320 Wis. 2d 724, 772 N.W.2d 188. Whether the evidence at trial supports giving a lesser-included instruction is a question of law we review *de novo*. *See* ***State v. Glenn***, 199 Wis. 2d 575, 581-82, 545 N.W.2d 230 (1996).

The trial court declined to give the second-degree reckless homicide instruction because "[t]he only difference between [first-]degree reckless and [second-]degree reckless is that [first-] degree requires proof of utter disregard for human life, where [second-]degree reckless does not." The trial court further explained that, "under the evidence received during this trial, there is no reasonable basis for a jury to find that Mr. Grant caused the death of [the victim] by criminally reckless conduct, but that he did not show utter disregard for [the victim's] life[.]"

"[T]he element of utter disregard for human life is measured objectively, on the basis of what a reasonable person in the defendant's position would have known." ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. "Utter disregard is proved through an examination of the act, or acts, that caused death and the totality of the circumstances that surrounded that conduct." ***State v. Edmunds***, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999). To determine whether the circumstances of the conduct showed utter disregard for human life, the jury is to consider: "what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct." WIS JI—CRIMINAL 1020. "Utter disregard for human life" may also be shown

through the defendant's actions and statements before, during, and after the crime. *See* ***Jensen***, 236 Wis. 2d 521, ¶17.

In its decision against instructing the jury on second-degree reckless homicide, the trial court noted "how dangerous the conduct was, shooting in close proximity if not at least one contact [shot.]" Regardless of whether there was contact, "I don't think there is any reasonable basis for the jury to find anything but that the shots happened … at very close range, that there were four bullets that entered [the victim's] body at close range," and that the shots occurred within three to five seconds. The trial court also gave "significant consideration not only to how dangerous the conduct was [but also] how apparently dangerous it is to adults who know how dangerous shooting bullets into a person is." It further considered Grant's conduct after the shooting, noting that it "is shown out without any dispute in the video footage that was presented" that after the shooting, when the victim "was clearly on the ground, defenseless," Grant "stepped over him and walked out of the bar without checking on his well-being … [and] did not do anything to call for help[.]" Thus, the trial court concluded that if the jury were to find that Grant caused the victim's death "by criminally reckless conduct, there is no reasonable basis for the jury to find that that did not also involve the defendant's conduct showing utter disregard for human life."

In his postconviction motion and again on appeal, Grant protests that the trial court "did not adequately consider" how he and the victim "had no prior contacts with each other prior to immediately before the shooting." Grant also claims he did not know where he had shot the victim, and there was no evidence that Grant knew how many of his shots had hit the victim. Grant also contends that his departure from the nightclub, without calling for help, "did not illustrate a lack of regard for human life" because there were "lots of people inside[.]" He

contends that a "reasonable argument could have been made that Grant was just scared and not indifferent to human life during the course of the incident."

We reject these arguments. Regardless of whether Grant had prior contact with this victim, a reasonable person in Grant's position would have known that firing multiple gunshots at a person in close proximity and in rapid succession could prove fatal. Moreover, knowledge of where or how many shots actually struck a victim does not mitigate the risks inherent in discharging a firearm. Finally, disclaiming the responsibility to render or summon aid because there are "lots of people" in the vicinity of one's criminally reckless conduct is indeed indifference to human life.

We agree with the trial court that there was no reasonable probability that the jury could acquit on first-degree reckless homicide but convict on second-degree reckless homicide. Thus, the trial court did not err when it declined to give the second-degree reckless homicide instruction, and the postconviction court did not err in ratifying that ruling.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are 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