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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 Reply Brief

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Argument

I. Because the two offenses do not meet the "elements only" test for lesser-included offenses, Patterson was prejudiced by submission of first degree reckless homicide.

The state argues that instructing the jury on a lesser-included offense can never materially prejudice the defendant. (Respondent's brief p. 10) For this bold assertion, the state relies upon, *State v. Fleming,* 181 Wis. 2d 546, 559, 510 N.W.2d 837 (Ct. App. 1993); and, in doing so, the state cherry-picks some language that seems to support the idea.

However, the sentences immediately following the state's selection are very instructive. The full context is as follows:

> It is unreasonable for a criminal defendant at the outset of trial to assume that the evidence presented at trial may not affect the state's prosecuting position. A criminal defendant must always be aware that the evidence may suggest to the state that an instruction on a lesser-included offense is appropriate. After the evidence is presented, the court may allow amendment of the complaint or information to conform to the proof *where such amendment is not prejudicial to the defendant*. Section 971.29(2), Stats. Variance from the complaint or information has been held immaterial where the court amended the charge against the defendant to charge a lesser-included crime. *Moore v. State,* 55 Wis.2d 1, 7-8, 197 N.W.2d 820, 823 (1972) (information amended to include theft as lesser-included offense of robbery).

(emphasis provided) *State v. Fleming,* 181 Wis. 2d 546, 559, 510 N.W.2d 837, 842 (Ct. App. 1993).

There are two points to emphasize here: (1) Amendment of the charge is permitted *only where it does not prejudice the defendant*; and, (2) The court of appeals has held that, in the particular case before the court, variance from the complaint was not prejudicial where the amendment was to an "elements only" lesser-included offense.

Central to Patterson's argument that the circuit court erred in instructing on first degree reckless homicide, though, is his claim that *he was prejudiced by the amendment*. The state, in its brief, makes no attempt to address Patterson's claim that the amendment prejudiced his defense.[1] Instead, the state is dismissive, suggesting that an amendment to a lesser-included offense *can never* prejudice the defendant.

This is not the law, though. As mentioned above, in *Fleming* the court of appeals merely observed that in the particular case before the court the amendment to a elements only lesser-included offense did not prejudice the defendant. This certainly does not mean that the amendment to a lesser-included offense can *never* prejudice the defendant. This is clear from a reading of the case relied upon by the

[1] Recall that Patterson argued that he was prejudiced by the amendment because the nature of the original charge, first degree intentional homicide, informed many of the strategic decisions he made during the course of trial, including the decision to testify.

Fleming court: *Moore v. State*, 55 Wis. 2d 1, 197 N.W.2d 820, 823 (1972). There, the supreme court wrote:

> *In this instance*, since theft is an included crime of robbery, the amendment of the information from robbery to theft did not materially prejudice the defendant. *All of the elements of theft are included in the elements of robbery.* Of necessity, then, the defendant had notice and opportunity to prepare a defense to the elements of theft as well as to the additional elements that comprise the crime of robbery.

(emphasis provided) *Moore,* 55 Wis. 2d at 7-8. In *Moore*, then, the court found no prejudice because the lesser-included offense satisfied the "elements only" test. "Under the elements only test, the lesser offense must be statutorily included in the greater offense and contain no element in addition to the elements constituting the greater offense." *State v. Carrington,* 134 Wis. 2d 260, 265, 397 N.W.2d 484, 486 (1986)

Here, though, first degree reckless homicide is not an "elements only" lesser-included offense of first degree intentional homicide. Rather, it is a lesser-included offense by judicial declaration. *See, e.g. State v. Chapman*, 175 Wis. 2d 231, 241, 499 N.W.2d 222, 225 (Ct. App. 1993) Despite the fact that the elements of first degree reckless homicide are entirely different than the elements of first degree intentional homicide, as a matter of public policy it is considered to be a lesser-included offense of first degree intentional homicide.

Thus, where the defendant is charged with first degree intentional homicide-- and especially where the defendant

claims self-defense-- later instructing the jury on first degree reckless homicide can, and frequently does, prejudice the defendant.

Here, the circuit judge apparently failed to appreciate the difference between the "elements only" test for lesser-included offenses and offenses that are lesser-included as a matter of public policy. The judge said,

> If they conclude that it was imperfect self-defense but they have a problem with the intent element, then they consider first-degree reckless homicide with self-defense included. So I look at what is criminally reckless conduct versus intent mainly in deciding whether or not to give this instruction.

