COURT OF APPEALS DECISION DATED AND RELEASED

August 12, 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. 96-2093-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMANUEL D. JOHNSON,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Emmanuel D. Johnson appeals from a judgment of conviction, following a jury trial, for first-degree intentional homicide, party to a crime. He argues that the trial court erred in denying his request for a lesser-included instruction, that the party-to-a-crime jury instruction violated his right to

have the State prove each element of the crime, and that the jury polling was defective. We affirm.

The facts relevant to resolution of this appeal are not in dispute. Johnson and "Sabir," associates of a drug house, planned to rob Elvis Anderson of his drugs while driving him home. On the trip home, Johnson drove and Sabir shot Anderson in the head three times. Johnson then turned the car into an alley where he and Sabir removed Anderson from the car, took the drugs from his pocket, and left the body. Johnson and Sabir then returned to the drug house.

Johnson first argues that the trial court erred in refusing to instruct the jury on the lesser-included offense of first-degree reckless homicide. He contends on appeal, as he testified at trial, that although he and Sabir talked of shooting Anderson before the crime, that was merely drug house "lingo" or "rapping" and he did not expect or intend Sabir to shoot Anderson. Therefore, he maintains, his testimony established reasonable doubt about his intent to kill, thus justifying a lesser-included instruction on reckless homicide. We disagree.

Whether the evidence at trial supports submission of a lesser-included offense is a question of law, which we review *de novo*. ***State v. Kramar***, 149 Wis.2d 767, 791, 440 N.W.2d 317, 327 (1989). In determining the appropriateness of submitting a lesser-included offense, the reviewing court must apply a two-step test. ***State v. Morgan***, 195 Wis.2d 388, 433-34, 536 N.W.2d 425, 442 (Ct. App. 1995). First, the court must determine whether the lesser offense is, as a matter of law, a lesser-included offense of the crime charge. ***Id.*** at 434, 536 N.W.2d at 442. If it is, then the court must determine whether the instruction is justified. ***Id.*** This requires the court to decide whether there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser.

Id. Further, the reviewing court must view all the relevant evidence in a light most favorable to the defendant and the requested instruction. ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988). A verdict on a lesser offense should not be submitted, however, simply because a jury could convict the defendant of the lesser crime. ***Hayzes v. State***, 64 Wis.2d 189, 195, 218 N.W.2d 717, 721 (1974). An alternative verdict should be submitted only if there is some basis in the evidence for a reasonable doubt as to an element necessary for conviction of the charged offense. ***State v. Foster***, 191 Wis.2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995).

In this case, even accepting Johnson's version and viewing the facts most favorably to him, the evidence offers no reasonable grounds for acquittal on first-degree intentional homicide. As the State argues:

> [I]f the killing that actually occurred during the robbery the accused planned or assisted was an intentional killing and that killing was a natural and probable consequence of the robbery, then the accused is guilty of first-degree intentional homicide, not merely extremely reckless conduct. The fact that appellant personally contemplated only robbery or did not believe his cohort would actually kill the victim (even though his cohort had said he would) is legally irrelevant.
>
> Appellant focuses on his claimed conduct, asserting it was only extremely reckless because he did not know the killing would actually occur. But his theory misses the whole point. He is not only guilty of intentional homicide because he actually, subjectively intended the victim to be killed. He's guilty of intentional homicide because his cohort who shot the victim actually intended the victim to be killed.

The State is correct. Johnson's account of his actions before, during, and after the crime unequivocally establish his assistance to Sabir. He talked with Sabir about

killing Anderson. He helped set up and carry out the robbery. He helped dump the body in the alley. Thus, even assuming Johnson did not expect or intend Sabir to shoot Anderson, Johnson, by his own account, acted in ways that aided and abetted the shooting. Therefore, even accepting Johnson's version, as a matter of law there was no reasonable basis in the evidence for acquittal of first-degree intentional homicide, party to a crime. *See* ***State v. Ivy***, 119 Wis.2d 591, 596-97, 350 N.W.2d 622, 626 (1984) ("aider and abettor [or co-conspirator] may be guilty not only of particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged [or conspired to commit]."); *see also* ***State v. Glenn***, 199 Wis.2d 575, 588-89, 545 N.W.2d 230, 235 (1996).

Johnson next argues that the party-to-a-crime instruction, by failing to specify the "intended crime," improperly relieved the State of its burden of proving all the elements of first-degree intentional homicide, party to a crime. The record, however, reveals that Johnson failed to object to the instruction on this basis. Thus, Johnson has waived this issue on appeal. *See* § 805.13(3), STATS.; *see also* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988) (court of appeals has no power to reach the unobjected-to instruction, except to exercise its discretionary power under § 752.35, STATS., to order a new trial in the interest of justice). Johnson has not asked this court to order a new trial in the interest of justice; therefore, we decline to address the issue.

Finally, Johnson argues that the manner in which the trial court polled the jury denied his right to individual polling. The basis for Johnson's claim is that although the trial transcript reflects individual polling of the jurors, it does not reflect that the first juror answered the trial court's question, "[W]as this

and is this now your verdict?" Here again, however, Johnson failed to object or bring this to the trial court's attention in any way. Thus, Johnson has waived this issue as well. *See **State v. Cydzik***, 60 Wis.2d 683, 696, 211 N.W.2d 421, 429 (1973) (failure to contemporaneously object to the manner of polling the jury constitutes waiver of the claimed error).

By the Court.–Judgment affirmed.

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