

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 9, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2012AP2108-CR**

**Cir. Ct. No. 2009CF1123**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOHN M. NAVIGATO,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS and ALLAN B. TORHORST, Judges.<sup>1</sup> *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

---

<sup>1</sup> The Honorable Anthony G. Milisuskas tried the case and entered the judgment of conviction. The Honorable Allan B. Torhorst denied the defendant's postconviction motion.

¶1 BROWN, C.J. John Navigato was convicted of first-degree murder and other crimes in a joint trial with codefendant Teddy Bieker. Navigato was the ringleader of the group that committed these crimes, but Bieker fired the fatal shot. As we explain in our opinion in Bieker’s appeal, the only issues for trial concerned the parties’ intentions—in particular, whether Bieker shot the victim intentionally or accidentally. *State v. Bieker*, No. 2012AP2693-CR, unpublished slip op., ¶¶4, 46-48 (WI App Apr. 9, 2014).

¶2 The circuit court, relying upon the district attorney’s assertion of the so-called “interlocking confessions” doctrine, denied Navigato’s and Bieker’s motions to sever their trials, even though the State intended to use both defendants’ out-of-court statements implicating each other as evidence in the trial. The interlocking confessions doctrine had been abrogated for more than twenty years. *See Cruz v. New York*, 481 U.S. 186, 191-94 (1987). Forcing Navigato and Bieker into a joint trial with all of their out-of-court statements admitted as evidence therefore violated *Cruz*, and it also violated Wisconsin statutory law:

The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

WIS. STAT. § 971.12(3) (2011-12).<sup>2</sup>

¶3 On appeal, the State admits the significant error here but argues that it was harmless because Bieker testified, curing any Confrontation Clause issues as to Navigato. But the more fundamental problem is that, as we have explained

---

<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

in our opinion in Bieker’s appeal, *Bieker*, No. 2012AP2693-CR, ¶¶47-52, the errors undermined the reliability of the jury’s verdicts finding Bieker guilty of the crimes. If the verdicts against Bieker cannot be trusted, then, necessarily, the related verdicts against Navigato cannot be trusted either.

¶4 For a detailed description of the underlying crimes and prosecution, see our opinion in Bieker’s appeal. *Id.*, ¶¶5-41. For purposes of Navigato’s appeal, a summary suffices. The four men involved in these crimes were caught leaving the scene, with the weapons they had carried there. *Id.*, ¶¶5-8. Neither Navigato nor Bieker denied going to the house, having a confrontation with the victim, or that a shot was fired from Bieker’s .22 caliber rifle at the scene. *Id.*, ¶¶12-13. The issues for trial related to the parties intentions—i.e., what were their intentions in going to the victim’s house that night, and did Bieker intentionally fire the fatal gunshot? See *id.*, ¶¶19, 46-51. The erroneous failure to sever the trials prejudiced the trial on those very issues, rendering the jury’s verdicts against Bieker unreliable.

¶5 If the Bieker verdicts are unreliable, then, necessarily the Navigato verdicts are unreliable too. As the jury instructions explained, to find Navigato guilty of first-degree intentional homicide, even though Bieker pulled the trigger, the jury had to find that (1) the parties committed armed robbery, (2) first-degree intentional homicide was committed, and (3) that the homicide was a “natural and probable consequence of armed robbery.” See *State v. Ivy*, 119 Wis. 2d 591, 602, 350 N.W.2d 622 (1984) (explaining that a defendant may be liable for “any crime that was committed as a natural and probable consequence of the intended criminal acts, as well as the crime the defendant knowingly aided and abetted”). The linchpin of such a verdict was a finding by the jury that Bieker committed the crime of first-degree intentional homicide. That finding cannot be trusted because

the error in denying the motion to sever the trials yet admitting the codefendants' out-of-court statements incriminating each other tainted the trial on that very issue. *See Bieker*, No. 2102AP2693-CR, ¶51.

¶6 Nor can we trust any of the other verdicts against Navigato. The verdicts cannot be disentangled. The viability of Navigato's defense depended in large part on Bieker's credibility with the jury, which was undermined by the errors here. *See id.*, ¶52. Navigato's convictions are reversed and the case is remanded for new proceedings. If the State wants to use these defendants' out-of-court statements as evidence against them, it must do so in separate trials, consistent with the rules of evidence.<sup>3</sup>

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

---

<sup>3</sup> Because we reverse on other grounds, we need not address Navigato's arguments concerning the admission of testimony by a jail informant concerning an alleged confession by Bieker and the State's alleged failure to disclose impeaching evidence concerning that informant. The admissibility of testimony by that informant and impeaching information concerning that informant are issues for the new proceedings.

