COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1634-CR **Cir. Ct. No. 99 CF 3775**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVIS S. WIMPIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Travis S. Wimpie appeals from a judgment of conviction entered on a jury verdict convicting him of one count of armed robbery, as a party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (1999-

2000).[1] He also appeals from an order denying his postconviction motion for a new trial. Wimpie claims that: (1) the trial court erred when it denied his request for jury instructions on the lesser-included offenses of unarmed robbery and theft, and (2) the trial court erred when it denied his trial counsel's request to reargue the evidence after the court modified a jury instruction. We affirm.

I. BACKGROUND

¶2 Wimpie was tried for robbing a Baymont Inn with co-defendant Fredrick Martin. Eshekiah Winters and Dora Holloway were working when the robbery occurred. Winters testified that she was at the front counter, which adjoined a center office and a back office, when Wimpie and Martin came to the front desk to inquire about room rates.

¶3 Wimpie was filling out a registration card at the front counter when Holloway asked Winters to open a door for employees, which was located in the back office. Winters opened the door and when she did not hear it close, she turned around to find Martin pushing Holloway inside the back office. Winters turned around again, discovered that Wimpie was standing in the front doorway to the center office, and concluded that he must have jumped over the counter to get there.

¶4 Wimpie then asked Winters, "Where is it [the money]?" Winters took Wimpie to the cash register at the front counter where she gave some money to him. Winters testified that she believed that Martin had a gun because Martin said he had a gun "before we went out to get the money out of the drawer" and

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

because Martin's "hand was behind [Holloway], so I could only see that his arm was bent."

¶5 Wimpie and Winters went back to the center office where Wimpie removed videotape from a cabinet. After Wimpie took the tape, Martin went through Winters's purse while he "forcefully" held her by the arm. Martin took a pager, Winters's social security card, an identification card, business cards, and a fifty-dollar bill. Then Wimpie and Martin pulled out the phone cords, took a cordless phone, and left. The police arrived two or three minutes later.

¶6 Dora Holloway also testified at Wimpie's trial. Holloway stated that she was walking in a hallway, toward the back door, when Martin came up from behind and said, "I got a gun, don't move." He grabbed her wrist and pointed something sharp into her back. Martin pushed Holloway inside the back office where Holloway saw Wimpie. Holloway testified that when Wimpie and Winters came back from the front cash register Wimpie began to grab videotapes and a video camera but that she did not see Martin go through Winters's purse because she "wasn't really looking … [because she was] shaking and scared."

¶7 During deliberations, the jury submitted a question to the court: "Does the fact that Martin threatened Holloway with a gun imply that an armed robbery is in progress and any actions taken thereafter by Martin and/or Wimpie are considered part of the same crime?" In response, the court reread the party-to-a-crime instruction and the armed robbery instruction, modifying the armed

robbery instruction by stating "the defendant or Mr. Martin" instead of "the defendant."[2]

¶8 The jury convicted Wimpie of one count of armed robbery, as a party to a crime, and the trial court sentenced Wimpie to twenty years in prison. Wimpie filed a postconviction motion for a new trial, or in the alternative, an evidentiary hearing. He alleged that his rights to due process and to the assistance of counsel were violated when the trial court denied his attorney's request to reargue the evidence after the court modified the armed robbery instruction. Wimpie claimed that the original armed robbery instruction had the jury focus only on Wimpie's actions, while the modified instruction focused on Wimpie's and Martin's actions. Thus, Wimpie alleged that after the modified instruction, his trial counsel would have argued that Wimpie was not guilty of armed robbery because Martin claimed that he was armed outside of Wimpie's presence. The court denied Wimpie's motion.

[2] The modified armed robbery instruction stated, in pertinent part:

> The fifth element requires that at the time of the taking or carrying away, the defendant or Mr. Martin used or threatened to use a dangerous weapon. A dangerous weapon is any firearm, whether loaded or not…
>
> This element requires that a threat to use a dangerous weapon must be of such a nature that Eshekiah Winters reasonably believed that the defendant or Mr. Martin was armed with a dangerous weapon. Whether Eshekiah Winters reasonably believed that the defendant or Mr. Martin was armed with a dangerous weapon is to be determined from the standpoint of Eshekiah Winters at the time of the alleged offense.

