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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP000749 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Brian A. Patterson,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Dennis Cimpl, presiding

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Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal are complex legal issues concerning the elements of the various levels of homicide. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

I. Whether the evidence was sufficient as a matter of law to convict Patterson of first degree reckless homicide where Patterson invoked the privilege of self-defense to the charge of first degree intentional homicide, and it was undisputed that Patterson deliberately fired his weapon five times at a vital part of the body of the victim?

Answered by the trial court: Yes.

II. Whether the circuit court erred in submitting to the jury, over Patterson's objection, the lesser included offense of first degree reckless homicide?

Answered by the trial court: No.

III. Whether the circuit court erred in denying Patterson's postconviction motion for a new trial on the grounds that the instruction the court gave to the jury concerning first degree

reckless homicide was erroneous in that it shifted the burden of proof to Patterson to prove self-defense, and where the instruction failed to instruct the jury that if Patterson actually believed that deadly force was necessary, then he could not be found guilty of first degree reckless homicide.

Answered by the trial court: No.

IV. Whether the circuit court abused its sentencing discretion by failing to set forth on the record a nexus between the sentence imposed and the sentencing factors considered by the court.

Answered by the trial court: No.

Summary of the Arguments

I. The evidence was insufficient as a matter of law to convict Patterson of first degree reckless homicide. Where the defendant's conduct is *practically certain* to cause death, it is presumed that he acted with intent to kill. On the other hand, where the defendant's conduct merely created a risk of death or great bodily harm, his conduct is criminally reckless. Here, Patterson's conduct was practically certain to cause the death of McGowan. Patterson fired a pistol at least four times at a vital part of McGowan's body. Thus, the evidence is undisputed that Patterson intended to kill

McGowan. This precludes a finding that Patterson's conduct was criminally reckless. Patterson's defense to the charge of first degree intentional homicide-- of which the jury did not convict him-- was the privilege of self-defense. Since the jury did not convict Patterson of first degree intentional homicide, the jury must have believe that Patterson actually believed that deadly force was necessary. As such, the evidence was insufficient as a matter of law to convict Patterson of first degree reckless homicide.

II. The circuit court erred in submitting the lesser included offense of first degree reckless homicide to the jury. At the close of all evidence the state sought to have to court submit to the jury the lesser included offense of first degree reckless homicide. Patterson objected. The court overruled the objection and submitted first degree reckless homicide. It was error to do so. Firstly, there is no reasonable view of the evidence that would permit the jury to find Patterson not guilty of first degree intentional homicide, but guilty of first degree reckless homicide. This is because the evidence permits no dispute over the fact that Patterson acted with the intent to kill McGowan. Thus, in order to acquit Patterson of first degree intentional homicide, the jury would have to find that Patterson had an actual belief that deadly force was necessary. This precludes a finding that Patterson was aware that his conduct created an *unreasonable* risk of death or great

bodily harm, which is a necessary element of first degree reckless homicide. More importantly, the state's request to submit the lesser included offense came only after all evidence had been presented, and after Patterson had committed to a defense. As such, it violated Patterson's due process right to be put on notice of the charges, and given an opportunity to defend against those charges, only to then have the fundamental nature of the charge changed. If Patterson had faced the charge of first degree reckless homicide from the outset, his theory of defense would have been very different.

III. The circuit court erred in denying Patterson's motion for a new trial on the grounds that the instruction that the court gave the jury concerning first degree reckless homicide was plain error. Patterson filed a postconviction motion for a new trial on the grounds that the circuit court committed plain error in the manner in which it instructed the jury concerning first degree intentional homicide. The instruction was defective in two respects: (1) the instruction failed to clearly inform the jury that, with regard to first degree reckless homicide, it was the state's burden to disprove beyond a reasonable doubt the defendant's claim that he was acting in self-defense; and, (2) the jury instruction failed to inform the jury that if it found that Patterson held an actual belief that deadly force was necessary, the jury could not

convict him of first degree reckless homicide.

IV. The circuit court erred in permitting Patterson to testify to some-- but not all-- of the prior acts of violence by McGowan of which Patterson was aware at the time. Patterson filed a pretrial motion for a preliminary ruling on the admissibility of evidence concerning prior violent acts by the victim, McGowan, of which Patterson was aware at the time of the shooting. The court conducted a hearing into the motion. The court ruled that Patterson could testify to some of the incidents, but excluded the majority of them on the grounds that they were either remote in time or not firmly established. The circuit court erroneously exercised its discretion because it applied the wrong legal standard. The defendant has the right to testify concerning his knowledge of the victim's propensity for violence. There is no requirement that the incidents be near in time nor firmly established. The only basis for excluded such testimony is if the probative value is exceeded by considerations of unfair prejudice. Here, the circuit court may no such finding.

