COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3018-CR **Cir. Ct. No. 99-CF-58**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM E. WESO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: ROBERT A. KENNEDY, Judge. *Affirmed.*

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

¶1 PER CURIAM. William Weso appeals a judgment of conviction in which a jury found him guilty of three counts of attempted first-degree intentional

homicide, party to a crime, contrary to WIS. STAT. § 940.01(1) and § 939.05.[1] Weso argues two errors; first, that there was insufficient evidence for a jury to convict him on all three counts and second, that the trial court erred when it refused to hold a hearing on the admissibility of his statements outside the presence of the jury. We reject both of Weso's arguments and affirm the judgment of conviction.

Facts

¶2 In the early morning hours of August 26, 1999, Jacqueline Brown called the Forest County Sheriff's Department four times. The first two times, Brown called after hearing gunshots coming from Theresa Johnson's residence next door. Brown stated she did not know who fired the shots but she knew that Johnson's son, William Weso and his brother, Clifford "Alvin" Weso, were at the house.[2] In the third call, Brown reported Weso called her and told her he was going to wait on his porch with guns, shoot at officers if needed, and that he had already shot at a squad car that had driven past his house. Brown called a fourth time, but the record is unclear what this call reported.

¶3 After Brown's first phone call, Forest County deputies Craig Justice and John Dennee were dispatched to the scene. Once they arrived in the area, they stopped at the tribal hall near the Johnson/Weso residence to listen for gunshots. When they heard additional shots, they proceeded to the residence and heard a

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

[2] Appellant William Weso will be referred to as "Weso" throughout this opinion. Clifford Weso will be referred to as "Alvin."

shot as they passed the house. The officers returned to the tribal hall to summon backup.

¶4 Deputy Sam Marvin and sergeant Bob Jarvais were dispatched to the scene as backup officers, at which point the content of Brown's third phone call was relayed to the officers in the field. When Marvin and Jarvais arrived at the house with Justice and Dennee, the officers used a public address system in an attempt to coax any occupants out of the house. During this attempt, Marvin noticed Weso through the patio door, holding a gun.

¶5 Justice moved to the back of the house. Through a window, Justice saw Weso walk into a bedroom, turn the light on, walk around, turn the light off, and leave the room. Moments later, Justice heard the window open and tried to radio the other officers but his radio failed to transmit. Three people had emerged from the window, talking and making their way toward Justice. Justice could not identify them but could tell that all three people were holding guns and approaching his position.

¶6 Justice announced himself and ordered them to drop their guns. When the people did not drop their guns, Justice repeated the order and one of the people shot at him. Justice returned fire and the group divided, one veering to the left and the other two going right. Justice heard more shots and turned to see the pair near the edge of the woods. Justice raised his gun scope and saw one of the people aiming toward the location where the other officers were supposed to be. Justice fired as the person fired, hitting him. Justice saw the second person bend down, use two hands to pick up a long item from the first person, and then run off. Justice lost sight of the fleeing person and discovered the wounded person was Alvin.

¶7 Marvin and Dennee had heard the gunfire and Justice identify himself and the gunfire. They then saw two people approach. Marvin and Dennee identified themselves, only to be fired upon. The officers returned fire and ordered the people to drop their guns. Dennee used his flashlight to illuminate the scene and Marvin identified Weso running toward them with a gun. The officers fired again and Weso turned and ran to the woods without pointing or firing directly at the officers.

¶8 As Alvin was secured and transported, the officers searched the area, finding Weso laying in the brush in the woods. He had no gun on or immediately near him, but did have shotgun shells. Two guns were recovered: (1) a double barrel shotgun with two spent shells and (2) a Maverick Mossberg shotgun with six unspent shells. The Mossberg was recovered in the woods, although Weso was found deeper in the woods than the gun. The third person was not found.

¶9 Weso was convicted of three counts of attempted first-degree homicide, party to a crime, following a jury trial. Weso now appeals, arguing there was insufficient evidence for the jury to have found him guilty on all three counts. Weso also argues the court failed to hold a hearing outside the presence of the jury regarding the admissibility of certain statements made to the police.

