STATE OF WISCONSIN :: COURT OF APPEALS :: DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2021 AP-765-CR

vs.

Trial No. 18-CF-1428

ANTONIO DARNELL MAYS,

Defendant-Appellant.

Appeal from a judgment of conviction entered December 24, 2018
and an order denying postconviction relief entered April 15, 2021
in the Circuit Court of Milwaukee County,
Honorable David L. Borowski, Judge, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

Whether burglary based on entry made with intent to commit a reckless crime is an offense under Wisconsin law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication are requested in this appeal.

STATEMENT OF THE CASE

Procedural history

A complaint dated March 27, 2018 charged Mr. Mays with two counts of first-degree reckless homicide while armed in violation of Wis. Stat. §940.02(1) and §939.63(1)(b) and two counts of felon in possession of a firearm in violation of Wis. Stat. §941.29(1m)(a).

During the jury trial held October 15-19, 2018 before the Honorable David Borowski, count 1 was amended from first-degree reckless homicide while armed to felony murder in violation of Wis. Stat. §940.03. The jury convicted Mr. Mays of one count of felony murder, one count of first-degree reckless homicide while armed and two counts of felon in possession of a firearm.

On December 20, 2018 Judge Borowski imposed sentences on the four counts of conviction aggregating 55 years imprisonment with 40 years initial confinement. Apx. 107-109; 178: 1-3.

On January 13, 2021 Mr. Mays filed a postconviction motion to vacate the conviction and sentence as to count 1. 203: 1-15. Pursuant to a briefing schedule (204: 1; 209: 1) the State filed a response (210: 1-6) and Mr. Mays filed a reply (211: 1-6). On April 15,

2021 Judge Borowski entered a decision and order denying postconviction motion to vacate conviction on court one. Apx. 101-106; 212: 1-6.

The offenses

On March 15, 2018 police who were dispatched to a shooting at 4260 North 27th Street, apartment 1, discovered the bodies of two shooting victims: Malik Smith was in the hallway, and Romale Richardson was inside the apartment. 226: 7, 10, 19. The medical examiner determined that both victims died from gunshot wounds. 230: 17-18, 22-23.

In the days preceding the shooting, Brandon Jones had been present at the apartment participating in a series of dice games. 226: 29, 39, 49, 68, 73. Mr. Jones was losing. 226: 71. An argument arose, during which Mr. Jones accused others of cheating. 226: 39, 54. After the last dice game, Mr. Jones paced around, claiming to be searching for his dope, then left the apartment. 226: 74-76; 227: 7-9.

Shortly after Mr. Jones left, someone knocked at the door. 226: 76. Someone answered the door; the shooter then burst in and the shooting started. 226: 77-78; 227: 9. Romale Richardson returned fire. 226: 80-81.

Testimony conflicted over who opened the door before the shooter entered. Christopher Wright testified he thought Romale Richardson opened the door. 226: 76. However, Mr. Wright had told police that Malik Smith had opened the door. 230: 54. Jervita Tisdale testified that Romale Richardson answered the door. 227: 9. However, after the shooter rushed in, Ms. Tisdale fled into the hall, heard shots, turned around and saw Malik Smith fall in the hallway. 227: 10. (As noted above, police found Mr. Smith's body in the hallway.)

None of the three surviving witnesses at the apartment at the time of the shooting could identify the shooter at a line-up which included Antonio Mays. 226: 60-62. 78-79; 227: 11-12; 230: 42. The evidence suggesting that Antonio Mays was the shooter was circumstantial. A series of texts between Mr. Mays and Brandon Jones in the minutes before the shooting suggested Mr. Mays and Mr. Jones were acting in concert. 227: 89-90. DNA testing determined that blood found in the hallway was Mr. Mays' blood. 227: 55-56; 228: 11-12. Police recovered 3 .45 caliber casings and 7 9mm casings in the apartment. 227: 36, 44. Police searched 3623 West Marian Street, an address where Mr. Mays had resided in

early 2018, and found a number of firearms. 228: 59-60, 72; 229: 67-74. Firearm testing showed that three guns matched casings found on the scene. 229: 121-124, 129. Mr. Mays' DNA was found on two of these three guns, a Hi Point and a Taurus. 228: 12-13, 17-18. The third of the three guns which matched casings, a Smith & Wesson 9mm, was used by Romale Richardson; Jervita Tisdale had hidden this gun after the shooting, but police eventually found it. 227: 9, 12-13; 228: 35.