V. The circuit court erroneously exercised its sentencing discretion because, in sentencing Patterson, the judge merely restated the aggravating facts in the case and then imposed a thirty-five year sentence. In order to ensure proper appellate review of the circuit court's exercise of sentencing discretion, the judge is required to

place on the record the sentencing factors that were considered; and then explain why those factors demand the sentence that was imposed. Here, the circuit court judge set forth no nexus between the factors considered and the sentence imposed. Additonally, the judge relied upon the misapprehension that Patterson had shot McGown "twice in the back" as McGowan was retreating. There was not such evidence presented at trial.

Statement of the Case

I. Procedural History

On February 6, 2010, the defendant-appellant, Brian A. Patterson (hereinafter "Patterson"), was charged with first degree intentional homicide arising out of the shooting death of Joseph McGowan in Milwaukee on February 2, 2010. (R:2) Patterson waived his preliminary hearing, he was bound over for trial, and he entered a not guilty plea.

Patterson filed a pretrial motion seeking a preliminary ruling on the admissibility of other violent acts by McGowan[1]. The circuit court conducted a hearing into the motion on June 2, 2010. Patterson testified at the hearing concerning the various violent acts by McGowan of which Patterson was aware. These acts included: an incident in which McGowan

[1] A so-called "McMorris" motion

argued with Shannon Dancer about a sexual assault that McGowan had committed in the Eighties (R:95-41); an incident in Madison in which McGowan was charged with reckless use of a weapon (R:95-42); Patterson said that McGowan told him about an incident where McGowan's brother, Tracy, shot a man, and then Joseph McGowan picked up the victim's gun and fired the remaining shots into the victim (R:95-53); Patterson testified that he personally observed an incident where McGowan shot "JJ" over an ounce of cocaine (R:95-61); and, finally, there was a Christmas Eve incident in which Patterson saw McGowan shoot a person. (R:95-62).

The circuit court permitted Patterson to introduce evidence of the January 29, 2010 incident in which McGowan threatened Patterson that "he better get his money or he's gonna [sic] kick Mr. Patterson's ass", punched him, and pulled a gun on him. (R:96-6). The court also permitted Patterson to introduce evidence of a December 27, 2009 incident (R:96-16); but ruled that the remaining incidents were not admissible.[2]

Patterson also filed a pretrial motion seeking suppression of the statement he made while in police custody. (R:19). The court conducted a hearing, and ruled that Patterson's statement was admissible.

[2] Patterson filed a motion to reconsider and,on reconsideration, the court admitted evidence of the September, 2009 incident in which McGowan shot "JJ"

The matter proceeded to jury trial beginning on December 14, 2010.

During the defense case, Patterson called Tommy Wynne to testify[3]. Wynne, however, invoked his Fifth Amendment right to remain silent. (R:110-118)[4] Thereafter, Patterson sought to introduce Wynne's statement through either the police interview conducted by Det. Gust Petropolous (Exhibit 99; Appendix B) or through the testimony/transcript of an interview of Wynne conducted by defense investigator Lori Gonion. (Exhibit 100; Appendix B). (R:112-9 et seq.)[5] The trial court sustained the state's hearsay objection in large part, but admitted the portion of Wynne's statement in which he said that immediately following the shooting, Patterson gave him the pistol and directed him to bury it in the snow at his sister's house[6]. *Id.*

At the close of all evidence, the state moved the court to

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[3] Wynne, who was an eyewitness to the shooting, was on the state's witness list; however, the state did not call Wynne. Apparently, a detective, unbeknownst to Patterson, told Wynne that he was free to leave. There was some difficulty in getting Wynne to return for the defense case, but he did return. The state refused to offer Wynne immunity, and the state did not offer him any consideration for his testimony. Thus, when Wynne was called by the defense, he invoked his right to remain silent.

[4] The court permitted Wynne to invoke his Fifth Amendment privilege before the jury. This should not have been permitted; however, Patterson did not move for a mistrial because, according to his lawyer, this was at the defendant's request. (R:111-6)

[5] Wynn was present at the scene of the shooting, and he was an eyewitness. According to Wynn's statement, immediately before the shooting McGowan was behaving in an intimidating and threatening manner.

