COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2103-CR **Cir. Ct. No. 2012CF487**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. LEE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for La Crosse County: SCOTT L. HORNE, Judge. *Affirmed*.

Before Lundsten, Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Anthony Lee appeals judgments convicting him after a jury trial of multiple crimes, including burglary, battery, substantial battery, and second-degree recklessly endangering safety, all as party to a crime and by use of a dangerous weapon. Lee contends that: (1) the evidence was insufficient to

support application of the dangerous weapon enhancer; (2) the evidence was insufficient to support the convictions for substantial battery and second-degree recklessly endangering safety; (3) the circuit court erred by denying Lee's motions challenging the sufficiency of the evidence at trial; and (4) the circuit court erroneously exercised its discretion by instructing the jury as to the "natural and probable consequences" theory of liability. We conclude that the evidence was sufficient to support the enhancer and the convictions, and that the circuit court did not err by denying Lee's motions or by instructing the jury as to the natural and probable consequences of the underlying burglary. We affirm.

¶2 The State presented the following evidence at trial. Around midnight on July 15, 2012, Lee and another man, Brett Clark, entered an apartment in La Crosse that was rented by college students B.S., C.S., J.J., and J.R. At that time, B.S., C.S., and a friend were eating pizza on a rear deck; none of them had met Lee or Clark before or given them permission to enter the apartment. When Lee and Clark encountered the three men on the deck, Lee asked for a slice of pizza. After a brief argument over the pizza, Lee punched B.S. in the face. A fight ensued, during which the occupants of the apartment forced Lee and Clark out of the building; eventually Lee and Clark fled. During the fight, B.S. suffered a deep laceration to his cheek that required stitches. When Lee and Clark were arrested, police recovered a knife near Clark; later tests showed the knife had B.S.'s blood on the blade.

¶3 Lee contends that the evidence was insufficient to support the dangerous weapon enhancer. Lee argues that evidence that Clark possessed the knife was insufficient to support the enhancer as to Lee, contending that Clark's

possession of the knife was not a "natural and probable" consequence of the intended burglary.[1] *See* ***State v. Ivy***, 119 Wis. 2d 591, 596-97, 350 N.W.2d 622 (1984) ("[A]n aider and abettor may be guilty not only of the particular crime that to his knowledge his confederates intend to commit, but also for different crimes committed that are a natural and probable consequence of the particular act that the defendant knowingly aided or encouraged."). We disagree.

¶4 Party to a crime liability extends to the "natural and probable consequences of the intended crime." ***State v. Hecht***, 116 Wis. 2d 605, 624, 342 N.W.2d 721 (1984). The nature and probable consequences may include a co-actor's possession of a dangerous weapon during the commission of the intended crime. *See* ***Ivy***, 119 Wis. 2d at 600-01.

¶5 In ***Ivy***, the supreme court held that armed robbery may, under particular facts, be a natural and probable consequence of a robbery; thus, a defendant may be liable as party to the crime of armed robbery "even though he or she did not actually know that the person or persons who directly committed the armed robbery were armed with a dangerous weapon." ***Id.*** at 600. The supreme court noted that robbery itself is a violent crime, and that there are numerous situations in which armed robbery would be a natural and probable consequence of robbery. ***Id.*** at 601. The court also stated that "whether an act committed was the natural and probable consequence of the act the aider and abettor encouraged, and the extent of his or her knowledge, are questions of fact for the jury." ***Id.***

[1] The State does not contend that there was any evidence that Lee personally possessed or used the knife.

