COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0117-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH H. ECKSTEIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Joseph Eckstein appeals from a judgment convicting him of conspiracy to commit first-degree intentional homicide and solicitation to commit first-degree intentional homicide, contrary to WIS. STAT. §§ 940.01(1),

939.31 and 939.30.[1] He also appeals from the order denying his motion for postconviction relief. Eckstein argues that (1) the evidence was insufficient to support his convictions; (2) the trial court erred by convicting him of both conspiracy and solicitation to commit first-degree intentional homicide because solicitation is a lesser-included offense of conspiracy; and (3) the trial court misused its discretion in sentencing. We reject Eckstein's arguments and affirm the judgment and order.

BACKGROUND

¶2 Joseph and Annamaria Eckstein were married in 1988. After Annamaria filed for divorce in March of 1998, the couple's dispute over division of the marital property ultimately led to contempt and criminal actions. During this time, Joseph met Chrystal Graham through his then-girlfriend, Delores Wuhrman.

¶3 During Eckstein's trial to the court, Graham testified that in April of 1998, Eckstein told Graham he wished he knew somebody who could "get rid of" his wife. Graham informed Eckstein that her son, Mervel, could find someone to do it. Although specifics were not mentioned during this first conversation, Graham and Eckstein later met to discuss the price of "the job," ultimately agreeing to $10,000. The two met for a third time a few days later. At the third meeting, Eckstein reiterated that he wanted his wife "bumped off" the week of June 13 as he would be attending a wedding out of town. Graham informed Eckstein that Mervel suggested planting drugs on Annamaria rather than killing

[1] All statutory references are to the 1997-98 version unless otherwise noted.

her, as "it would be too risky to kill somebody." Eckstein agreed to the alternative plan.

¶4 At a fourth meeting, Eckstein gave Graham $1,000 to pay for the drugs and three calling cards to allow Graham to more easily communicate with Mervel, who was then institutionalized at Wisconsin Resource Center. Eckstein also gave Graham keys to Annamaria's car, a business card with Annamaria's photo on it, her work address, home address, and addresses of friends with whom she might visit. Ultimately, however, Graham was unable to obtain any drugs. In late June, Graham returned the $1,000, the identification and keys to Eckstein. About a month later, Graham and Eckstein again discussed the plan to "get rid of" Annamaria. Graham, however, had changed her mind about participating in any criminal activity.

¶5 Consequently, on August 31, Graham reported her discussions with Eckstein to the Green Bay Police Department and agreed to be wired for her next meeting with Eckstein. On September 1, Eckstein contacted Graham to ask if she would be a witness for his divorce proceedings. The two agreed to meet in person on September 2. The subsequent conversations between Eckstein and Graham were memorialized by tape recording. During the September 2 meeting, Eckstein stated that "he was going to do things his way this time" and further told Graham that he wanted her to get rid of Annamaria by October 15. Eckstein then made various suggestions on how to kill Annamaria. He demonstrated, without speaking, how to slash her throat or stab her in the stomach. Alternatively, he suggested that Graham spray oven cleaner in her mouth. Graham and Eckstein additionally agreed that she would get $500 up front and another $500 several days after the job had been done. Eckstein would then pay Graham $10,000 after

he was cleared of any involvement in the crime. Finally, the two agreed that the job would be done the following weekend, as Eckstein would be out of town.

¶6 On September 3, the two met again. Eckstein gave Graham the initial $500, the business card with Annamaria's photo, keys to Annamaria's car and information on where to find her. Eckstein suggested that it would be easy for Graham to bury Annamaria's body in a cornfield because it was time for farmers to plant their corn. Eckstein additionally told Graham that if she needed a car, she should just change the vehicle identification number on Annamaria's car and retitle it in her name.

¶7 Eckstein testified that it was Graham who initially broached the idea of "getting rid" of Annamaria. He claimed that Graham conferred with her son and suggested three options to Eckstein: (1) plant drugs on Annamaria; (2) take her out of the country; or (3) kill her. Eckstein testified that although he agreed to pay $10,000 to plant drugs on Annamaria, he never agreed to any plan that involved killing his wife. He further testified that it was his understanding that any subsequent references to "hurting" or "getting rid of" Annamaria involved only the plan to plant drugs on her.

¶8 The trial court convicted Eckstein of both conspiracy and solicitation to commit first-degree intentional homicide. His motion for postconviction relief was denied and this appeal followed.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

¶9 Eckstein argues that the evidence was insufficient to support his convictions for solicitation and conspiracy to commit first-degree intentional homicide. In reviewing a challenge to the sufficiency of the evidence, we:

> may not substitute [our] 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. 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Under this standard of review, we conclude that the record is sufficient to uphold the convictions.

¶10 Eckstein argues that the State failed to prove each element of the charged offenses beyond a reasonable doubt. We disagree. The crime of conspiracy is committed by one who, with intent that a crime be committed, "agrees or combines with another for the purpose of committing that crime," if one or more of the parties to the conspiracy does an act to effect its object. WIS. STAT. § 939.31. The State had the burden of proving beyond a reasonable doubt that (1) Eckstein intended that the crime of first-degree intentional homicide be committed; (2) Eckstein was a member of a conspiracy to commit first-degree intentional homicide; and (3) one or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and

agreement. *See* WIS J I—CRIMINAL 570; *see also* ***State v. West***, 214 Wis. 2d 468, 476, 571 N.W.2d 196 (Ct. App. 1997).

