COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3327-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAYMOND D. SHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

PER CURIAM. Raymond D. Shaw appeals from a judgment entered after a jury convicted him of one count of first-degree intentional homicide, party to a crime, and one count of armed robbery, party to a crime,

contrary to §§ 940.01(1), 943.32(1)(b), and 939.05, STATS.[1] He claims the trial court erred in refusing to instruct the jury on the lesser-included offense, felony murder, and that the trial court erroneously exercised its discretion in declining to give the jury the withdrawal from a conspiracy instruction, WIS J I—CRIMINAL 412. Because there was no reasonable basis in the evidence to give either instruction, we affirm.

I. BACKGROUND

On November 1, 1995, Shaw and his seventeen-year-old friend, M.B., decided to rob a drug dealer, Edwynn White. Shaw's pistol was used. After the robbery, White was shot twice in the head and died from the gunshot wounds. Shaw claimed in a statement to the police that M.B. was the shooter. M.B. claimed that Shaw was the shooter. The State contended at trial that Shaw did the shooting, but that even if M.B. had shot White, Shaw was still guilty under the party to a crime theory. The jury found Shaw guilty. He now appeals.

II. DISCUSSION

A. Felony Murder Instruction.

Shaw claims the trial court erred by failing to instruct the jury on the lesser-included offense of felony murder. He contends that under his version of the facts, the jury should have been given the option of acquitting him of first-degree intentional homicide in favor of convicting him of felony murder. We are not persuaded.

[1] Shaw challenges only the first-degree intentional homicide conviction.

In determining whether to submit a lesser-included offense jury instruction, a trial court must perform a two-step analysis. *See* ***State v. Muentner***, 138 Wis.2d 374, 387, 406 N.W.2d 415, 421 (1987). First, it should determine whether the crime is a lesser-included offense of the charged crime. *See* ***id.*** Second, it must weigh whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense. *See* ***id.*** If both steps are satisfied, the trial court should submit the lesser-included instruction to the jury if the defendant requests it. *See* ***State v. Weeks***, 165 Wis.2d 200, 209, 477 N.W.2d 642, 645 (Ct. App. 1991). A trial court commits reversible error if it refuses to submit an instruction on an issue that is supported by the evidence. *See* ***id.*** at 208, 477 N.W.2d at 645. Whether the evidence adduced at trial requires a jury charge on the lesser-included offense instruction is a question of law that we review de novo. *See* ***id.*** at 209, 477 N.W.2d at 645. In addition, we must view the evidence in a light most favorable to the defendant. *See* ***State v. Davis***, 144 Wis.2d 852, 855, 425 N.W.2d 411, 412 (1988).

Here, it is not disputed that the first step is satisfied–felony murder is a lesser-included offense of first-degree intentional homicide. Therefore, we examine only whether the evidence meets the second step of the test warranting submission of the felony murder instruction. Our review involves determining whether there was a reasonable basis in the evidence for a jury to acquit on the greater offense of first-degree intentional homicide and to convict on the lesser offense of felony murder. We conclude there was not.

Shaw's theory underlying a felony murder instruction is that M.B. was the primary actor in committing these crimes. This evidence came in only

through a statement that Shaw gave to the police.[2] Shaw did not testify. In this statement, Shaw claims that M.B. suggested they rob White because they did not have the money to pay for the drugs White brought over. Shaw states that he (Shaw) was reluctant to do so for fear of retribution. Shaw indicated that he told M.B. that White was sitting on the couch. Shaw stated that M.B. held Shaw's pistol to White and robbed him. The three then went to White's van and Shaw drove while M.B. held White at gunpoint. When they parked, Shaw states he told M.B. to keep White "on point" so he "don't buck us as we're leaving." Shaw left the van and started running away. Shaw heard two shots and when M.B. caught up with Shaw, M.B. said he had to "buck" White because he was shady.

