STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2021AP765-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO DARNELL MAYS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

The State charged Antonio Darnell Mays with two counts of first-degree reckless homicide while armed and two counts of being a felon in possession of a firearm. On the third day of trial, the State filed an amended information: Count 1 now charged Mays with felony murder with the underlying felony of armed burglary. The State's theory was that Mays entered a dwelling with the intent to commit the felony of second-degree recklessly endangering safety. Mays objected to the amended information and moved to dismiss. Mays later withdrew his objection, however, when the court informed the parties that it would instruct the jury that felony murder with the underlying felony of armed robbery was a lesser-included offense of first-degree reckless homicide while armed.

Mays was convicted of all counts. After sentencing, Mays moved for postconviction relief. He argued that Count 1 should be vacated because "as formulated by the jury instructions, [it] does not set forth a crime cognizable under Wisconsin law." Specifically, Mays argued that "the notion of having the purpose to commit recklessly endangering safety is irreconcilable with the definition of intent." Therefore, "armed burglary, being based on intent to commit a reckless crime, is not a valid offense under Wisconsin law."

The circuit court denied his motion.

Did the circuit court err when it denied May's motion to vacate his conviction for Count 1?

The circuit court held, No.

This Court should affirm. Felony murder with an underlying felony of armed burglary is a cognizable crime in Wisconsin.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. It does request publication because there is no Wisconsin case that expressly provides that while a person cannot intend to commit a reckless-result crime, a person *can* intend to commit reckless endangerment. Because reckless endangerment does not require anything other than endangering the safety of another by criminally reckless conduct, a person can intend, and in Mays' case *did intend*, to commit it.

STATEMENT OF THE CASE

Pretrial and trial proceedings

The State filed a complaint charging Mays with two counts of first-degree reckless homicide while armed (PTAC) as well as two counts of being a felon in possession of a firearm. (R. 1.) The complaint alleged that Brandon Jones went to an apartment to play dice, and he had been losing money. (R. 1:3.) Jones left, and then he returned to the apartment. (R. 1:2–3.) While on the phone, Jones asked individuals in the apartment what the address was, and Jones relayed the address to the individual on the phone. (R. 1:3.) Jones left again. (R. 1:3.) Shortly after, Mays knocked on the door, and a person inside the apartment asked who it was. (R. 1:3.) Mays did not answer. (R. 1:3.) One person inside—either RRR or MTS[1]—opened the door, and Mays "forced his way" inside and started shooting. (R. 1:3.) Both RRR and MTS were shot and killed. (R. 1:2.)

Based on preliminary ballistics evidence, there appeared to have been three different guns shot in the apartment. (R. 1:2.) Additionally, witnesses saw RRR with a gun during the incident, and they also saw RRR fire back. (R.

[1] The State uses initials for victims RRR and MTS.

1:3.) At trial, defense counsel argued during his opening statement that MTS may have been the one to answer the door, and since MTS was shot in the back, RRR may have been the one who shot him. (R. 225:56.)

On the third day of trial, the State filed an amended information, which changed Count 1 from first-degree reckless homicide (of MTS) while armed to felony murder with the underlying felony of armed burglary. (R. 31.)

The next day, the trial court inquired about the amended information. (R. 230:26–27.) The State explained that it was seeking to change Count 1 based on the evidence that had so far been presented at trial:

> Felony murder is a lesser included offense of first degree reckless homicide. In this case, the evidence is and I think has shown from the state's perspective that [MTS] was shot during the course of this unlawful intrusion into the apartment.
>
> What the evidence hasn't shown exactly is who or which bullet hit him because of the volley of gunfire that exchanged.
>
> As a result, it's the state's opinion that this better conforms to the evidence. It's a lesser included. . . . .
>
> Given the fact it's a lesser included, the state believes it's right to file this to conform to the evidence.
>
> I filed it with the basis of an armed burglary being the underlying felony. The state's theory being that the evidence has shown that Mr. Mays unlawfully entered the apartment with the intent to commit the felony which is to shoot [RRR].

(R. 230:27–28.)