¶11 On appeal, Eckstein reiterates his claim that the plan was never to kill Annamaria, but rather, only to plant drugs on her. He argues that there was never a common criminal objective between the conspirators. Although the trial court recognized that intent is often difficult to prove, it nevertheless found Eckstein's intent to kill his wife in both his words and his conduct. Despite Eckstein's protestations to the contrary, the trial court is the ultimate arbiter of the credibility of witnesses, *see* ***State v. Holt***, 128 Wis. 2d 110, 121, 382 N.W.2d 679 (Ct. App. 1985), and was entitled to rely on Graham's testimony. Eckstein's delivery of the money, identification, keys and addresses, in combination with Eckstein's words, memorialized by tape recording, were sufficient to establish the elements of conspiracy to commit first-degree intentional homicide.

¶12 With respect to his conviction for solicitation to commit first-degree homicide, Eckstein similarly contends that the State failed to prove the elements of the crime. Solicitation is committed by one who, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has that intent. *See* WIS. STAT. § 939.30. Here, the State had the burden of proving beyond a reasonable doubt that Eckstein (1) intended that the crime of first-degree intentional homicide be committed; and (2) advised another person, by the use of words or other expressions, to commit first-degree intentional homicide. *See* ***id.***; s*ee also* WIS J I—CRIMINAL 550. Again, given Graham's testimony of Eckstein's conduct, combined with the tape recording of his words, we conclude there was sufficient evidence for the trier of fact to convict Eckstein of solicitation to commit first-degree intentional homicide.

II. CONSPIRACY -- SOLICITATION

¶13 Eckstein argues that the trial court erred by convicting him of both conspiracy and solicitation to commit first-degree intentional homicide. Citing WIS. STAT. § 939.66, Eckstein contends that conspiracy and solicitation are gradations of the substantive offense of homicide, making solicitation a lesser-included offense of conspiracy and thus precluding his conviction for both crimes.[2] Specifically, Eckstein focuses on the maximum penalty that may be imposed for the respective crimes to support his contention that solicitation is a "less serious" type of criminal homicide than conspiracy. We are not persuaded. Although § 939.66(2) defines a less serious type of criminal homicide as a lesser-included offense when a more serious variety of homicide is charged, solicitation and conspiracy are not gradations of the crime of homicide. Rather, solicitation and conspiracy are separate crimes in and of themselves.

¶14 Under the Criminal Code, WIS. STAT. ch. 939, solicitation and conspiracy appear under the section entitled "INCHOATE CRIMES."[3] One may commit an inchoate crime without the intended substantive crime ever having been committed. Because solicitation and conspiracy are not gradations of the substantive offense of homicide, but rather, discrete crimes, we conclude that WIS.

---

[2] WISCONSIN STAT. § 939.66 provides, in relevant part:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> ….
>
> (2) A crime which is a less serious type of criminal homicide than the one charged.
>
> (3)

[3] BLACKS LAW DICTIONARY 761 (6th ed. 1990), defines "inchoate":

> Imperfect; partial; unfinished; begun, but not completed; as a contract not executed by all the parties.

STAT. § 939.66's prohibitions against convictions for lesser-included offenses is inapplicable.

III. SENTENCING

¶15 The trial court sentenced Eckstein to forty years on the conspiracy count and ten years on the solicitation count, to run consecutively to the forty-year sentence. Eckstein contends that the trial court misused its discretion in sentencing him. However, we recognize a strong policy against interference with the trial court's discretion in imposing sentence. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). On review:

> an [erroneous exercise] of discretion will be found only when the trial court fails to exercise its discretion, or "where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."

Id. (quoting ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975)). The trial court must consider the following factors in imposing sentence: "(1) the gravity of the offense, (2) the character and rehabilitative needs of the offender, and (3) the need for protection of the public." ***Id.***

¶16 Eckstein argues that the court misused its discretion by failing to adequately consider and sufficiently weigh the fact that he was a first-time offender of considerable age. Specifically, he contends that given the fact that he was sixty-years-old at the time of sentencing, a forty-year sentence is tantamount to a life sentence. We conclude that the trial court properly considered any mitigating factors in sentencing Eckstein. The court recognized it had the option of imposing a maximum fifty-year sentence for the crimes Eckstein committed. It

noted Eckstein's beliefs that (1) he did nothing wrong; and (2) God had forgiven him for whatever he did, thus precluding the need for punishment. The court also considered the mitigating factors of Eckstein's age, lack of prior criminal record, and upbringing. It nevertheless concluded: "It is hard to give [the mitigating factors] great weight … in the face of such a serious offense." In any event, the trial court did not even impose the maximum sentence allowed. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). Based on this record, we conclude that the trial court properly exercised its discretion and that Eckstein's sentence was not excessive under the circumstances.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.