State of Wisconsin
Court of Appeals
District I
Appeal No. 2007AP001380 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Cantrell Robinson,

Defendant-Appellant.

Appeal from a judgment of conviction entered in the Milwaukee County Circuit Court, the Honorable Jeffrey Wagner, presiding

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Appellant's Brief and Appendix

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Table of Authority

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Statement on Oral Argument and Publication

The issues presented by this appeal are controlled by well-settled law and, therefore, neither oral argument nor publication is recommended by the appellant.

Issues Presented

I. Whether the evidence was sufficient, as a matter of law, to prove that the appellant, Cantrell Robinson, was guilty as a part to the crime of first degree intentional homicide.

Answered by the trial court: Yes.

II. Whether the trial court erred in denying Robinson's motion to suppress his confession where substantial evidence was presented at the hearing that Robinson invoked his right to counsel, where the court neglected to make any findings of fact as to whether this occurred, and where the record establishes that the State failed to prove that Robinson did not invoke his right to counsel.

Answered by the trial court: No

Summary of the Arguments

I. Sufficiency of the Evidence. The defendant was charged in count one with the first degree intentional homicide of Benjamin Chestnut. Chestnut was shot in the head during the course of a carjacking. It was the State's theory that the appellant, Robinson, was part of a conspiracy with two others to steal an automobile from Joevashaun Ward. When the robbery took place many shots were fired and some of them were fired by Robinson. No one saw how

Chestnut got hit in the head though. Robinson admitted that when the shooting started he also fired shots in the direction of some people on the sidewalk but that he never intended to kill anyone. The State argued at trial that the first degree intentional homicide of Chestnut was a natural and probable consequence of the conspiracy to commit armed robbery. There is no evidence, though, from which the finder of fact could infer that whoever shot Chestnut ever formed the intent to kill. Likewise, in the absence of evidence of how Chestnut was shot the evidence was insufficient as a matter of law to convict Robinson of the lesser-included offense of felony murder.

II. Motion to suppress. Robinson filed a motion to suppress the confession he gave to police. In the written motion he alleged that the statement was involuntary and was also obtained contrary to his right to counsel. At the motion hearing the detectives testified that Robinson never asked to speak to an attorney during the interrogation. Robinson, on the other hand, testified that over the course of the three interrogations he repeatedly asked to speak to a lawyer. In denying the motion to suppress the trial court made no findings of historical fact as to whether or not Robinson invoked his right to counsel. Because the State has the burden of production and of persuasion at such hearings the fact that the record is incomplete to support the trial court's denial of the motion requires that the order denying the motion must be reversed.

Statement of the Case

I. Procedural Background

The defendant-appellant, Cantrell Robinson ("Robinson") was originally charged with one count of felony murder and one count of

armed robbery arising out of a "car jacking" incident that occurred in Milwaukee on April 9, 2005: (R:1). As to each count it was alleged that Robinson was a party to the crime.

On March 13, 2006, shortly before the start of trial, the State filed an amended information alleging, as to count one, the crime of first degree intentional homicide of Benny Chestnut (replacing the felony murder charge). The State also alleged an additional count, count three, of attempted first degree intentional homicide of Antoine Sanders. Again, Robinson entered pleas of not guilty.

Robinson filed a pretrial motion to suppress the confession he gave to police. The court conducted a hearing on the motion and denied it. Testimony was elicited at the hearing that Robinson, during the course of three interviews in three days, repeatedly invoked his right to counsel but that the interrogations continued nonetheless and Robinson was never given access to counsel.

The court denied the motion to suppress making finding of fact that Robinson was not subject to any coercion; however, the court never made any findings concerning Robinson's invocation of his right to counsel. (R:55-59 to 61).

The matter proceeded to a jury trial beginning on March 27, 2006. Robinson challenged the sufficiency of the evidence on count one but the court denied the motion. The jury returned verdicts finding Robinson guilty of all counts. The court sentenced Robinson to life in prison on count one; on count two the court sentenced Robinson to five years initial confinement and five yeas of extended supervision consecutive to count one; and on count three the court sentenced Robisonson to five years initial confinement and five years extended supervision concurrent to count one.

Robinson timely file a notice of intent to pursue postconviction

relief. Thereafter, he filed a notice of appeal to the Court of Appeals.

