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

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

ARGUMENT 3

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 3

CONCLUSION 8

FORM AND LENGTH CERTIFICATION..... 8

TABLE OF AUTHORITIES

Cases

State v. Carter, 44 Wis.2d 151, 170 N.W.2d 681 (1969) 6

McClanahan v. State, 276 S.W.3d 893 (Mo. App. 2009)..... 7

State v. Melvin, 49 Wis.2d 246, 181 N.W.2d 490 (1970) 4-5, 6

Statutes

Wis. Stat. §941.30(2)..... 5

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

The heart of Mr. Mays' claim in this appeal is that one cannot commit a burglary by entering a premises with intent to commit a crime if that intended crime requires only recklessness and not specific intent. Specifically, Mr. Mays could not have entered the premises with intent to commit second-degree recklessly endangering safety.

In response, the State suggests that Mr. Mays' is failing to see some distinction between intending a reckless crime and intending a reckless act. Thus, the State asserts: "There is a significant difference between intent to commit a reckless crime and intent to commit reckless endangerment." State's br. 11. The State maintains that Mr. May's argument goes astray because "his arguments conflate reckless criminal acts with the crime of recklessly endangering safety." State's br. 12. Even the heading of the longest section of the State's argument asserts that Mr. Mays "ignores the distinction between a reckless criminal act and recklessly endangering safety." State's br. 12. Any

such distinction makes no difference. Logically, one cannot intend to act recklessly. One can act recklessly, disregarding the risk that an action could lead to a harmful result, or one can act intentionally, engaging in an action to ensure a harmful result.

In any event, the State offers no clarity to its purported distinction between intent to commit a reckless act and intent to commit a reckless crime. The State asserts that "the *relevant* intent inquiry in this case is whether Mays intended to *endanger the safety* of MTS by his criminally reckless conduct." State's br. 14 (emphasis in original). Yet, in the same paragraph, the State acknowledges in was "required to prove that Mays entered the apartment with the intent to commit second-degree recklessly endangering safety." Thus, rather that showing some crucial act/crime distinction, the State also treats them interchangeably.

In his brief, Mr. Mays relied on *State v. Melvin*, 49 Wis.2d 246, 181 N.W.2d 490 (1970), which held that attempted homicide by reckless conduct is not a crime under Wisconsin law. The basis for this holding is 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 (emphasis added). Mr. Mays argued that the holding in *Melvin* is not limited to attempted reckless homicides, but would apply to any reckless crime with a result element. Br. 21. In *Melvin*, attempted reckless homicide was inconsistent with the intent to attain the result of death. Likewise, attempted reckless injury is inconsistent with intent to cause great bodily harm, and attempted recklessly endangering safety in inconsistent with the intent to endanger another's safety.

The State agrees that the *Melvin* holding extends beyond attempted reckless homicide and would extend to attempted reckless injury because an actor "cannot intend to unintentionally cause a death or injury." State's br. 14. However, the State does not take the next logical step and recognize that the *Melvin* holding would extend to attempted recklessly endangering safety because one cannot intend to unintentionally "endanger[] another's safety." Wis. Stat. §941.30(2). Death, injury and endangerment are result elements in reckless homicide, reckless injury, and recklessly endangering safety, respectively. In each instance, one cannot intend the result unintentionally, and therefore one cannot attempt these

crimes.

The State suggests that any inconsistency or impropriety in intending reckless conduct or intending to commit a reckless crime is somehow rectified by the intent requirement in burglary:

> 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. 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.

State's br. 15 (record citations and footnote omitted; emphasis in original). This is turning the *Melvin/Carter* holding on its head. One could likewise argue that one can attempt to commit a reckless homicide because the attempt statute *adds* the intent requirement. This is precisely what *Melvin* and *Carter* did not hold. It was the attempt statute's intent requirement that rendered attempt unreconcilable with reckless homicide and felony murder.

In Mr. Mays' brief, he noted he could find no Wisconsin case in which the State charged burglary based on entry with intent to commit a reckless felony. Br. 20.

Citing this, the State asserts that this demonstrates the unprecedented nature of the relief Mr. Mays is requesting. However, the absence of Wisconsin cases equally shows the unprecedented nature of the charging decision. The State points to no case supporting the premise that burglary may be charged based upon entry with intent to commit a reckless crime.

Even searching outside of Wisconsin, Mr. Mays could find no case directly on point. Perhaps the closest is *McClanahan v. State*, 276 S.W.3d 893 (Mo. App. 2009). Ms. McClanahan challenged as inconsistent the verdicts convicting her of first-degree burglary and first-degree arson, asserting that "it is not possible to form a purposeful intent to commit a reckless act." *McClanahan*, 276 S.W.3d at 899. Ms. McClanahan was charged with the burglary based upon entry "for the purpose of committing a crime therein," specifically first-degree arson, and was also charged with arson. However, contrary to Ms. McClanahan's assertion, first-degree arson was *not* primarily a reckless crime: it required "knowingly" damaging by fire an occupied building and thereby "recklessly" endangering the occupant. *McClanahan*, 276 S.W.3d at 899. Thus, the court in *McClanahan* did not

deny or disparage the validity of the premise that it is not possible to form a purposeful intent to commit a reckless act. Rather, the Court found the premise inapplicable because arson was not a reckless crime.

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 AND LENGTH CERTIFICATION
Wis. Stat. §809.19(8g)(a)1

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief. The length of this reply brief is 1257 words.

Electronically signed by
John T. Wasielewski

_____

John T. Wasielewski