**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 31, 2007**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2006AP660-CR** **Cir. Ct. No. 2005CF191**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDRE W. WARFIELD,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. Andre W. Warfield and five other men were arrested after police officers thwarted their in-progress kidnapping of a woman

from her home to force her to aid them in robbing her workplace. A jury convicted Warfield of kidnapping and seven counts of hostage taking, all as party to a crime and by use of a dangerous weapon; of armed burglary as party to a crime; and of conspiracy to commit armed robbery with use of force. On appeal, Warfield challenges only the hostage-taking and kidnapping charges. He argues that the evidence does not support those convictions because kidnapping and hostage taking are not a natural and probable consequence of the underlying crime, conspiracy to commit armed robbery. We disagree and affirm.

## BACKGROUND

¶2 The jury heard the following testimony. In the early morning hours of February 20, 2005, Nora Nieves and James Terrell were awakened in their home by three masked intruders, guns drawn. The gunmen forced Nieves and Terrell to lie face down, bound Terrell's ankles and wrists with duct tape, and warned him to "keep [his] eyes closed and nobody will die." Two of the men took Nieves downstairs, where she observed two other intruders. Nieves believed a sixth was in the basement.

¶3 Also in the house were Nieves' three sons, seventeen-year-old Mikhail, fourteen-year-old Malcolm and five-year-old Ronnie, and Terrell's thirteen-year-old son, James, Jr., and two grandsons, Obtavius and William, both six. James, Jr., Obtavius and William were asleep on a fold-out couch in the living room when James, Jr., was awakened by a man's hand over his mouth. The man told him to be quiet, asked how many people were in each room, and threw a blanket over the boys' heads. The intruder dispatched others throughout the house and brought back five-year-old Ronnie, whom he placed under the blanket with the other three boys. One of the men guarded the boys.

¶4 Mikhail was awakened in his basement bedroom by someone holding a gun against his neck. Two other men stood nearby. Three or four people bound his hands and ankles with duct tape and tied his wrists behind his back to his ankles with a cord. Two held guns to Mikhail; one cocked his gun and threatened to shoot if he moved.

¶5 Upstairs, Malcolm was awakened when the overhead light was turned on in his bedroom. As he looked up, he was hit near his eye with what he thought was a gun. A man told Malcolm to lie face down, bound his hands and ankles with duct tape, pulled a hat down over his eyes, and carried him to the basement. It seemed to Malcolm that two people were involved. James, Jr., Mikhail and Malcolm all described the intruders as being masked and dressed in black or dark clothing.

¶6 The apparent ringleader indicated to Nieves that he knew she worked at a check cashing service, that he had some idea of the amount of cash on hand at the business and that the money was kept in a safe there. He also seemed to know that she smoked and told her to get her cigarettes. Nieves' work responsibilities included putting the money in the safe at the end of the business day, so she knew the safe combination and how to disarm the alarm. The man instructed her to get dressed because they were going to make her open the safe for them and threatened to kill her family if she did not cooperate. The safe held between $27,000 and $50,000.

¶7 Fearing for her family's safety, Nieves agreed to accompany the intruders and went to the room where she kept her clothes. Just then, one of the intruders yelled "po po," slang for "police," and the intruders fled. Nieves heard a police radio outside of the house and frantically waved to an officer she saw

outside. The police entered and, after ensuring that all the intruders were gone, set free the various family members.

¶8 By happenstance, City of Kenosha Police Officer Robert Schrei had been patrolling the area due to a rash of business burglaries when he observed numerous footprints in the fresh snow outside a bar near the Nieves' house. Suspecting a break-in at the bar, Schrei radioed for backup assistance. As he continued to investigate, he noticed even newer footprints in the fresh snow. Schrei also observed footprints on the front porch of the Nieves' house, leading away from the house and spaced to suggest a running stride. Police officers followed four sets of footprints to a nearby garage where they discovered Warfield and three other men. Officers ultimately apprehended six suspects. The police found discarded in the area several gloves and three knit ski masks matching those the Nieves' family said the intruders were wearing. Several days later, a neighbor's dog carried home a fourth, non-ski-type, mask. DNA samples on the knit masks matched the DNA of three of the suspects, but the fourth mask yielded no DNA evidence. Warfield's DNA was not found on any evidence.