II. Factual Background

A. Motion to suppress Robinson's confession

Robinson was in police custody on May 1, 2005 after being arrested at approximately 1:05 p.m. (R:55-4) Thereafter he was interrogated by police detective Erik Gulbrandson. (R:55-4) Gulbrandson testified at the suppression hearing that at the outset of the interrogation he read Robinson the Miranda warning. (R:55-5) According to Gulbrandson, Robinson understood the rights. (R:55-6) This first interview lasted from 8:00 p.m. on May 1st until the following morning at 4:00 a.m. (R:55-11) Gulbrandson said that during that entire time Robinson never requested a lawyer. (R: 55-26) Nonetheless, Robinson denied being involved in the incident. (R:55-32)

Robinson was interrogated two more times over the next three days. Detective Louis Johnson questioned Robinson the next day, May 2, 2005: (R:55-32). Again, Johnson testified that he read Robinson the Miranda warning. *Ibid.* This second interrogation lasted from 2:35 p.m. until 6:35 p.m. (R:55-36) Det. Johnson "warned" Robinson during this interview that Robinson's cousin, Aldric, had already given a statement that implicated Cantrell in the shooting. (R:55-39).

Gulbrandson testified that he involved in the third interrogation as well and witnessed Detective Chavez read Robinson the Miranda warning prior to the start of that questioning on May 3, 2007. (R: 55-7) This interrogation started at 2:30 a.m. and continued until 9:00 a.m. (R:55-15, 16) Gulbrandson went and got Robinson out of his

cell and brought him to the interrogation room and, when Gulbrandson found Robinson in the cell, he was lying in his bed. (R: 55-29)

Robinson, on the other hand, testified that:

> Q [Were you] . . . asking for a lawyer?
>
> A I asked before, during and after both interviews. I asked for a lawyer when I was being taken into custody because the police had beaten me up, hit me in the head with guns and everything, and I was real angry like I want to press charges, I need a lawyer but I was never appointed a lawyer.

(R:55-45). According to Robinson during the first interview he asked for a lawyer over ten times. *Ibid.*

Robinson testified that he also asked Johnson for a lawyer before and during the second interview. (R:55-46) Likewise, Robinson asked for a lawyer during the third inteview. *Ibid.*

During cross-examination of Robinson the prosecutor played five mintues of an intercepted telephone conversation between Robinson and his sister, "Snookie". (R:55-56) The call was intercepted while Robinson was in jail. The prosecutor pointed out that, although Robinson did tell Snookie that he had been coerced by police, he never mentioned that he was denied a lawyer. (R: 55-57)

B. The "car jacking" incident on April 9, 2005

Late in the evening on April 9, 2005, Antoine Sanders, Benny Chestnut, Joevashaun Ward (who was paralyzed below the waist and who was sitting on a "scooter"), and several others were hanging in front of Ward's house in Milwaukee. (R:63-4). Ward was the owner of a nice, white Monte Carlo (automobile) with "spinning rims". (R:62-55). While these men were hanging out in front of Ward's house they saw a loud, beat-up black Cadillac slowly

drive by with three occupants. (R:62-56). The black car went around the corner, parked, and in a moment three men all dressed in black came walking down the sidewalk from the direction of where the Cadillac had parked. (62-58).

Ward thought this was suspicious and so he asked Antoine Sanders to pick him up and put him into his car. (R:62-57) As Sanders was attempting to put Ward into the driver's seat one of the men in black ran up behind him and ordered, "Lay it down" (meaning "give me your valuables") (R:62-58) Almost immediately the man began shooting. Sanders dropped Ward but he (Sanders) was shot in the back shoulder. *Ibid.* Sanders then ran away. At trial Sanders identified the appellant, Robinson, as the man who shot him from behind. (R:62-62, 75)

For his part, Ward was able to testify that he heard more than one gun shooting but he was not able to see how Benny Chestnut got shot- much less was Ward able to say who shot him. (R;62-97) Charlotte Ward was in the house and did not see what happened; however, she estimated that she heard at least twenty shots. (R: 63-22) Minutes later Charlotte found Benny Chestnut lying in the hedges. (R:63-24) Chestnut was later pronounced dead of a gunshot wound to the head (R:64-99)

Charlotte Murdock (note that this is a different person from Charlotte Ward) was Chestnut's fiance and she was nearby when the incident happened. When she got to the scene see saw Chestnut lying on the ground with a gun in his hand and a gold necklace around his neck. (R:64-9) When she looked at him again a few minutes later the gun and necklace were gone. *Ibid.*

The State presented Robinson's confession to the jury. In it, Robinson admitted that he, Cortez Robinson (the appellant's

brother), and Aldric Robinson, decided to do the robbery. According to Cantrell, Aldric never explained ahead of time who or what they were going to rob. (R:62-38) Once at the scene, though, Cantrell heard shots being fired and so he fired a number of shots in the direction of "seven or eight" people who were standing on the sidewalk. *Ibid.* Cantrell told the police that he never meant to kill anyone. (R:62-47)

Reginald Templin is a firearms and toolmarks expert. He testified that he examined the shell casings recovered at the scene by the police. It was Templin's opinion that of the sixteen shell casings recovered in this case, six were fired from one gun and ten from another (R:64-77) Templin also told the jury that there were at least two guns, but possibly three guns, that fired shots at the scene. (R:64-91)

Argument

I. The evidence was insufficient, as a matter of law, to prove that Robinson was guilty of first degree intentional homicide as a party to the crime.