¶6 Lee attempts to distinguish ***Ivy*** by arguing that burglary, unlike robbery, is not an inherently violent crime. He argues that the possibility of violence during a burglary may be remote, as in the burglary of an unoccupied building.[2] Lee also contends that, in this case, there were no facts to support a finding that Clark's possession of a knife was foreseeable to Lee. He contends that the following facts establish that Lee was not expecting to encounter any occupants in the apartment: (1) the apartment was not well-lit; (2) the occupants were sitting quietly on the rear deck, where they could not be seen by Lee when he entered the apartment; (3) the occupants had not completed moving into the apartment; and (4) Lee appeared surprised to see the men on the rear deck.[3] Lee also points to the intervening negotiations over pizza as supporting the conclusion that the ensuing violence was unforeseeable. He argues that Clark's possession of the knife was incidental and unrelated to the planned burglary. He argues that the only reasonable inference is that Lee could not have foreseen that Clark would be armed with a dangerous weapon as part of the planned burglary, and thus the evidence was insufficient to support the dangerous weapon enhancer.

¶7 We conclude that the evidence was sufficient for the jury to find that Clark's possession of the knife was a natural and probable consequence of the planned burglary. *See* ***Outagamie County v. Michael H.***, 2014 WI 127, ¶21, 359

[2] Burglary is the intentional entrance of one of the places identified in WIS. STAT. § 943.10(1m) "without the consent of the person in lawful possession and with intent to steal or commit a felony in such place." All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] Lee also points out that it was a weekend; the neighborhood was populated by college students; there was a lively party going on next-door; and one occupant of the apartment "was so thoroughly passed out that he missed out on the entirety of the events at issue." Lee does not explain how those facts support Lee's argument that the only reasonable inference was that the apartment appeared to be unoccupied.

Wis. 2d 272, 856 N.W.2d 603 ("If we find that there is 'any credible evidence in the record on which the jury could have based its decision,' we will affirm that verdict." (quoted source omitted)). The State presented evidence that Lee and Clark entered the dimly lit apartment around midnight. It was reasonable for the jury to infer that Lee would reasonably expect that occupants of the apartment might be home, and might respond to Lee and Clark's unauthorized entry with violence. It was further reasonable for the jury to infer that Lee would reasonably foresee that Clark would be armed in anticipation of possible violence during a burglary of a private residence late at night. Accordingly, we will not disturb the jury's verdict.

¶8 Lee also contends that evidence that Clark injured B.S. with the knife was insufficient to support Lee's convictions for substantial battery and second-degree recklessly endangering safety. Lee contends that substantial battery and recklessly endangering safety were not natural and probable consequences of the intended burglary. Lee contends that the evidence established that Lee planned to burglarize an apparently unoccupied residence, and thus could not have reasonably foreseen that Clark would stab someone in the face over a piece of pizza. He contends that the stabbing was a "wildly improbable act owing to bizarre intervening circumstances and highly irregular behavior on the part of Mr. Clark that cannot be reasonably linked to the underlying, contemplated criminal activity." Again, we disagree.

¶9 For the reasons set forth above, we conclude that there was sufficient evidence for the jury to find that use of the knife in the course of the burglary was a natural and probable consequence of the burglary itself. As explained, the State presented evidence that Lee and Clark unlawfully entered a private residence late at night; the jury could reasonably infer that the violence that followed between

Lee and Clark and the occupants of the residence was a natural and probable consequence of that unauthorized entry. We disagree with Lee's categorization of Clark's behavior as "wildly improbable" and related to a disagreement over pizza rather than related to the burglary. Rather, the State's evidence showed that Lee and Clark had a short discussion with the apartment occupants on the ostensible topic of pizza after they were discovered burglarizing the apartment, and that the physical violence quickly followed. Accordingly, we uphold the jury's verdict.

¶10 Finally, Lee contends that the circuit court erred by: (1) denying his motion for a directed verdict as to second-degree recklessly endangering safety and substantial battery; (2) denying his motion to dismiss those charges; and (3) instructing the jury as to the "natural and probable consequences" theory of liability. The basis for each of these arguments is that the evidence was insufficient to support a finding that either the reckless endangerment or substantial battery was a natural and probable consequence of the underlying burglary. Because we have already rejected that argument, we reject these final arguments as well.

By the Court.—Judgments affirmed.

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