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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 7, 2022

To:

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You are hereby notified that the Court has entered the following opinion and order:

2021AP1154-CR State of Wisconsin v. Rafheal A. McGruder (L.C. # 2018CF2660)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rafheal M. McGruder appeals a judgment of conviction, following a jury trial, of two counts of first-degree recklessly endangering safety as a party to a crime.[1] Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[2] We summarily affirm.

[1] McGruder was also convicted of two counts of armed robbery as a party to a crime, but does not challenge those convictions on appeal.

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

On June 11, 2018, the State charged McGruder with two counts of armed robbery as a party to the crimes, and two counts of first-degree recklessly endangering safety as a party to the crimes. The complaint alleged that on June 6, 2018, M.R. and M.S. met McGruder and his co-defendant, Jeremy Wilkes, at a corner store in order to purchase drugs. The four men walked to the vehicle of M.S. and M.R., at which point both McGruder and Wilkes pulled out handguns and pointed them at the victims. When M.R. tried to push away McGruder's handgun, both defendants struck M.R. with their handguns. McGruder and Wilkes proceeded to rob M.R. and M.S., and then walked way. The complaint further states that M.R. and M.S. then got into their vehicle and began to follow McGruder and Wilkes. One of the defendants fired his gun at the vehicle. M.R. and M.S. continued to pursue McGruder and Wilkes, prompting Wilkes to run towards the car as it drove by and fire his gun. M.R. and M.S. then drove north, and the defendants fired three to four more shots. When police arrived at the scene, they observed McGruder exiting a gangway. M.S., who was nearby assisting officers, identified McGruder as one of the robbers. Officers returned to the gangway where McGruder was seen exiting, and found a nine-millimeter handgun wrapped in a sweatshirt. Officers also recovered a nine-millimeter handgun on Wilkes's person, which was fully loaded. The complaint further states that McGruder later admitted to the robbery and that surveillance video from a nearby store "shows [the] victims' arrival, the defendants' arrival, the armed robbery, the victims driving off after the defendants, defendant [Wilkes] firing a shot at the [the vehicle], the defendants running past [a witness] and defendant [Wilkes] returning to the store."

The matter proceeded to trial where multiple witnesses testified. K.S. testified that on the afternoon of June 6, 2018, he was returning to work at a liquor store when he observed a vehicle make a u-turn in front of him, and then heard gunshots. K.S. did not see who fired the shots, but

observed two African-American men in black hoodies run past him. K.S. further testified that Wilkes, whom K.S. recognized from the neighborhood, returned to his store later that night and told an employee not to turn over surveillance video to the police. K.S. did provide police with surveillance video and identified Wilkes from the footage.

M.S. testified consistent with the facts in the complaint and stated he could see one of the men shooting at his vehicle, but could not tell which one, nor could M.S. tell if both of the men were actually shooting. M.S. identified McGruder and Wilkes as the men who robbed him from the surveillance video.

Detective Michael Slomczewski testified that he was dispatched to the area to investigate a report of a robbery and shots fired. He testified that the scene was "large," as it involved multiple locations. Slomczewski testified that he recovered numerous nine-millimeter casings from multiple areas within the crime scene as well as a nine-millimeter handgun about a block from where the robbery occurred. Slomczewski stated that when McGruder and Wilkes were eventually detained, a nine-millimeter gun was found on Wilkes's person. Slomczewski further stated that, based on the surveillance video, it appeared as though one person did all of the shooting.

Detective Marco Salaam testified that he interviewed McGruder at the jail. McGruder identified himself in the surveillance video, as well as the gun that he used in the robbery. He denied, however, shooting the gun at any point.

During closing arguments, the State acknowledged that it was unclear who actually fired the shots at M.R. and M.S., but stated that even if McGruder "did not pull the trigger, he's guilty" as a party to the crimes. The jury found McGruder guilty of two counts of armed robbery

as a party to the crime and two counts of first-degree recklessly endangering safety as a party to the crime. McGruder now appeals the first-degree recklessly endangering safety as a party to the crime convictions on the grounds of insufficient evidence.

"When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State." *See* ***State v. Long***, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Whether the evidence is direct or circumstantial, this court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990).

> If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507.

In order to prove that McGruder was guilty of first-degree recklessly endangering safety, the State was required to show that (1) McGruder endangered the safety of another human being, (2) McGruder endangered the safety of another by criminally reckless conduct, and (3) the circumstances of McGruder's conduct showed utter disregard for human life. *See* WIS JI—CRIMINAL 1345. In turn, the party to a crime statute provides, "[w]hoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it[.]" WIS. STAT. § 939.05(1). This

statute extends liability to any person who "[i]ntentionally aids and abets the commission of" a crime or "[i]s a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit" the crime. Sec. 939.05(2)(b)-(c).

The crux of McGruder's argument is that there was insufficient evidence for the State to prove guilt because: the State lacked eyewitness testimony that McGruder was the shooter; the State lacked physical evidence that McGruder was the shooter or that he aided and abetted in the shooting; the State lacked a confession from McGruder regarding the shootings; M.S. did not provide testimony "indicating how the non-shooter may have aided or abetted the shooter"; and the surveillance video did not implicate McGruder as the shooter. In short, McGruder claims that he was just a "bystander" to the crime of first-degree recklessly endangering safety.

Although McGruder itemizes the specific evidence the State lacked, he ignores the premise that a person who intentionally aids and abets in the *intended* crime's commission is also responsible for other crimes that are committed as a natural and probable consequence. *See* ***State v. Asfoor***, 75 Wis. 2d 411, 430, 249 N.W.2d 529 (1977). In other words, regardless of whether McGruder actually pulled the trigger, a natural and probable consequence of the *intended* crime—armed robbery—is that one or both of the armed parties would start shooting. Therefore, the evidence was sufficient to convict McGruder, in the very least, as an aider and abetter to the reckless endangerment crimes. We agree with the State's concise explanation that:

> a "natural and probable consequence" of McGruder's *intended* crime—robbing M[.]S[.] and M[.]R[.] while armed—and then fleeing that intended crime, is that the victims who were just robbed would pursue McGruder and [Wilkes]. And a natural probable consequence of the victims' pursuit is that [Wilkes], whom McGruder *knew* was armed, would then shoot at the victims pursuing them. McGruder is therefore responsible not only for his

> *intended* crime of armed robbery, but also for aiding and abetting first-degree recklessly endangering safety.

McGruder conceded that he participated in the armed robberies. The other evidence presented at trial was also sufficient for the jury to draw the inference that McGruder, in the very least, aided and abetted in the shooting. K.S. testified that two African-American men in hoodies ran past him when he was on his way to work and then he heard gunshots. The surveillance video from his store confirms his testimony and shows the robbery, the vehicle pursuit, and a shooting. M.S. identified the men in the video as McGruder and Wilkes. While M.S. could not confirm who shot at his vehicle, the evidence showed that both defendants had firearms, both defendants robbed M.S. and M.R., a firearm and casings were located in the area where McGruder was seen fleeing, and both defendants were running along side each other while being pursued by the victims. We conclude that the evidence was sufficient to sustain McGruder's conviction on the charges of first-degree recklessly endangering safety as a party to a crime.

For the foregoing reasons, we affirm the circuit court.

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals