COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0679-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SEAN P. TATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and LAURENCE C. GRAM, JR., Judges. *Affirmed.*

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

PER CURIAM. Sean Tate appeals from a judgment of conviction entered after a jury found him guilty of felony murder, as a party to an underlying offense of armed robbery, while concealing identity. *See* §§ 940.03, 943.32(2), 939.641(2), 939.05, STATS. Tate argues: (1) that the jury verdict is inconsistent

and perverse because the jury acquitted his codefendant; and (2) that the evidence is insufficient to support his conviction.[1] We affirm.

BACKGROUND

On February 12, 1996, four armed and masked men robbed an automotive garage, and killed a man in the process. On February 29, 1996, the State filed an information charging Tate, Tate's brother (Daymon Tate), Keith Baldwin, and Willie Hannah with felony murder, as parties to the armed robbery. Tate and Hannah were tried together in May of 1996. Tate's brother and Keith Baldwin pled guilty to reduced charges, and testified against Tate and Hannah at trial.

Michael Campbell, Marshall Burnside, William George and David Alston were in the garage at the time of the robbery. George testified that he saw four masked men enter the garage with guns. Campbell and Burnside testified that they were working on a car when two of the men put guns to their heads. George testified that the robbers searched his pockets and took ten dollars from him. George testified that the robbers then asked Alston where he kept the money. George testified that Alston told them the money was in the back of the garage, but that they could not go in the back because there were dogs there. George said that Alston then went to the back of the garage, and George then heard several gunshots. Alston was shot and killed during the gunfire.

Both Tate's brother and Baldwin testified that they robbed the garage with Tate and Hannah, while armed and masked. Additionally, the State

[1] Tate also purports to appeal from the order denying his motion for postconviction relief; however, he raises no issue with respect to the order.

presented a statement that Tate gave the police after his arrest, in which Tate admitted that he took part in the armed robbery. Tate's brother, Baldwin, and Tate's statement to the police all indicated that Hannah fired the shot that killed Alston.

Both Tate and Hannah testified at trial, presenting alibi defenses. Hannah also presented evidence that Tate's brother and his friend, Baldwin, had a motive to falsely implicate him, because of a prior conflict with Tate's brother. Consistent with this evidence, Tate testified that his brother told him to implicate Hannah if the police questioned him about a robbery.

The jury returned a verdict finding Tate guilty of felony murder, but acquitting his codefendant, Hannah. Accordingly, the trial court entered a judgment of conviction against Tate, and discharged Hannah.

DISCUSSION

Tate argues that his conviction must be reversed because the jury's verdict is inconsistent and perverse. He argues that the jury could not convict him and acquit Hannah because the evidence against them was essentially the same, and the evidence indicated that Hannah was the actual shooter.

In support of his argument, Tate relies on ***State v. Hess***, 233 Wis. 4, 288 N.W. 275 (1939). In ***Hess***, the defendant and his codefendant, a county treasurer, were charged with multiple counts of embezzlement. The defendant was charged both as a principal to the embezzlements and as an accessory before the fact. The defendant was also charged in multiple counts as an accessory before the fact to the treasurer's malfeasance in office. The treasurer was acquitted in separate proceedings, and the trial court, therefore, dismissed the

charges against the defendant. The State appealed, and the supreme court reversed. *See* ***id.***, 233 Wis. at 10, 288 N.W. at 278.

With respect to the counts in which the defendant was charged as an accessory before the fact, the supreme court held that "'it is not essential to his conviction that the perpetrator of the principal crime be prosecuted or convicted; it being sufficient to prove the guilt of the principal felon.'" ***Id.***, 233 Wis. at 6, 288 N.W. at 277 (citation omitted). The court further explained:

> If [the principal's] trial had resulted in a conviction, his conviction would not be binding on Hess as an accessory. Hess, upon the trial of his case, would have the right to retry the issue of the principal's guilt. However, if the principal and his accessory are tried together, a verdict finding one guilty and the other not guilty would be a perverse verdict upon which no judgment could be based. But where there are separate trials by different juries there may be an acquittal of one and a conviction of the other.

Id., 233 Wis. at 8, 288 N.W. at 277.