II. ANALYSIS

¶9 First, Wimpie claims that his right to due process was violated when the court failed to instruct the jury on the lesser-included offenses of robbery and theft. A lesser-included offense jury instruction is proper when: (1) the crime for which an instruction is given is a lesser-included offense of the crime charged, and (2) there are reasonable grounds in the evidence to acquit on the greater charge and convict on the lesser charge. ***State v. Jones***, 228 Wis. 2d 593, 598, 598 N.W.2d 259, 261 (Ct. App. 1999). The evidence must be viewed in the light most favorable to the defendant and to the requested instruction. ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22, 26 (Ct. App. 1995). "Further, the lesser-included offense should be submitted only if there is a reasonable doubt as to some particular element included in the higher degree of crime." ***Id.*** (quoted source omitted). Whether a jury instruction on a lesser-included offense should be given is a question of law we review *de novo*. ***State v. Borrell***, 167 Wis. 2d 749, 779, 482 N.W.2d 883, 894 (1992).

¶10 Neither party disputes that robbery and theft are lesser-included offenses of armed robbery. Wimpie claims, however, that he was entitled to an instruction for unarmed robbery because there was conflicting evidence as to whether he was present when Martin indicated that he had a gun. He claims that Winters could not testify with certainty that Wimpie was present when Martin claimed to have a gun, and, even if she could, this contradicted Holloway's testimony that the only time Martin said that he had a gun was while Martin and Holloway were in the hallway, outside of Wimpie's presence. The record does not support these arguments.

¶11 A conviction for armed robbery requires the State to prove, beyond a reasonable doubt, that the defendant took property, with the intent to steal from the person or presence of another, "by use or threat of use of a dangerous weapon." WIS. STAT. § 943.32(2).[3] To intentionally aid and abet in an armed robbery, the defendant must know that another person is committing or intends to commit the crime of armed robbery and must have the purpose to assist in the commission of that crime. WIS JI—CRIMINAL 400 ("To intentionally aid and abet [armed robbery], the defendant must know that another person is committing or intends to commit the crime of [armed robbery] and have the purpose to assist the commission of that crime."). Winters's direct examination testimony is evidence that Wimpie knew Martin committed a robbery by threatening to use a dangerous weapon:

[3] WISCONSIN STAT. § 943.32 states, in pertinent part:

> **Robbery. (1)** Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property; or
>
> (b) By threatening the imminent use of force against the person of the owner or of another who is present with intent thereby to compel the owner to acquiesce in the taking or carrying away of the property.
>
> **(2)** Whoever violates sub. (1) by use or threat of use of a dangerous weapon, a device or container described under s. 941.26 (4) (a) or any article used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon or such a device or container is guilty of a Class B felony.

> Q. [D]id you believe he [Wimpie] or the other individual [Martin] to have a weapon? … Did he [Martin] say anything about a gun?
>
> A. Yes, he [Martin] did. I'm not really sure exactly when he said it, but there's a lot of commotion going on the entire time that they were back there, and I'd like to believe that it was before we went out to get the money out of the drawer that the other guy said he had a weapon.
>
> Q. And do you remember what he said?
>
> A. I just remember a gun. I don't remember what the first words may have been. I just remember a gun.
>
> Q. What made you think that he might really have a gun?
>
> A. The fact that his hand was still in his pocket. His hand was behind Dora, so I can [sic] only see that his arm was bent…

On cross-examination Winters clarified that Wimpie was indeed present when Martin said that he had a gun:

> Q. And you've testified that you believed that the other man [Martin] said something about a gun, but you're not sure when he said it or where he was when he said it?
>
> A. He [Martin] had to be in the office, and I would assume that it was in the middle office because that's where all of us were.

¶12 Moreover, contrary to Wimpie's allegations, Holloway's testimony does not contradict Winters's. Holloway testified that Martin claimed to have a gun while she and Martin were in the hallway. Holloway never testified that Martin did *not* state that he had a gun when he and Wimpie were in the middle office. She simply never testified about this specific sequence of events. Thus, a jury could conclude that Wimpie knew that Martin claimed to have a gun.