At the outset of the trial, as shown in the opening statement, the prosecution's theory was that Antonio Jones entered the apartment and shot both victims. 225: 44-48. In response, the defense opening statement suggested that Malik Smith answered the door, and since he was shot in the back, he may have been shot by Romale Richardson. 225: 56; 230: 20.

Amending court 1

On October 17, 2018, the third day of the jury trial, the prosecutor filed an amended information which changed the charge in count 1 from first-degree reckless homicide while armed to felony murder, with the underlying felony alleged to be armed burglary.

The following morning, Judge Borowski inquired

about the amended information, which led to a lengthy discussion. 230: 26-40. The prosecutor noted that this amended charge could apply without regard to whether the jury found that Mr. Mays or someone else fired the fatal shot. 230: 27. Defense counsel objected to the amendment, and moved to dismiss count 1. 230: 28-30. The prosecutor further explained her theory, asserting that Mr. Mays entered without consent and with intent, not to steal, but to commit a felony, specifically second-degree recklessly endangering safety. 230: 32, 34. The prosecutor suggested that numerous felonies might have been intended upon entry, including injury and battery. 230: 35. The defense objected that no one testified about non-consent to the entry. 230: 36. The prosecutor responded that non-consent can be shown circumstantially. 230: 38. This discussion ended without any decision.

Before the noon recess, the court indicated an inclination not to allow the amended charge, but to have felony murder as a lesser included offense. 230: 59. However, the defense withdrew its objection to the amended information. 230: 60-61.

Thus, the jury was instructed on count 1 on felony murder. Apx. 110-115; 231: 16-21. Per the jury

instructions, the underlying felony of felony murder was armed burglary as party to a crime. Apx. 111-113; 231: 17-19. The fourth element of armed burglary was defined as entry with intent to commit second-degree recklessly endangering safety. Apx. 113; 231: 19. The court provided the jury with the elements of second-degree recklessly endangering safety. Apx. 113-114; 231: 19-20. The court concluded instruction on count 1 by addressing intent:

> When Must Intent Exist? The intent to commit a felony must be formed before entry is made. The intent to commit second-degree recklessly endangering safety which is an essential element of burglary is no more or less than the mental purpose to commit second-degree recklessly endangering safety formed at any time before the entry, which continued to exist at the time of the entry.

Apx. 114; 231: 20.

ARGUMENT

Burglary based on entry made with *intent* to commit a *reckless* crime is not an offense under Wisconsin law, and therefore such a burglary may not support a felony murder charge

As a general principle, one cannot attempt to commit a crime which requires only reckless conduct rather than intent. *State v. Melvin*, 49 Wis.2d 246, 250, 181 N.W.2d 490 (1970) (citing *State v. Carter*, 44 Wis.2d 151, 170 N.W.2d 681 (1969)). Convicted of attempted first-degree murder, Mr. Melvin appealed the trial court's refusal to give jury instruction on several lesser charges which Mr. Melvin asserted were included offenses. One of the requested instructions was for attempted homicide by reckless conduct. The *Melvin* court affirmed the trial court's refusal to instruct on this charge:

> The trial court did not err in refusing to give the requested instruction on attempted homicide by reckless conduct (secs. 940.06 and 939.32, Stats.) because there is no such crime. An "attempt" by sec. 939.32 (2) requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime. Acts to constitute an attempt must unequivocally demonstrate that the actor had such intent and would have committed the crime

> excepting for the intervention of another person or some other extraneous factor. Homicide by reckless conduct does not require any intent to attain a result which if accomplished would constitute a crime; and consequently, one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent.

Melvin, 49 Wis.2d at 249-250 (citation omitted).

