COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1903-CR **Cir. Ct. No. 01-CF-913**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTWAINE SAGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PETERSON, J. Antwaine Sago conspired with Ken Williams to rob Brandon Martin. Sago and Williams went to Martin's apartment, where Williams robbed and shot and killed both Martin and Ladell Smith. The State charged Sago with two counts of first-degree intentional homicide as party to a crime and two counts of armed robbery as party to a crime—one count of each offense for each

victim. A jury convicted Sago of Martin's homicide and both armed robbery counts. The jury acquitted him of Smith's homicide.

¶2 For Martin's homicide, the trial court sentenced Sago to life imprisonment with no extended supervision. For each armed robbery, the court sentenced Sago to twenty years' confinement followed by twenty years' extended supervision. The armed robbery sentences were consecutive to each other and concurrent to the homicide sentence.

¶3 Sago filed a postconviction motion (1) alleging ineffective assistance of counsel for his failure to object to an erroneous jury instruction and (2) requesting resentencing on the grounds that his sentences were unduly harsh. The trial court denied Sago's motion. Sago appeals his judgment of conviction of the first-degree intentional homicide of Martin and the armed robbery of Smith. He also appeals the denial of his postconviction motion. Sago argues (1) the court gave an erroneous and prejudicial jury instruction regarding first-degree intentional homicide as party to a crime; (2) there was insufficient evidence to prove that Sago and Williams conspired to rob Smith; and (3) his sentences were unduly harsh.

¶4 We agree with Sago that the jury instruction was erroneous and prejudicial. We therefore reverse the homicide conviction and remand for a new trial on that charge. We further conclude there was sufficient evidence to convict Sago for Smith's robbery. We therefore affirm that portion of the judgment. Finally, because we are reversing Sago's homicide conviction, we need not address Sago's sentencing argument regarding the homicide. As to his sentences for the armed robberies, we further conclude that Sago inadequately develops his argument and therefore we do not address that part of the appeal.

BACKGROUND

¶5 At Sago's trial, his friend, Sabrea Hill, testified that on July 18, 2001, Sago and Williams had a discussion at her house regarding a robbery. Hill was unaware whom they were planning to rob. She testified that Williams stated he could get a gun. Sago stated he did not want to be part of the robbery if anyone was going to get hurt or killed.

¶6 Detective Christine Thiel testified that Sago admitted to her the plan was to rob Martin. Sago and Williams planned to go to Martin's apartment when Martin was gone. However, when they got to the apartment, Martin was there. Instead of leaving, Sago and Williams acted as if they were simply there to visit Martin. After about five minutes, Smith arrived. Sometime later, Williams went into the bathroom and later came out and shot Smith in the head. Williams then took Martin into a bedroom, asked him where the money was, and then shot and killed him. Sago and Williams then robbed Smith and Martin, left the apartment, and later divided the proceeds from the robbery. The State argued that Sago conspired with Williams to commit the armed robbery of Martin and that the other offenses were the natural and probable consequence of that conspiracy.[1] A jury

[1] WISCONSIN STAT. § 939.05, entitled "Parties to crime," states:

> (2) A person is concerned in the commission of the crime if he:
>
> ….
>
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it.

(continued)

acquitted Sago of the intentional homicide of Smith, but convicted him on the remaining three counts.

¶7 Sago filed a postconviction motion alleging his trial counsel was ineffective because he failed to object to an erroneous jury instruction regarding conspiracy to commit Martin's homicide. In its oral and written instruction, the court stated:

> Finally, consider whether first degree intentional homicide was committed in pursuance of armed robbery and under the circumstances was *a natural and probable consequence of first degree intentional homicide*. (Emphasis added.)

The instruction should have asked the jury to determine whether the homicide was a natural and probable consequence of armed robbery, not first-degree intentional homicide. Sago also requested resentencing, arguing his sentences were unduly harsh. The circuit court denied Sago's motion.

DISCUSSION

A. Jury Instruction

¶8 The State concedes the intentional homicide instruction was erroneous. The instruction should have stated that the jury should determine

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> 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. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

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

whether first-degree intentional homicide of Martin was a natural and probable consequence of armed robbery, not of first-degree intentional homicide.

¶9 Where the trial court incorrectly instructs the jury, this court must set aside the verdict unless that error was harmless, that is to say, unless there is no reasonable possibility that the error contributed to the conviction. ***State v. Neumann***, 179 Wis. 2d 687, 703, 508 N.W.2d 54 (Ct. App. 1993); *see also* WIS. STAT. § 805.18(2). The State has the burden of establishing, beyond a reasonable doubt, that there is no reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). An error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). This presents a question of law we review independently. ***State v. Harris***, 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996). In determining whether an error is harmless, we weigh the effect of the trial court's error against the totality of the credible evidence supporting the verdict. ***Id.*** at 255.

¶10 The State contends that the error was harmless. First, the State points out that the court properly instructed the jury several times regarding the homicide charge and incorrectly only twice—once in its oral recitation and once in the written instructions submitted to the jury. Thus, in the context of the trial and all the instructions taken as a whole, the State argues the jury would not have been confused or misled. The State posits that the jury would simply have understood that the court misstated the instruction on the two occasions it was erroneous.

