COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1213-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEMETRIUS NEWMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT W. LANDRY, Judge. *Affirmed.*

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

PER CURIAM. Demetrius Newman appeals from a judgment entered after a jury convicted him of first-degree intentional homicide, while armed, as party to a crime, and possession of a short-barreled shotgun, contrary to

§§ 940.01(1), 939.63, 939.05 and 941.28, STATS.[1] Newman claims: (1) the trial court erred when it took judicial notice of co-defendant Andrae Bridges's related homicide conviction; (2) the trial court erroneously exercised its discretion when instructing the jury regarding Bridges's conviction; and (3) the evidence was insufficient to support Newman's homicide conviction. Because the trial court did not err in taking judicial notice of Bridges's conviction, because the trial court did not erroneously exercise its discretion when it instructed the jury, and because the evidence was sufficient to support the conviction, we affirm.

I. BACKGROUND

On March 25, 1992, Newman and others gathered in the basement of the residence of Ulysses Hall, who was having a party memorializing the homicide of his cousin. Newman came out of the basement holding a sawed-off shotgun and said "Almighty, let's fuck up somebody." Together with his girlfriend, Tia Skaggs, and co-defendant Bridges, the threesome engaged in an altercation with four girls who were in front of the residence next to Hall's home. Bridges had a handgun, and Skaggs was also armed. Newman fired his shotgun into the ground and Bridges fired his handgun into the air. The four girls started running. A group of the partygoers, including Newman, Skaggs and Bridges, began chasing the girls. Newman discharged his weapon again, this time hitting Skaggs in the back of the legs. Newman shouted, "Damn, you made me shoot my girl, bitch," and "you better shoot the bitch" or something to that effect.

Bridges caught up with one of the girls, Corzetta Vance, and shot her in the head at point-blank range. He announced, "I got the bitch." Vance died

[1] Newman does not challenge the conviction for possession of a short-barreled shotgun.

from the gunshot wound. Bridges and Newman were charged with first-degree intentional homicide, while armed, as party to a crime. The cases were severed and Bridges was tried first. He was convicted.

At the close of the State's case-in-chief at Newman's trial, the State asked the court to take judicial notice of Bridges's conviction. The court took the motion under advisement. The State renewed this request before closing argument as the court had not yet ruled. At that point, the court granted the request and advised the jury that the court had taken judicial notice of the fact that Bridges was found guilty of first-degree intentional homicide, while armed, party to a crime, on August 19, 1992. The court directed the jury to "accept that as true."

The jury convicted. Newman now appeals.

II. DISCUSSION

A. Judicial Notice.

Newman claims that the trial court erred in taking judicial notice of Bridges's conviction. He argues that because the State waited until the evidence was closed before renewing its motion regarding judicial notice, we should conclude that the State waived its request. He also argues that the trial court erred in taking judicial notice because it had to rely on its own circuit court records to do so, which is prohibited by case law. Finally, he claims that the trial court erred in taking judicial notice of Bridges's conviction because this relieved the State of proving an element of the crime in Newman's trial. We reject each contention in turn.

Section 902.01, STATS., governs judicial notice requests. It provides:

> **(1)** SCOPE. This section governs only judicial notice of adjudicative facts.
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> **(2)** KINDS OF FACTS. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> **(3)** WHEN DISCRETIONARY. A judge or court may take judicial notice, whether requested or not.
>
> **(4)** WHEN MANDATORY. A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> ….
>
> **(6)** TIME OF TAKING NOTICE. Judicial notice may be taken at any stage of the proceeding.
>
> **(7)** INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed.

The plain language of the statute, subsec. (6), refutes Newman's first contention. He argues that the State waived its right to ask the court to take judicial notice because it waited to renew the motion until the evidence was closed. The statute provides that judicial notice may be taken at any stage of the proceeding. Further, the State did not wait until the close of evidence to make its motion requesting judicial notice. The motion was made earlier, but the trial court took it under advisement. The renewal motion was made because the trial court had not yet ruled on the motion. Therefore, based both on these facts and on the statutory language, we conclude that the State did not waive its right to seek judicial notice.

We also reject Newman's next contention that the case law prohibits the trial court from taking judicial notice here because it relied on its own records. Newman relies on ***Perkins v. State***, 61 Wis.2d 341, 346-47, 212 N.W.2d 141, 144 (1973). ***Perkins*** does not control. The statement in ***Perkins*** to that effect relies on case law preceding codification of the judicial notice rule. The statutory language does not limit a trial court in such manner and, in fact, provides that a fact may be

judicially noticed when it is "not subject to reasonable dispute" and "capable of accurate and ready determination." Post-codification case law has interpreted this language to allow a court to take judicial notice of court records when the records are immediately accessible to it or under its direct control. *See* ***State v. Gilbert***, 109 Wis.2d 501, 504 n.3, 326 N.W.2d 744, 745-46 n.3 (1982). It is not disputed here that Bridges's trial record and judgment of conviction were immediately accessible to the court. Accordingly, we conclude that the trial court did not err when it relied on these records.[2]

Finally, Newman also contends that taking judicial notice of Bridges's conviction interfered with the jury's fact-finding because it relieved the State of proving an element of the crime. We disagree.

Newman was charged as party to a crime for the homicide of Vance. He was accused of participating in a murder which was actually committed by Bridges. To convict Newman as a party to an intentional homicide committed by another person, the State needed to prove that the person who actually committed the homicide intended to kill the victim. *See* ***State v. Sharlow***, 110 Wis.2d 226, 238-39, 327 N.W.2d 692, 698-99 (1983). Thus, Bridges's intent was an element of the crime with which Newman was charged.

