

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2004

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. 03-1399-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF000392

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GENEVIEVE M. PAUSER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Deininger, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Genevieve Pauser appeals from a judgment convicting her as a party to first-degree intentional homicide, armed burglary and armed robbery. She contends that the jury heard insufficient evidence to convict her on the homicide charge, that the jury instructions were confusing and erroneous such that she should receive a new trial in the interest of justice, and that

the trial court erred by barring a proposed defense witness from testifying. We affirm on all three issues.

¶2 The State charged Pauser in connection with the death of Kyle Hachmeister. At her jury trial, the State presented testimony that Pauser and three others conspired to rob Hachmeister, whom they knew as a marijuana dealer who carried cash. After several days developing various robbery plans, Pauser and her accomplices drove to Hachmeister's home late at night. She remained in the car with Lindsey Kopp, while Jeremy Greene and Corey Ellis broke into the home and entered Hachmeister's bedroom. There, they encountered Hachmeister sleeping, and in the course of the robbery Hachmeister received seven stab wounds, and later died.

¶3 The State tried Pauser and Greene together. Both Ellis and Kopp testified against them pursuant to plea bargains. Ellis and Kopp testified that Pauser helped plan the robbery and that Pauser knew that the plan included using a knife to induce Hachmeister's cooperation and using physical force if he did not cooperate. Both testified that Pauser accompanied them, and Greene, to Hachmeister's house. Both testified that they were surprised that Greene stabbed Hachmeister.

¶4 Various witnesses testified to specific acts Pauser did in furtherance of the robbery conspiracy. Two witnesses testified that Pauser called Hachmeister the night before the murder to try to set up a marijuana buy, the inference being that Pauser was actually trying to set Hachmeister up for the robbery. Pauser sought to introduce testimony from another witness who was also present when Hachmeister received the call, who was prepared to testify that Hachmeister identified "Lindsey," presumably Lindsey Kopp, as the caller. However, the court

granted the State's motion to exclude the testimony because the defense had failed to identify him timely as a witness.

¶5 Other evidence against Pauser included testimony about inculpatory statements she made during phone calls placed from jail, after her arrest. Additionally, a police officer testified that Pauser knew facts about the murder that had not been released to the public. Pauser testified for herself, denying that she helped plan the robbery or that she was with the others at Hachmeister's house.

¶6 At the close of evidence, the trial court's jury instructions included the following:

Before you may find Ms. Pauser guilty of first-degree intentional homicide, you must be satisfied beyond a reasonable doubt that Ms. Pauser intentionally aided and abetted or joined in a conspiracy to commit the crime of armed robbery or armed burglary, that first-degree intentional homicide was committed, and that under the circumstances, first-degree intentional homicide was a natural and probable consequence of armed robbery or armed burglary.

....

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 Ms. Pauser at the time the events occurred. If Ms. Pauser knew, or if a reason—or if a reasonable person in Ms. Pauser's position would have known, that the crime of first-degree intentional homicide was likely to result from the commission of armed robbery or armed burglary, then you may find that first-degree intentional homicide was a natural and probable consequence of the armed robbery or the armed burglary.

The jury found Greene guilty of first-degree intentional homicide and Pauser guilty as an aider and abettor of that crime.

¶7 Pauser first asserts that the evidence was insufficient to find her guilty as a party to the homicide. Specifically, she argues that the State produced no evidence showing that she had any reason to suspect that Greene would use the knife to stab Hachmeister to death. Consequently, it could not have been a natural and probable result to one in her shoes because it was, by all accounts, an unexpected and surprising result to all three of Greene's accomplices. We disagree. There was ample testimony that Pauser knew that the plan included physical force, if necessary, and knew that Greene was going into the home armed with a large hunting knife. It was the jury's prerogative to believe that evidence. *See Whitaker v. State*, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978). If believed, it allowed the jury to find beyond a reasonable doubt that a reasonable person in Pauser's position would have known that Hachmeister's death was a natural and probable consequence of the late night home invasion and forcible robbery by two men ready to use force, at least one of whom carried a dangerous weapon. We will reverse a jury's verdict on criminal charges only if the evidence, viewed most favorable to the State, is so lacking in probative value and force that no trier of fact, acting reasonable, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Such is not the case here.¹

¶8 Pauser next contends that the jury instructions quoted above were erroneous and confusing. She concedes that she made no proper objection, but

¹ Our decision makes it unnecessary to delay our opinion, as the State suggests, until the supreme court resolves whether appellate review of the sufficiency of the evidence is waived if the defendant does not first raise the issue in the trial court.

seeks reversal in the interest of justice, under WIS. STAT. § 752.35 (2001-02).² However, either on direct review of the issue or under the interest of justice standard the result is the same. The instructions were neither confusing nor erroneous. The State charged Pauser as an aider and abettor, and the instruction clearly and accurately set forth the law applicable to determining the guilt of an aider and abettor. *See* WIS JI—CRIMINAL 406 (1994); *State v. Asfoor*, 75 Wis. 2d 411, 427-32, 249 N.W.2d 529 (1977).

¶9 Finally, Pauser contends that the trial court erred by excluding her witness for what it concluded was a discovery violation. However, we need not determine whether the trial court properly excluded the witness because the error, if any occurred, was harmless. There was extensive evidence that Pauser actively participated in planning and carrying out the robbery and committed several specific acts in furtherance of the conspiracy. Even if the jury had found her witness more credible than the State’s two witnesses, and concluded that Kopp called Hachmeister the day before he died, there would have been no affect on the verdict. Excluding the witness was therefore harmless. *See State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (concluding error is harmless if it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.”) (citation omitted).

By the Court.—Judgment affirmed.

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

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

