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DISTRICT I

December 7, 2021

To:

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
Electronic Notice

Jeffrey W. Jensen
Electronic Notice

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

2020AP2160-CR State of Wisconsin v. Brandon R. Davis (L.C. # 2018CF2597)

Before Brash, C.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).

Brandon Davis appeals a judgment convicting him of first-degree reckless injury with a dangerous weapon, as a party to a crime. He contends that the evidence was insufficient to support the jury's guilty verdict. Based upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

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

D.W. testified at trial that two men robbed him as he was walking to a store. After they robbed him, they made him undress and sit down saying, "It's all a part of the game." D.W. testified that after he was sitting, the men shot him three times in his abdomen, causing him serious injuries which required multiple surgeries. D.W. identified Davis as one of the men who shot him when the police showed him a photo array and again identified Davis in person in court.

Davis argues that there was insufficient evidence to show that he acted in a criminally reckless manner. "Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life" is guilty of first-degree reckless injury. *See* WIS. STAT. § 940.23(1)(a). Criminal recklessness means: (1) the conduct created a risk of death or great bodily harm to another person; (2) the risk of death or great bodily harm was unreasonable and substantial; and (3) the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. WISWIS JI—CRIMINAL 1250.

When reviewing the sufficiency of the evidence, we look at whether "the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn [the] verdict[.]" ***Id.*** (citation omitted).

The testimony adduced at trial was more than sufficient for the jury to conclude that Davis acted in a criminally reckless manner. Based on D.W.'s testimony that Davis forced him to strip off his clothes, sit on the ground, and then shot him three times, the jury could have

reasonably concluded that Davis's conduct was criminally reckless because Davis's actions created an unreasonable and substantial risk of death or great bodily harm to D.W. The jury could also reasonably have inferred that Davis was aware that his conduct created an unreasonable and substantial risk of death or great bodily harm based on D.W.'s testimony about Davis's actions.

Davis contends that the evidence is insufficient because the only reasonable inference that can be drawn from the evidence is that he acted with the? intent to kill D.W., not with criminal recklessness. He argues that the evidence adduced at trial supports conviction of a crime he was not charged with, attempted first-degree intentional homicide, but does not support his conviction of first-degree reckless injury. Davis also contends that the state of mind applicable to each crime—intent and recklessness, respectively—are mutually exclusive.

We reject Davis's argument. A defendant has intent to commit a crime when the defendant "either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." WIS. STAT. § 939.23(4). A defendant acts with a criminally reckless state of mind when the defendant is aware that his or her conduct creates an unreasonable and substantial risk of death or great bodily harm. WISWIS JI—CRIMINAL 1250. Although these two standards are different, they are not *inconsistent*. As we explained in ***State v. Cox***, 2007 WI App 38, ¶13, 300 Wis. 2d 236, 730 N.W.2d 452, "["[t]o]o be aware that one'sone's actions create a 'practical certainty' of killing someone else does not *preclude* also being aware that one'sone's actions pose an 'unreasonable and substantial risk' to that person; it instead *guarantees* it." Stated differently, a defendant may act in a manner that is both intended to cause death and sufficient to create a risk of great bodily harm.

Davis next argues that he should not have been convicted of first-degree reckless injury simply because it is a lesser-included offense of attempted first-degree intentional homicide. This argument is meritless for two reasons. First, the jury was never asked to decide whether Davis was guilty of attempted first-degree intentional homicide. There is no basis for arguing that the jury convicted Davis of first-degree reckless injury because it is a lesser-included offense of a more serious crime. Second, first-degree reckless injury is not a lesser-included offense of attempted first-degree intentional homicide under the well-established elements only test. *See* ***State v. Carrington***, 134 Wis. 2d 260, 265, 397 N.W.2d 484 (1986) (stating that an "offense is a lesser included offense of another offense only if all of its statutory elements can be demonstrated without proof of any fact or element, in addition to those that must be proved for the greater offense").

Davis counters that first-degree reckless injury should be considered a lesser included offense of first-degree intentional homicide as a matter of public policy, citing WIS. STAT. § 939.66(3), which includes in the definition of "included" crime "[a] crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent."[2] Here, however, these crimes differ in more ways than just the mental state required to commit them. In addition to the differing mental states required, first-degree reckless injury requires an injury, while attempted first-degree intentional homicide does not require an injury. Therefore, we reject this argument.

[2] We note that Davis's argument relies on a statute here, not on public policy as he asserts.

Upon the foregoing,

IT IS ORDERED that the judgment of the circuit court 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