COURT OF APPEALS DECISION DATED AND RELEASED

September 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3313-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TOMMIE THAMES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Tommie Thames appeals from a judgment of conviction for first-degree reckless homicide while armed with a dangerous weapon, attempted first-degree intentional homicide while armed with a dangerous weapon, and mutilating a corpse. *See* §§ 940.02(1), 940.01(1), 939.32, 939.63(1)(a)2 and 940.11(1), STATS. Thames argues that the complaint was defective because there was no probable cause to charge him with attempted

intentional homicide while armed with a dangerous weapon. Thames also argues that the charges of reckless homicide while armed with a dangerous weapon and attempted intentional homicide while armed with a dangerous weapon are duplicitous. We affirm.[1]

According to the complaint, Thames and his friends, David Bost and Sean Rhodes, met at Rhodes's home to smoke marijuana and drink gin. Thereafter, Thames and Bost began "playing" with guns and Thames accidently shot Bost. Instead of taking Bost to a hospital, out of fear that they would be caught by the police, Thames and Rhodes put Bost in the trunk of Rhodes's car and drove around, looking for an open garage to dump the body. After Thames and Rhodes left Bost in a vacant garage, they left in the car. They returned to the garage when their car ran out of gas. When Thames and Rhodes returned, Rhodes instructed Thames to "put him [Bost] to rest." Thames shot Bost again. Thames then burned the body.

Subsequently, Thames was charged with reckless homicide while armed with a dangerous weapon for the first shot; attempted intentional homicide while armed with a dangerous weapon for the second shot; and mutilation of a corpse for burning the body. Thames filed two motions to dismiss, arguing that there was no probable cause to charge him with attempted intentional homicide and that reckless homicide and attempted intentional homicide are duplicitous. The trial court denied both motions. Thames then pled guilty to all three counts.

"The sufficiency of a criminal complaint is a question of law, which we independently review." ***State v. Kordas***, 191 Wis.2d 124, 127, 528 N.W.2d 483, 485 (Ct. App. 1995). "Additionally, we independently review issues involving statutory interpretation and application to a particular set of facts." ***Id***. A complaint establishes probable cause if it sets forth facts sufficient to permit an impartial judicial officer "`to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.'" ***State ex rel. Cullen v. Ceci***, 45 Wis.2d 432, 442, 173 N.W.2d 175, 179 (1970) (citation omitted). The complaint "need

[1] Thames does not dispute the charge of using a dangerous weapon.

not," however, "contain all the allegations of fact which if proved would be necessary to convict." ***Id.***

The first issue involves application of the attempt and intentional homicide statutes. *See* §§ 939.32(3) and 940.01(1), STATS. Section 940.01(1) states, in relevant part, that "whoever causes the death of another human being with intent to kill that person ... is guilty of a Class A felony." Section 939.32(3) defines attempt. It provides:

> 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 and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

As noted, the facts alleged in the complaint include the following: Thames accidently shot Bost while the two were intoxicated and had been "playing" with loaded guns. After shooting Bost, Thames saw Bost on the floor moving, with blood seeping out of his head. Afraid that Bost would inform the police about what had happened, Thames and Rhodes decided not to take Bost to a hospital. Instead, Thames and Rhodes put Bost in the trunk of a car and drove around, looking for an open garage to dump the body. After Thames and Rhodes dumped Bost in a garage, Rhodes told Thames to "put him to rest," and Thames then shot Bost again. Thames then set fire to Bost, after dousing him with gasoline. The complaint further alleges that an autopsy concluded that Bost died as a result of the bullet that entered behind his ear and lodged in his brain, the first shot, and that the second shot, the one which entered the left side of his jaw and lodged in the right side, was "non-fatal."

