COURT OF APPEALS DECISION DATED AND FILED

June 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP2007-CR **Cir. Ct. No. 2003CF255**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE CORNELIUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Wayne Cornelius appeals a judgment, entered upon a jury's verdict, convicting him of attempted first-degree intentional homicide and two counts of attempted armed robbery, contrary to WIS. STAT.

§§ 940.01(1)(a), 943.32(2) and 939.32.[1] Cornelius argues that the evidence at trial did not support his conviction for attempted first-degree intentional homicide because there was insufficient evidence of his specific intent to kill. We reject Cornelius's argument and affirm the judgment.

BACKGROUND

¶2 An amended Information charged Cornelius with attempted first-degree intentional homicide and two counts of attempted armed robbery with use of force. The charges arose from allegations that Cornelius entered Keith and Ronald Otten's apartment and demanded money at gunpoint. The complaint further alleged that Cornelius pointed the gun at Ronald and pulled the trigger, although no shot discharged. After a trial, the jury returned verdicts finding Cornelius guilty of the crimes charged. Cornelius was convicted upon the jury's verdicts and this appeal follows.

DISCUSSION

¶3 Cornelius argues that the evidence at trial was insufficient to demonstrate that he had the intent to commit first-degree intentional homicide. We disagree. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Cornelius's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶4 An attempt to commit a crime has two elements: criminal intent and some acts in furtherance of the intent. ***State v. Kordas***, 191 Wis. 2d 124, 129, 528 N.W.2d 483 (Ct. App. 1995). With respect to the relationship between attempted first-degree intentional homicide and completed first-degree intentional homicide, this court has stated:

> The law of attempted first-degree intentional homicide is not conceptually different from that of completed first-degree intentional homicide. Both require an intent on the part of the defendant to take the life of another. In order to prove the crime of attempted first-degree intentional homicide, the State must establish that the defendant's action would have caused the death of another except for the intervention of some extraneous factor.

State v. Webster, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995).

¶5 To prove the intent element of attempted first-degree intentional homicide, the State must establish that the defendant "acted with the intent to kill," that is, "the defendant had the mental purpose to take the life of another human

being or was aware that his or her conduct was practically certain to cause the death of another human being." *See* WIS JI—CRIMINAL 1010 (2000); *see also* WIS. STAT. § 939.23. Intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances. ***Webster***, 196 Wis. 2d at 321.

¶6 The acts of the accused, however, "must not be so few or of such an equivocal nature as to render doubtful the existence of the requisite criminal intent." ***Id.*** Further, "[s]ince all attempts to commit crimes are failures to do so, a failure excuses a defendant who attempts a crime only when his actual attempt is incomplete, rather than unsuccessful." ***State v. Dix***, 86 Wis. 2d 474, 483, 273 N.W.2d 250 (1979). A jury could infer "that a person intends the natural and probable consequences of those acts he voluntarily and knowingly performs." ***Id.*** at 482-83. This rule is applicable to attempted first-degree intentional homicide cases, as well as "completed" homicide cases. ***Id.***

¶7 Here, Keith Otten testified that on the evening of October 14, 2002, he and his brother, Ronald Otten, made arrangements for Daniel Webster to deliver marijuana to their apartment after "bar time." Webster called the Ottens at their apartment asking for directions. A few minutes later, the apartment buzzer rang and the Ottens, believing it was Webster, buzzed the visitor in through the outer door of the apartment building. When Keith then answered the knock on their actual apartment door, a man later identified as Cornelius walked in and said "Dan sent me." When Keith asked to see the marijuana, Cornelius pulled out a handgun and demanded money. When Keith turned to retrieve money from his bedroom, Cornelius punched him in the head. Ronald then said to Cornelius: "Put the fucking gun down. We'll see how tough you are." Ronald testified that Cornelius then pointed the gun at Ronald's head and although the gun did not

discharge, Ronald, Keith and a third witness, Amanda Kohn, testified that they heard a “click.” The brothers then immediately tackled Cornelius in an attempt to wrestle the gun from him. During this altercation, they heard the gun “click” several more times. Cornelius was ultimately disarmed and the Ottens continued to struggle with him until the police arrived.

¶8 Five Brown County law enforcement officers testified regarding their observations when dispatched to the Ottens’ apartment. Cornelius was found lying on the floor, incoherent and bloody. The Ottens and Kohn were visibly upset and indicated that Cornelius had tried to kill them. Additionally, Sergeant Todd Zehms testified that he collected a nine millimeter semi-automatic pistol, a magazine that matched the pistol and nine millimeter bullets at the crime scene. William Newhouse, a firearms expert, testified that the gun “worked as it’s designed to work,” but that it will not shoot, even if fully-loaded, unless ammunition is first moved from the magazine into the chamber by pushing down on a lever that releases the gun’s “slide.”

¶9 Cornelius testified in his defense that he went to the Ottens’ apartment to sell them marijuana, but initially left the drugs outside because he was concerned about “undercover work” and getting arrested. According to Cornelius, he proceeded to the apartment and one of the brothers asked where the marijuana was. Cornelius testified that when he turned to retrieve the drugs from outside, the brothers attacked him. Cornelius denied taking a gun to the Ottens’ apartment and denied threatening or starting a fight with them.

¶10 Cornelius argues that the State’s evidence failed to exclude the reasonable hypothesis that Cornelius deliberately chose not to chamber a round in order to avoid actually hurting anyone during the robbery. Cornelius additionally

contends that testimony of the "click" sound was insufficient to permit the inference that Cornelius actually pulled the trigger. We are not persuaded. Cornelius ignores the proper standard of appellate review and asks this court to substitute its view of the evidence and inferences therefrom for the jury's. Contrary to Cornelius's arguments, this court need not exclude every reasonable hypothesis of innocence before upholding a jury's verdict. Rather, as noted above, if there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Poellinger***, 153 Wis. 2d at 507. Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07.

¶11 To the extent Cornelius disputes any contrary testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Toy***, 125 Wis. 2d at 222. The jury could reasonably infer that Cornelius attempted to kill Ronald when he pointed the gun at Ronald's head and pulled the trigger, producing a "click" sound. Rather than concluding that Cornelius never intended to chamber a round, the jury could infer that it was merely fortuitous that a bullet was not chambered. Cornelius's theory that testimony of the "click" sound was insufficient to permit the inference that Cornelius actually pulled the trigger fails for the same reason. The jury could reasonably determine otherwise. Moreover, Cornelius does not dispute the State's claim that these theories were never presented to the jury. An appeal is not a trial de novo at which the defendant can advance new theories of innocence after a jury has rejected the defendant's initial defense. The evidence at trial provided a

sufficient basis upon which the jury could reject Cornelius's interpretation of the evidence and convict him of attempted first-degree intentional homicide.

By the Court.—Judgment affirmed.

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