[6] The circuit court ruled that this statement was admissible as a statement against penal interest pursuant to Sec. 908.045(4), Stats.

submit to the jury the lesser-included offense of first degree reckless homicide. (R:112-96 to 99) Patterson objected. The court overruled Patterson's objection, and submitted to the jury the lesser included offense of first degree reckless homicide. *Id.*

The jury returned a verdict finding Patterson guilty of first degree reckless homicide. (R:112-7)

The circuit court sentenced Patterson to thirty-five years in prison, bifurcated as twenty-five years initial confinement and ten years of extended supervision. (R:117-54) Significantly, at the sentencing hearing the judge said, "And you shot him twice in the back as he was going away from you." (R:117-49)

Patterson timely filed a notice of intent to pursue postconviction relief. He filed a postconviction motion for a new trial on the grounds that plain error was committed in the manner in which the circuit court instructed the jury; or, in the alternative, that trial counsel was ineffective for failing to object to the defective instructions. (R:82)[7] The circuit court did not conduct a hearing; instead, the court denied the motion by memorandum decision. (R:87)

[7] Specifically, the motion alleged that in instructing the jury as to first degree reckless homicide (Wis. JI Criminal 1016), the instruction improperly shifted the burden of proof to the defendant to establish that he was acting reasonably in self-defense; and,concerning first degree reckless homicide, the instruction failed to inform the jury that Patterson cannot be convicted of first degree reckless if it is established that he had an actual belief that deadly force was necessary to terminate an unlawful interference with his person, even if that actual belief was unreasonable.

II. Factual Background

This incident between cousins-- Patterson and McGowan-- began as a disagreement over the manner in which Patterson completed a tax return for Tiffany Stephens, who was McGowan's girlfriend. (R:106-74; 76; 79) On February 2, 2010, in the company of Devin Holmes and Joseph McGowan, Stephens went to Patterson's home at about two o'clock in the afternoon to discuss the matter with Patterson. (R:106-76) When Stephens knocked on Patterson's door, though, Lonnie Tolbert answered and told her that Patterson was not home. (R:106-83)

Stephens turned to leave but, just at that point, Patterson pulled up in his car (R:106-84) He stopped it in the middle of the street. Tommy Wynne was in the car with him. (R:106-84) Stephens then had a brief discussion with Patterson about her tax return. At that point, McGowan got out of his vehicle.

Neighbors reported hearing the two men arguing (R:106-37) One neighbor saw the "guy who got shot" [McGowan] take off his coat like he wanted to fight. (R:106-42, 43) McGowan was demanding money from Patterson (R:110-27) A neighbor described McGowan's behavior as terrible and "outraged." (R:106-49) McGowan told Tolbert, "Lonnie . . . this has nothing to do with you, but I advise you not to be in the house." (R:110-31)

Apparently, though, the argument subsided, and Patterson went up onto his porch. Wynne got into Patterson's vehicle, and he moved it so that McGowan could leave. As the cars were passing, McGowan had words with Wynne. This prompted Wynne to get out of the car and approach McGowan (R:106-103) According to Stephens, Wynne, who was yelling, was demanding to know why McGowan would threaten him even though he had nothing to do with the dispute. (R:106-105)

At that point, Patterson came back down from his porch, stood in the street, and, according and Stephens, demanded to fight McGowan (R:106-112) Stephens testified that both men put up their hands to fight, but then Patterson pulled out a gun and he shot McGowan. (R:106-115, 116) Devin Holmes heard McGowan say (to Patterson), "You got it. Use it." (R:109-38) Patterson continued to walk forward as he fired four shots (R:109-51). McGowan fell backwards. *Id*

According to the medical examiner, all of McGowan's gunshot wounds were on the front part of his body, including his hands, except for one gunshot wound to his left buttocks. (R:107-118)

Patterson also testified. He said on the day of the shooting he had found out that the district attorney had decided not to issue charges against McGowan for pulling a gun on Patterson the previous Friday. (R:110-88) Patterson described the previous incident. On that day, McGowan was

demanding money from Patterson. He "sucker punched" Patterson, and then he pulled a gun on him. (R:110-103 to 106) Carl McAfee corroborated that McGowan was threatening Patterson, and that McGowan punched him. (R:112-51)

Regarding the present incident, Patterson said that, after he pulled up in his vehicle, he got out and McGowan was "excited", and he was again demanding money from Patterson. (R:110-93) McGowan threatened that unless Patterson paid him the money within twenty-four hours, McGowan would shoot Patterson. (R:111-13)

Patterson went back up onto the porch. However, when he saw the argument between Wynne and McGowan, he went back down. At that point, according to Patterson, McGowan said that he [Patterson] did not have twenty-four hours any more, and he reached under the seat of his car. (R:111-34) Patterson testified that he felt threatened because he believed that McGowan had retrieved a gun from the car. (R:111-35) Therefore, Patterson pulled out his pistol, and he warned McGowan that if he came any closer, he was going to shoot. (R:111-38) McGowan had his hand in his pocket, and he kept coming toward Patterson, so Patterson fired four or five times. (R:111-39, 40) Patterson told the jury that he thought McGowan's threat was credible because around Christmas, 2009[8], Patterson had seen McGowan shoot a man. (R:111-47)

[8] Which was only a little more than a month earlier

Additionally, Patterson testified that on another occasion, McGowan had called him and told him that he [McGowan] had shot Dujuan Johnson. (R:111-53, 54)