The State elaborated that "the facts support an argument that [Mays] did not consensually enter that apartment but that he forced his way in with the intent to shoot at the individuals inside that apartment namely as we

heard through Jervita Tisdale[2] that [Mays] went straight for [RRR] and continued shooting at him." (R. 230:32.) According to the State, "[t]hat's the underlying felony second degree recklessly endangering safety that he intended to commit. . . when he entered there; and that's very clearly an applicable burglary, an armed burglary, because he has those guns when he enters." (R. 230:32–33.)

Mays objected and moved to dismiss Count 1. (R. 230:28–30.) He acknowledged that "this amendment takes a 60 year maximum penalty down to a 30 year maximum penalty." (R. 230:29.) However, Mays argued, allowing the State to amend the information midtrial was prejudicial because it affects Mays' opportunity to defend himself. (R. 230:28–29.) The court inquired, "I guess I'm missing the burglary part. Unless the [S]tate is saying the mere entry into the house is the burglary." (R. 230:34.) The State responded that under the burglary statute it requires a person to enter a building or dwelling "with the intent to steal ***or*** commit a felony." (R. 230:34 (emphasis added).) The State was not arguing that Mays intended to steal. (R. 230:34.) The State continued, "It's the same as when the [S]tate charges a burglary because a man has forcibly entered into his way into a home in order to commit a sexual assault." (R. 230:34.) And, in response to Mays' prejudice argument, the State argued that it had "a right to request it as a lesser included; and if that's how we prefer to proceed, we can certainly do that." (R. 230:35.)

Mays finally argued that the State had insufficient evidence that Mays entered the apartment without consent or that Mays entered with a gun, and therefore "what should happen is count one should be dismissed based on what the State's, you know, admitted lack of evidence is for count one."

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[2] Tisdale testified that the individual "bum-rushed in." (R. 227:9.)

(R. 230:36–37.) However, the court noted that with Detective Jeffrey Emanuelson's testimony[3] "the State just got in with their officer enough evidence to in the light most favorable to the [S]tate indicate that there was a burglary by the pushing and bum rushing and entering the house. It's now been testified to not just by a witness but by the officer." (R. 230:60.)

The court informed the parties it would table its decision until later in the day, but that its "inclination is to not allow the amendment but to have it as a lesser included." (R. 230:39, 59.) The State responded that if that's what the court wants, the State can withdraw the amended information and prepare the jury instructions. (R. 230:60.) Defense counsel responded that it "will withdraw our objection to the amended information." (R. 230:60–61.)

Regarding Count 1, the jury instruction laid out the elements of felony murder with an underlying crime of armed burglary. (R. 231:16–18.) For the fourth element of armed burglary, the jury was instructed: "the defendant 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." (R. 231:19.)

The court then instructed the jury of the two elements of second-degree recklessly endangering safety:

> 1), the defendant endangered the safety of another human.
>
> 2) The defendant endangered the safety of another by criminally reckless conduct.
>
> "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

[3] (*See* R. 230:57.)

> bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

(R. 231:19–20.)

The court provided the jury an additional instruction regarding intent, which included: "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." (R. 231:20.) Mays did not object to these jury instructions. (R. 231:6–8.)

The jury convicted Mays on all four counts. (R. 232:5–6.) On Count 1, the court sentenced Mays to 15 years of initial confinement followed by 5 years of extended supervision. (R. 233:33.)

Postconviction proceedings

Mays moved for postconviction relief, requesting that the court vacate Count 1. (R. 203:1.) Although he never objected to the jury instructions, he now argued that Count 1 "as formulated by the jury instructions, does not set forth a crime cognizable under Wisconsin law." (R. 203:1.) According to Mays, "the notion of having the purpose to commit recklessly endangering safety is irreconcilable with the definition of intent." (R. 203:13.) Therefore, "armed burglary, being based on intent to commit a reckless crime, is not a valid offense under Wisconsin law." (R. 203:13.)

