

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1479-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS E. VEST, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Douglas Vest, Jr., appeals from a judgment convicting him as a party to the crime of first-degree intentional homicide and as a party to the crime of possessing a short-barreled shotgun and from an order denying his motion for postconviction relief. The issues are whether the trial court

properly refused to exclude the testimony of a state witness and properly instructed the jury. We affirm on both issues.

The State charged Vest as a party to the murder of Ruben Borchardt. In statements to police, Vest admitted his participation in the crime. He also reported that several hours before the murder Shannon Johnson had threatened to kill him if he did not do it or if he implicated Borchardt's wife, Diane Borchardt, in the murder. Before Vest's jury trial, the court granted his motion to introduce a coercion defense, based on his testimony that Johnson forced him to participate in the murder by threatening to kill him and his mother if he did not do so. Also before trial, the court issued a sequestration order that applied to all witnesses.

The State called various witnesses at trial who testified to Vest's participation in a conspiracy to kill Borchardt, and in the killing itself. The State called Johnson to the stand where initial questioning revealed that the State never informed her of the sequestration order and consequently she had listened to ten to fifteen minutes of testimony on a radio broadcast. The trial court denied Vest's motion to exclude her as a witness on the grounds that he had shown no prejudice from Johnson's brief exposure to the trial. The State then determined that it would call Johnson as a rebuttal witness, if necessary.

Vest's defense relied on testimony that Diane Borchardt and Johnson manipulated and coerced him into participating in Borchardt's murder. He testified to various occasions when Diane attempted to recruit him, including the day of the murder when she forced money on him. Immediately afterward, Johnson, who was present, threatened to kill him and his mother if he did not do as Diane wanted. He further testified that after the murder Johnson again threatened to kill him for acts that might implicate Diane. Vest further testified that he never

agreed to kill Borchardt, never asked for money and never otherwise conspired with her to commit the murder.

The State called Johnson to rebut Vest's testimony and acknowledged that it had offered her consideration in a pending perjury case in exchange for her testimony. Johnson denied threatening to kill Vest either before or after Borchardt's murder, but admitted saying to him "you better not rip her off" after Vest accepted Diane's money and promised to do the killing.

At the close of evidence, the trial court instructed the jury that coercion is a defense to criminal liability and informed the court that the only evidence of coercion was Vest's testimony that Johnson threatened to kill him and his mother. The court further instructed:

You should now determine whether, beyond a reasonable doubt, the defendant and Shannon Johnson were co-conspirators in the first-degree intentional homicide of Ruben Borchardt at the time the alleged threat was made.... If you do so find, then you should find the defendant's conduct is not privileged under the law of coercion and you should not consider the charge of second-degree intentional homicide. If you don't so find, then you must consider whether the defendant's conduct was privileged under the law of coercion.

Defense counsel objected to the instruction on conspiracy because there was insufficient evidence to find that the two conspired in the murder. The trial court concluded, however, that the interaction between Johnson and Vest when she made the purported threat was sufficient evidence of a conspiracy to justify the instruction. The jury rejected the defense and convicted Vest on the homicide charge.

Vest first argues that the trial court erred in failing to exclude Johnson's testimony. We conclude, however, that the trial court properly allowed Johnson to testify despite her violation of the sequestration order. Section 906.15, STATS., authorizes sequestration orders to prevent witnesses from hearing the testimony of other witnesses. The decision whether to exclude a violating witness is left to the trial court's discretion. *State v. Bembenek*, 111 Wis.2d 617, 637, 331 N.W.2d 616, 626 (1983). The trial court properly excludes a violating witness if the party calling the witness was responsible for the violation and if it prejudiced the defendant. *Id.* Here, the trial court found no evidence of prejudice, and Vest identifies none on appeal. That is true even if, as Vest suggests, Johnson lied about the amount of time she spent listening to the broadcast of the trial. Vest still gives no concrete example of Johnson's testimony that appeared shaped or tailored to conform to testimony from other witnesses. The essential element of Johnson's testimony was her version of the conversation with Vest on the day of the murder. None of the other State's witnesses testified to that conversation or were present during it.

Vest next contends that the court erred by instructing the jury to consider whether Vest and Johnson were co-conspirators without evidence of a conspiracy between them. That error, in Vest's view, created a reasonable likelihood that the jury mistakenly found a conspiracy and therefore failed to consider Vest's coercion defense. We conclude that the alleged error did not prejudice Vest because he was not entitled to a coercion defense instruction in the first place. Coercion is a defense when someone who is not a co-conspirator threatens imminent death or great bodily harm to the defendant or another person, causing the defendant to reasonably believe that continued criminal conduct is the only means of avoiding the threat. Section 939.46, STATS. Vest introduced no

evidence that Johnson made a threat of imminent death or great bodily harm and no evidence that killing Borchardt hours later was the only means of preventing Johnson from carrying out her threat.

We also conclude that the court properly gave the conspiracy instruction in any event. “[W]hoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime” is guilty of conspiracy. Section 939.31, STATS. “It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other.” WIS J I—CRIMINAL 410 (1994). Here, even though Johnson and Vest had only one short conversation before the crime, there was ample evidence of a mutual understanding and a joint effort to effect the murder in concert with Diane Borchardt and others.

By the Court.—Judgment and order affirmed.

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