Argument

I. The evidence was insufficient as a matter of law to convict Patterson of first degree reckless homicide.

The evidence presented at trial was to the effect that Patterson fired his pistol at a vital part of McGowan's body at least four times from a position where the two men were "face-to-face." The only available inference is that Patterson intended to kill McGowan. Intentional conduct is not criminally reckless conduct. Patterson defended the charge of first degree intentional homicide by invoking the privilege of self-defense. Apparently, because the jury did not convict Patterson of first degree intentional homicide, the jury must have believed that Patterson actually believed that deadly force was necessary. Similarly, the jury did not convict Patterson of second degree intentional homicide and, therefore, the jury must have believed that Patterson's use of deadly force was reasonable and necessary. Thus, the state failed to disprove Patterson's claim of perfect self-defense. Since Patterson's intent to kill McGowan was undisputed, the evidence was insufficient as a matter of law to convict Patterson of first

degree reckless homicide.

A. Standard of Appellate Review

The standard of appellate review on challenges to the sufficiency of the evidence to support a verdict in a criminal case is well-known. In *State v. Poellinger*, 153 Wis. 2d 493, 501 (Wis. 1990), the Supreme Court held:

> We hold that the standard for reviewing the sufficiency of the evidence to support a conviction is the same in either a direct or circumstantial evidence case. Under that standard, an appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state 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.

B. Elements of first degree reckless homicide

To prove first-degree reckless homicide, the State must show that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by *criminally reckless conduct*; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* § 940.02(1), STATS. "Criminally reckless conduct" means: the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that her conduct created the unreasonable and substantial risk of death or great bodily harm. Wis. JI-Criminal 1020.

Where, as here, the defendant introduces "some evidence" that he was acting in self-defense, a fourth element to first degree reckless homicide is created. The court of appeals has specifically explained that, "Once a defendant successfully places an affirmative defense in issue, the State is required to disprove the defense beyond a reasonable doubt. [internal citation omitted] Thus, the lack of the defense becomes an element of the crime." *State v. Schmidt,* 2012 WI App 113, 344 Wis. 2d 336, 343, 824 N.W.2d 839, 843, review denied (Jan. 14, 2013), *review denied* 2013 WI 22, 346 Wis. 2d 284, 827 N.W.2d 374

Where the evidence is undisputed that the defendant intended to kill the victim, there is no circumstance under which he could be found guilty of first degree reckless homicide. Acting with "intent to kill" and "criminally reckless conduct" are related but distinct concepts. As the court noted in, *State v. Weeks*, 165 Wis. 2d 200, 206-07, 477 N.W.2d 642, 644-45 (Ct. App. 1991), a defendant has intent to kill when he is aware that his conduct is *practically certain* to cause the proscribed result. By comparison, a defendant's conduct is criminally reckless where the conduct creates a mere risk of death or great bodily harm. Thus, where a defendant's conduct is practically certain to cause death, it is not criminally reckless behavior.

C. Patterson acted with intent to kill McGowan and this precludes a finding that his behavior was reckless.

Here, it is undisputed that Patterson's conduct was practically certain to kill McGowan. He fired four or five shots at a vital part of McGowan's body from close range. In, *Cupps v. State*, 120 Wis. 504, 513, 514, 97 N. W. 210 (1904), the supreme court wrote, "When it is made to appear in the prosecution of a case like this that the accused fired the shot, *the weapon being aimed at a vital part of the body,* and that death ensued as a natural and probable result, the presumption of fact as to intention to take human life, in the absence of any explanatory circumstance or evidence, makes a *prima facie* case for the prosecution." Additionally, death is the natural and probable consequence of firing a pistol at another human being. "One is presumed to intend the natural and probable consequences of pointing and discharging a gun at a vital part of another's body." *Smith v. State*, 69 Wis. 2d 297, 304 (Wis. 1975). In *Smith,* there was evidence that the defendant pointed a shotgun at the deceased, and that he fired twice.

Perhaps the most articulate expression of this principle is from New York. There, the court of appeals wrote:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such

> circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (Penal Law § 15.05[3]).
>
> As the Appellate Division correctly concluded, in this case "defendant was guilty of an intentional shooting or no other" (*People v. Wall,* 29 N.Y.2d 863, 864, 328 N.Y.S.2d 170, 278 N.E.2d 341 [1971]). A defendant acts intentionally with respect to a result "when his conscious objective is to cause such result" (Penal Law § 15.05[1]). The only reasonable view of the evidence here was that defendant intentionally killed the victim by aiming a gun directly at him and shooting him 10 times at close range, even after he had fallen to the ground.

People v. Gonzalez, 1 N.Y.3d 464, 466-67, 807 N.E.2d 273, 275 (2004)

Here, it is undisputed that Patterson killed McGowan by shooting him several times in vital areas of the body. *See State v. Kramar*, 149 Wis. 2d 767, 793, 440 N.W.2d 317, 328 (1989) (intent to kill may be inferred from nature of victim's wounds). Patterson's intent to kill McGowan, then, cannot be disputed.