(R:112-95). The circuit judge was evidently confused. If the jury concludes that the defendant acted in imperfect self-defense, this means that the jury found that the defendant actually believed that he was acting to prevent or to terminate a unlawful interference with his person; and that he actually believed that deadly force was necessary to repel the attack, where either belief was unreasonable. *See, e.g., State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 207, 648 N.W.2d 413, 419. Thus, if the jury finds imperfect self-defense, this, by necessity, means that the defendant actually believed that *deadly force* was necessary. One cannot actually believe that deadly force is necessary but lack the intent to kill.

Thus, the circuit court's reason for finding no prejudice to the defendant is based upon a misunderstanding of the elements of the two offenses where self-defense is involved.

II. The court should review the jury instruction because the issue prevented the real controversy from being tried.

The state correctly points out that the court of appeals may not review an unpreserved challenge to the jury instructions except where, "[I]t appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for *any reason* miscarried . . " Sec. 752.35, Stats.

It is true that in his opening brief Patterson did not specifically invoke the statute or the phraseology from the statute permitting discretionary review. Rather, Patterson urged the court of appeals to consider the unobjected-to jury instruction issue because it involved the deprivation of Patterson's constitutional right to due process. The jury instruction shifted the burden of proof to Patterson to prove that he acted in self-defense. In other words, it was *structural error*. "Structural errors" are those that, "[D]eprive defendants of 'basic protections' without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded

as fundamentally fair." *Id.* at 577–78[, 106 S.Ct. 3101]." *State v. Harvey*, 2002 WI 93, 254 Wis. 2d 442, 461, 647 N.W.2d 189, 199. The right to have the state prove the crime beyond a reasonable doubt is certainly one of the most basic constitutional protections provided to the defendant in a criminal trial.

In, *State v. Schumacher,* 144 Wis. 2d 388, 420, 424 N.W.2d 672, 684-85 (1988) the supreme court observed that, "[T]he purpose of [the supreme court] is . . . 'to oversee and implement the statewide *development* of the law.'" *Schumacher*, 144 Wis. 2d 388, 405, 424 N.W.2d 672, 678 (1988). However, the court of appeals has already reviewed the very issue raised by Patterson in, *State v. Austin,* 2013 WI App 96, 349 Wis. 2d 744, 754, 836 N.W.2d 833, 838. There, the court wrote:

> The Committee's explanation notwithstanding, we believe that when a defendant successfully makes self-defense an issue, the jury must be instructed as to the State's burden of proof regarding the nature of the crime, even if the defense is a negative defense

Additionally, in *Austin*, the court explained:

> Wisconsin JI—Criminal 801 informs the jury that it "should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, [his] conduct did not create an unreasonable risk to another." By itself, however, this standard instruction implies that the *defendant* must satisfy the jury that he was acting in self-defense. In doing so, the instruction removes the burden of proof from the State to show

> that the defendant was engaged in criminally reckless conduct.

Austin, 49 Wis. 2d at 755. Plainly, the jury instruction issue raised by Patterson implicates his constitutional right to due process.

Therefore, the court of appeals may resolve this issue without having to further interpret the language of the standard jury instruction. The court of appeals should find that under the interpretation already provided by this court the real issued was not tried. Patterson was denied his constitutional right to have the state disprove self-defense beyond a reasonable doubt. This is a function that is well within the discretionary power of the court of appeals under Sec. 752.35, Stats.

In any event, Patterson must raise this issue before the court of appeals in order to preserve it for review by the supreme court. As Justice Abrahamson, writing separately, observed in *Schumacher*:

> This court, not the court of appeals, will be the only court with the power to grant an appellant relief for an unobjected-to, allegedly erroneous instruction that does not fall within one of the two prongs of the discretionary reversal provisions of sec. 752.35. Appellants should, of course, point out the respective powers of the court of appeals and this court when seeking review in this court. As a result of the majority opinion this court should receive and grant more by-passes, petitions for review, and certifications.

Schumacher, 144 Wis. 2d at 420. An appellant-petitioner may not include an issue in a petition for review to the supreme

court unless the issue was first presented to the court of appeals. *See, generally*, Sec. 809.62, Stats. Thus, this issue must be presented to the court of appeals.

Dated at Milwaukee, Wisconsin, this _____ day of March, 2014.

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Jeffrey W. Jensen