FILED

MAY 24 2022

CLERK OF SUPREME COURT
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STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP765-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

ANTONIO DARNELL MAYS,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING A PETITION FOR REVIEW

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Antonio Darnell Mays seeks reversal of the court of appeals' opinion in *State v. Antonio Darnell Mays,* 2021AP765-CR (Wis. Ct. App. Apr. 12, 2022) (recommended for publication). (Pet-App. 101–11.) In its decision, the court of appeals affirmed Mays' conviction for the felony murder of Malyk Smith with the underlying charge of armed burglary. (Pet-App. 102.) Mays had argued that such a crime does not exist because the armed burglary was predicated on Mays entering a building with the intent to commit second-degree recklessly endangering safety. Mays asserted that one cannot intend to commit a reckless crime.

The court of appeals disagreed. It concluded that Mays was indeed convicted of a valid crime. (Pet-App. 102.) It noted that felony murder is committed when the death of another person is caused during a person's commission of certain crimes, including burglary. And, the court pointed out, "[t]he elements of burglary include the intent to either steal *or* to commit a felony." (Pet-App. 102.) In Mays' case, the court determined that the evidence showed that Mays "forced his way into a building and started shooting with two guns, which is indicative of an intent to recklessly endanger the safety of those inside—a felony." (Pet-App. 102.)

Mays now seeks this Court's review of that decision. The State opposes Mays' petition on the following grounds:

1. Contrary to Mays' assertion (Pet. 2), the court of appeals expressly addressed the issue before it: felony murder with the underlying charge of armed robbery is a valid crime in Wisconsin.

2. Contrary to Mays' assertion, the court of appeals' decision does not conflict with *any* controlling opinions of this Court, including *State v. Melvin*, 49 Wis. 2d 246, 181 N.W.2d 490 (1972). (Pet. 4.) *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. This is because an

attempt to commit a crime "requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime[.]" Wis. Stat. § 939.32(3). (*See also* Pet-App. 108.) *Melvin* did not hold that one can never intend to act recklessly—only that one cannot *attempt* to commit a reckless homicide.

3. The State agrees that under Wisconsin law, one cannot attempt to commit a crime which does not itself include an element of specific intent. (Pet. 17.) But that is not Mays' case. Recklessly endangering safety expressly penalizes the creation of risk of harm, and since one can intend to create risk of harm, one can intend to recklessly endanger safety. Mays' reliance on *Melvin*, the court of appeals correctly recognized, is "misguided." (Pet-App. 108–09.)

4. Nor is the court of appeals' decision in conflict with *State v. Carter*, 44 Wis. 2d 151, 170 N.W.2d 681 (1969). (*See* Pet. 12–14.) 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. But again, 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. The court of appeals correctly determined that "because there was no element of intent for the crimes for which the defendants in *Melvin* and *Carter* sought jury instructions . . . there could be no attempt of those crimes; in other words, a charge of attempt of those crimes would not be valid under Wisconsin law." (Pet-App. 108–09.)

5. The court of appeals also correctly pointed out that the State did not try to prove that Mays intended to cause Smith's death through criminally reckless conduct. (Pet-App. 109.) "Rather, the State sought to prove that Mays intended

to endanger the safety of [a different victim]—as well as the other people in Smith's apartment—by his criminally reckless conduct of forcing his way into the apartment and firing two guns." (*Id.*) "[Mays'] intent to commit this felony upon entering Smith's apartment without consent proved the requisite elements of burglary, and it was during the commission of that burglary that he committed felony murder by causing Smith's death." (*Id.*)

6. 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." (Pet. 20.) Rather, as the court of appeals determined, it only requires that the defendant intended to endanger the safety of another by criminally reckless conduct. (Pet-App. 110.) *See also* Wis. Stat. § 941.30(2); Wis. JI–Criminal 1347 (2015).

7. The court of appeals correctly determined that the reasoning in *State v. Kloss*, 2019 WI App 13, 386 Wis. 2d 314, 925 N.W.2d 563, applied to Mays' case. (Pet-App. 109–10.) In *Kloss*, the defendant appealed his conviction for solicitation of first-degree reckless injury, claiming that the crime was not cognizable under Wisconsin law. *Kloss,* 386 Wis. 2d 314, ¶ 1. The court of appeals found the defendant's argument "meritless." *Id.* ¶ 9. It 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." *Id.* ¶ 10. But Mays argues that *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." (Pet. 21–22.) Mays argues, "[t]he acts and intent are both by the same actor." (Pet. 22.) But 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 intent 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. In summary, one cannot logically attempt or intend to recklessly cause a specific result, because where a specific result is an element of a crime, an attempt or intent to cause the result necessarily implies intent, not mere recklessness. But one *can* logically attempt or intend to commit reckless acts where the recklessness crime at issue requires no specific result. That was the case here with Mays' underlying armed burglary predicated on his intent to recklessly endanger safety by indiscriminately firing a gun.

8. Finally, there is no prohibition on charging felony murder with an underlying felony of armed burglary based on reckless endangerment. 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" (Pet. 19), 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.

CONCLUSION

Mays' petition fails to demonstrate a need for this Court to second-guess the decision of the court of appeals' succinct, sound decision. The court of appeals appropriately applied the correct statutes, case law, and standard of review to the facts of the case.

Dated this 24th day of May 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,269 words.

Dated this 24th day of May 2022.

SARA LYNN SHAEFFER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

A copy of this certificate has been served with the paper copies of this response filed with the court and served on all opposing parties.

Dated this 24th day of May 2022.

SARA LYNN SHAEFFER
Assistant Attorney General