Accordingly, there are no reasonable grounds in the evidence for an acquittal on the charge of armed robbery.

¶13 Similarly, the record does not support Wimpie's claim that the court should have instructed the jury on the lesser-included offense of theft. The critical distinction between theft and robbery is that robbery requires proof that force was used in the taking.[4] ***Whitaker v. State***, 83 Wis. 2d 368, 375, 265 N.W.2d 575, 579 (1978). Here, there is ample evidence that Wimpie and Martin used force in committing the robbery.

¶14 First, as noted above, there is evidence that Martin threatened to use a gun in Wimpie's presence. Second, Winters testified that when Martin went through her purse, he held her wrist "very forcefully." Wimpie again claims that Winters's testimony is contradicted by Holloway's because Holloway testified that she did not see Martin grab Winters's arm or go through her purse. Holloway testified that she did not see these events, however, because she was too scared to look, not because they did not happen. Accordingly, Wimpie was not entitled to a lesser-included instruction for the crime of theft.

¶15 Second, Wimpie claims that the trial court violated his rights to due process and to the assistance of counsel when it denied his trial counsel's request to reargue the evidence after the court modified the jury instruction on armed robbery. He claims that his trial counsel's closing argument would have been

[4] Theft, under WIS. STAT. § 943.20(1)(a), occurs when a defendant:

> [i]ntentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with the intent to deprive the owner permanently of possession of such property.

"significantly different" after the modified instruction because his counsel would have focused on Martin's actions, as well as Wimpie's. Thus, he alleges that in a second argument, his trial counsel "could and would have been able to refute all bases of Travis Wimpie's criminal liability for Fredrick Martin's use or pretextual use of a weapon."

¶16 The right to the assistance of counsel is violated when the defendant is denied the opportunity to offer a summation of the evidence. *See* ***Herring v. New York***, 422 U.S. 853, 858 (1975); ***State ex rel. Funmaker v. Klamm***, 106 Wis. 2d 624, 633, 317 N.W.2d 458, 462 (1982). A trial court has wide discretion, however, in framing jury instructions, ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107, 112 (1988), and it may tailor standard jury instructions to the particular facts of a case as long as it correctly states the law. ***Jones***, 228 Wis. 2d at 597, 598 N.W. 2d at 261. Whether jury instructions violate a defendant's right to due process is a question of law that we review *de novo*. ***Foster***, 191 Wis. 2d at 28, 528 N.W.2d at 28.

¶17 There is no basis for a second summation of the evidence. Wimpie does not argue that the original jury instructions or the modified jury instruction were incorrect statements of the law. Furthermore, the modified instruction for armed robbery did not change the law of the case. The jury originally heard an armed robbery and a party-to-a-crime instruction. When the jury asked for clarification, the trial court re-read the original armed robbery instruction, but replaced "the defendant" with "the defendant or Mr. Martin." In doing so, the trial court merely integrated the existing law of the case to explain to the jury how a conviction as a party to a crime related to the underlying offense of armed robbery. *See* WIS JI—CRIMINAL 400, n.5 ("The primary change required in integrating the instruction for the underlying crime is to phrase it in terms of either

the defendant or another person committing the crime rather than by using only 'the defendant.'"). Thus, Wimpie's attorney was not surprised with new charges or a different theory of the case.

¶18 Moreover, Wimpie's attorney approved the original armed robbery and party-to-a-crime instructions.[5] Thus, she was aware that the jury would be instructed that it could consider Martin's actions, as well as Wimpie's, when it determined whether or not Wimpie was guilty of armed robbery. Wimpie's trial attorney was given the full opportunity to make a closing argument based upon the armed-robbery as party-to-a-crime charge. She could have argued that Wimpie was not guilty of armed robbery, as a party to a crime, because Martin did not claim to have a gun in Wimpie's presence, yet she failed to do so. Accordingly, Wimpie was not entitled to a second chance to argue the evidence.

By the Court.—Judgment and order affirmed.

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

[5] Wimpie's trial attorney originally objected to an instruction on armed robbery and argued for instructions on the lesser-included offenses of robbery and theft. She did, however, approve the armed robbery instruction after the trial court denied her requests.