Appeal No. 2014AP1099-CR **Cir. Ct. No. 2013CF30**

WISCONSIN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MALTESE LAVELE WILLIAMS,

DEFENDANT-APPELLANT.

FILED

NOV 06, 2014

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

We certify this case to the supreme court because we are uncertain which of two decisions is controlling: ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), or ***State v. Beamon***, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681. The issue is whether, under the circumstances here, a sufficiency of the evidence challenge requires us to measure the evidence against the instructions the jury received, as the court did in ***Wulff***, or instead against statutory requirements, as the court did in ***Beamon***.[1]

[1] This appeal raises two additional issues that, in our view, are not difficult and do not warrant certification: (1) whether defendant Maltese Williams' trial counsel was ineffective by failing to seek removal of an allegedly biased juror, and (2) whether counsel was ineffective by failing to object to the introduction into evidence of crime scene and autopsy photographs.

We first summarize the circumstances here. We then discuss ***Wulff*** and ***Beamon*** and explain why we are uncertain which controls.

A jury found Maltese Williams guilty of two counts of felony murder. The charges were based on Williams' involvement in the shooting deaths of two men, a drug dealer named Parker and another person present in Parker's home, Robinson, during an attempt to take marijuana from Parker's home. The issue we certify involves Williams' felony murder conviction relating to Robinson.

The felony murder statute requires an underlying crime, and that crime here was attempted armed robbery. *See* WIS. STAT. § 940.03.[2] Armed robbery requires the taking of "property from the person or presence of the owner." *See* WIS. STAT. § 943.32(1). The trial evidence was sufficient to support a finding that Williams and his accomplices attempted to take marijuana from Parker and, therefore, as pertinent here, was sufficient to support a finding that Williams attempted an armed robbery of Parker. However, there does not appear to be sufficient evidence to support a finding of an attempted armed robbery of *Robinson*.[3] This is significant because the jury was instructed that Williams could

[2] All references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

[3] It appears the circuit court concluded that the trial evidence was sufficient to support a finding of an attempted armed robbery of Robinson. Our contrary conclusion is based on our own review of the evidence, and on the State's plainly conscious decision not to defend the circuit court's conclusion that the evidence was sufficient when measured against the instructions. We say "plainly conscious" because it is difficult to comprehend how the State could have overlooked the argument or failed to make it if the State thought that argument was viable. The State's implicit concession is apt because we see no evidence to support a finding that Robinson had a possessory or other ownership interest in the marijuana and, therefore, no evidence to support a finding that Williams and his accomplices attempted an armed robbery of Robinson.

be found guilty of the felony murder of Robinson only if there was an attempted armed robbery of Robinson.[4]

Accordingly, if measured against the jury instructions, the evidence does not appear to be sufficient to support the felony murder conviction relating to Robinson because there is insufficient evidence of the predicate felony as that predicate crime was defined to the jury, namely, the attempted armed robbery of Robinson. On the other hand, we perceive no dispute that, under the applicable statutory scheme, all that was required to sustain a conviction on the felony murder count for Robinson's death was proof of an attempted armed robbery of Parker. This situation prompts the parties' dispute over whether ***Wulff*** or ***Beamon*** applies here.

In ***Wulff***, the supreme court reversed a conviction, and directed that the circuit court enter a judgment of acquittal, because the evidence was insufficient when measured against the jury instructions. ***Wulff***, 207 Wis. 2d at 144, 149-54. The crime there was attempted second-degree sexual assault. ***Id.*** at 144. The applicable statutes required an attempt at "sexual contact" or "sexual intercourse," with sexual intercourse defined to include "fellatio" and "intrusion … into the genital or anal opening." *See* ***id.*** at 147-48. In ***Wulff***, the evidence showed that the victim awoke to the defendant attempting to force his penis into her mouth. ***Id.*** at 146. The evidence was therefore sufficient to support a finding

[4] Another possible reading of the jury instructions might be that the instructions told the jury that Williams could be found guilty of felony murder of Robinson only if Williams and his accomplices attempted an armed robbery of *both* Parker *and* Robinson. However, Williams does not read the instructions this way and, as far as we can tell, neither does the State. Regardless which way the instructions are read, the issue we certify remains because, under either reading, the instructions told the jury that it needed to find that there was an attempted armed robbery of Robinson.

of guilt under the statutory requirements. However, the evidence was insufficient when measured against the instructions the jury received because the instructions made no reference to "sexual contact" or fellatio and did not otherwise cover penis-to-mouth sexual contact. *See* ***id.*** at 148.