Thames argues that the complaint does not show that he intended to kill Bost when he shot him the second time because Bost died as a result of the first shot. We disagree. Although the complaint alleges that the first shot was the fatal shot and that the second shot was non-fatal, the complaint does

not allege that Bost was already dead when Thames shot him the second time. The complaint merely alleges that Bost died from the wound he received as a result of the first shot. Further, the allegations in the complaint give every indication that Thames believed that Bost was still alive immediately before he shot Bost the second time and that he fired the second shot with every intention of making sure Bost was dead. As noted, Rhodes instructed Thames to "put him to rest." Thames then shot Bost at close range. Notwithstanding Thames's argument, we find that the circumstances of the crime allow the clear inference of an intent to kill. Further, the attempt element is satisfied because the complaint establishes probable cause that Thames would have killed Bost except for the extraneous factor that the second shot was non-fatal. The allegations of Count 2 of the complaint establish probable cause to believe that Thames committed the crime of attempted first-degree intentional homicide.

Thames next argues that the trial court erred in denying his motion to dismiss the complaint based on multiplicity of counts. Multiplicity occurs when the state charges more than one count for a single criminal offense. ***State v. Hirsch***, 140 Wis.2d 468, 471, 410 N.W.2d 638, 639 (Ct. App. 1987). We apply a two-part test to determine whether a charge is multiplicitous. ***Id.*** The first prong requires an inquiry into whether the charged offenses are identical in law and in fact. ***Id.*** The second prong requires consideration of the legislative intent regarding whether the legislature intended the offenses to be brought as a single count. ***Id.***, 140 Wis.2d at 471, 410 N.W.2d at 639-640.

To determine whether the offenses are different in law, we examine whether each charged offense requires proof of an element which the other does not. ***State v. Kanarowski***, 170 Wis.2d 504, 510, 489 N.W.2d 660, 662 (Ct. App. 1992). First-degree reckless homicide requires proof that Thames caused the death of Bost, under circumstances showing utter disregard for human life. Section 940.23(1), STATS. Attempted first-degree intentional homicide does not require proof of utter disregard for human life, it requires proof of intent to kill. WIS J I—CRIMINAL 1070 (1990). Further, the attempt element does not require that death be caused. *See* § 939.32(3), STATS. The offenses are not the same in law.

We also consider whether the offenses are the same in fact. Offenses are different in fact if they are either significantly different in nature or separated in time. ***State v. Eisch***, 96 Wis.2d 25, 31, 291 N.W.2d 800, 803 (1980).

We conclude that the offenses are different in fact because they are separated in time. Offenses are considered separate in time if the defendant had time to reconsider his or her course of action between each offense. ***Harrell v. State***, 88 Wis.2d 546, 555, 277 N.W.2d 462, 464-465 (Ct. App. 1979). The complaint alleges that Thames initially shot Bost at Rhodes's home, then he and Rhodes put Bost into the trunk of Rhodes's car and drove around looking for a place to dump Bost. The complaint further alleges that they dumped Bost at a garage, left in the car, but walked back to the garage after their car ran out of gas. It was at that point that Thames shot Bost again to "put him to rest." Although Thames argues that his actions occurred in a continuous stream of events, the complaint alleges facts that show that Thames had time to reconsider his course of action. The charges are not the same in fact, they are separate acts.

Thames does not address the legislative intent or offer any factors demonstrating a legislative intent contrary to multiple charging for the two separate gun shots. Given the presumption that the legislature intended cumulative punishments, *see* ***Kanarowski***, 170 Wis.2d at 512-513, 489 N.W.2d at 663, the charges were not multiplicitous.

In an undeveloped argument, Thames argues that first-degree reckless homicide is a lesser-included offense of attempted first-degree intentional homicide, making the convictions multiplicitous. We disagree. First, the prohibition against obtaining multiple convictions involving a lesser-included offense contemplates offenses arising out of one criminal act. *See* § 939.66, STATS. As noted, Thames's conduct constitutes two criminal acts and he can be prosecuted for both of them. *See* § 939.65, STATS. Second, the two crimes are not lesser-included offenses—first-degree reckless homicide requires that the victim have died; attempted first-degree intentional homicide does not. *See* ***State v. Dowe***, 197 Wis.2d 848, 851, 541 N.W.2d 218, 220 (Ct. App. 1995) ("An offense is a `lesser-included' offense if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the `greater' offense.").

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.