It is well-settled that upon review, the court must uphold a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said, as a matter of law, that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990). The test for reviewing whether the evidence is sufficient to sustain a criminal conviction is not whether the evidence is sufficient to exclude every reasonable hypothesis of innocence, but whether the

trier of fact could have been reasonably convinced of the accused's guilt beyond a reasonable doubt by any direct or circumstantial evidence upon which it had a right to rely. See id. at 503-04, 451 N.W.2d 752.

The jury, as the finder of fact, is free to determine which testimony it finds credible, regardless of any conflicts in the testimony, and is permitted to piece together any evidence it finds credible to construct a chronicle of the alleged crime. *See id*. at 503, 451 N.W.2d 752.

Here, the State's theory was that Robinson became part of a conspiracy to rob Joevashaun Ward of his Monte Carlo. The shooting of Chestnut was intentional and was a "natural and probable" consequence of the plan.

The appellate courts have recognized that, as a matter of law, no reasonable jury could conclude that felony murder is not the natural and probable consequence of brandishing a gun during a robbery. *See, e.g., State v. Oimen*, 184 Wis. 2d 423, 441, 516 N.W. 2d 399 (1994) (death is a natural and probable consequence of the felony of armed robbery). However, at trial in this case, Robinson was not charged with felony murder.

He was charged with first degree intentional homicide. The question, then, is whether the evidence was sufficient to prove that (1) whoever killed Chestnut did so intentionally; and if Chestnut was killed intentionally, (2) whether intentional homicide was a natural and probable consequence of the conspiracy to commit armed robbery.

In Wisconsin a member of a conspiracy may be guilty not only of the particular crime that, to his knowledge, his confederates intend to commit, but also for different crimes committed that are a

natural and probable consequence of the particular act that the defendant knowingly aided or encouraged. *State v. Ivy*, 115 Wis. 2d 645, 653-54, 341 N.W.2d 408 (Ct. App. 1983).

In the event the court finds that the evidence was insufficient as a matter of law to support jury's verdict finding the defendant guilty of first degree intentional homicide the court must then consider whether the evidence was sufficient to support the lesser-included offense of felony murder. The jury was instructed on felony murder and, therefore, an appellate court may order a judgment of conviction be entered on the lesser-included offense where the evidence is legally insufficient on an element of the greater offense. In, *Dickenson v. State*, 75 Wis. 2d 47, 248 N.W.2d 447 (1977), The Wisconsin Supreme Court held that there was insufficient evidence to convict the defendant of armed robbery, and remanded to enter a conviction for robbery. In that case, though, the jury was instructed on the lesser included offense. *See Dickenson v. Israel*, 482 F. Supp. 1223, 1224 (E.D. Wis. 1980), aff'd 644 F.2d 308 (7th Cir. 1981). Where the jury is not instructed as to the lesser-included offense the appellate court may not order a judgment of acquittal on a lesser-included offense. *State v. Myers*, 158 Wis. 2d 356, 371 (Wis. 1990)

A. There was no evidence to establish that whoever shot Chestnut formed the intent to kill.

To prove the intent element of first-degree intentional homicide, the State must establish that the defendant "acted with the intent to kill," that is, "the defendant had the mental purpose to take the life of another human being or was aware that his or her conduct

was practically certain to cause the death of another human being." See WIS JI—CRIMINAL 1010 (2000); see also WIS. STAT. § 939.23. Intent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances. *State v. Webster*, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995). The acts of the accused, however, "must not be so few or of such an equivocal nature as to render doubtful the existence of the requisite criminal intent." *Id*.

At the outset it should be noted that it is unlikely that Robinson was the person who fired the shot that killed Chestnut. If Antoine Sanders is to be believed, Cantrell Robinson was at the driver's side of the Monte Carlo firing shots into Sanders' back. This certainly does not preclude Robinson from being the person who fired the fatal shot but it does make it unlikely since Chestnut's body was not nearby.

The evidence established only that Chestnut was shot in the head during the course of a carjacking. There is utterly no evidence as to who shot him, where the person was located when the shot was fired, whether the shooter ever said anything that indicated an intent to kill- or even, for that matter, whether the shooter was associated with Robinson's conspiracy to commit armed robbery (i.e. by all accounts there were a number of people present in front of Ward's home when the robbery took place). Put another way, there simply is no evidence concerning the shooter's conduct, the shooter's words, or the shooter's gestures taken in the context of the circumstances. In the absence of such evidence there simply is no basis to infer that the shooter ever formed the intent to kill Chestnut.

