COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

NOTICE

No. 95-2434-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Denziss Jackson,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Denziss Jackson appeals from the judgment of conviction, following a jury trial, for first-degree intentional homicide while armed, party to a crime. He argues that the evidence was insufficient to prove his intent to kill the victim, City of Milwaukee Police Officer William Robertson, and that the trial court erred in admitting that portion of his statement to police that related statements of his accomplice. We affirm.

On September 7, 1994, officers William Robertson and James Andritsos were in a patrol wagon on their way to check on a report of gang activity. Officer Robertson, sitting in the front passenger seat, was fatally wounded by a bullet that came through the left rear of the wagon. The evidence proved that Jackson's accomplice, Curtis Walker, had fired the shot from a high-powered rifle with a telescopic sight from a distance of 183 feet. Jackson's statement, introduced at trial through the testimony of Milwaukee Police Detective Michael Lewandowski, described the circumstances:

> Curtis [Walker] told [Jackson] he wanted to quote, "kill some donuts" ... referring to Gangster Disciple Folks....
>
> > [Jackson] agreed to do this with him. States Curtis opened his jacket and displayed a long gun under his right arm of his jacket and stated that they walked to the vacant field at North 24th Street and Brown.... And upon arrival, Curtis removed the rifle from under his jacket and saw it had a scope on it and a strap and that Curtis told him that it was a .308 rifle. He stated that Curtis told him that a lot of donuts, meaning GD Folks or Gangster Disciple Folks, drive down 24th and Brown Street. And he states that Curtis told him to go to the two phones by The Orange Bowl Tavern and signal him when the donuts approached. States that he knew that Curtis was going to shoot at the cars, and he willfully helped him. He states that he told Curtis he would raise his arm when the donut was approaching. States that Curtis stayed in the back of the vacant field near the alley by the cement wall with the rifle. And he further stated that he did not have a gun.
> >
> > He then stated that he then walked to the two phones next to the tavern and stood by the phone between the building and the taller phone booth. He states he picked up the phone with his left hand and pretended he was talking. He stated that he was standing there for about five minutes when he saw a white police paddy wagon with two white police officers inside. He states that the wagon was going

> east on Brown Street and stopped at the sign at 24th Street. He states that he then stepped to the side of the phone and peeked around the phone and saw the officers looking at him. He states the officers turned the corner to go south on 24th Street. He states that he then held up his right arm over his head.

Detective Lewandowski then continued his testimony as he showed the trial court the motion Jackson had demonstrated during the interview.

> And [Jackson] then went like this (indicating). He raised his right arm over his head to signal Curtis that the police were coming.
>
> He states that the van turned the corner and slowly headed south and that he heard a loud gunshot.... States that after hearing the shot, he noticed that the paddy wagon slowed down and then sped up and turned right, westbound, onto Vine Street.
>
> States that ... he thinks Curtis fired the shot from the ... vacant field.
>
> States he then walked north on 24th Street toward Lloyd Street and cut through the alley by the Madison Times Tavern and headed home. He stated that upon arriving home, he heard Curtis tapping on the window in the back hallway. He states that he entered the back hallway and asked Curtis if he heard the shot, and at that time Curtis told him he fired the shot. He states that Curtis opened up the rifle and showed him the empty bullet....
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> Curtis then unloaded three unfired bullets from the rifle. Curtis then placed the rifle in the basement around a corner against the wall. He then stated that ... he and Curtis then left the house. That they walked to 23rd and Vine and saw that all the squad cars were around 24th and Vine Street.

Detective Lewandowski continued reading Jackson's statement, telling of Jackson's encounter with the police, detention for two hours, interview, and release. During this portion of the statement, Detective Lewandowski testified that Jackson said "he knew a police officer was shot when he was at 24th and Vine Street because he saw the officer on the stretcher." Detective Lewandowski then related that portion of Jackson's statement containing the Walker statements challenged in this appeal:

> He stated that [after he was released and had called his mother] he went to 27th and Lisbon to buy some food but left and ran into Curtis on 24th Place and Lloyd and the both of them walked to the gas station located at 27th and Lisbon Avenue.
>
> He continued to state that as they were walking, Curtis again told him he shot the rifle. Curtis stated that he shot at the police paddy wagon knowing it was the police and that he was aiming for the driver's side window. Curtis told him that the reason he shot at the police was because he was geeked up. And that meaning, I asked him, "Well, what's geeked up?" And he said hyped up ... from a rap song called Gangster-Shukar and Ice-T and Spice-One and M.C.A. He states that this rap song refers to shooting policemen.
>
> He states that he continued to 27th and Lisbon and hung out for a while and then went home. He states Curtis left shortly to an unknown place. He states that early in the morning, which he told me before noon, Curtis arrived back at his house. Curtis then went to the basement to hide the rifle. He states that later on in the day Curtis told him that he hid the rifle by the heater in the basement. He then stated that Curtis went home.

Detective Lewandowski then explained that during a break in the interview Jackson assisted the investigation in several ways and, Detective Lewandowski testified, Jackson stated "that he did not mean for a police officer to be killed and that he only thought they were only shooting at donuts

meaning Folks, Gangster Disciple gangs, but knows that ... what he did was wrong."