Patterson's defended the charge of first degree intentional homicide by invoking the privilege of self-defense. Where the defendant claims self-defense, it it incumbent upon the state to prove beyond a reasonable doubt that the defendant did not have an actual belief that force was necessary, or that the use of deadly force was not reasonable.

Where the defendant holds an actual belief that deadly force is necessary-- even if that belief is unreasonable-- he cannot be convicted of first degree reckless homicide. This is because an actual belief that deadly force is reasonable and necessary is mutually exclusive of the element of first degree reckless homicide requiring that the state to prove that the defendant was aware that his conduct created an *unreasonable* risk."[9]

The court of appeals recognized this years ago, when the court wrote:

> It is impossible to act in perfect self-defense without actually believing that the force used is necessary for self-defense. It is also impossible to satisfy the elements of manslaughter/imperfect self-defense without having that actual belief. Under these circumstances, the jury should find the defendant guilty of first-degree or second-degree murder, and the jury should be so instructed.
>
> If the jury finds that the state proved the existence of the statutory elements of either first-degree or second-degree murder, but that the state failed to prove that the defendant lacked an actual belief that the force used was necessary in self-defense, then the state has failed to disprove not only perfect self-defense but also manslaughter/imperfect self-defense, and the jury should be so

[9] To prove first-degree reckless homicide, the State must show that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* § 940.02(1), STATS. "Criminally reckless conduct" means: the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that her conduct created the *unreasonable* and substantial risk of death or great bodily harm. Wis. JI-Criminal 1020

instructed.

State v. Harp, 150 Wis. 2d 861, 885 (Wis. Ct. App. 1989), overruled on other grounds by *State v. Camacho,* 176 Wis. 2d 860, 882 (Wis. 1993), which was also overruled by *State v. Head,* 2002 WI 99 (Wis. 2002).

Thus, the only reasonable view of the evidence that would have permitted the jury to acquit Patterson of first degree intentional homicide and second degree intentional homicide is that the state failed to disprove that Patterson had an actual belief that deadly force was necessary. Where the defendant held an actual belief that deadly force was reasonable and necessary, as a matter of logic, he could not have at the same time been aware that his conduct created an *unreasonable* risk of death or great bodily harm (which is a necessary element of first degree reckless homicide.) The *reason* for the risk is the defendant's belief that he needed to act in self-defense.

For these reasons, the evidence was insufficient as a matter of law to convict Patterson of first degree reckless homicide. He acted with intent to kill; but with the actual belief that deadly force was reasonable and necessary. This precludes a finding that Patterson was aware that his conduct created an *unreasonable* risk of death or great bodily harm.

II. The circuit court erred in instructing the jury as to the lesser-included offense of first degree reckless homicide.

As mentioned above, at the instruction and verdict conference the state requested that the judge submit to the jury the lesser-included offense of first degree reckless homicide. Patterson objected. However, the circuit court overruled Patterson's objection and submitted first degree reckless homicide.

As will be set forth in more detail below, it is error to submit an instruction to the jury where the evidence does not support the instruction. Here, there was no reasonable view of the evidence that would permit the jury to acquit Patterson of first degree intentional homicide but find him guilty of first degree reckless homicide. Moreover, it violates due process to change the fundamental nature of the charge after Patterson has already defended the case as an intentional crime, and has rested his case.

A. Standard of appellate review

Whether the evidence at trial supports submission of a lesser-included offense is a question of law, which the appellate court review *de novo*. *State v. Kramar*, 149 Wis. 2d 767, 791, 440 N.W.2d 317, 327 (1989)

B. Under no view of the evidence did Patterson engage in criminally reckless conduct

If the court of appeals finds that the evidence is insufficient as a matter of law to convict Patterson of first degree reckless homicide, then the court must order that a judgment of acquittal be entered. No further issues would need to be considered. Given the deferential standard of appellate review for the sufficiency of evidence, though, it is possible that the court will find the evidence to be sufficient to support the verdict. In that case, the court must then consider whether the circuit court erred in submitting first degree reckless homicide to the jury[10]. If so, the remedy on appeal is to order a new trial.

In determining the appropriateness of submitting a lesser-included offense, the reviewing court must apply a two-step test. *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 lesser offense is, as a matter of law, a lesser-included offense of the crime charge. *Id.* at 434, 536 N.W.2d at 442. If it is, then the court must determine whether

[10] The author is aware of the fact that if the evidence is sufficient to support the jury's verdict on first degree reckless homicide then, by definition, submission of the lesser-included offense was raised by the evidence. However, Patterson also claims that it violated his due process rights to fundamentally change the nature of the charge after he had already presented his defense.

the instruction is justified. *Id.* This requires the court to decide whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser. *Id.*

Here, first degree reckless homicide is indisputably a lesser-included offense of first degree intentional homicide. The only question is whether there was a reasonable basis in the evidence for acquittal on the charge of first degree intentional homicide, and conviction of first degree reckless homicide.