In *Carter*, as in *Melvin*, a defendant charged with attempted first-degree murder sought instructions on attempts to commit lesser degrees of homicide:

- attempted second degree murder (i.e., attempting to cause death "by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life");

- attempted third-degree murder (i.e., attempting to cause death "in the course of committing or attempting to commit a felony . . . being as a natural and probable consequence of the commission of or attempt to commit the felony"); and,

- attempted manslaughter (i.e., attempting to cause death "without intent to kill and while in the heat of passion").

The Court in *Carter* determined that because intent as defined in Wis. Stat. §939.23 is not an element of any

of these crimes, the language of these three degrees of homicide "is not reconcilable with the concept of attempt." *Carter*, 44 Wis.2d at 155 (text and footnotes 1-3); *but see State v. Oliver*, 108 Wis.2d 25, 321 N.W.2d 119 (1982) holding that attempted manslaughter *is* an offense because of the unique concept of heat of passion:

> [T]he literal language of sec. 940.05(1), Stats., requiring that a defendant act without intent to kill, is a legal fiction. Heat of passion negates the distinct intent required for first-degree murder, but a defendant acting in the heat of passion may still intend to actually kill a person. It necessarily follows from this result that a defendant may be guilty of attempted manslaughter. A person may have the actual intent to kill someone and attempt to do so, but still be acting in the heat of passion as that phrase has been interpreted.

Oliver, 108 Wis.2d at 28. This Court later noted that the holding in *Oliver* is "peculiar to the crime of manslaughter." *State v. Briggs*, 218 Wis.2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998).

When a person is convicted of a non-existent crime, the court lacks subject matter jurisdiction, and the error cannot be waived; "'the waiver doctrine does not permit conviction for a nonexistent crime,' even when a defendant has specifically requested that the jury be

instructed on the non-offense." *Briggs*, 218 Wis.2d at 68, quoting *State v. Cvorovic*, 158 Wis.2d 630, 631, 462 N.W.2d 897 (1990). Mr. Briggs, charged with attempted first-degree intentional homicide, plead guilty to the amended charged of attempted felony murder pursuant to a plea agreement; since attempted felony murder is not a crime under *Carter*, the conviction had to be vacated.

Burglary is committed by one who "intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place." Wis. Stat. §943.10(1m). The statute lists six categories of places, such as "building or dwelling" and "enclosed railroad car." Wis. Stat. §943.10(1m)(a)-(f). These alternative places are not essential elements about which the jury must be unanimous; the six options simply present alternate means of committing the offense. *United States v. Franklin*, 2019 WI 64, ¶4, ¶20, 387 Wis.2d 259, 928 N.W.2d 545. However, the statute defines alternate intents: "to steal" or "to commit a felony." These alternatives set forth separate crimes which may not be joined in a single charge. *Champlain v. State*, 53 Wis.2d 751, 756, 193 N.W.2d 868 (1972). Moreover, when a burglary charge is based on

intent to commit a felony, the information, jury instruction and verdict all should specify what felony. *Champlain*, 53 Wis.2d at 756. A jury may be given multiple intended felony options, and the jury need not be unanimous as to which felony a defendant intended, as long as all jurors agree the defendant intended to commit one of the felony options. *State v. Hammer*, 216 Wis.2d 214, 675 N.W.2d 285 (Ct. App. 1997). Finding that a person intended to commit a felony when entering a place means finding that the person intended *every element* of the felony:

> It was not alleged that the defendant intended to steal anything once he had entered the Shawano Paper Mill. Rather, it was alleged that defendant intended to commit the felony of criminal damage to property in excess of $1,000. Thus, it was necessary to show beyond a reasonable doubt that defendant entered the premises not only to commit criminal damage to property therein but intending that such damage would exceed $1,000.

Gilbertson v. State, 69 Wis.2d 587, 592, 230 N.W.2d 874 (1975) (footnote omitted).

For a burglary charge based on intent to commit a felony, the burglary statute does not expressly limit which felonies might apply. *State v. O'Neill*, 121 Wis.2d 300, 305, 359 N.W.2d 906 (1984). Thus, one might assume that

any felony might apply which meets the definition of felony: "A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor." Wis. Stat. §939.60. However, the Court in *O'Neill* found that the range of possible felonies is not unlimited: "We conclude that the legislature intended to include only offenses against persons and property within the felonies which could form the basis of a burglary charge. . .." *O'Neill*, 121 Wis.2d at 307. Mr. O'Neill's burglary conviction, based on intent to commit misconduct in office, could not stand, as this underlying offense was not against persons or property.

