

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 27, 2018**

Sheila T. Reiff  
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. 2017AP38-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2013CF004864

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DOMINIQUE P. WILDER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. Dominique P. Wilder appeals the judgment convicting him, after a jury trial, of first-degree reckless homicide by use of a dangerous weapon as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.63(1)(b), 939.05 (2013-14).<sup>1</sup> Wilder argues: (1) the evidence was insufficient to support a guilty verdict on the charge; (2) a supplemental jury instruction deprived him of a fair trial; and (3) discretionary reversal is warranted. We reject Wilder’s arguments and affirm.

## I. BACKGROUND

¶2 In an amended information, the State charged Wilder with one count each of first-degree reckless homicide by use of a dangerous weapon as a party to the crime and possession of a firearm by a felon.<sup>2</sup> The charges stemmed from Wilder’s role in the shooting death of E.P.<sup>3</sup>

¶3 E.P. was shot while driving a car full of passengers. He was hit by a bullet fired by the passenger of a car driving alongside his. The State’s theory was that Wilder and his brother Lewis killed E.P. because he had beaten Wilder’s sister. The State alleged that Wilder drove the car that pulled up alongside of E.P.’s car and that Lewis was the shooter.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>2</sup> Initially, Wilder was charged with one count of harboring or aiding a felon.

<sup>3</sup> The victim’s name is spelled inconsistently in the record. Although we are not required to do so, *see* WIS. STAT. RULE 809.86(3), we use the victim’s initials to ensure that we will not perpetuate any misspellings.

¶4 At trial, witnesses who were in E.P.’s car at the time of the shooting identified Wilder as the driver of the other car and Wilder’s brother, Lewis, as the shooter. Ashley Nelson, an ex-girlfriend of Wilder’s, testified that Wilder told her Lewis took a gun from him and shot E.P.

¶5 The jury found Wilder guilty of the first-degree reckless homicide charge but not guilty of the possession of a firearm by a felon.

¶6 The trial court sentenced Wilder to sixteen years of initial confinement and ten years of extended supervision. He appeals. Additional background information is discussed below as necessary.

## II. DISCUSSION

### A. *Sufficiency of the Evidence*

¶7 Wilder argues that the evidence was insufficient to support his conviction for first-degree reckless homicide by use of a dangerous weapon as a party to a crime. He contends that Nelson’s testimony about the gun was not believable and without it, the evidence showed only that he was the driver of the car and was unaware that his brother was going to shoot E.P. To support his position, he asserts that the jury must not have believed Nelson’s testimony given that it found him not guilty of being a felon in possession of a firearm.

¶8 “When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury’s determination and view the evidence in the light most favorable to the State.” *State v. Long*, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557. Whether the evidence is direct or circumstantial, this court “may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate 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.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 507, 451 N.W.2d 752 (1990). “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.” *Id.* at 507.

¶9 Here, the trial court instructed the jury that to convict Wilder of being a party to the crime of first-degree reckless homicide, it had to conclude Wilder or a person he was a party to the crime with caused the death of E.P. by criminally reckless conduct that showed an utter disregard for human life. *See* WIS JI-CRIMINAL 1022. The trial court also instructed the jury on party-to-a-crime liability, explaining that the jury could convict Wilder of first-degree reckless homicide if it found that he directly committed the crime or intentionally aided and abetted its commission. *See* WIS JI-CRIMINAL 400. The trial court informed the jury that a person does not aid and abet if he is a bystander or spectator and does not assist in the crime’s commission. *See id.*

¶10 To establish that a defendant was an aider and abettor, the State must show: “(1) that the defendant undertook some conduct (either verbal or overt) that as a matter of objective fact aided another person in the execution of the crime; and (2) that the defendant had a conscious desire or intent that the conduct would in fact yield such assistance.” *State v. Rundle*, 176 Wis. 2d 985, 990, 500 N.W.2d 916 (1993). It is not necessary for an aider and abettor to “share the intent required for direct commission of the offense.” *See State v. Sharlow*, 110 Wis. 2d 226, 238, 327 N.W.2d 692 (1983). Intent can be inferred from an aider and

abettor's conduct. See *State v. Hecht*, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984).

¶11 In his brief, Wilder describes the underlying facts:

The victim of the shooting had a relationship with the sister of the defendant. The victim severely beat the defendant's sister shortly before the shooting. The defendant's brother, without any doubt, was the person who shot the victim. The defendant was driving the car when his brother shot the victim and drove off immediately after the shooting occurred.

Wilder submits that his conviction is not supported by the evidence, which “[i]f anything ... supports [his] position that he was unaware of what was about to occur.” This argument, which seems to amount to a claim that Wilder was merely a bystander, ignores Nelson's trial testimony.

¶12 Nelson was the only witness who gave testimony that directly connected Wilder to the gun. Nelson was Wilder's girlfriend at the time of the shooting. She testified that after the shooting, Wilder told her that he and Lewis had pulled alongside E.P.'s car. Wilder told her that E.P. sped off, and that he and Lewis caught up to E.P.'s car. Nelson testified that Wilder told her he initially had the gun and that Lewis told him to shoot it, but he hesitated. Lewis then took the gun from Wilder and fired the shots.