All of the other evidence suggests that Shaw was the instigator of the armed robbery and the shooter. M.B. testified that Shaw had called him on November 1, 1995, and they arranged to smoke marijuana together at Shaw's apartment that he shared with his girlfriend. While at the apartment, White showed up. M.B. saw White sitting at the table. Shaw went to a bedroom and came out carrying a small silver gun and said "I'm about to lick this nigger." Less than twenty seconds later, Shaw had White at gunpoint. Shaw patted White down and took his cellular phone, pager, bags of cocaine and his van keys. Shaw then told M.B. to take the keys because the three of them were going for a ride in White's van. M.B. drove and White was in the front passenger seat. Shaw was in

[2] Shaw actually gave 5 statements to the police over the course of 24 hours. The statement he relies on was the 5th and last statement given. This statement was given only after he was informed that M.B. and Shaw's girlfriend had given statements. In Shaw's first 3 statements, he denied having seen White on the night of the incident. In the 4th statement, Shaw claimed that he had arranged for White to come to his apartment to sell him drugs, but that White never made it into the apartment because M.B. had crept up on White's van as White was parking outside Shaw's apartment. Shaw claimed that M.B. drove away with White in the van and came back 30 minutes later announcing that White was dead.

the back seat with the gun. After traveling seven or eight blocks from the apartment, M.B. parked the van, got out and ran because he was not sure what was going to happen. M.B. heard two gunshots and, about thirty seconds later, Shaw caught up with him. M.B. asked Shaw why he shot White and Shaw replied that he had White's cocaine and was not giving it back. M.B. asked Shaw where he shot White and Shaw said in the leg and foot. Once they were back at Shaw's apartment, Shaw took a shower, saying something about gunpowder. He had M.B. give him the shirt Shaw had been wearing and Shaw placed it in the bottom of the bathtub while he was showering.

Shaw's neighbor, Maurice Ware, testified that Shaw woke him up late on November 1, 1995, and asked him to keep a plastic bag for him. The bag contained Shaw's pistol, White's cellular phone, pager, keys and the wet clothes that Shaw had been wearing on that night. Shaw's girlfriend identified the clothes and the gun as belonging to Shaw.

With the exception of Shaw's statement, all of the evidence supports the State's theory that Shaw shot and intentionally killed White. Shaw's statement is insufficient to warrant the lesser-included instruction. A lesser-included instruction is not warranted when it is supported by a mere scintilla of evidence, but requires *appreciable* evidence to warrant the instruction. *See* ***Ross v. State***, 61 Wis.2d 160, 171, 211 N.W.2d 827, 832-33 (1973).

There is no reasonable view of the evidence, even taking Shaw's statement in a light most favorable to him, under which a jury could acquit of first-degree intentional homicide and convict of felony murder. Even if it were reasonable to believe that M.B. was the principal actor, that would not permit an acquittal of first-degree intentional homicide because Shaw still aided and abetted

and conspired with M.B. to rob White. Shaw, knowing that M.B. intended to rob White, allowed White to enter the apartment and brought White to where M.B. was waiting to rob him. Prior to the time the robbery occurred, Shaw provided M.B. with information about where White was located in the apartment. Shaw took White's keys and went with M.B. and White to White's van, where Shaw assisted in getting White away from the scene of the armed robbery. M.B. used Shaw's gun. Once they reached the scene of the murder, Shaw told M.B. to keep White covered while they made their getaway. Even under Shaw's version, there is only one reasonable conclusion–that Shaw aided and abetted and conspired to commit the armed robbery.

Further, the uncontroverted evidence demonstrates that the shooter intended to kill White. The medical examiner testified that two shots were fired into White's head. One shot was from one inch away and one shot was from a foot away. Under a party to a crime theory, a principal's intent is imputed to the accomplice where the crime is a natural and probable consequence of the crime that the accomplice has aided or abetted. *See* § 939.05(2)(c), STATS.