The supreme court in ***Wulff*** began its sufficiency-of-the-evidence analysis by observing that there are "different ways" of accomplishing sexual intercourse under the statutes. ***Id.*** at 149. The court stated that it could "uphold Wulff's conviction only if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions." ***Id.*** at 153; *see also* ***id.*** at 152 (quoting ***Chiarella v. United States***, 445 U.S. 222, 236 (1980), for the proposition that "'we cannot affirm a criminal conviction on the basis of a theory not presented to the jury'"). The court determined that the evidence was insufficient to support a finding of guilt based on the instructions. ***Id.*** at 144, 153-54. The court concluded that it had no alternative but to reverse the conviction and direct the circuit court to enter a judgment of acquittal. ***Id.*** at 153-54.

In contrast with ***Wulff***, the supreme court in ***Beamon*** measured sufficiency of the evidence against the statutory requirements. ***Beamon***, 347 Wis. 2d 559, ¶¶3, 40, 50. The crime there was "fleeing or attempting to elude a traffic officer." *See* ***id.***, ¶¶1, 15-16, 29 (citing WIS. STAT. § 346.04(3) (2009-10)). The court in ***Beamon*** explained that one of the statutory requirements for this crime can be proven in three alternative ways. ***Id.***, ¶¶2, 29-32, 35. One statutory alternative requires proof that the defendant increased the speed of his vehicle to flee. ***Id.*** The evidence in ***Beamon*** was sufficient to support at least one other alternative, but not sufficient to support the increasing-speed alternative. *See* ***id.***, ¶¶5-13, 39.

The court in ***Beamon*** explained that the jury instructions "combined" alternatives in a way that made the increased-speed alternative a requirement. ***Id.***, ¶¶15, 35-36. The court determined that the instructions were erroneous because they "added" a requirement to the statutory definition of the crime. ***Id.***, ¶¶2-3, 35-37. The ***Beamon*** court concluded that, because the instructions added a requirement and "created a charge that does not exist," the sufficiency of the evidence should be measured against the statute instead of the instructions. *See* ***id.***, ¶¶23-24, 44-45.

The ***Beamon*** court distinguished ***Wulff***, explaining as follows:

> The primary distinction between ***Wulff*** and our decision today is the nature of the jury instructions in each case. In ***Wulff***, the instructions *did not add a requirement* to the applicable law; instead, the instructions *properly stated one of the methods* by which a defendant could commit second-degree sexual assault and completely omitted the method for which there was testimony. Therefore, in ***Wulff***, the jury was asked to apply the *correct law* to the facts adduced at trial, and reached a conclusion contrary to the evidence. In that situation, the proper standard for evaluating the sufficiency of the evidence was the jury instructions, *because the instructions conveyed a correct statement of the law, and thereby informed the jury of the requirements of an actual statutory offense*….
>
> In contrast to ***Wulff***, in which we stated that we could uphold the conviction "only if there was sufficient evidence to support guilt on the charge submitted to the jury," 207 Wis. 2d at 153, here, the addition of a requirement *created a charge that does not exist in the statutes.* If we evaluated sufficiency of the evidence against the instructions given, we would be sanctioning the creation of a new crime that was not created by the legislature. This is contrary to WIS. STAT. § 939.10, which outlaws common law crimes. *Therefore, sufficiency of the evidence in Beamon's case cannot justifiably be measured against the jury instructions.*

Beamon, 347 Wis. 2d 559, ¶¶44-45 (emphasis added).

Here, defendant Williams argues that ***Wulff*** requires that the evidence be measured against the jury instructions. The State disagrees, arguing that ***Beamon*** controls and requires that the evidence be measured against the statutory requirements. We see merit in both parties' arguments.

