

Appeal No. 03-3478-CR

Cir. Ct. No. 03CF000286

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEREK ANDERSON,

DEFENDANT-APPELLANT.

FILED

April 1, 2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Lundsten and Higginbotham, JJ.

This case raises the novel issue of whether Wisconsin has territorial jurisdiction over a crime that may have been completed in another state, if it can be shown the intent to commit the crime was formed in this state. Specifically, the primary question presented is whether the *mens rea* component of first-degree intentional homicide constitutes a “constituent element” of that crime within the meaning of WIS. STAT. § 939.03(1)(a) (2001-02).¹ If it does, a related question arises as to whether a Wisconsin county where an act manifesting intent occurred may claim venue under WIS. STAT. § 971.19(2).

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The stakes are high. Depending on the laws or prosecutorial decisions of the state in which a body is found, a decision that the manifestation of intent is insufficient to give Wisconsin territorial jurisdiction could mean that no state would have jurisdiction over a murder if it cannot be determined where the actual act or acts causing death occurred.

Because this appeal presents an issue of first impression of significant import, and because the parties have set forth strong arguments on each side of the issue, we believe this state's highest court is the proper forum for it. Accordingly, we hereby certify this appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 for determination as to whether territorial jurisdiction and venue may properly be based solely upon the commission of an act manifesting intent to commit a crime with a *mens rea* component.

BACKGROUND

According to evidence adduced at the preliminary hearing, Allen Krnak, his wife and one of his sons were last seen alive in Jefferson County, Wisconsin, on July 2, 1998. Krnak's skeletal remains were discovered in North Carolina in December 1999, about 780 miles from the Krnak residence and seven to ten miles from the campus of a college that had been attended by Krnak's other son, Derek Anderson. The cause of death was determined to be blunt force trauma to the head, but the time of death could not be ascertained, other than "months to years" prior to the discovery of the remains. Although there is evidence of Anderson's guilt, including Anderson's fingerprints on a map which his father had been given only a few hours before he was last seen alive and approximately 2600 unexplained miles logged on Anderson's truck around the time of the

disappearance, there is apparently no evidence as to where the blows that killed Krnak occurred.

The trial court concluded that the State had failed to produce evidence showing that Anderson had committed any act in this state that caused Krnak's death. However, the court also concluded that it would be plausible to infer, based on the fact that Anderson had called his father at work shortly before his disappearance and that his father had appeared upset shortly after that call, that the call was "part of a scheme to get [the father] to the house for the purpose of causing his demise." Therefore, the court reasoned, it could be inferred that Anderson had formed an intent to commit murder in Jefferson County and it bound him over for trial on that basis.

DISCUSSION

The parties agree the State must have territorial jurisdiction in order to prosecute a crime. *State v. Brown*, 2003 WI App 34, ¶¶25, 260 Wis. 2d 125, 695 N.W.2d 110. WISCONSIN STAT. § 939.03(1)(a) provides that "[a] person is subject to prosecution and punishment under the law of this state if: [t]he person commits a crime, any of the constituent elements of which takes place in this state." The central dispute on this appeal is the meaning of the term "constituent element" and its application to the offense of first-degree intentional homicide.

First-degree intentional homicide has two elements: (1) the causing of death, (2) with intent to kill. WIS. STAT. § 940.01(1)(a); *State v. Watkins*, 2002 WI 101, ¶¶60, 255 Wis. 2d 265, 647 N.W.2d 244. At common law, the first element was characterized as *actus reus* (a guilty act) while the second was characterized as *mens rea* (a guilty mind). See *State v. Wells*, 51 Wis. 2d 477, 187 N.W.2d 328 (1971) (Heffernan, J., dissenting).

Anderson first contends that a *mens rea* element cannot “take place” in the common sense of an occurrence. Therefore, Anderson reasons, only an *actus reus* element can possibly qualify as a constituent element within the meaning of WIS. STAT. § 939.03(1)(a). Anderson further argues that there is a temporal component to the *mens rea* element of intentional homicide — that is, that the requisite mental state must exist at the time the killing occurs. Thus, even if a *mens rea* element can “take place,” Anderson maintains that the State cannot evade the question of where the killing actually occurred by showing that the accused may have had an intent to kill within this state at a prior time.

The State concedes that the existence of intent alone would be insufficient to establish territorial jurisdiction. Its position is that the commission of any act within this state manifesting intent to kill should qualify as a constituent element of intentional homicide sufficient to establish territorial jurisdiction. The State points out that a prior statute, WIS. STAT. § 353.29 (1953), provided territorial jurisdiction “[w]henver a person, with intent to commit a crime, does any act ... within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state....” The State then claims that the legislative history of the current statute shows an intent to expand territorial jurisdiction, rather than restrict it. See William A. Platz, *The Criminal Code*, 1956 WIS. L. REV. 360, 350-59. The State also cites several opinions from other jurisdictions that it believes are consistent with its position. See *People v. Morante*, 975 P.2d 1071 (Cal. 1999); *State v. Willoughby*, 892 P.2d 1319 (Ariz. 1995); *Lane v. State*, 388 So.2d 1022 (Fla. 1980); and *State v. Harrington*, 260 A.2d 692 (Vt. 1969).

Anderson responds by arguing that the plain language of the current territorial jurisdiction statute is narrower, rather than broader, than the prior one.

He argues that while jurisdiction previously attached based on “any act” in partial execution of a crime, jurisdiction now requires an entire “constituent element.” He then discounts the cases cited by the State from other jurisdictions, because the statutory language at issue in those cases was closer to Wisconsin’s old statute than its current one.

We consider the territorial jurisdiction issue to be a close call. The statutory phrase “constituent elements” has not been previously defined in Wisconsin and both parties offer plausible interpretations of it. Each proposed interpretation also has weaknesses, however. For instance, the parties agree that thoughts alone should be insufficient to invoke territorial jurisdiction. But the State does not adequately explain why, if a jury could infer both causation and intent from the single act of killing, it would take a separate act manifesting intent to confer jurisdiction. This would seem to support Anderson’s position that the requisite intent element must be linked in time to the act of killing itself. On the other hand, Anderson does not provide a convincing explanation for why an act manifesting intent to kill could not also be treated as one of a series of acts in a chain of causation.

The success of Anderson’s challenge to venue likely depends on the resolution of the territorial jurisdiction question. If an act manifesting intent to kill is sufficient to establish territorial jurisdiction in this state, it is probably also sufficient to establish venue in the county where the act occurred.

Finally, if an act manifesting intent is insufficient to provide territorial jurisdiction and venue, the State further argues that it would have been able to show probable cause that Anderson had committed an act in Wisconsin causing his father’s death if the trial court had not excluded evidence from one of

its witnesses on hearsay grounds. We do not address this issue in the certification because we believe it may be resolved according to established caselaw if it becomes necessary to reach it.