Discussion

I. Sufficiency of the Evidence

¶10 An appellate court may not reverse a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v.***

Poellinger, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence to find the requisite guilt, we will not overturn the verdict. ***State v. Von Loh***, 157 Wis. 2d 91, 101, 458 N.W.2d 556 (Ct. App. 1990). When a defendant is charged as a party to a crime under WIS. STAT. § 939.05,[3] the jury need not unanimously agree in which of the alternative ways the defendant has committed an offense. ***State v. Hecht***, 116 Wis. 2d 605, 619, 342 N.W.2d 721 (1984). Rather, the jury must unanimously agree as to the defendant's participation in the crime. ***Id.***

[3] WISCONSIN STAT. § 939.05 provides:

> (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 and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> (2) A person is concerned in the commission of the crime if the person:
>
> (a) Directly commits the crime; or
>
> (b) Intentionally aids and abets the commission of it; or
>
> (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 ….

¶11 Weso argues that other than physically locating him at the scene and testimony regarding his demeanor upon arrest, there is no evidence supporting convictions on all three counts.[4] We disagree.

¶12 Two elements must be established to sustain a conviction of attempted first-degree murder: (1) a specific intent to take the life of another, and (2) an unequivocal act that, but for the intervention of some extraneous factor, would have resulted in the death of that person. ***State v. Dix***, 86 Wis. 2d 474, 482, 273 N.W.2d 250 (1979).

¶13 On count II, the State argued that Weso had been the principal. Without restating the facts set forth above, a reasonable jury could have inferred that:

1. Weso and Alvin were the duo that ran to the right, because the officers did not track and did not find the third person;

2. Weso and Alvin each had a gun when they separated from the third person, because all three came out of the house with guns;

3. Weso picked up Alvin's gun after Alvin was shot, because Justice saw the unwounded person pick up something long from Alvin's fallen body;

4. Alvin's gun was the Mossberg shotgun, because the Mossberg was abandoned closest to Weso's location and would have been the last item Weso possessed; and

5. Therefore, Weso had the regular shotgun first and was the one who fired it.

[4] Count I was for the attempted murder of Dennee, count II was for the attempt against Justice, and count III was for the attempt against Marvin.

¶14 The presumption that a person intends the natural and probable consequences of those acts he or she voluntarily and knowingly performs may be applied in a murder case, and where the act is an assault with a deadly weapon, the presumption is that there was an intent to kill. ***Id.*** at 482-83. The first shotgun blast was directed at Justice. But for the fact that he was laying on the ground instead of standing, the blast would have presumably killed him. Both of the ***Dix*** requirements for sustaining an attempted first-degree intentional homicide conviction are therefore satisfied, and the evidence was sufficient for a jury to so conclude. ***Dix***, 86 Wis. 2d at 482. Even if we were unsatisfied that the above evidence supported the charge that Weso was a principal on count two, we are satisfied that for all three counts, Weso could be convicted as an aider and abettor or a conspirator.

¶15 A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he or she knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of willingness to assist. *See* WIS JI—CRIMINAL 401. A person is a member of a conspiracy if, with the intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime. If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of a conspiracy, then that person and all other members of the conspiracy are guilty of the crime. ***Id.***

¶16 From the evidence, the jury could have inferred that:

1. Weso and Alvin were the pair running toward Dennee and Marvin;

2. Alvin shot at Dennee and Marvin, because from Justice's perspective, he shot and wounded the suspect who fired;

3. Alvin therefore intended to kill Dennee and Marvin;

4. Weso was ready and willing to assist Alvin in the commission of a crime because he had a gun, had telephoned Brown to tell her he was going to shoot at the police if necessary and that he had already shot at a squad car that drove past his house; and

5. The squad car to which Weso referred was the vehicle Justice and Dennee were in when they first arrived at the scene.

¶17 These inferences, along with the inference that Weso recovered Alvin's gun, are sufficient to support the finding that even if Weso was not the primary shooter, he aided at least Alvin in an attempt to kill Dennee and Marvin. The inferences noted above, along with those from ¶13, *infra*, are sufficient to support a verdict on the grounds of aiding and abetting the attempt to kill Justice even if Weso had not been the principal in that attempt.