On the one hand, as Williams argues, the instructions here may be like those in ***Wulff*** in the sense that they could be characterized as accurately stating one of the "methods" by which Williams and his accomplices could have committed felony murder, namely, by causing Robinson's death while attempting an armed robbery of Robinson. Viewed this way, and as Williams argues, the instructions here are not erroneous and do not implicate ***Beamon***'s concern with the procedure to be followed when a jury is given an *erroneous* instruction. Stated differently, the jury instructions here would not create a charge that does not exist in the statutes and, therefore, would not implicate the ***Beamon*** court's corresponding concerns.

On the other hand, as the State argues, the instructions here may be like the ones in ***Beamon*** in the sense that they could be characterized as imposing an "additional requirement" to those in the statutes, namely, a requirement that a felony murder victim also be the victim of the predicate crime. Alternatively, as we discuss in footnote 4 above, the instructions might be read as adding the requirement that Williams could be guilty of felony murder of Robinson only if Williams and his accomplices attempted an armed robbery of *both* Parker *and* Robinson. Regardless, it is undisputed that the statutes required only that there be an attempted armed robbery of Parker *or* Robinson to support a felony murder charge for Robinson's death. Thus, viewed this way, and as the State argues, the jury instructions here would be "erroneous," as in ***Beamon***. They would create a

crime that does not exist in the statutes and, therefore, implicate the ***Beamon*** court's corresponding concerns.

Each of these three cases, ***Wulff***, ***Beamon***, and now ***Williams***, appears to present a subtle variation on the same issue, and we are uncertain whether ***Williams*** is more like ***Wulff*** or more like ***Beamon***. It seems likely that additional cases will raise the same categorization problem.

The parties' disagreement over whether the instructions here are "erroneous" leads to a final point. The court in ***Beamon*** concluded that the instructional error in that case was harmless because a properly instructed jury would have found the defendant guilty. *See* ***Beamon***, 347 Wis. 2d 559, ¶39; *see also* ***id.***, ¶¶3-4, 50-51. And, the ***Beamon*** court seemed to rely on harmless error as a second reason for distinguishing ***Wulff***. More specifically, the ***Beamon*** court said:

> Second, ***Wulff*** is distinguishable because the decision did not address harmless error. Although we need not decide here whether the jury instructions in ***Wulff*** would be subject to harmless error analysis, we note that ***Wulff*** preceded our decision in [***State v.***]***Harvey***, [2002 WI 93,] 254 Wis. 2d 442, ¶49[, 647 N.W.2d 189], in which we adopted the now-controlling standard for harmless error analysis. Indeed, our analysis in this case rests largely on the harmlessness of the erroneous jury instructions, in that it is clear beyond a reasonable doubt that a rational jury, properly instructed on the statutory requirements of the offense of fleeing or eluding, would have found Beamon guilty. Therefore, the evidence was sufficient to convict him on that charge.

Beamon, 347 Wis. 2d 559, ¶46 (footnote omitted). We have trouble understanding this comment because the issue at hand, as described by the ***Beamon*** court, was sufficiency of the evidence, not whether a defendant was entitled to a new trial because of instructional error. Moreover, the error identified

by the ***Beamon*** court favored, or at least potentially favored, the defendant. However, as we understand harmless error analysis, it is used to decide whether an error caused a defendant harm or was, instead, harmless to the defendant.

Regardless, even if a harmless error analysis might apply here, it appears to us that Williams' case still turns on the threshold question of whether the instructions here are more like those in ***Wulff*** or instead more like those in ***Beamon***. If the instructions are like those in ***Wulff*** and not erroneous, then it makes no sense to ask whether a harmless error analysis applies. Moreover, as far as we can tell, if Williams' case is a ***Wulff*** case, we would be bound by ***Wulff*** to reverse and direct the circuit court to enter a judgment of acquittal on Williams' conviction for the felony murder of Robinson. If, on the other hand, the situation is like ***Beamon***, then Williams' sufficiency of the evidence argument fails.

For the reasons above, we certify this appeal.