Jackson also testified. He stated that Walker told him that he (Walker) wanted to shoot rival gang members and that he told Walker "that I would help him." He testified that he would do so "[b]ecause [Walker] was a friend. They shot at him. I help him out." Jackson then explained that he would signal the approach of gang members to Walker from the phone booth and that, when the police van approached, he waived to Walker "trying to warn him the police was in the area,... [h]oping that he would move back so the police wouldn't see him." Jackson acknowledged that the statement introduced through Detective Lewandowski's testimony was "pretty much the statement that [he] gave," but that "there [were] some things that were not exactly what [he was] trying to tell them." Jackson testified that he did not intend that a police office would be killed and did not have any idea that Walker was going to shoot at the paddy wagon.

Jackson argues that the evidence was insufficient to establish his intent to kill Officer Robertson. In considering a challenge to the sufficiency of evidence, we evaluate whether the trier of fact, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Because the credibility of witnesses and weight of evidence is for the trier of fact to determine, we will consider the evidence and all reasonable inferences in the light most favorable to the verdict. ***State v. Pankow***, 144 Wis.2d 23, 30, 422 N.W.2d 913, 914 (Ct. App. 1988). We reject Jackson's argument that the evidence was insufficient to establish his intent.

First, although at times Jackson equivocated, he testified that when he attempted to signal Walker that the police were in the area, he "raise[d] [his] hand in the signal that [he and Walker had] agreed upon." Thus, if the jury believed Jackson's version except for his denial of specific intent, the evidence was sufficient to establish Jackson's intent to kill police in the van. That is, given that Jackson used the same signal he believed would result in Walker's shooting at gang members, the jury could have concluded that Jackson intended that Walker shoot at the police van. *See* ***Peters v. State***, 70 Wis.2d 22, 34, 233 N.W.2d 420, 426-427 (1975) (jury's function is to decide which evidence is credible and how conflicts in evidence are to be resolved; thus, the jury may "reject testimony suggestive of innocence").

Second, because Jackson admitted attempting to help Walker shoot gang members, he is responsible for the shooting that occurred in the course of that plan. One who aids or abets the commission of a crime may be liable not only for the intended crime, "but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged." ***State v. Ivy***, 119 Wis.2d 591, 596-597, 350 N.W.2d 622, 626 (1984). Whether a crime is a natural and probable consequence is a factual question for the jury. ***Id.***, at 601, 350 N.W.2d at 628. Jackson agreed to help Walker shoot gang members. He knew Walker was armed with a high-powered rifle with a telescopic sight. He used the agreed-upon signal when the police van approached. The jury reasonably could conclude that the shooting of a police officer was a natural and probable consequence of Jackson's conduct.

Thus, we conclude that there was sufficient evidence proving that Jackson specifically intended that Walker shoot at the police, *and* there was sufficient evidence proving that Jackson, assisting the effort to shoot gang members, aided Walker who specifically intended to shoot at the police.[1]

Jackson argues, however, that any possible proof of his intent to kill Officer Robertson necessarily stemmed from Walker's statement that he knowingly shot at the police van aiming for the driver's side window. Jackson contends that only Walker's statement establishes intent that, arguably, could link him to Walker's killing of Officer Robertson. Jackson maintains that the trial court erred in allowing Detective Lewandowski to testify about that portion of Jackson's confession. He argues that "[t]he co-actor's out of court statements ... were inherently unreliable and did not fall under any recognized exception to the hearsay rule." Again, Jackson is incorrect.

First, as we have explained, if the jury rejected Jackson's denial of specific intent to kill a police officer, then the evidence established Jackson's

[1] Jackson also argues that because the fatal bullet entered towards the rear of the van, the evidence of Walker's intent was insufficient. He contends, "If Walker intended to kill the police officer, he would have aimed at the passenger cabin and not at the rear of the van." According to Jackson's statement, however, Walker "was aiming at the driver's side window." As the State argues, "the fact a person is not a good marksman does not mean he lacked intent to kill." Clearly, the evidence of Walker's intent was sufficient.

intent regardless of Walker's intent. Thus, the evidence was sufficient to convict Jackson exclusive of any reference to Walker's statement.

Second, Walker's statement to Jackson that he aimed at the driver's side window knowing that it was a police van was admissible under § 908.01(4)(b)5, STATS., which provides that an out-of-court statement is not hearsay if it is "[a] statement by a co-conspirator ... during the course and in furtherance of the conspiracy." In Wisconsin, "a conspiracy continues during the course of the concealment." ***Bergeron v. State***, 85 Wis.2d 595, 613 n.9, 271 N.W.2d 386, 392 (1978). Further, "[a] statement by a co-conspirator is in furtherance of the conspiracy if it reassures and keeps the other participants cohesive in their illegal endeavor, or apprises them of developments." ***State v. Whitaker***, 167 Wis.2d 247, 262, 481 N.W.2d 649, 655 (Ct. App. 1992). According to Jackson, Walker made his statement after putting the rifle in Jackson's home but before returning to hide it. Clearly, Walker's statement came "during the course of the concealment" and "apprise[d] [Jackson] of developments."[2]

Accordingly, we conclude that Walker's statement to Jackson was admissible and that the evidence proved beyond a reasonable doubt that Jackson, as party to a crime, committed first-degree intentional homicide of Officer William Robertson.

By the Court. – Judgment affirmed.

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

[2] The State, expressing concern about a potential claim of ineffectiveness of appellate counsel, notes that Jackson has failed to argue that the admission of Walker's statement violated his right of confrontation. The State correctly argues that because this statement falls within a "firmly rooted" hearsay exception, the confrontation clause is satisfied and no separate analysis is required. ***White v. Illinois***, 502 U.S. 848, 859 n. 8 (1992).