

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0602-CR
95-0603-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

95-0602-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOSEPH J. CUTCHINS,

Defendant-Respondent.

95-0603-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MATTHEW J. HARVEY,

Defendant-Respondent.

APPEALS from orders of the circuit court for Rock County: JOHN H. LUSSOW and JAMES DALEY, Judges. *Reversed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. The State appeals from orders dismissing one felony charge against Matthew Harvey, and two felony charges against Joseph Cutchins. We consolidated the State's two appeals because the charges derived from the same incident and each appeal presents the same issue. That issue is whether the evidence introduced at the joint preliminary hearing establishes probable cause to believe that Harvey and Cutchins committed the dismissed offenses. Because we conclude that the evidence does establish probable cause as to those offenses, we reverse.

A group of motorcyclists leaving a park said something to anger Cutchins. He and Harvey jumped in their cars and began to pursue the cyclists so that Cutchins could catch the offending cyclist and beat him. A confrontation occurred when the cyclists temporarily stopped. Harvey and Cutchins then pursued two of the cyclists for several miles, with speeds possibly reaching ninety miles per hour.

The cyclists then began slowing down in order to turn into a driveway. As they turned, at a much reduced speed roughly estimated to be twenty miles per hour, the two cycles collided and crashed. Harvey, following fast and close behind, struck and killed one of the cyclists, Chad Herbst, after he had fallen from his cycle. Cutchins, right behind Harvey, was unable to stop and skidded through the accident scene, possibly striking something. Herbst's passenger, J.L.E., was seriously injured in the incident, probably in the initial crash as there is no evidence that either Harvey or Cutchins struck her.

The State's complaints charged Harvey and Cutchins with recklessly causing great bodily harm to J.L.E., and reckless homicide for Herbst's death. Based on the facts presented above, the presiding court

commissioner at the joint preliminary hearing found probable cause that both defendants committed a felony.

The State then issued informations charging the same offenses as the complaints. Both defendants moved to dismiss. On Harvey's motion, the trial court concluded that the evidence was sufficient to proceed on the homicide charge, but not the great bodily harm count. The court reasoned that Harvey was merely following Cutchins' lead and that the intervening factor of the motorcycles slowing down and colliding caused J.L.E.'s injury.

The trial court, with a different judge presiding, dismissed both charges against Cutchins, reasoning that the chase was over when the cyclists slowed for the turn, and it was their action, plus Harvey's alone, that caused the resulting injury and death.

Whether the evidence presented at the preliminary hearing establishes probable cause is a question we decide without deference to the trial court because the trial court on review of the magistrate's decision is in no better position than we are to assess the evidence. *State v. Saucedo*, 163 Wis.2d 553, 567, 472 N.W.2d 798, 803 (Ct. App. 1991), *rev'd on other grounds*, 168 Wis.2d 486, 485 N.W.2d 1 (1992). The test for probable cause is whether a believable or plausible account allows the inference that the defendants committed the charged felonies. *Id.* Probable cause exists for both defendants on both charges if their conduct was an antecedent "but for which" J.L.E.'s injury and Herbst's death would not have occurred, and injury and death were natural and probable consequences of their conduct. See *State v. Bartlett*, 149 Wis.2d 557, 566, 439 N.W.2d 595, 599 (Ct. App. 1989).

Both Harvey and Cutchins were properly charged with both offenses. Testimony showed that Cutchins instigated the chase and Harvey, to say the least, enthusiastically participated in it. The inference is reasonably available that but for the chase, the cyclists would not have needed to make an evasive turn into the driveway and, in any event, would have been more careful in their cycling. Furthermore, a natural and probable consequence of a highway chase is accident, injury and death whether occurring at a high speed or during an evasive action.

Additionally, Cutchins can be held responsible for the death caused by Harvey because his conduct in instigating the chase can be considered a substantial factor in all that subsequently happened during it. Criminal responsibility depends on whether the defendant's conduct was a substantial factor in causing the harm. *Id.* at 565, 439 N.W.2d at 599. It need not be the only or primary factor.

Cutchins contends that the appeal should be dismissed because an order dismissing criminal charges before trial is not appealable by the State as of right. That issue was resolved in the State's favor in *State v. Goyer*, 155 Wis.2d 294, 296, 456 N.W.2d 168, 169 (Ct. App. 1990).

By the Court. – Orders reversed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.