Felony murder is committed by one who "causes the death of another human being while committing or attempting to commit a crime specified. . .." Wis. Stat. §940.03. The crimes specified in this statute include burglary while armed with a dangerous weapon in violation of Wis. Stat. §943.10(2)(a).

Under amended count one, Mr. Mays was charged with causing the death of Malik Smith while committing an armed burglary. The armed burglary was based on the allegation, set forth in the jury instruction, that Defendant Mays "entered the building with the *intent* to commit

second-degree *recklessly* endangering safety that is, the defendant intended to commit second-degree recklessly endangering safety at the time the defendant entered the building." Apx. 113; 231: 19 (emphasis added).

As stated in *Melvin*, "one cannot attempt to commit a crime which only requires reckless conduct and not a specific intent." *Melvin*, 49 Wis.2d at 250. The *Melvin* Court reached this conclusion immediately after noting that the attempt statute "requires that the actor have an intent to perform acts and attain a result which if accomplished would constitute the crime." *Melvin*, 49 Wis.2d at 249-250. Thus, the *Melvin* Court essentially concluded that one may not *attempt* a reckless crime because one may not logically *intend* to commit a *reckless* crime. Yet Mr. Mays' conviction for felony murder is based on the premise that Mr. Mays *intended* to commit *recklessly* endangering safety.

Acting with a specific intent is defined by statute:

> "With intent to" or "with intent that" means that the actor 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). This definition incorporates two

alternates: *purpose* to do an act or cause a specified result and *knowledge* (i.e., awareness) that conduct will bring about a particular result. *State v. Smith*, 170 Wis.2d 701, 706-712, 490 N.W.2d 40 (Ct. App. 1992) (rebuffing a claim that the purpose and knowledge prongs of intent are so conceptually different as to constitute separate offenses). In Mr. Mays' case, the jury was instructed with respect to the purpose prong of the intent definition:

> The intent to commit second-degree recklessly endangering safety which is an essential element of burglary is no more or less than the mental purpose to commit second-degree recklessly endangering safety formed at any time before the entry, which continued to exist at the time of the entry.

Apx. 114; 231: 20. However, as with the offenses involving attempts to commit reckless crimes, the notion of having the purpose to commit recklessly endangering safety is irreconcilable with the definition of intent. The armed burglary, being based on intent to commit a reckless crime, is not a valid offense under Wisconsin law. As such, it could not be a constituent part of the charge of felony murder.

When a person is charged with burglary based on intent to commit a felony, the only express limits on what

that felony may be is that it must be a crime against persons or property. *State v. O'Neill*, 121 Wis.2d 300, 307, 359 N.W.2d 906 (1984). However, the undersigned counsel can find no Wisconsin case addressing a burglary charge based on intent to commit a felony where such felony did not itself require specific intent. The law and logic which prohibits charges of attempt to commit a reckless crime also prohibits reckless felonies from being the basis for burglary with intent to commit a felony.

The Postconviction Court took a narrow view of the logic and rationale of *Melvin*:

> The problem the *Melvin* court identified in instructing the jury on first degree reckless homicide as an attempt was not so much that it would require the jury to find that the defendant intended to act recklessly but rather that it required the jury to find that he intended to "attain the result" of death, which would be inconsistent with a finding of recklessness. Thus, the holding in *Melvin* is not that one can never intend to act recklessly – of course one can – it is only that one cannot *attempt* to commit a reckless homicide. This case does not involve an attempt to commit a reckless homicide.

Apx. 103-104; 212: 3-4 (emphasis in original). The Postconviction Court found *Melvin* is premised on the rationale that attempt, which requires a finding that the

defendant "intended to 'attain the result' of death," is inconsistent with a finding of recklessness. However, the distinction does not hold, for reckless crimes have result elements. Second-degree reckless homicide requires the result of "death of another human being." Wis. Stat. §940.06(1). Second-degree reckless injury requires the result of "great bodily harm to another human being." Wis. Stat. §940.23(2)(a). Second-degree recklessly endangering safety requires the result that "another's safety" is "endanger[ed]" Wis. Stat. §941.30(2). Each of these reckless crime examples requires causing a result recklessly. *Melvin* would prohibit charging *any* of these offenses as an attempt, because to do so would require intending the result of a reckless crime. Contrary to the Postconviction Court's analysis, the holding of *Melvin* is not confined to reckless homicides.