¶18 The same evidence supports inferences that there was a conspiracy among the three people to commit the crime. It is not necessary that conspirators had any express or formal agreement, or that they had a meeting, in order for there to be a conspiracy. ***State v. Seibert***, 141 Wis. 2d 753, 762, 416 N.W.2d 900 (Ct. App. 1987). However, the jury could have inferred that the three people did in fact discuss some sort of plan, because Justice heard the three of them talking as they came out of the window. The jury could have also reasonably inferred that if Weso were going to call Brown to tell her his plans, he also discussed them with the others in the house.

¶19 In any event, the evidence shows that all three people were acting together at the time of the shootings—they crawled out the window together with

guns. Given this and all the other evidence, a reasonable jury could have inferred the three people were working together under a master plan as conspirators, making it irrelevant whether Weso actually fired any shots.

II. Admissibility of Statements

¶20 Weso claims the trial court erred when, after he objected to certain testimony about his own statements, the court failed to hold a ***Miranda-Goodchild*** evidentiary hearing outside the presence of the jury on the admissibility of the statements. *See* ***Miranda v. Arizona***, 384 U.S. at 444; ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

¶21 After Weso was placed in handcuffs, he made several prejudicial and inculpatory statements.[5] At trial, when one officer testified about the statements, Weso objected on relevancy grounds, but the trial court overruled the objection. Weso now alleges it was error to allow the testimony without holding a hearing. He bases this argument on WIS. STAT. § 971.31(3)[6] and ***Upchurch v. State***, 64 Wis. 2d 553, 219 N.W.2d 363 (1974).

¶22 Weso claims that these authorities require the court to hold a ***Goodchild*** hearing whenever the admissibility of a defendant's statement is challenged unless the challenge was made prior to trial. The supreme court,

[5] Captain Jerry Gibson said Weso was "threatening to kill the officer, threatening to kill the officers' families." Lieutenant Ken Van Cleve testified Weso "made several remarks about killing us white fuckers. Made comments about fucking our daughters and watching us die …."

[6] WISCONSIN. STAT. § 971.31 (3) states: "The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial."

however, clarified ***Upchurch*** in ***State v. Monje***, 109 Wis. 2d 138, 325 N.W.2d 695 (1982). Monje made the same argument as Weso—that ***Upchurch*** always requires a hearing. ***Id.*** at 149. However, the supreme court explained that because a ***Goodchild*** hearing only determines the voluntariness of the defendant's statements, the defendant must have challenged the voluntariness of his statements or claim that he was not advised of his ***Miranda*** rights in order to have an evidentiary hearing. ***Id.***; s*ee also* ***Miranda***, 384 U.S. at 444.

¶23 Here, Weso did not challenge testimony regarding his statements the first time they were offered. When the statements were mentioned by a second witness, Weso challenged admissibility on relevance only. Weso argues that his failure to object or to object on the correct theory is not fatal because his constitutional rights are implicated. However, ***Monje*** tells us exactly the opposite—"[g]eneralized objections without reference to the voluntariness of the challenged statements are not sufficient to require a ***Miranda-Goodchild*** [evidentiary] hearing." ***Monje***, 109 Wis. 2d at 149.

¶24 Weso claims there is an inadequate record of whether he was ***Mirandized***, in custody, or interrogated and that this warrants reversal. While there is no record of whether the police read Weso his ***Miranda*** rights, those rights only apply to protect a defendant from self-incrimination while he is being interrogated in custody. ***Miranda***, 384 U.S. at 444. Even if Weso was in custody, the record is clear that Weso was not being interrogated when he made his statements.

¶25 Gibson testified that Van Cleve and Wilson had Weso in custody and were walking up to the squad cars when Gibson overheard Weso's statements. Van Cleve testified that he and Wilson arrested Weso and were walking back to

the squad when Weso made his threats. Neither officer indicated he was questioning Weso and in fact Weso does not claim he was interrogated. Because the statements were not made during a custodial interrogation, it is immaterial whether Weso was advised of his ***Miranda*** rights.

Conclusion

¶26 There is sufficient evidence for a reasonable jury to infer Weso's guilt on all three attempted first-degree homicide charges under any of the theories of WIS. STAT. § 939.05(2). Additionally, Weso's inculpatory statements were not a product of interrogation. Thus, the judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

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