COURT OF APPEALS
DECISION
DATED AND RELEASED

September 10, 1996

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

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No. 95-2638-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALONZO R. PERRY,

Defendant-Appellant,

LUEGENE HAMPTON,

Defendant.

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. Alonzo Perry appeals his conviction on one count of first-degree intentional homicide, party to a crime, *see* §§ 940.01(1) and 939.05, STATS., two counts of attempted first-degree intentional homicide, party to a

crime, *see* §§ 940.01(1), 939.05 and 939.32, STATS., and one count of armed robbery, party to a crime, *see* §§ 943.32(1)(a) and 939.05, STATS. Perry raises three issues on appeal: (1) whether the trial court misused its discretion when it denied his motion to admit the transcript of testimony given at the trial of a co-actor when the witness invoked his right against self-incrimination and was thus "unavailable" to testify at Perry's trial, *see* RULES 908.04(1)(a) and 908.045(1), STATS.; (2) whether the trial court misused its discretion by sentencing Perry to the mandatory life sentence for a Class A felony when there was evidence to suggest that he was not the "prime shooter"; and (3) whether the trial court's denial of Perry's motion to suppress his statements to police was a misuse of discretion. We affirm.

I.

This case arises out of an incident that occurred shortly before 2:30 a.m. on August 13, 1994. City of Milwaukee police officers patrolling in a squad car heard gun shots and saw muzzle flashes along a sidewalk outside a tavern. As the officers approached the scene with their squad-car lights unlit, they saw one man lying in the street behind a blue Cadillac, and two males standing closer to the car. Both of the men standing near the car were dressed in black clothes, and wore knit ski masks. The police also saw that both of the men were carrying handguns. Upon seeing the squad car, both men fled on foot and were chased by the two police officers. They were caught and immediately arrested. The two males were later identified as Perry and his half-brother Luegene Hampton.

Michael Moore testified that he and Walter Parker had just left a tavern with their friend Harry Roberts. According to Moore, Roberts owned the blue Cadillac, and as they were getting in the car, they were robbed and shot by armed gunmen wearing clothes and ski masks identical to those worn by Perry and Hampton. Moore sustained several gunshot wounds but survived. Roberts died as a result of his wounds.

Police officers testified at the suppression hearing that Perry was advised of his ***Miranda*** rights, after which he agreed to make a statement. Perry admitted that he was involved in the robbery. The officers who questioned Perry testified that he understood the questions asked of him during their

interviews, and that he freely and voluntarily waived those rights. One of the officers testified that he wrote down Perry's statement and then read it to Perry verbatim, after which Perry signed it. Perry and Hampton were tried separately.

II.

A. Perry's first claim of error is that the trial court erroneously exercised its discretion by applying the hearsay rule to bar receipt of Jonathan Burnley's testimony given during Hampton's trial. When Perry called Burnley to testify during his trial, Burnley invoked his Fifth Amendment privilege. He was therefore unavailable. *See* RULE 908.04(1)(a), STATS. Perry then sought to have a transcript of Burnley's Hampton-trial testimony admitted. *See* RULE 908.045(1), STATS. During Hampton's trial, Burnley had allowed a brief direct examination by the State before he invoked his Fifth Amendment privilege. Perry concedes in his brief that the State's direct examination of Burnley at Hampton's trial ended abruptly and prematurely by Burnley's invocation of the privilege.

The decision to admit or exclude evidence rests within the discretion of the trial court and will not be upset unless that discretion is erroneously exercised. ***State v. Stevens***, 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992); ***State v. Barksdale***, 160 Wis.2d 284, 287, 466 N.W.2d 198, 199 (Ct. App. 1991). Perry argues that the admission of Burnley's testimony from the Hampton trial was necessary to protect his right to confront witnesses. He further contends that the incomplete direct examination of Burnley at the prior proceeding was adequate enough to give the statement such indicia of reliability that it should have been admitted into evidence.

We do not address Perry's arguments. As the State correctly points out, Perry has failed to present us with an adequate appellate record. The transcript of Burnley's testimony at the Hampton trial is not included in the appellate record. We are limited to matters in the record. ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Although Perry includes a portion of the prior testimony in the appendix to his brief, we cannot consider any materials in an appendix that are not in the record. ***State v. Smith***, 100 Wis.2d 317, 322, 302 N.W.2d 54, 56 (Ct. App. 1981), *overruled on other grounds*, ***State v. Firkus***, 119 Wis.2d 154, 350 N.W.2d 82 (1984); ***State v. Aderhold***, 91 Wis.2d 306, 314, 284 N.W.2d 108, 112 (Ct. App. 1979).

B. Perry's second claim of error is his contention that the trial court misused its discretion by sentencing Perry to the mandatory life sentence

for his conviction of first-degree intentional homicide as party to a crime. Perry contends that because there was evidence to suggest that he was not the "prime shooter," the trial court erroneously exercised its discretion by imposing a life sentence, even though Perry was convicted of a "Class A" felony. Ordinarily, this court applies a standard of review deferential to the discretion of the sentencing judge. ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). In this case, however, the trial court had no discretion to impose anything other than the mandatory life sentence for a Class A felony. Section 939.50(3)(a), STATS. A lawful conviction as party to a crime makes Perry as liable as the principals who directly committed the crime. *See* § 939.05, STATS.; ***State v. Ivy***, 119 Wis.2d 591, 605, 350 N.W.2d 622, 630 (1984); ***State v. Cydzik***, 60 Wis.2d 683, 688, 211 N.W.2d 421, 425 (1973). Perry was convicted of a Class A felony. Therefore, the trial court could have imposed only one sentence: life imprisonment, which it properly did.

C. The third claim of error is Perry's contention that the trial court misused its discretion when it denied the defense motion to suppress statements that Perry made to the police shortly after he was arrested. The standard of review is whether the findings of historical fact made by the trial court are clearly erroneous. *See* RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.11(1), STATS. Questions of law including whether the defendant's constitutional rights were protected require independent appellate review. ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832–833 (1987). A defendant's statement is voluntary if it was the product of a free and rationale choice under the totality of the circumstances. ***State v. Moats***, 156 Wis.2d 74, 94, 457 N.W.2d 299, 308 (1990).

The trial court heard testimony from detectives at the suppression hearing that it found credible indicating that they administered ***Miranda*** warnings, which Perry understood and waived. Perry makes the claim that somehow his waiver was ineffective because he had smoked a marijuana cigarette laced with cocaine eight hours earlier. Yet, Perry conceded that when he was asked by detectives at the time of questioning whether he was under the influence of drugs or alcohol, his answer was "no." He testified that he lied to the police because he "didn't want to bring it up." The trial court's findings of historical fact are not clearly erroneous. Based on our independent review of the constitutional facts, the trial court properly denied the suppression motion.

By the Court.—Judgment affirmed.

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