[2] In reply, Newman references ***State v. Christian***, 142 Wis.2d 742, 746, 419 N.W.2d 319, 321 (Ct. App. 1987) arguing that ***Perkins v. State***, 61 Wis.2d 341, 212 N.W.2d 141 (1973), is still followed even post-codification of the judicial notice rule. The cite to ***Perkins***, in ***Christian***, however, is dicta and we are not bound by it. Further, the ***Christian*** court was dealing with confidential records from a CHIPS proceeding, and concluded that judicial notice was not appropriate because these records were neither "generally known" nor "capable of accurate and ready determination." ***Christian***, 142 Wis.2d at 746, 419 N.W.2d at 321. Thus, the holding of the case relies on the statutory language rather than on ***Perkins***.

Here, the trial court did not direct the jury on this element. Rather, it took judicial notice of *the fact* that the record in circuit court case number 92 F 1569, ***State v. Andrae Lamont Bridges***, "indicated[d] that on August 19, 1992, Andrae Bridges was found guilty of first degree intentional homicide, party to the crime, while using a dangerous weapon." The jury was not directed to accept as true the finding of the other tribunal that Bridges intended to kill the victim. Rather, the jury was instructed to accept that another tribunal found Bridges guilty of the crime. In fact, the jury here was presented with substantial evidence of Bridges's intent. Further, the jury was instructed that it was the sole judge of the facts, of the weight and credit to give to the testimony, and that the case should be decided strictly on the evidence as the jury found it to be. The jury was instructed as to what constitutes evidence and that it was to draw its own conclusions and inferences from the evidence. The jury was instructed not to find Newman guilty unless they were satisfied beyond a reasonable doubt by the evidence in this case that Bridges intended to kill the victim. Accordingly, we reject Newman's claim that the judicially noticed fact influenced the jury's function or relieved the State of proving an element of the crime charged.

B. Jury Instruction.

Newman next contends that the trial court erroneously exercised its discretion when it instructed the jury to accept the judicially noticed fact as true. He argues that the federal rules require a federal judge, who takes judicial notice of a fact, to instruct any "criminal jury that it may, but is not required to, accept as conclusive any judicially noticed fact." We reject this contention because our statute actually requires the opposite.

Section 902.01(7), STATS., specifically provides: "INSTRUCTING JURY. The judge shall instruct the jury to accept as established any facts judicially noticed." This is precisely what the trial court did in the instant case. The statute was not violated and, therefore, we are not persuaded by Newman's reliance on the federal requirement.

C. Insufficiency of the Evidence.

Finally, Newman claims that the evidence was insufficient to support his conviction. We disagree. In reviewing a sufficiency of the evidence claim, we review the evidence to determine whether the trier of fact could have reasonably been convinced of the defendant's guilt beyond a reasonable doubt by the evidence, direct or circumstantial, on which it had a right to rely. *See* ***State v. Poellinger***, 153 Wis.2d 493, 503-05, 451 N.W.2d 752, 756-57 (1990).

We will not substitute our judgment for the jury's "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value" that no reasonable jury "could have found guilt beyond a reasonable doubt." ***Id.*** at 507, 451 N.W.2d at 757-58. There is evidence in this record to support the jury's conviction of Newman.

Newman was tried under the party to a crime statute. It was undisputed that Bridges was the direct actor. A defendant is liable under the party to a crime theory if he aids and abets the commission of the crime. An aider and abettor is someone who knows or believes that another person is committing, or intends to commit, a crime and knowingly either renders aid to that person or stands by, ready and willing to render aid if needed, and the person who directly commits the crime knows of his willingness to help. *See* ***Sharlow***, 110 Wis.2d at 238-39, 327 N.W.2d at 698.

Here, Newman verbally encouraged his friend Bridges to "fuck up somebody." Seconds later, while chasing the victim, Newman encouraged Bridges to "shoot the bitch." Bridges announced that he "got the bitch." Both Newman and Bridges were members of the Vice Lords gang and Newman announced after the killing that he had to protect his brothers and sisters.

Even if Newman did not physically aid in the murder, he verbally encouraged Bridges to commit the crime. A person may become an accomplice without rendering physical aid by acting to induce another to commit the crime through words or gestures of encouragement. *See* ***Sharlow***, 110 Wis.2d at 239 n.11, 327 N.W.2d at 699 n.11. This alone would be sufficient to support Newman's conviction.

But there was also evidence that Newman did provide physical aid by chasing the fleeing victim and shooting at her himself as she fled. Although there was evidence disputing these facts, the jury was free to believe the witnesses who testified against Newman. *See* ***Kohlhoff v. State***, 85 Wis.2d 148, 154, 270 N.W.2d 63, 66 (1978) (jury determines which witness provides credible testimony when conflicting testimony presented).

Here, Newman put "into motion the wheels of a mechanism" that led to Vance's murder. ***State v. Hecht***, 116 Wis.2d 605, 624, 342 N.W.2d 721, 731 (1984). He kept "those wheels turning in a fluid motion." ***Id.*** Accordingly, he is liable for committing the crime under the aider and abettor theory of party to a crime liability. *See* ***id.*** at 624, 342 N.W.2d at 731-32.

By the Court.—Judgment affirmed.

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