As argued in the preceding section, under the evidence in the record, the only way Patterson could be found not guilty of first degree intentional homicide and second degree intentional homicide is if the jury believed that the state did not disprove that Patterson had an actual belief that deadly force was necessary. If Patterson held such an actual belief, then he could not have been aware that his conduct created an unreasonable risk of death or great bodily harm, which is a necessary element of first degree reckless homicide. For that reason, the evidence did not support the submission of the lesser included offense.

C. It violated Patterson's due process rights to change the fundamental nature of the charge after he had defended the case as an intentional crime.

An additional, and equally compelling reason that it was inappropriate for the circuit court to submit first degree reckless homicide to the jury is that the state's request came only after Patterson had presented his defense (self-defense).

Although first degree reckless homicide is, by statute, a lesser-included offense of first degree intentional homicide, *see* Sec. 939.66(2), Stats., it has almost entirely different elements. The only common element is that the defendant's conduct must have caused the death of another human being.

Where the defendant is charged with first degree intentional homicide, and he defends the case by claiming that he did not intend to kill the victim, there is no due process question raised by the submission of the lesser-included offense of first degree reckless homicide.

However, where, as here, the defendant defends the case by invoking the privilege of self-defense, there is a serious due process question raised by the submission of first degree reckless homicide as a lesser-included offense.

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense, are basic to our system of justice. *In re Oliver,* 333 U.S. 257, 272 (1948). No principle of procedural due process is more clearly

established than that an accused must receive notice of the specific charge, and he must have the chance to be heard at trial on the issues raised by that charge. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948) In a slightly different context, the United States Supreme Court has observed that, "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh." *In re Ruffalo,* 390 U.S. 544, 551 (U.S. 1968)

Here, prior to trial, Patterson was put on notice that he had to defend against the state's claim that he intentionally caused the death of McGowan. Patterson chose to concede the fact that he intentionally killed McGowan, but claim that he acted under the privilege of self-defense. Thus, Patterson's case focused on the violent nature of McGowan's personality, the threatening nature of McGowan's conduct on the day in question, and on Patterson's state of mind as he pulled out his gun and fired.

After all evidence had closed, though, and Patterson had submitted his defense, the state's suddenly changed the fundamental nature of the charge by seeking submission of reckless homicide. Had Patterson known prior to trial that the state's claim actually was that he caused the death of McGowan by criminally reckless conduct evincing an utter

disregard for human life, Patterson's defense would have been very different.

For example, had Patterson faced a charge of first degree reckless homicide from the outset, he may not have raised the privilege of self-defense at all. Although it is legally possible to claim the privilege of self-defense to defend against a charge of first degree reckless homicide (*see* Sec. 939.45, Stats), it is rarely done because, in most cases of reckless homicide, self-defense is of no help. The privilege of self-defense permits the defendant to *intentionally* use force against another human being. "Reckless homicide" requires no proof that the defendant intended to cause any harm to the victim. Rather, reckless homicide requires proof that the defendant merely created a *risk* of harm.

If Patterson decided not to rely on self-defense, it would not have been necessary for him to testify. In order to succeed on a claim of self-defense, it is almost always required that the defendant testify in order to establish the defendant's state of mind (believed that force was necessary to terminate an unlawful interference).

Similarly, in defending against a charge of first degree reckless homicide, Patterson would have focused on the various ways in which his conduct demonstrated regard for human life, such as, the efforts he made to avoid the confrontation with McGowan.

For these reasons, the circuit court erred in presenting the lesser-included offense of first degree reckless homicide. Patterson had no opportunity to present evidence concerning that charge, nor to tailor his arguments accordingly.

III. The circuit court erred in denying Patterson's motion for a new trial on the grounds that the jury instructions given to the jury erroneously stated the law.

In a postconviction motion, Patterson sought a new trial on the grounds that it was plain error for the circuit court to fail to instruct the jury[11] that it was the state's burden to disprove self-defense as it relates to the charge of first degree reckless homicide. In the alternative, Patterson alleged that it was ineffective for his trial counsel to fail to object to the form of the instructions. The circuit court denied the motion without conducting a hearing.

Trial counsel failed to object to the use of Wis. JI-1016 to instruct the jury regarding the elements of the various offenses where self-defense is an issue. Nevertheless, for the reasons set forth below, the instruction inaccurately states the law. Firstly, with regard to first degree reckless homicide, the instruction never tells the jury that it is the state's burden to prove that Patterson was not acting in self-defense. Secondly, the circuit court did not instruct the jury that an actual belief that

[11] The circuit court used Wis. JI-Criminal 1016 to instruct the jury

deadly force was necessary in self-defense, even if that belief is unreasonable, precludes a finding of guilt on the charge of first degree reckless homicide.