The court denied Mays' motion, concluding that it *was* a crime (R. 212:6), and that the State proved that in this case Mays intended to recklessly endanger the safety of others:

> Second degree recklessly endangering safety only requires proof that the defendant endangered the safety of another by criminally reckless conduct. It is without dispute that when the defendant burst into

> the apartment firing his weapon he was recklessly endangering the safety of everyone in that space. There is no material dispute that the defendant intended to do what he did in committing that crime. So, the defendant intended to do what he did, and what he did was to recklessly endanger the safety of others. . . .

(R. 212:4 (footnote omitted).) The court reiterated: "when [Mays] entered the apartment, gun in hand, and began firing, he did so with the *intent* to endanger the safety of another human being by criminally reckless conduct." (R. 212:5–6.) According to the court, "[t]his is plainly a crime under Wisconsin law, and therefore, the defendant's motion to vacate his conviction on count one is denied." (R. 212:6.)

Mays appeals his conviction of Count 1.[4]

STANDARD OF REVIEW

Whether felony murder with the underlying felony of armed burglary is a crime in the State of Wisconsin is a matter of statutory interpretation which this Court reviews *de novo. See State v. Briggs,* 218 Wis. 2d 61, 65, 579 N.W.2d 783 (Ct. App. 1998).

[4] Mays does not challenge the jury's convictions of Counts 2–4.

ARGUMENT

The circuit court correctly determined that felony murder based on the underlying felony of armed burglary is a crime that Wisconsin recognizes.[5]

The State's theory at trial was that Mays entered the apartment with the *intent* to commit the felony of second-degree recklessly endangering safety. (R. 230:32–33.) But according to Mays, "burglary based on entry made with *intent* to commit a *reckless* crime is not an offense under Wisconsin law" because one cannot intentionally commit a reckless crime, and so the court erred when it refused to dismiss Count 1. (Mays' Br. 12, 18.) Mays is incorrect. There is a significant difference between intent to commit a reckless crime and intent to commit reckless endangerment.

A. Mays was charged with felony murder based on intent to recklessly endanger safety.

First, Mays correctly recognizes that "[f]elony murder is committed by one who 'causes the death of another human being while committing or attempting to commit a crime specified. . . .'" (Mays' Br. 17 (quoting Wis. Stat. § 940.03).) He also correctly recognizes that "[t]he crimes specified in this statute include burglary while armed with a dangerous weapon." (Mays' Br. 17.) Further, Wis. Stat. § 943.10(1m) defines burglary as when someone "intentionally enters" a dwelling "without the consent of the person in lawful

[5] While Mays did not object to the jury instructions on Count 1, the State does not argue that forfeiture or waiver apply because this Court has held that "[s]ubject matter jurisdiction cannot be conferred on the court by consent, and an objection to it cannot be waived." *State v. Briggs*, 218 Wis. 2d 61, 68, 579 N.W.2d 783 (Ct. App. 1998).

possession and with intent to steal *or commit a felony*." (Emphasis added).

The pertinent felony here is second-degree recklessly endangering safety. And this is where Mays loses the mark, as his arguments conflate reckless criminal acts with the crime of recklessly endangering safety.

B. Mays ignores the distinction between a reckless criminal act and recklessly endangering safety.

Mays relies on *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490 (1970)[6], and *State v. Carter,* 44 Wis. 2d 151, 170 N.W.2d 681 (1969) to support his argument that one cannot intend to commit a reckless crime. (Mays' Br. 12–14.) But both cases are inapposite.

Melvin held that the crime of attempted reckless homicide does not exist because one cannot intend to recklessly cause a death. 49 Wis. 2d at 250. Under the logic of *Melvin*, Mays argues, "[t]he 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." (Mays' Br. 23 (emphasis in original).)