Instead of applying *Melvin*, the Postconviction Court relied on an analogy to solicitation, noting that this Court has held that one person may solicit another to commit a reckless crime. Apx. 104-105; 212: 4-5, citing *State v. Kloss*, 2019 WI App 13, 386 Wis.2d 314, 925 N.W.2d 563, *review dismissed* 2020 WI 26, 390 Wis.2d 685, 939 N.W.2d 564. In *Kloss*, the defendant made a

series of recorded calls from jail to his wife in which he urged his wife, should the police come to her door, to shoot them through the door, and in the event that the police flee, to pursue them and to continue shooting them. *Kloss*, ¶3. Based on these calls, Mr. Kloss was charged with and convicted of solicitation of first-degree reckless injury.

Without mention of either *Melvin* or *Carter*, the Court in *Kloss* rejected Mr. Kloss' assertion that one cannot intentionally solicit another person to engage in a reckless act:

> We see no reason why a *solicitor* cannot intend, at the time he or she solicits reckless conduct from another, that great bodily harm result from the *solicitee's* reckless conduct. It may be true that a solicitor cannot know with certainty at the time of the solicitation whether an injury will in fact result from the solicitee's conduct—such uncertainty is inescapable in an inchoate crime such as solicitation. But no level of certainty is required to form a purpose to cause a particular result —that is, an intent that a result take place.

Kloss, ¶10 (emphasis by the Court). This rationale makes clear why solicitation affords a poor analogy to Mr. Mays' charge: the crime of solicitation requires two persons, a solicitor and a solicitee. A solicitor such as Mr. Kloss, sitting in jail and powerless to act directly, may

nonetheless intend that his wife, the solicitee, cause harm to others, whether by reckless or intentional conduct. In a solicitation, the actor who, "with intent that a felony be committed, advises another to commit that crime," completes the crime. Wis. Stat. §939.30. The crime is completed by one who, with requisite intent, merely advises another to commit a crime.

In contrast, in Mr. Mays' situation, as with an attempt, only one actor is involved. In an attempt, the actor must have an intent to perform acts and attain a result which if accomplished would constitute the crime. *Melvin*, 40 Wis.2d at 249-250. A burglar must enter premises with intent either to steal or to commit a felony. The acts and intent are both by the same actor. Thus, the logic of *Melvin* that one may not attempt a reckless crime because one cannot intend a reckless crime likewise applies to Mr. Mays: one may not enter premises with *intent* to commit a *reckless* crime. The crime of felony murder based on a burglary, which in turn is based on entry with *intent* to commit a *reckless* crime, does not exist.

Because felony murder, as defined for Mr. Mays' jury, is not a crime under Wisconsin law, count 1 must be vacated. The defect deprives the Court of subject matter

jurisdiction; failure to object to the offense, or even a defendant's request for an instruction on a non-existent crime, cannot cure the error or allow it to be deemed waived. *State v. Briggs*, 218 Wis.2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998). Likewise, Mr. Mays' withdrawal of his initial objection to the amended count 1 cannot confer subject matter jurisdiction over a non-existent offense. Mr. Mays' conviction for count 1 must be vacated.

CONCLUSION

Antonio Darnell Mays prays that this Court vacate his conviction and sentence on Count 1.

Respectfully submitted,

Electronically signed by
John T. Wasielewski

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John T. Wasielewski
Attorney for
Antonio Darnell Mays

FORM, LENGTH AND APPENDIX CERTIFICATION
Wis. Stat. §809.19(8g)(a)1 and (b)1.

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 4377 words.

I hereby certify that filed with this brief is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

This appeal is not taken from a circuit court decision entered in a judicial review of an administrative decision.

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 one or more initials or other appropriate pseudonym or designation 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.

Electronically signed by
John T. Wasielewski

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John T. Wasielewski

APPENDIX CONTENTS