COURT OF APPEALS DECISION DATED AND FILED

March 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 00-2969-CR

Cir. Ct. No. 97-CF-135

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES L. SCHUMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DALE T. PASELL, Judge. *Affirmed*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. James Schuman appeals a judgment of conviction and an order denying his postconviction motion. The issues are whether the jury instructions sufficiently addressed his theory of defense and whether the court erred in certain evidentiary rulings. We affirm.

¶2 Schuman was convicted of attempted first-degree intentional homicide of his estranged wife, and of solicitation to commit the homicide of her boyfriend. The State's case was based primarily on evidence that Schuman engaged in planning and negotiation with a person he believed was a "hit man" for hire, but was actually a government agent. Several meetings between Schuman and the agent were recorded. Eventually, Schuman provided a payment to the agent to kill his wife. Schuman made the payment by leaving money for the agent on a Thursday evening, and he and the agent agreed that the homicide would not occur until after midnight on Friday. Schuman was arrested during the day on Friday.

¶3 Schuman's theory of defense was that he was entrapped by inducements and coercion of the agent. Schuman testified that although he made the payment, he was planning to contact the agent by beeper the following day and abort the plan. He testified that he wanted to back out of the transaction, but was afraid that the agent would harm Schuman or his children if he did so.

¶4 Entrapment is a defense to a charge when the "evil intent" and the "criminal design" of the offense originate in the mind of the government agent, and the defendant would not have committed an offense of that character except for the urging of the government. ***State v. Saternus***, 127 Wis. 2d 460, 469, 381 N.W.2d 290 (1986). To establish the defense of entrapment, the defendant must show by a preponderance of the evidence that he was induced to commit the crime, and if he does so, the burden falls on the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. ***Id***. at 472-74.

¶5 Schuman's first argument is that the circuit court erred by declining his request to modify the entrapment instruction that was given. He believes the

standard instruction given prevented the jury from considering what he claims was a period during the negotiation and planning in which he was no longer predisposed to kill his wife, but continued with the plan only because of the actions of the agent that caused him to fear for the safety of himself and his children if he withdrew from the transaction. According to Schuman, the given instruction had the effect of requiring the jury to conclude that if he was once predisposed, he was always predisposed.

¶6 Our focus is on Schuman's state of mind at the time he made the payment, because that was when the crime of attempted homicide occurred. The planning and negotiation before that point might have been conspiracy or solicitation, but the payment of the money was the first point that Schuman's conduct could reasonably be said to have demonstrated unequivocally, under all the circumstances, that he had formed the intent to commit the crime, and would commit the crime except for the intervention of another person or some other extraneous factor. *See* WIS. STAT. § 939.32(3) (1999-2000)[1] (definition of "attempt").

¶7 Schuman's defense was that when he made the payment, he was still planning to call off the hit at a later time, and made the payment only out of fear. The State responds that Schuman was adequately protected by the existing instruction on the elements of the charge. We agree. Whatever merits Schuman's theory may have as an entrapment defense, it also goes to his intent in making the payment. Schuman is essentially arguing that he did not intend to kill his wife,

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

because even though his payment was an act that *looked* like an attempt to kill his wife, he was still planning to call off the hit and was not going to allow the crime to be committed. He is arguing that his real intent in making the payment was to placate the hit man. If the jury believed Schuman's version of his motivation, it would never consider entrapment because it would have found that he lacked the intent required for attempt. As instructed in this case, the jury was only to consider entrapment if it first found Schuman guilty of the charge.

¶8 In addition, we think that even if there were instructional error in this regard, it was harmless because Schuman's requested instruction would not have affected the outcome of the trial. Schuman is concerned that if the jury had attempted to apply the entrapment instruction actually given, it would have felt required to find that he was predisposed to commit the crime simply because it found that he was predisposed at one point early in the planning and negotiation. Schuman concedes that he might reasonably be considered predisposed at some point early in that process, but argues that he lost his predisposition during that process. However, the evidence he cites for his loss of predisposition is modest, consisting primarily of his own testimony about his state of mind. As we discussed above, it appears that the jury rejected Schuman's testimony about his state of mind, and found that he intended to kill his wife. We think it unlikely that the jury, after making that finding, would then accept Schuman's argument that he lost his predisposition sometime during the negotiation and planning.

¶9 Schuman next argues that the circuit court erred by not allowing him to introduce extrinsic evidence that one of the State's witnesses, at the time of trial, had been growing and using marijuana in the recent past. He sought to introduce this evidence to rebut testimony by the witness that the witness had done nothing illegal since being released from prison. Schuman argues that this

evidence was relevant to the witness's credibility, and that the State opened the door on the issue of the witness's criminal behavior since prison. We conclude that the evidence was properly excluded as extrinsic evidence attacking the credibility of the witness. *See* WIS. STAT. § 906.08(2). The State may have opened the door, but not to extrinsic evidence. Schuman was permitted to cross-examine the witness about marijuana, and he did so.

¶10 Schuman argues that the court erred by admitting certain testimony from two witnesses as prior consistent statements. The statements had been made by Herbert Glen Miller, one of the State's other witnesses, to Miller's wife and to a professor. Miller's wife and the professor each testified that Miller told them Schuman was trying to find somebody to kill his wife. Miller eventually went to police with this information. Schuman argues that these statements by Miller were lies that Miller told in order to divert attention from Miller if something should later happen to Schuman's wife.

¶11 On appeal, Schuman argues that these statements did not qualify as admissible prior consistent statements under WIS. STAT. § 908.01(4)(a)2, because they were not offered to rebut any charge of *recent* fabrication. We conclude that the error, if any, was harmless. Schuman argues that the admission of Miller's earlier statements enhanced Miller's credibility in testifying that Schuman had been looking for somebody to kill Schuman's wife. However, we are satisfied that Miller's statements to his wife and the professor would have had a minimal effect on the jury's assessment of whether Miller was truthfully reporting what Schuman had said. The testimony of Miller's wife and the professor was cumulative, and the jury would not have been deterred from considering Schuman's claim that Miller's statements to them were false.

¶12 Schuman argues that the trial court erred by denying his request to introduce evidence pertaining to the accuracy of notes taken by a police investigator. The investigator interviewed Schuman shortly after Schuman's arrest in this case, and the investigator's notes of that interview formed the basis for a report that was later relied on by that investigator and another when testifying at Schuman's trial. Schuman sought to challenge the accuracy of those notes by questioning the investigator, and introducing extrinsic evidence, about notes the investigator had taken of an interview with another witness in this case who claimed his notes of her interview were not accurate. The circuit court denied this request on the ground that the modest probative value was outweighed by the danger of confusion of the issues and waste of time, under WIS. STAT. § 904.03. We conclude that the court properly exercised its discretion and reached a reasonable result.

¶13 For the above reasons, we affirm the judgment of conviction. Schuman's notice of appeal and brief state that he is also appealing from the order denying his postconviction motion on sentencing, but the arguments actually made in his brief do not address any issues from the postconviction motion. Therefore, we also affirm the order denying that motion.

By the Court.—Judgment and order affirmed.

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