¶11 Second, the State argues the evidence is sufficient to support the conviction and there is no reasonable possibility that the erroneous instruction

contributed to the conviction. It notes that Sago admitted conspiring to rob Martin. Further, Sago's friend, Tara Lynn Hucek, testified that Sago admitted to her that Martin was killed "for the money." Detective Thiel testified that Sago admitted he knew that it was possible someone would get hurt during the robbery because Sago knew Williams had a gun. Thus, the State maintains there is sufficient evidence for the jury to convict Sago of Martin's homicide.

¶12 We conclude that the error was not harmless. Contrary to the State's first argument, the issue is not resolved by the ratio of correct versus incorrect instructions. Instead, the question is whether the jury was so misled or confused by the erroneous instruction that our confidence in the outcome is undermined.

¶13 Second, we agree that there is sufficient evidence from which the jury could have convicted Sago. However, that does not answer our inquiry either. The question remains whether there is a reasonable probability that the erroneous instruction contributed to the conviction.

¶14 There are at least two reasonable hypotheses for how the error might have led to the jury's conviction of Sago for the first-degree intentional homicide of Martin. The erroneous instruction told the jury to focus on the natural and probable consequence of first-degree homicide. Smith's homicide preceded Martin's homicide. The jury may simply have concluded that one homicide led to the other, namely that Smith's homicide led to Martin's. However, the jury found Sago not guilty of Smith's homicide. Therefore, it could not legally have concluded that Martin's homicide was a natural and probable consequence of a homicide for which Sago was acquitted.

¶15 A second possible scenario could be that the jury thought it had alternatives. At different times, the circuit court stated the instruction both

correctly and incorrectly. Consequently, the jury may have thought it could find Sago guilty if Martin's homicide was the natural and probable consequence of either armed robbery or first-degree intentional homicide. If this were the case, we would be unable to determine which formed the basis of the jury's verdict. If some of the jurors applied the incorrect instruction, again, the conviction could not be upheld.

¶16 Either of these two scenarios is a reasonably possible result of the erroneous instruction. However, neither scenario would be a sufficient legal basis for a conviction. Consequently, our confidence in the verdict is undermined. We therefore reverse Sago's conviction of the first-degree intentional homicide of Martin and remand for a new trial.[2]

B. Armed robbery—sufficiency of the evidence

¶17 Sago next argues that there is insufficient evidence to support his conviction for the armed robbery of Smith. The jury was instructed on conspiracy to commit armed robbery. Sago argues he and Williams only agreed to rob Martin and there is no evidence of a conspiracy to rob Smith.

¶18 In reviewing sufficiency of the evidence claims, we review the record to determine whether there is any credible evidence to support the jury's

[2] The State also makes a further argument in its brief. The State mentions Occam's Razor. While the State goes on to define Occam's Razor, we do not see how this theory applies to the facts of this case. However, the State seems to connect Occam's Razor with an argument that any error redounds to Sago's benefit. The State essentially argues that the error did not lead to an erroneous conviction for Martin's murder, as Sago contends. Instead, it led to an erroneous acquittal of Smith's murder. Thus, the State argues any confusion on the jury's part worked to Sago's benefit. However, the issue on appeal here is Sago's conviction for Martin's murder. Any error that might exist regarding Sago's acquittal of Smith's murder is irrelevant to whether Sago was erroneously convicted of Martin's murder. We therefore do not address this argument.

verdict. ***Morden v. Continental AG***, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 611 N.W.2d 659. "[I]f there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, [this court] will not overturn that finding." ***Id.***, ¶38.

¶19 Under WIS. STAT. § 939.05(2)(c), if a person is found to have been a party to a conspiracy or procured another to commit the crime, the party is responsible not only for the intended crime but also for any crime which, under the circumstances, was a natural and probable consequence of the intended crime. Whether the act committed was the natural and probable consequence of the act encouraged is a question of fact for the jury. ***State v. Asfoor***, 75 Wis. 2d 411, 431, 249 N.W.2d 529 (1977). We conclude that a reasonable jury could have found that the armed robbery of Smith was a natural and probable consequence of the conspiracy to rob Martin.

¶20 Sago admits that he conspired with Williams to rob Martin and they went to Martin's apartment for that purpose. When Smith arrived at Martin's apartment, Sago and Williams did not abandon their plan but moved forward with it. Sago remained in the apartment while Williams killed and robbed both Martin and Smith. Sago and Williams then left the apartment together following a preplanned escape route and later divided the proceeds from the robbery. From this evidence, a reasonable jury could conclude that by continuing with the plan to rob Martin even after Smith showed up, it would naturally and probably follow that they would rob Smith as well. Thus, there was sufficient evidence for a jury to find Sago guilty of the armed robbery of Smith.

C. Resentencing

¶21 Sago's argument for resentencing focuses on the life sentence, which was for the homicide conviction. Because we are reversing his homicide conviction due to the erroneous instruction, we need not determine whether that sentence is unduly harsh or excessive.

¶22 It is unclear how Sago takes issue with his sentences on the armed robbery convictions. He asserts he did not commit the robberies himself. Instead, he argues Williams was the actor. However, we have already determined there is sufficient evidence to support the Smith robbery and Sago did not challenge his conviction for the Martin robbery. We conclude that Sago's argument on the armed robbery sentences is undeveloped. We therefore do not address them. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (appellate court need not address "amorphous and insufficiently developed" arguments).

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.