¶13 Nelson also testified that Wilder used her car on the day of the shooting. Nelson was driving a rental car at the time. Nelson testified that on the day of the shooting, Wilder dropped her off at work in the rental car around 6:30 a.m. She said that Wilder returned to where she worked around lunch time and told her that they needed to return the car because there was a problem with the brakes. They then exchanged the car at the rental lot.

¶14 This evidence was sufficient to show that Wilder was a party to Lewis's crime. He aided Lewis in executing the crime by driving the car from which the fatal shots were fired and by providing the gun that Lewis used. Wilder's continued driving from the scene and the exchange of Nelson's rental car after the shooting were done in an effort to help Lewis avoid detection, which further aided him in the commission of the homicide. *See Carter v. State*, 27 Wis. 2d 451, 455, 134 N.W.2d 444 (1965) (explaining that getaway drivers and lookouts are properly convicted as parties to the crime).

¶15 Wilder takes issue with Nelson's testimony describing it as "inconsistent and erratic." However, it was the jury's function, not this court's, to resolve any discrepancies in the testimony and to assess Nelson's credibility. *See Hoffman v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. Wilder has not established that Nelson's testimony was incredible as a matter of law. *See Poellinger*, 153 Wis. 2d at 506-07 (explaining that when the record contains facts which support more than one inference, we must accept and follow the inference drawn by the jury "unless the evidence on which that inference is based is incredible as a matter of law").

¶16 To the extent Wilder's argument hinges on what he perceives to be inconsistent verdicts, it fails. The fact that Wilder was acquitted of the charge of being a felon in possession of a firearm does not make the evidence insufficient as to the charge of first-degree intentional homicide as a party to a crime. *See State v. Rice*, 2008 WI App 10, ¶2, 307 Wis. 2d 335, 743 N.W.2d 517 (holding that "whether the evidence is sufficient to support a conviction is decided independently of jury verdicts on related charges").

¶17 In sum, when we view the evidence in a light most favorable to the verdict, we conclude that the evidence was sufficient to support the jury’s finding that Wilder was guilty of first-degree reckless homicide as a party to the crime.

B. *The Supplemental Jury Instruction*

¶18 Wilder additionally argues that the trial court erred when it granted the State’s request that the jury be instructed it could consider Wilder and Lewis’s post-shooting conduct when determining the existence of utter disregard for human life. According to Wilder, the supplemental instruction misled the jury by leading it to conclude that Wilder’s poor decision-making after he fled the scene was a basis on which to convict him as a party to a crime.

¶19 The language the State requested was based on that set forth in the standard jury instruction to be applied in cases where evidence of the defendant’s after-the-fact conduct was admitted. *See* WIS JI-CRIMINAL 1022. After listening to the parties’ arguments, the trial court, citing *State v. Burris*, 2011 WI 32, 333 Wis. 2d 87, 797 N.W.2d 430, concluded that the supplemental language would be provided to the jury. Accordingly, it instructed the jury: “Consider also the defendant’s conduct or conduct of the person that the defendant was a party to a crime with after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard to human [life] at the time of [sic] the death occurred.”<sup>4</sup>

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<sup>4</sup> The supplemental language as set forth in WIS JI-CRIMINAL 1022 provides: “Consider also the defendant’s conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.”

¶20 A defendant is entitled to a new trial if “there is a reasonable likelihood that the jury applied an instruction in a manner that violates the constitution[.]” *State v. Badzinski*, 2014 WI 6, ¶35, 352 Wis. 2d 329, 843 N.W.2d 29. A jury is unconstitutionally misled if it is reasonably likely that the jury applied the instruction so as to deny the defendant a meaningful opportunity to have the jury consider the defendant’s defense to the detriment of his or her due process rights. *Burris*, 333 Wis. 2d 87, ¶50.

¶21 Whether the jury “improperly applied [a] legally correct jury instruction[] in a manner that denied the defendant due process raise[s] a question[] of constitutional fact that this court reviews *de novo*.” *Id.*, ¶24 (italics added). “We examine the challenged jury instruction[] in light of the proceedings as a whole, keeping in mind that [trial] courts have broad discretion in deciding which instructions to give.” *Id.* A jury applies the instruction properly if, in assessing whether the defendant acted with utter disregard for human life, the jury understood that it should consider the totality of the circumstances, including the defendant's relevant conduct before, during, and after the crime. *Id.*, ¶51.

¶22 Wilder has not shown that there is a reasonable likelihood the jury was misled by the trial court’s instruction that it could consider his and Lewis’s conduct after the shooting in determining whether they acted with utter disregard for human life. Wilder’s decision to drive away from the crime scene and dispose of the car was probative of his guilt as a party to the crime and of both his and Lewis’s utter disregard for human life. *See id.*, ¶63. The supplemental instruction did not unconstitutionally mislead the jury.

C. *New Trial in the Interests of Justice*

¶23 Lastly, Wilder argues that we should exercise our discretion and reverse his conviction “in that he was not fairly tried.” *See* WIS. STAT. § 752.35. He relies on claims of error already set forth in this opinion. Because we reject those claims, we are not persuaded that discretionary reversal is warranted. Wilder has not shown either that the real controversy was not fully tried or a miscarriage of justice.<sup>5</sup> *See id.*

*By the Court.*—Judgment affirmed.

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

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<sup>5</sup> It is not clear from his brief what theory he is relying upon.