"[A] defendant's waiver of the right to object to jury instructions does not preclude . . . review of claimed errors in the instructions. [The court] may choose to review challenges to jury instructions which raise federal constitutional questions going to the integrity of the fact-finding process." *State v. Zelenka,* 130 Wis. 2d 34, 44 (Wis. 1986). Whether a jury instruction correctly states the law is a legal issue. *State v. Ziebart*, 2003 WI App 258, ¶16, 268 Wis. 2d 468, 673 N.W.2d 369.

A. The instruction fails to instruct the jury that it is the State's burden to disprove self-defense.

Where self-defense is an issue, the state must disprove it beyond a reasonable doubt. *State v. Head,* 2002 WI 99, ¶106, 255 Wis. 2d 194, 648 N.W.2d 413. The instructions given in this case were erroneous because, with regard to first degree reckless homicide, the instructions did not inform the jury of this burden. Recall that disproving self-defense is the "fourth element" of first degree reckless homicide. Omission of the burden of proof is a misstatement of law that renders jury instructions erroneous. *State v. Patterson,* 2010 WI 130, ¶53, 329 Wis. 2d 599,790 N.W.2d 909

Wis JI-Criminal 1016, does mention the burden of proof with regard to first degree intentional homicide, and with regard to second degree intentional homicide. For example, regarding first degree intentional, the instruction reads:

> The third element of first degree intentional homicide requires that the defendant did not actually believe the force used was necessary to prevent imminent death or great bodily harm to himself. This requires the State to prove either:
>
> 1) that the defendant did not actually believe he was in imminent danger of death or great bodily harm; or
>
> 2) that the defendant did not actually believe the force used was necessary to prevent imminent danger of death or great bodily harm to (himself) (herself).

With regard to first degree reckless homicide, though, there is no similar statement that it is the State's burden to prove that the defendant *did not* have an actual belief that deadly force was necessary, or that the belief was unreasonable. Rather, the instruction only provides that, "If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another."[12]

This is not merely a statutory issue. Rather, due process is implicated by the failure of the court to instruct a jury that it is

[12] If the court has any doubt that Wi-JI Criminal 1016 is defective, it is illustrative to compare the "Jury Decision" paragraph in Wis-JI Criminal 1020 (regular first degree reckless homicide) and Wis. JI 1016 (which applies when self-defense is an issue) In both instructions, that paragraph reads: "If you are satisfied beyond a reasonable doubt that the defendant caused the death of (name of victim) by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide." In 1016, where self-defense is supposedly in issue, there is no mention of self-defense in the jury decision paragraph. This is the fourth element of the crime.

the state's burden to prove that the defendant did not have a mitigated state of mind. *See,* e.g., *Falconer v. Lane,* 905 F.2d 1129, 1131 (7th Cir. Ill. 1990)

Thus, the instruction is inaccurate in two ways: (1) there is no affirmative statement that it is the State's burden to prove that the defendant was not acting in self-defense; and, (2) to the extent that self-defense is mentioned, the instruction suggests that it is the defendant's burden to prove that he was acting reasonably in self-defense.

B. The instruction fails to explain to the jury that if Patterson had an actual belief that deadly force was necessary, even if that belief was unreasonable, he cannot be convicted of first degree reckless homicide.

As mentioned above, Wis. JI-Criminal 1016 does tell the jury that, with regard to first degree reckless homicide, that, "If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another."

The burden of proof issue aside, less than perfect self-defense will defeat a charge of first degree reckless homicide. For example, if the defendant held an actual belief that deadly force was necessary-- even if that belief was unreasonable-- it will defeat a charge of first degree reckless homicide. This is because, as demonstrated earlier, an actual

belief that deadly force is necessary is mutually exclusive of the element of first degree reckless homicide requiring that the state to prove that the defendant was aware that his conduct created an unreasonable risk."[13]

Thus, the instruction was inaccurate because it did not inform the jury that if Patterson held an actual, but unreasonable, belief that deadly force was necessary, he could not be convicted of first degree reckless homicide. This is because an actual belief that deadly force is necessary excludes a finding that Patterson knew that his behavior created an *unreasonable* risk of death or great bodily harm.

IV. The circuit court erroneously exercised its sentencing discretion by failing to set forth a nexus between the factors considered and the sentence imposed.

In order to ensure proper appellate review of the circuit court's exercise of sentencing discretion, the judge is required to place on the record the sentencing factors that were considered; and then explain why those factors demand the

[13] To prove first-degree reckless homicide, the State must show that: (1) the defendant caused the death of the victim; (2) the defendant caused the death by criminally reckless conduct; and (3) the circumstances of the defendant's conduct showed utter disregard for human life. *See* § 940.02(1), STATS. "Criminally reckless conduct" means: the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that her conduct created the *unreasonable* and substantial risk of death or great bodily harm. Wis. JI-Criminal 1020

sentence that was imposed. Here, the circuit court judge set forth no nexus between the factors considered and the sentence imposed. More disturbingly, in reciting the facts of the case, the judge was under the misapprehension that McGowan was shot twice in the back as he was running away from Patterson. There was no such evidence. The medical examiner found no entrance wounds in McGowan's back. There was one entrance wound in his left buttocks. Eyewitnesses testified that Patterson was walking toward McGown and he fired, and that McGowan *fell backwards.*

A. Standard of Appellate Review

Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of discretion. *See State v. Rodgers*, 203 Wis. 2d 83, 93, 552 N.W.2d 123, 127 (Ct. App. 1996). Appellate courts have a strong policy against interference with that discretion and the sentencing court is presumed to have acted reasonably. *See State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633, 638 (1984). To overturn a sentence, an appellant must show some unreasonable or unjustified basis for the sentence in the record. *See id* . at 622-23, 350 N.W.2d at 638-39.

B. The circuit court failed to create a nexus.

In, *State v. Taylor*, 2006 WI 22 ¶18 (Wis. 2006) the Wisconsin Supreme Court court reaffirmed the traditional sentencing factors but, in the light of "Truth in Sentencing", emphasized the need for trial courts to do more than simply recite the facts, invoke the sentencing factors, and to then decide the sentence. Rather, the trial court must *explain* what factors are being considered and *why* those factors require the sentence being imposed (i.e. to provide the "linkage" between the sentencing factors and the sentence imposed). In a concurring opinion in *Taylor*, Justice Bradley wrote, "Merely uttering the facts involved, invoking sentencing factors, and pronouncing a sentence is not a sufficient demonstration of the proper exercise of discretion." *Taylor,* 2006 WI 22, ¶54 (Wis. 2006). Rather, as the court explained in *State v. Gallion***,** 2004 WI 42, ¶23 (Wis. 2004), "[W]e require that the court, by reference to the relevant facts and factors, explain how the sentence's component parts promote the sentencing objectives. By stating this linkage on the record, courts will produce sentences that can be more easily reviewed for a proper exercise of discretion." *Gallion*, 2004 WI 42, ¶46 (Wis. 2004)

In, *Gallion***,** the court made clear that:

> *McCleary* further recognized that 'the sentence imposed in each

> case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.' Id. at 276. This principle has been reiterated in subsequent cases.

Here, the court did precisely what Justice Bradley condemned, only to a greater extent. The court considered almost exclusively the seriousness of the offense, and then commented that Patterson was a "con man", and the imposed the sentence of thirty five years.

What is conspicuously absent from the record of the sentencing hearing is any explanation by the court as to why thirty-five years in prison is is the minimum amount of custody which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. In order words, there is absolutely no nexus on the record between the sentencing factors considered by the court and the actual sentence imposed.

As the Supreme Court in *Taylor* emphasized, meaningful appellate review of a sentence absolutely requires that the judge place on the record his process of reasoning. Here was none. This is important in every case but it is especially important in this case.

C. The court considered inaccurate information

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v.*

Tiepelman, 2006 WI 66, 291 Wis. 2d 179, 185, 717 N.W.2d 1, 3 Before the defendant is entitled to relief, though, it must be demonstrated that the judge actually relied on the information. *Id.*

One need look no further than the record to determine that Patterson did not shoot McGown twice in the back as he was running away.

Moreover, we know the judge relied on it because, in this case, the judge said he was relying on it.

For these reasons, if the court does not grant Patterson a new trial, the court should remand the matter for resentencing.

Conclusion

For the foregoing reasons, it is respectfully requested that the court of appeals find that the evidence was insufficient as a matter of law to support the jury's verdict finding Patterson guilty of first degree reckless homicide; and to order that a judgment of acquittal be entered. In the alternative, the court of appeals should order a new trial on the charge of first degree reckless homicide only because the circuit court erred in submitting the lesser-included offense of first degree reckless homicide only *after* Patterson had rested his defense. Further, the jury instructions that the court gave concerning first degree reckless homicide and self-defense were defective. If

the court does not order a new trial, then the court should remand the matter for resentencing.

Dated at Milwaukee, Wisconsin, this _____ day of November, 2013.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 8170 words.

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Dated this _____ day of November, 2013:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2013AP000749 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Brian A. Patterson,

Defendant-Appellant.

Defendant-Appellant's Brief and Appendix

A. Record on Appeal

B. Jury instruction on self-defense

C. Circuit court's memorandum decision denying postconviction motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit

court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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_____

Jeffrey W. Jensen