With respect to the counts in which the defendant was charged as a principal, the supreme court explained:

> Clearly the court erred in sustaining the plea in abatement as to counts 5, 6, and 7 in which defendant was charged as a principal with [the treasurer] as to the embezzlements. In counts 5, 6, and 7 defendant was charged with embezzlement and fraudulent conversion as principal. The offense in each count is alleged to have been committed in co-operation with [the treasurer]. However, [the treasurer] was not made a codefendant. Defendant Hess was informed against separately and was put upon a separate trial. In the following cases it has been held that even in cases of parties jointly indicted for a crime in which they were alleged to have acted in concert that the acquittal of one is no bar to the conviction of the other: ***People v. Marcus*** (1931), 253 Mich. 410, 235 N.W. 202; ***People v. Simon*** (1926), 218 App. Div. 363, 218 N.Y. Supp. 297; ***Studer v. State*** (1906), 29 Ohio Cir. Ct. Rep. 33, affirming (1906) 74 Ohio St. 519, 78 N.E. 1139 (mem.); ***Williams v.***

> ***Commonwealth*** (1889), 85 Va. 607, 8 S.E. 470; ***Goforth v. State*** (1886), 22 Tex. App. 405, 3 S.W. 332; ***State v. Orr*** (1876), 64 Mo. 339; ***State v. Caldwell*** (1876), 8 Baxt. (Tenn.) 576.

Id., 233 Wis. at 9, 288 N.W. at 278.

Tate seizes upon the supreme court's statement that "if the principal and his accessory are tried together, a verdict finding one guilty and the other not guilty would be a perverse verdict upon which no judgment could be based." ***Id.***, 233 Wis. at 8, 288 N.W. at 277. He argues that the evidence indicated that Hannah planned the robbery and shot Alston, and that he was, therefore, merely an accessory to the felony murder; thus, he argues, he cannot be convicted because he was tried jointly with Hannah and Hannah was acquitted.

Contrary to Tate's assertion, however, he was a principal to the felony murder, rather than an accessory before the fact; the cited language from ***Hess***, therefore, does not apply. "A person convicted of a felony as a party to the crime becomes a principal to a murder occurring as a result of that felony." ***State v. Oimen***, 184 Wis.2d 423, 449, 516 N.W.2d 399, 410 (1994). The evidence discloses that Tate acted in concert with the parties to the armed robbery; therefore, regardless of who actually shot Alston, Tate is a principal to the felony murder. Thus, under ***Hess***, the acquittal of Tate's codefendant does not bar his conviction. *See* ***Hess***, 233 Wis. at 9, 288 N.W. at 278 ("In the following cases it has been held that even in cases of parties jointly indicted for a crime in which they were alleged to have acted in concert that the acquittal of one is no bar to the conviction of the other ….").

Moreover, the evidence against Tate was not identical to the evidence against Hannah, and the jury could reasonably conclude from the

evidence that Tate took part in the armed robbery, and that Hannah did not.[2] As noted, both Tate and Hannah presented alibi defenses. They presented different witnesses in support of their alibis, and the jury was free to believe Hannah's alibi witnesses and disbelieve Tate's alibi witnesses. The jury was also free to believe the portions of Tate's brother's and Baldwin's testimony that implicated Tate, and disbelieve the portions that implicated Hannah. *See* ***Nabbefeld v. State***, 83 Wis.2d 515, 529, 266 N.W.2d 292, 299 (1978) (rejecting defendant's argument that "a jury must either totally believe or totally disbelieve a witness"). Further, the State presented against Tate his statement to the police that he was involved in the armed robbery, whereas Hannah made no such statement to the police. Finally, Hannah presented evidence that he was falsely implicated in the robbery because of a dispute he had with Tate's brother. The jury's decisions to acquit Hannah and to convict Tate were neither inconsistent nor perverse.

Tate also argues that the evidence is insufficient to support his felony murder conviction. We disagree.

> [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.

[2] Although logical consistency in verdicts in criminal cases is not required, *see* ***Teske v. State***, 256 Wis. 440, 447, 41 N.W.2d 642, 645 (1950) (rejecting the defendant's argument that the jury verdict regarding the defendant was inconsistent with the verdict regarding the codefendants), we nonetheless conclude that the verdicts here were not logically inconsistent.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible -- that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

Whoever causes the death of another while committing or attempting to commit an armed robbery is guilty of felony murder. *See* §§ 940.03 and 943.32(2), STATS. A person commits armed robbery when he or she has the intent to steal and takes property from the person or presence of the owner by using or threatening to use a dangerous weapon against the owner. *See* § 943.32, STATS.

Tate does not claim that there was insufficient evidence on any specific element set out above; rather, he argues that the evidence was insufficient to convict him because the jury acquitted his codefendant. As noted, the jury could reasonably conclude from the evidence that Tate took part in the armed robbery and that Hannah did not; Tate's conviction is not invalid merely because Hannah was acquitted. The evidence discloses that Tate and three others entered the garage, wearing masks and carrying guns. At gun-point, they demanded and took money from the men in the garage. A gunfight then occurred, and one of the robbery victims was killed. This evidence is sufficient to support Tate's conviction.

By the Court.—Judgment and order affirmed.

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