The only remaining question, therefore, is whether, under these facts, a reasonable jury could find that the homicide was not a natural and probable consequence of the armed robbery. If the murder was a natural and probable consequence of the robbery, then Shaw was guilty of first-degree intentional homicide as party to a crime and there is no reasonable possibility that the jury could acquit Shaw of this charge.[3] In reviewing the evidence, we

[3] The fact that Shaw may also be guilty of felony murder does not alter the analysis. In order to submit a lesser-included instruction, there must be appreciable evidence on which the jury could acquit on the greater crime.

conclude that there is no reasonable jury that could find that the homicide was not a natural and probable consequence of the armed robbery.

The homicide was incontrovertibly linked to the armed robbery because it was the natural culmination of an armed confrontation of one drug dealer (Shaw) robbing another drug dealer (White) at gunpoint and then killing him in order to complete the robbery, assure escape, and prevent retribution. In addition, according to Shaw, he drove the victim away from the robbery scene while M.B. held a gun to White's head. There was some heated conversation concerning whether White would seek retribution for the armed robbery. White feared that he was going to be killed and offered to turn over his drugs and even his van. Shaw instructed M.B. to keep the gun pointed at White while Shaw ran away. It appeared, based on the foregoing, that White was going to be killed. Under these facts, there is no reasonable view under which a jury could find that the homicide was not a natural and probable consequence of the armed robbery. *See also* ***State v. Oimen***, 184 Wis.2d 423, 441, 516 N.W.2d 399, 407 (1994) (death is a natural and probable consequence of the felony of armed robbery). Even if M.B. was the shooter, his intent to kill is imputed to Shaw and, therefore, the trial court did not err in declining to give the felony murder instruction.

B. Withdrawal Jury Instruction.

Shaw also claims the trial court erroneously exercised its discretion when it refused his request for the withdrawal from a conspiracy jury instruction, WIS J I—CRIMINAL 412.[4] We do not agree.

[4] WIS J I—CRIMINAL 412 (1994) provides:

(continued)

A trial court possesses broad discretion in choosing which jury instructions should be given. *See* ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). We will not find that the trial court erroneously exercised its discretion in charging the jury so long as the instructions adequately cover the law applicable to the facts. *See* ***State v. Lagar***, 190 Wis.2d 423, 433, 526 N.W.2d 836, 840 (Ct. App. 1994).

Based on our review of the record, we conclude that there was no basis for giving the withdrawal instruction. Shaw claims that his statement to M.B. to "make sure to keep him on point so he don't buck us as we're leaving" indicates intent to leave White without killing him. We do not share the same view in interpreting this statement. The statement does not express Shaw's desire that White not be killed. Rather, the statement expresses a desire to keep the gun pointed at White so that White does not kill Shaw. There is no evidence that Shaw withdrew from the conspiracy to commit the crime.

Further, we are not persuaded by Shaw's claim that running away from the van before the shooting occurred evidenced his intent to withdraw from the conspiracy.

> A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme which

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> You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.
>
> A person withdraws if he voluntarily changes his mind, no longer desires that the crime be committed, and notifies the others of his withdrawal far enough before the commission of the crime to allow the other parties also to withdraw.
>
> A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

> he has helped to devise and carry forward because, as the result either of fear or even of a better motive, he concludes to run away at the very instant when the act in question is about to be committed and when the transaction which immediately begets it has actually been commenced.

State v. Dyleski, 154 Wis.2d 306, 310-11, 452 N.W.2d 794, 796 (Ct. App. 1990) (citation and quotation marks omitted). At the time Shaw ran from the scene, it was too late to withdraw from the conspiracy. Shaw did not take any action to discourage the homicide or convey, with any degree of clarity, that he no longer wanted to participate in the scheme. Therefore, the trial court did not erroneously exercise its discretion when it declined to charge the jury with the withdrawal instruction.

By the Court.—Judgment affirmed.

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