COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0042-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM LEE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. William Lee Brown appeals from the judgment convicting him of first-degree intentional homicide while armed, theft from a person, and operating a vehicle without the owner's consent, and from the order denying his motion for postconviction relief. The issues on appeal are whether Brown validly waived his right to a jury trial, and whether there was sufficient

evidence to find him guilty of first-degree intentional homicide. Because we conclude that the waiver was valid and there was sufficient evidence, we affirm.

Brown was convicted after a bench trial of intentionally killing Earl Cosey. Brown and Cosey had been friends since childhood, and at times, Brown lived in Cosey's home. On the night of the incident, Brown was smoking cocaine at Cosey's apartment. Although Cosey sold cocaine, he did not use it. Cosey fell asleep for some time, woke up and demanded to know where his "shit" (cocaine) was. Brown, frightened by Cosey's manner, got a kitchen knife, and went to the room where Cosey was. The men began to struggle and Brown stabbed Cosey repeatedly, eventually causing his death. The testimony offered at trial conflicted about the nature of the struggle between the two men, and whether Brown or Cosey was the initial aggressor. After Cosey collapsed on the floor, Brown took money and car keys from Cosey and left in Cosey's car. Later the next morning, Brown turned himself in to the police.

Brown asked to waive his right to a jury trial. The State did not object. Before accepting the waiver, the trial court engaged in a colloquy with Brown about the right he was waiving. The court asked Brown if he understood that he was waiving his right to trial by jury. Brown responded that he did. The court then explained to Brown what that meant, saying:

> Which means I decide whether or not you're guilty. I'm the one who decides whether or not you're guilty of a lesser-included offense and I believe your attorney's going to ask for that, and you're giving up your right to have 12 citizens from the community decide that. They would sit in the jury box. They would hear the evidence and then all 12 have to agree you're guilty in order to find you guilty. Do you understand that?

Brown responded that he understood. The court accepted the waiver and trial to the court was held.

At trial, it was not disputed that Brown killed Cosey. The main issue considered by the court was whether the evidence established first-degree reckless homicide or first-degree intentional homicide. After hearing the evidence, the court found that the state had established that Brown intended to kill Cosey, and, therefore, found him guilty of first-degree intentional homicide.

The first issue on appeal is whether Brown validly waived his right to a jury trial. Brown argues that his waiver was not valid because the colloquy was not sufficient for the court to determine whether the waiver was knowing, voluntary and intelligent. We disagree.

Section 972.02(1), STATS., provides:

> (1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury selected as prescribed in s. 805.08, unless the defendant waives a jury in writing or by statement in open court or under s. 967.08 (2) (b), on the record, with the approval of the court and the consent of the state.

In ***State v. Livingston***, 159 Wis.2d 561, 569-70, 464 N.W.2d 839, 843 (1991), the supreme court described the actions necessary for a valid waiver of the right to trial by jury:

> [W]e hold that any waiver of the defendant's right to trial by jury must be made by an affirmative act of the defendant himself. The defendant must act personally; he and only he has the power and authority to waive his right to a jury trial, and that power and authority is legally effective only by virtue of an affirmative act by him. Neither counsel nor the court nor any other entity can act in any way or to any degree so as to waive on the defendant's behalf his right to trial by jury. The affirmative act by the defendant, in order

> to constitute a personal waiver, must be such as to comply with at least one of the specific means of effecting a waiver provided in sec. 972.02(1), and the court and the state must consent in order for a waiver to occur in accordance with the statute. The record must clearly demonstrate the defendant's personal waiver; the personal waiver may not be inferred or presumed. All of these concerns reflect the fact that the ultimate question is what the defendant wants—a court trial or a jury trial; it is his decision, no matter what advice he has received.

The record in this case establishes that Brown personally waived his right to a jury trial. The circuit court engaged in a colloquy with Brown. The court explained to Brown that he was giving up the right to have a jury of twelve citizens hear the evidence. The court explained that the jury would all have to agree that he was guilty. The court explained that without the jury, the court would be the one who decided whether he was guilty of the offense charged or a lesser-included offense. We conclude that the colloquy fully satisfies the requirements of § 972.02(1), STATS., and ***Livingston***.[1]

The second issue is whether there was sufficient evidence to establish that Brown intentionally killed Cosey. When reviewing the sufficiency of the evidence, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state 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." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citation omitted). "If any possibility exists that the trier of fact could have drawn the

[1] Although the state argues in its brief that the colloquy also was constitutionally sound, Brown does not challenge the waiver on constitutional grounds. Brown's brief addresses only whether the waiver was valid under ***State v. Livingston***, 159 Wis.2d 561, 569-70, 464 N.W.2d 839, 843 (1991), and, presumably, § 972.02(1), STATS. While we need not address the issue, we agree with the state that the waiver was constitutionally valid as well.

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.***

In this case, there was sufficient evidence before the court from which it could determine that Brown intentionally killed Cosey. There is no dispute that Brown killed Cosey by stabbing him nearly thirty times. Brown, relying on his own testimony at trial, argues that he did not have the requisite intent because he did not initiate the fight, he was frightened, and he was under the influence of cocaine. There was, however, conflicting testimony about who started the physical fight.

Brown testified that Cosey started the fight by grabbing him by the neck. However, an officer testified about the statement Brown made to the police the morning after the incident. In this statement, Brown stated that Cosey was yelling at him, demanding to know where his dope was. Brown got a kitchen knife and, with the knife behind his back, returned to the living room to confront Cosey. Brown further stated that when he returned to the living room, Cosey was seated in a chair. Brown told the police that he had the knife in his right hand and then he stabbed Cosey in the neck. Cosey then grabbed Brown by the neck and they started to struggle.

There was other evidence which also supports the conclusion that Brown intended to kill Cosey. Nichole Smith, Cosey's girlfriend, was a witness to some of the events that night. Smith testified that when she arrived at Cosey's home with her baby, she heard a struggle. She entered the apartment, and saw the two men facing each other. Brown had a knife in one hand. When he saw her, Brown came after her and threatened her with the knife. She testified that Cosey

did not attempt to attack Brown when Brown came after her. Brown pushed Smith, causing her to drop her baby. After leaving her, Brown went behind Cosey, and put the knife up to Cosey's throat. At this time, Cosey appeared to be dazed and was bleeding. Brown walked Cosey into another room with the knife at his throat. There Smith saw Cosey fall to the floor, with Brown standing over him with the knife.

Further, the medical evidence established that Cosey had twenty-nine stab wounds. While only one of the wounds was by itself fatal, some of the other wounds were quite severe, causing damage to bone. It is reasonable from the number and severity of the wounds inflicted to conclude that Brown intended to kill Cosey.

It was certainly possible for the court to draw the requisite inferences from this testimony and reasonably conclude that Brown intended to kill Cosey. Since there was sufficient evidence to find Brown guilty of intentional homicide, we affirm.

By the Court.—Judgment and order affirmed.

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