COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1792-CR **Cir. Ct. No. 2008CF231**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD M. WILLISON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury found Richard Willison guilty of solicitation and conspiracy to commit first-degree intentional homicide for approaching a fellow inmate to locate someone to kill Willison's ex-wife and her boyfriend. Willison appeals pro se from the judgment of conviction on grounds of

ineffective assistance of counsel, prosecutorial misconduct, police misconduct, and judicial error. The combination of his failure to file postconviction motions and to present meaningful legal argument precludes our review of most of his eighty-four issues; his few salvageable arguments fail. We affirm.

¶2 Willison and his appointed postconviction/appellate counsel reached an impasse and he opted to proceed pro se. This court granted Willison three extensions of time to file a WIS. STAT. RULE 809.30 (2009-10)[1] notice of appeal or postconviction motion. When he requested a fourth, we agreed to one final extension but advised him that if he did not either commence an appeal to this court or file a motion for postconviction relief in the trial court by August 31, 2011, he would lose his rights to both. We expressly cautioned him: "[M]ost issues must be raised by postconviction motion in the trial court before they can be raised on appeal. In addition, a postconviction hearing is a prerequisite to raising ineffective assistance of trial counsel on appeal." (Citations omitted.) On August 2, 2011, despite having nearly a month left to file a postconviction motion in the trial court, Willison opted to filed a notice of appeal.

¶3 Willison's appellate brief lists eighty-four separately numbered issues, nearly all without any flesh on their bones. Willison provides scant relevant legal authority and little analysis of what he does provide. While we may extend some leniency, a pro se litigant still must satisfy the basic requirements that a brief state the issues, provide the facts necessary to understand them, and set forth an argument in support. *See* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). To decide most of Willison's issues, we first would have

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

to develop his arguments for him. We cannot serve as both advocate and judge. ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶4 In particular, the failure to bring a postconviction motion alleging ineffective assistance of trial counsel precludes our review of those claims. Without a postconviction motion and hearing, we cannot determine if trial counsel's actions or omissions were due to incompetence or to deliberate trial strategies. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Willison was advised that this procedure was necessary. We therefore do not address those issues that pertain to ineffective assistance of counsel. His remaining issues can be boiled down to three.

Sufficiency of the Evidence

¶5 The first issue is whether the evidence was sufficient to support his convictions for solicitation and conspiracy to commit first-degree intentional homicide. Willison contends, if obliquely, that the State failed to prove each element of the charged offenses beyond a reasonable doubt because no one was killed and, further, the other inmate never intended to cause the homicide to be carried out but only was playing along to shave time off his own sentence.

¶6 On review of the sufficiency of the evidence to support a conviction, this court must view the evidence most favorably to the State and the conviction, and affirm the verdicts unless the evidence is so lacking in probative value and force that no trier of fact could reasonably find guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we may not overturn the verdict even if we believed that the jury should not have found guilt based on the

evidence before it. ***Id.*** Under this standard of review, we conclude that the record is sufficient to affirm the convictions.

¶7 We first observe that the other inmate's intent or that no one was killed is irrelevant. Solicitation and conspiracy are "inchoate crimes." *See* WIS. STAT. ch. 939, subch. II. Inchoate crimes require acts *toward* the commission of the crime that show unequivocally that the *defendant* had the intent to cause the crime to be committed unless prevented. *See* ***Oakley v. State***, 22 Wis. 2d 298, 307, 125 N.W.2d 657 (1964); *see also* ***State v. Routon***, 2007 WI App 178, ¶19, 304 Wis. 2d 480, 736 N.W.2d 530.

¶8 The crime of solicitation is committed by one who, "with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent." WIS. STAT. § 939.30(1). The State had to prove beyond a reasonable doubt that Willison (1) intended that the crime of first-degree intentional homicide be committed and (2) advised another person, by the use of words or other expressions, to commit first-degree intentional homicide. *See* ***id.***; *see also* WIS JI—CRIMINAL 550.

¶9 The jury heard the following testimony from Willison's fellow inmate, Paul Kastern. In hopes of getting his own sentence modified, Kastern told jail authorities that Willison repeatedly said he wanted to have his ex-wife and her boyfriend killed. Kastern met with detectives several times, and each time he was instructed to get more information and details. Kastern told Willison he knew people who might be interested. Willison said that he would pay $25,000 apiece to have the pair killed, that his brother and sister-in-law were holding the cash, and that he could get the money deposited into Kastern's account or someone could pick it up from his brother's house. Willison gave Kastern handwritten notes

containing his own contact information; his brother's address and phone number; descriptions of the ex-wife and boyfriend and where they hung out; the make, model and license plate number of the ex-wife's car; and where the ex-wife worked. Willison also gave Kastern a diagram of the layout of his ex-wife's house. Finally, Willison told Kastern to tell the hitman to refer to the boyfriend, a Native American, as "squaw boy" before killing him so he would know Willison was behind it. Kastern gave the written and verbal information to police.

¶10 In her testimony, Willison's ex-wife told the jury that Willison was upset when she filed for divorce and that he said if he could not have her, no one else ever would; that he told her he would not go through with the divorce because she would be dead; that once when she was leaving to drive the children to school, Willison jumped into the back seat of the car and, after the boys got out, Willison moved to the front seat, shoved a gun into her side,[2] and said they were going to discuss not getting divorced; that, despite restraining orders, Willison kept breaking into her home, calling, showing up on her doorstep, getting re-arrested, and, as soon as he was released from jail, would show up or call again; and that the floor plan Kastern provided to police was accurate and that she recognized the handwriting as Willison's. We conclude there was sufficient credible evidence for the jury to find Willison guilty of solicitation to commit first-degree intentional homicide.

¶11 The crime of conspiracy is committed by one who, "with intent that a crime be committed, agrees or combines with another for the purpose of

[2] Willison testified that he did not intend or threaten to harm his ex-wife and that the gun was a paintball gun. It is for the jury to resolve conflicts in witnesses' testimony. ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

committing that crime … if one or more of the parties to the conspiracy does an act to effect its object." WIS. STAT. § 939.31. The State had to prove beyond a reasonable doubt that (1) Willison intended that the crime of first-degree intentional homicide be committed, (2) Willison was a member of a conspiracy to commit first-degree intentional homicide, and (3) one or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement. *See* WIS JI—CRIMINAL 570. "[C]riminal conspiracy will lie even where one of [the] alleged 'co-conspirators' is, unknown to the defendant, … a police informant who merely feigns participation in the conspiracy." ***State v. Sample***, 215 Wis. 2d 487, 496-97, 573 N.W.2d 187 (1998).

¶12 Whatever Kastern's motivation, jurors were entitled to rely on his testimony for what merit they thought it had. *See* ***Poellinger***, 153 Wis. 2d at 506. Willison's notes conveying accurate descriptions of the ex-wife, her boyfriend, her car, her places of employment and entertainment, and her home's floor plan; Willison's and his brother's contact information; the ex-wife's testimony; and the conversations Kastern testified he had with Willison were sufficient to establish the elements of conspiracy to commit first-degree intentional homicide.

"Outrageous Government Conduct"

¶13 Willison filed a pretrial motion to dismiss based on "outrageous government conduct" in violation of his rights to due process. He claimed the police created the charges against him by directing the activities of Kastern, an informant they knew was unreliable and self-serving. Willison also asserted that by doing through Kastern what they were barred from doing on their own, they violated his Sixth Amendment right to counsel. The trial court denied his motion.

¶14 The defense of outrageous government conduct requires the defendant to assert that the State was "so enmeshed in the criminal activity" that prosecution of the defendant is repugnant to our criminal justice system. ***State v. Steadman***, 152 Wis. 2d 293, 301, 448 N.W.2d 267 (Ct. App. 1989). Whether the defense applies to a given situation is a determination of constitutional fact that we review de novo. ***State v. Hyndman***, 170 Wis. 2d 198, 207-08, 488 N.W.2d 111 (Ct. App. 1992).

¶15 The State does not dispute that detectives met several times with Kastern and told him the type of information they needed, employing some deceit to get Willison to believe that Kastern was lining up willing players to carry out Willison's plan. The government has a legitimate need to investigate other crimes that either may have been or may be committed by the defendant. ***State v. Lass***, 194 Wis. 2d 591, 601, 535 N.W.2d 904 (Ct. App. 1995). Once the Sixth Amendment right to counsel attaches, the State may not use against a defendant incriminating statements made to a person acting as an agent of the state unless the defendant's lawyer is present. ***Id.*** at 600. Willison's right to counsel had not attached with regard to the charges in this case, however. He was in jail for the unrelated crime of violating a domestic abuse order when he approached Kastern. The Sixth Amendment right to counsel and its protections are offense specific and do not attach until the commencement of a prosecution. ***State v. Coerper***, 199 Wis. 2d 216, 222, 544 N.W.2d 423 (1996).

Jury Instructions

¶16 Finally, Willison claims that the "ambiguous" jury instructions left the jury with no choice but to convict him. He does not identify the ambiguity. We presume he is challenging the trial court's decision to instruct the jury consistent with the State's proffer of the instructions.

¶17 A trial court has wide discretion as to instructions. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). Our review of jury instructions is deferential to the trial court. ***State v. Wille***, 2007 WI App 27, ¶23, 299 Wis. 2d 531, 728 N.W.2d 343. The choice between requested instructions that correctly state the law is a matter for the exercise of trial court discretion. ***Id.*** We will reverse only if the instructions, taken as a whole, probably misled the jury or communicated an incorrect statement of law. ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995).

¶18 The State and the defense both proposed the same instructions, with one minor variation: WIS JI—CRIMINAL 115 One Defendant: [Multiple] Counts; WIS JI—CRIMINAL 550/1010 Solicitation of First-Degree Intentional Homicide; and WIS JI—CRIMINAL 570/1010 Conspiracy to Commit First-Degree Intentional Homicide. The State proposed that WIS JI—CRIMINAL 115 precede each of the other two substantive instructions. Defense counsel objected that the State's proposal was "confusing" and requested that the court give WIS JI—CRIMINAL 115 only once. The court concluded that the State's proposal was not misleading or confusing and correctly advised the jury of the charges. That is the one it gave.

¶19 The two proposed sequences each correctly stated the law. It is not probable that the jury was misled. Willison is not entitled to reversal.

By the Court.—Judgment affirmed.

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