But as the postconviction court noted, "[t]he 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." (R. 212:3–4.) The court correctly determined that *Melvin* did not hold "that one can never intend to act recklessly – of course one can – it

[6] Overruled in part by *State v. Smith*, 55 Wis. 2d 304, 198 N.W.2d 630 (1972).

is only that one cannot *attempt* to commit a reckless homicide." (R. 212:4.) And contrary to what Mays argues, the postconviction court was correct that this case "does not involve an attempt to commit a reckless homicide. Second degree recklessly endangering safety only requires proof that the defendant endangered the safety of another by criminally reckless conduct." (*Id.*)

Mays claims that the postconviction court's analysis of *Melvin* is "narrow" because it confined *Melvin* to reckless homicide. (Mays' Br. 20, 21.) He argues that "*Melvin* would prohibit charging [second-degree reckless homicide, second-degree reckless injury, and second-degree recklessly endangering safety] as an attempt, because to do so would require intending the result of a reckless crime." (Mays' Br. 21.) Mays is correct that one cannot attempt reckless homicide or reckless injury. This is because attempt requires an intent to achieve a specific result, Wis. Stat. § 939.32(3), and by definition reckless homicide and reckless injury penalize causing a death or an injury without intent to cause the death or the injury. That is what the court observed in *Melvin.* That's why those crimes cannot be charged as an "attempt," because one cannot "attempt" to cause a specific result without intending to create that result.

But this argument is a red herring, because what happened in this case is qualitatively different than claiming someone attempted to recklessly cause a specific harm. What makes recklessly endangering safety *different* is that recklessly endangering safety expressly penalizes *only* the creation of risk of harm, and since one can intend to create risk of harm, that's why one can intend to recklessly endanger safety.

Melvin is also inapposite because in this case, as the postconviction court noted, Count 1 did not charge Mays of an *attempt* crime. For the same reason, *Carter* is inapposite. In *Carter*, this Court concluded that felony murder does not

require intent, and therefore, "is not reconcilable with the concept of attempt." 44 Wis. 2d at 155.

Here, Mays was charged with entering the apartment with the intent to fire the gun indiscriminately into the apartment—so, the intent to commit criminally reckless conduct and thereby endanger the lives of other human beings—at the point he entered the apartment. And contrary to Mays' argument, a conviction for second-degree recklessly endangering safety does not require that the defendant "intend[ed] the result of a reckless crime." (Mays' Br. 21.) Rather, it only requires that the defendant intended to endanger the safety of another by criminally reckless conduct. *See* Wis. Stat. § 941.30(2); Wis. JI—Criminal 1347 (2015); (R. 231:19–20). This requires that Mays' conduct created an unreasonable and substantial risk of death or great bodily harm to another and that Mays was aware that his conduct created such a risk. *See* Wis. Stat. § 939.24(1); and Wis. JI—Criminal 1347.

Mays' intent argument focuses on whether he (or any defendant) can intend to commit a reckless crime. And he is correct that he cannot intend to commit reckless homicide or reckless injury, because he cannot intend to unintentionally cause a death or injury. But as argued above, the *relevant* intent inquiry in this case is whether Mays intended to *endanger the safety* of MTS by his criminally reckless conduct, which is conduct that created the unreasonable and substantial risk of death. Second-degree recklessly endangering safety had the same two elements it always has (R. 231:19–20), with the focus on "risk." (R. 231:19–20.) However, the fourth element of armed burglary added the intent requirement. (R. 231:19.) Accordingly, the State was required to prove that Mays entered the apartment with the intent to commit second-degree recklessly endangering safety. (R. 231:19.) This is clearly an intent one can have

under Wisconsin law. As the postconviction court stated, "It's just that simple." (R. 212:4.)

Applying *Melvin* and *Carter*, the State agrees that under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent. But that is not this case. In this case, the fourth element of burglary *added* the intent requirement in this case. (R. 231:19.)[7] And as indicated above, the State was required to prove that Mays entered the apartment with the intent to commit second-degree recklessly endangering safety. (*Id*.)

As the postconviction court determined, "more persuasive" is the case *State v. Kloss*, 2019 WI App 13, 386 Wis. 2d 314, 925 N.W.2d 563. (R. 212:4.) In *Kloss*, the defendant appealed his conviction for solicitation of first-degree reckless injury, claiming that the crime was not

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[7] But, even if Mays had been charged with an attempt crime, that would not have caused any infirmity here if the charge would have been attempted recklessly endangering safety, because one can intend to create an unreasonable risk of death or great bodily harm but be thwarted by an intervening factor. For instance, if Mays had burst into the apartment and repeatedly pulled the trigger but the gun jammed, all of the elements of attempted recklessly endangering safety would be met: Mays would have entered the apartment with the intent to create a substantial and unreasonable risk of death to the occupants which was only thwarted by the gun's malfunction. *See* Wis. Stat. §§ 939.32(3) and 941.30(2).