¶9 Warfield's signed statement was read to the jury. In it, he confessed that he and five acquaintances drove from Chicago to Kenosha in two cars to "rob some Mexicans." They left Chicago about one o'clock in the morning. Warfield stated that his companions wore black, but he wore bright colors.[1] He said one of the others planned the enterprise and that all he knew was that they were going to a house where there was marijuana and that one of his companions knew someone

[1] The criminal complaint also stated that Warfield wore "lighter-colored clothes" when apprehended.

there. Warfield said he went along just for his "chop," either money or a few pounds of marijuana. He thought his confederates had guns and saw them don gloves when they got out of the car. Warfield said he stayed in the car to act as "security" and to pick up the others when they signaled; only when he saw them running out of the back of the house, did he exit the car and run.

¶10 The jury convicted Warfield on all counts. He was sentenced to forty-seven years' confinement followed by thirty-four years' extended supervision.[2] Warfield appeals.

## DISCUSSION

¶11 On appeal, Warfield raises two issues, both styled as sufficiency-of-the-evidence challenges. He argues that the evidence was insufficient to show that the hostage takings and kidnapping were the "natural and probable consequence" of the conspiracy to commit armed robbery under WIS. STAT. § 939.05(2)(c) (2003-04).[3] Warfield argues that the hostages in Counts 4 through 7 were "released without bodily harm" within the meaning of WIS. STAT. § 940.305(2) and therefore he is guilty of a Class C, not a Class B, felony.

### 1. Standard of Review

¶12 We will not overturn a jury's verdict on a sufficiency-of-the-evidence claim unless the evidence is so insufficient in force and probative value

[2] Warfield also was ordered to pay a $1000 fine on Count 8, the kidnapping charge. The judgment later was amended to accommodate the Department of Corrections' request to eliminate the fine.

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

that no reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. ***State v. Forster***, 2003 WI App 29, ¶20, 260 Wis. 2d 149, 659 N.W.2d 144. We must keep clear the distinction between the standard the jury uses to determine whether reasonable doubt exists and our standard of appellate review. ***State v. Hauk***, 2002 WI App 226, ¶12, 257 Wis. 2d 579, 652 N.W.2d 393. It is the jury's role, not this court's, to weigh the evidence and draw reasonable inferences from basic facts to ultimate facts. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990). Our appellate duty is to affirm the jury's finding if there is any reasonable hypothesis that supports the conviction. *See* ***Hauk***, 257 Wis. 2d 579, ¶12. Only when the evidence is inherently or patently incredible will we substitute our judgment for the jury's. ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995).

2. Natural and Probable Consequence

¶13 Warfield was convicted of being party to the crimes of hostage taking and kidnapping. The jury was instructed that, under WIS. STAT. § 939.05,[4]

[4] The party-to-a-crime statute, WIS. STAT. § 939.05, provides, in relevant part:

> **939.05 Parties to crime. (1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it ….
>
> **(2)** A person is concerned in the commission of the crime if the person:
>
> ….
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime….

a member of a conspiracy is guilty of any crime committed by any other member of the conspiracy if that crime is committed in pursuance of the intended crime—here, conspiracy to commit armed robbery—and which under the circumstances is a "natural and probable consequence" of the intended crime.[5] A crime is a natural and probable consequence of another crime if:

> in the light of ordinary experience, it was a result to be expected, not an extraordinary or surprising result. The probability that one crime would result from another should be judged by the facts and circumstances known to the defendant at the time the events occurred. If the defendant knew, or a reasonable person in the defendant's position would have known, that [the charged crime] was likely to result from the commission of [the intended crime] then you may find that under the circumstances [the charged crime] was a natural and probable cause of [the intended crime].

WIS JI—CRIMINAL 411 (2005). The term "natural and probable consequence" is equated with foreseeability from the vantage point of one in the defendant's position at the time the crime was committed. ***Id.***, n.11.

¶14 Warfield does not dispute that he and his five comrades conspired to commit armed robbery, but contends that hostage taking and kidnapping are not a natural and probable consequence of that predicate crime under the facts of this case. He contends he cannot reasonably be held to have foreseen that the others

[5] The State argues on appeal that the jury also heard sufficient evidence to permit it to find that Warfield was a direct actor. The State hinted at this theory at trial when, during closing arguments, it asserted that the fourth mask suggested Warfield's active participation and scoffed at Warfield's confession downplaying his involvement. For the most part, however, it pursued the "natural and probable consequence" theory and that is how the jury was instructed. Accordingly, we limit ourselves to the theory developed at trial and on which the jury was asked to decide the case. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

would engage in hostage taking and kidnapping when he was told only that they were going to "rob some Mexicans" who had marijuana in the house.

