COURT OF APPEALS DECISION DATED AND RELEASED

April 1, 1997

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. 96-1102-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Nick Allen,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

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

PER CURIAM. Nick Allen appeals from a judgment entered after a jury found him guilty of operating an automobile without owner's consent and conspiracy to commit homicide, contrary to §§ 943.23(3), 940.01 and 939.31, STATS. He claims: (1) that the trial court erred in admitting certain testimony, which Allen contends constitutes inadmissible hearsay; (2) that we should exercise our discretionary reversal

power pursuant to § 752.35, STATS., because the trial court erred in instructing the jury and told the jury that the victim was killed, which was incorrect; and (3) that the evidence was insufficient to sustain his conviction for conspiracy to commit first-degree intentional homicide. Because admitting the hearsay testimony was harmless error, because we decline to exercise our discretionary reversal power, and because the evidence is sufficient to support the conviction, we affirm.

I. BACKGROUND

On May 25, 1995, on North Richards Street in Milwaukee, Rudell Wilder was shot while driving his automobile. When Allen was questioned by police regarding the shooting, he admitted that he was a member of the Black Gangster Disciples gang, that a fellow gang member had been shot by a Vice Lord, that he purchased a stolen automobile and on May 25, 1995, drove around with several others in an effort to find a member of the Vice Lords street gang to kill in retaliation for the shooting of a fellow Black Gangster Disciple.

Allen was subsequently charged with operating a vehicle without owner's consent and conspiracy to commit homicide. He pled not guilty. The case was tried to a jury. During cross-examination, Detective John Hagen, was asked: "What questions did you ask Mr. Allen which prompted his answer about wanting to shoot somebody?" The officer responded: "I believe he had been identified running from the stolen auto with someone with a gun just prior to the shooting." Defense counsel objected, moved to strike the answer as non-responsive, and moved for a mistrial. The trial court overruled the objection and denied the motion. On re-direct, the prosecutor brought up the same testimony, asking, "you had information that the persons running from that car right before the shooting, that one of them was armed." This drew another objection by the defense, asserting that this was "double hearsay." The trial court overruled the objection,

ruling that this testimony was not admitted for the truth of the matter, but rather for the effect on what the officers did next.

The jury convicted on both counts. Judgment was entered. Allen now appeals.

II. DISCUSSION

A. Inadmissible Hearsay.

Allen first claims that the trial court erred in admitting testimony that the officers were told by other witnesses that Allen was seen running from the car he was driving with others and that one of them was armed. The trial court overruled Allen's objection that the detective's answer was not responsive to Allen's question on cross-examination, and later admitted the testimony on re-direct on the basis that it was not offered to prove the truth of the matter, but rather to demonstrate why the officers did what they did next. The record does not support these conclusions by the trial court. First, the detective's answer was not responsive to Allen's question. Second, the prosecutor argued in closing that "a witness sees him and his buddies get out of that stolen car where they parked running down that alley with a weapon, okay?" and "a witness sees them running out of that auto down that alley armed with a weapon, what do they do?" Based on this closing, the prosecutor did use the challenged testimony to prove the truth. Accordingly, the trial court erred in admitting the hearsay. We conclude, however, that admitting this testimony was harmless error. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985) (where the error did not affect the result, it is harmless and does not require reversal of the judgment).

Dyess held that certain trial court errors do not require a reversal of the judgment. If "the error did not influence the jury or had such slight effect as to be *de*

minimis," we do not need to reverse. ***Id***. at 542, 370 N.W.2d at 231. We conclude that the testimony challenged satisfies the ***Dyess*** standard. Detective Hagen told the jury shortly before they heard the hearsay statement that Allen was not a suspect in the shooting of the victim and was not charged with that shooting. Therefore, there is no reasonable probability that the jury believed that Allen shot the victim. Moreover, Allen does not provide any showing that the erroneously admitted statements caused prejudice. Accordingly, we reject his claim.

B. Section 752.35, STATS.

Allen next claims that the judgment should be reversed pursuant to § 752.35, STATS. Specifically, he contends that an erroneous jury instruction and an incorrect statement by the trial court call for us to exercise our discretionary reversal power. We are not persuaded.

Allen's complaint regarding the jury instruction is that the trial court instructed the jury on each and every element of first-degree intentional homicide. He argues that the trial court should just have given a summary of the elements of the crime forming the basis for the conspiracy. We disagree. The trial court did not err in choosing to instruct the jury with the complete instruction on the substantive offense of first-degree intentional homicide.

When instructing the jury on the inchoate crime of conspiracy, the trial court must "define the crime involved, referring to the uniform instruction for that offense." WIS J I—CRIMINAL 570. Although the trial court may elect to summarize the underlying crime involved, it is not erroneous to give the full instruction. *See* WIS J I—CRIMINAL 570, n.1. Accordingly, there is no merit to Allen's argument that the jury was erroneously instructed on the law and, therefore, no reason for us to exercise our discretionary reversal power.

Allen also claims that the trial court's comment in front of the jury that "[t]here is no dispute that there was a shooting and someone was killed," calls for a reversal of the judgment. It is undisputed that the trial court misspoke when making this statement because the victim of the shooting did not die. Even so, we decline to exercise our discretionary reversal power because both the prosecutor and defense counsel expressly noted in their closing arguments that the victim did not die from his wound. Further, the jury knew that the crime charged was conspiracy to commit homicide and not the actual commission of a homicide. The jury knew that Allen was not a suspect in the shooting. Accordingly, the misstatement by the trial court did not prejudice Allen. Therefore, there is no reason to reverse the judgment on this ground.

C. Insufficient Evidence.

Finally, Allen claims there was insufficient evidence to support the conspiracy conviction. Specifically, he argues that the State failed to prove the third element of conspiracy: that "one or more of the parties to the conspiracy does an act to effect its object."[1] Based on our review of the record, we reject Allen's insufficiency of the evidence claim.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

[1] A conspiracy is committed by one who, "with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime … if one or more of the parties to the conspiracy does an act to effect its object." Section 939.31, STATS.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

There is evidence in the record that Allen stole a car with the intent to drive around and look for a gang member to kill. There is evidence that Allen and his companions drove around in an attempt to find a member of the Vice Lords gang that they could kill. Buying the stolen car and driving around are overt acts from which a reasonable jury could conclude that the third element was satisfied. The jury could conclude that the acts of buying the car and driving around were done in the furtherance of the conspiracy. Therefore, the evidence was sufficient for a reasonable jury to find the requisite guilt.

By the Court.—Judgment affirmed.

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