What Mays could *not* be charged with in that scenario is attempted reckless injury. This is because reckless injury requires that the person did not intend to injure the person, but attempt requires intent to commit the specific crime. *See* Wis. Stat. § 939.32(3). Since one cannot intend to unintentionally cause an injury, attempted reckless result crimes do not exist at law. But since the only result required by recklessly endangering safety is the creation of unreasonable risk, one can intend to create that risk. *See* Wis. Stat. § 941.30(2).

cognizable under Wisconsin law. *Id.* ¶ 1. The State alleged that the defendant repeatedly called his wife from jail and instructed her to shoot at officers if they showed up at the Kloss' home. *Id.* ¶¶ 2–3. The defendant noted that the solicitation statute requires "intent that a felony be committed," while reckless injury requires great bodily harm caused by reckless conduct. *Id.* ¶¶ 7–8. The defendant claimed that the level of harm, if any, was unknowable by the very nature of recklessness, and therefore the result cannot be intended at the time of the solicitation. *Id.* ¶ 9.

In upholding Kloss's conviction, this Court found the defendant's argument "meritless." *Id.* ¶ 9. This Court explained: "A can be guilty of solicitation to commit murder or manslaughter if A solicits B to engage in criminally negligent conduct and does so for *the purpose of causing* C's death." *Kloss*, 386 Wis. 2d 314, ¶ 10 (paraphrasing Wayne R. LaFave, 1 *Substantive Criminal Law* § 11.1(c) (3d ed. 2017)). Consequently, "soliciting/reckless-injury is a crime because it is likewise possible to prove that A solicited B to engage in reckless conduct intending that B's reckless conduct result in great bodily harm." *Id.*

Applying *Kloss*, the postconviction court determined that "[i]f a person can solicit reckless conduct from another, this court sees no reason why a person cannot intend their own reckless conduct." (R. 212:5.) The court continued, "*Kloss* leads this court to the following conclusion based on the facts of this case: when the defendant entered the apartment, gun in hand, and began firing, he did so with the *intent* to endanger the safety of another human being by criminally reckless conduct." (R. 212:5–6.) This, according to the court, "is plainly a crime under Wisconsin law." (R. 212:6.)

Mays takes issue with the postconviction court's reliance on *Kloss*. (Mays' Br. 21–22.) According to Mays, *Kloss* is a poor analogy because it deals with solicitation, which is a crime that is committed when one "who, with requisite intent,

merely advises another to commit a crime." (Mays' Br. 22–23.) Here, Mays argues, "[t]he acts and intent are both by the same actor." (Mays' Br. 23.) This is a distinction without a difference. The outcome in this case, using a reckless statute as the underlying crime for a burglary, creates the exact same situation raised in *Kloss*—a claim that a crime did not exist due to interplay between an intentional element in one statute and a reckless action in another. The outcome is the same. Just like the reckless actions intentionally solicited in *Kloss*, Mays intended reckless actions form the basis for a crime under Wisconsin law.

C. There is no prohibition on charging felony murder with an underlying felony of armed burglary based on reckless endangerment.

Finally, while Mays notes that he "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." (Mays' Br. 20.) Another way to say it is that Mays can find no case where this Court has done what he is asking this Court to do. And what Mays is asking this Court to do is to invent a prohibition in this State for charging a defendant with the crime of felony murder with the underlying felony of armed burglary. It should refuse to do so.

For all of the above reasons, the crime of felony murder with the underlying felony of armed burglary is a crime recognized under Wisconsin law.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 22nd day of September 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,693 words.

Dated this 22nd day of September 2021.

Electronically signed by:

Sara Lynn Shaeffer
SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of September 2021.

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