B. There was no evidence that Chestnut died during the course of the felony committed by Robinson.

In order to find Robinson guilty of felony murder the State must present sufficient evidence to prove that Chestnut's death was caused by the commission of the armed robbery. ""Cause' means that the commission of the armed robbery was a substantial factor in producing the death." Wis JI-Criminal 1030.

Again, there was no evidence as to *how* Chestnut came to be shot in the head. Undoubtedly, the State will argue that under the undisputed evidence Chestnut was not lying dead with a shot to his head prior to the appearance of the three armed robbers. It was only after the gunfire associated with the carjacking that Chestnut was found with the mortal wound to his head. Thus, a reasonable inference- if not the only inference the State will say- is that Chestnut was shot during the gunfire associated with the carjacking.

Admittedly, Robinson's sufficiency of the evidence argument on felony murder is less compelling than it is for first degree intentional homicide but it is compelling nonetheless.

That Chestnut was shot during the carjacking is one inference but it is not the *only* inference. There simply was no evidence as to how or *when* Chestnut was hit with gunfire. Both Sanders and Joevashaun Ward fled the scene once the shooting started. Neither of these men saw Chestnut get shot and Chestnut was not discovered immediately after the shooting. Thus, it does not necessarily follow that Chestnut must have been shot *during* the carjacking. There remains the possibility that he was shot *shortly after* the carjacking. Additionally, there remains the possibility that, for some unknown reasons, Chestnut shot himself in the head. No jury acting reasonably could have disregarded these reasonable

doubts.

II. The trial court erred in denying Robinson's motion to suppress his statement,

In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court formed a set of procedural guidelines designed to protect a suspect's rights under the Fifth Amendment from the "inherently compelling pressures" of custodial interrogation. *State v. Harris*, 199 Wis. 2d 227, 237-38, 544 N.W.2d 545 (1996). A suspect's right to counsel and the right to remain silent are separately protected by these procedural guidelines. *Miranda*, 384 U.S. at 467-73. Once the right to remain silent or the right to counsel is invoked, all police questioning must cease, unless the suspect later validly waives that right and "initiates further communication" with the police. *Miranda*, 384 U.S. at 473-74; *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

In, *Davis v. United States*, 512 U.S. 452, 460-62 (1994) the Supreme Court declared that in order for a suspect to invoke the right to counsel, "the suspect must unambiguously request counsel." *Id*. at 459. Accordingly, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer, in light of the circumstances, would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.*

A. Standard of appellate review

Sec. 971.31(3), Stats., provides that "[t]he admissibility of any statement of the defendant shall be determined . . . by the court in an evidentiary hearing out of the presence of the jury . . . ." The

State has the burden of production and the burden of proof.

Whether a person sufficiently invoked his or her right to counsel is a question of constitutional fact and the appellate court reviews this issue under a two-part standard. *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142, and *State v. Moats*, 156 Wis. 2d 74, 94, 457 N.W.2d 299 (1990). First, the court must uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *Jennings*, 252 Wis. 2d 228, ¶20, and Wis. Stat. § 805.17(2). Second, the court must independently review the trial court's application of constitutional principles to those facts. *Jennings*, 252 Wis. 2d 228, ¶20, and *State v. Hoppe*, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407.

B. The court failed to make findings of fact concerning invoking the right to counsel.

Here, appellate review is somewhat hindered by the fact that the trial court made no findings of historical fact concerning Robinson's contention that he invoked his right to counsel. Robinson's written motion alleges that his confession was obtained contrary to the defendant's invocation of his right to counsel. (R: 7) Moreover, Robinson testified at the motion hearing that during the course of the three interview he asked numerous times to be given an opportunity to confer with a lawyer.

Nonetheless, the trial court's findings of fact in support of the decision denying the motion contain no reference to the right to counsel and the court made no findings of fact as to whether Robinson did, or did not, unambiguously invoke his right to counsel.

Since the State bears the burden of production and of persuasion fact that the record was left in this incomplete state

operates to the detriment of the State. There simply were no findings of fact that Robinson waived his right to counsel. Therefore, as a matter of constitutional fact the trial court erred in deying Robinson's motion to suppress.

Conclusion

For these reasons it is respectfully requested that the court grant the following relief: (1) To reverse the order of the trial court denying Robinson's motion to suppress his confession, order that the confession be suppressed, and remain the matter for trial on counts two and three; and, (2) To find that the evidence was insufficient as a matter of law to support the jury's verdict in count one (first degree intentional homicide and felony murder) and order that a judgment of acquittal be entered on that count; additionally, the court should order that no judgment of conviction be entered on the lesser-included offense of felony murder.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2007.

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Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3835 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____, 2007:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District I
Appeal No. 2007AP001380 - CR

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Cantrell Robinson,

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Appellant's Brief and Appendix

A. Record on Appeal

B. Excerpt of trial court's decision on motion to suppress evidence (Doc. 55)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with

appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007

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