¶15 Whether the charged crime was a natural and probable consequence of the crime with which the defendant allegedly assisted is a jury question. ***State v. Ivy***, 119 Wis. 2d 591, 601, 350 N.W.2d 622 (1984). On this record, the inferences the jury drew were reasonable. A group of six men in two cars made the trip from Chicago to Kenosha, despite the late hour and poor visibility due to the snowfall. Given the number of conspirators, a reasonable hypothesis is that they anticipated that Nieves did not live alone and significant "manpower" was necessary. The jury also reasonably could have concluded that they drove two cars because they anticipated a need for the group to split up: one to escort Nieves to her business, the other to remain with the family until the crime was accomplished. Moreover, the jury also heard testimony that Warfield believed the men to be armed, that upon entering the house the men asked James, Jr., where everyone else was sleeping and that, except for Nieves, the victims were bound with duct tape. This allowed for the reasonable inference that the intruders came prepared to bind and restrain several victims at once.

¶16 Thus, it was for the jury to decide whether hostage taking and kidnapping foreseeably flowed from a conspiracy to commit armed robbery by a gang of armed, masked men descending on a home's sleeping residents. *See* WIS JI-CRIMINAL 411, and ***Ivy***, 119 Wis. 2d at 601. It was the jury's duty to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony. *See* ***Poellinger***, 153 Wis. 2d at 506. The jury therefore was entitled to disregard Warfield's self-serving statement that he did not know the extent of his confederates' plan, or to accept it and decide that, in terms of what the intruders seemed prepared to do to accomplish their mission, it did not matter whether

Warfield thought the intended booty was money or drugs. We cannot say that any of the evidence was inherently or patently incredible. *See* ***Saunders***, 196 Wis. 2d at 54.

3. "Release" Under WIS. STAT. § 940.305(2)

¶17 Counts 4 through 7 of the Information alleged that, as party to a crime, Warfield took William, James, Jr., Ronnie and Obtavious hostage and that the youngsters were not released before Warfield's arrest, contrary to WIS. STAT. § 940.305(2), a Class B felony. Warfield contends that the boys were "released" when the intruders fled such that, if we do not reverse the judgment as to the hostage-taking and kidnapping counts, we at least must reduce Counts 4 through 7 to Class C felonies.

¶18 The hostage-taking statute, WIS. STAT. § 940.305, provides:

> **940.305 Taking hostages. (1)** Except as provided in sub. (2), whoever by force or threat of imminent force seizes, confines or restrains a person without the person's consent and with the intent to use the person as a hostage in order to influence a person to perform or not to perform some action demanded by the actor is guilty of a Class B felony.
>
> **(2)** Whoever commits a violation specified under sub. (1) is guilty of a Class C felony if, before the time of the actor's arrest, each person who is held as a hostage is released without bodily harm.

Warfield's spare argument posits that because the four boys simply had a blanket put over their heads and were kept under guard, they were released at the moment their captors fled. Warfield looks to a dictionary to show that "release" means to "set free from restraint."

¶19 We view this issue less as examining the sufficiency of the evidence than as one of statutory construction. Construction of a statute presents a question

of law, which we review de novo. ***State v. Tremaine Y.***, 2005 WI App 56, ¶9, 279 Wis. 2d 448, 694 N.W.2d 462, *review denied*, 2005 WI 134, 282 Wis. 2d 722, 700 N.W.2d 274. We agree that in some cases statutory construction may involve consulting a dictionary to understand a word's common and approved usage. *See* ***State v. Sample***, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998). This is not such a case. These children were not released. To the contrary, they were rescued with the arrival of the police. Warfield deserves no break because of that fortuity.

CONCLUSION

¶20 The evidence was sufficient to establish that the crimes of hostage taking and kidnapping were natural and probable consequences of the conspiracy to commit armed robbery. The hostage-taking statute does not reward a captor when a third party rescues the hostage. We affirm the judgment.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.