STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Appeal No. 2006AP001981 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTWAINE SAGO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE FOR FIRST DEGREE INTENTIONAL HOMICIDE ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HON. PETER NAZE, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is factual in nature and, therefore, the appellant recommends neither oral argument nor publication.

STATEMENT OF THE ISSUES

I. Whether the evidence was sufficient, as a matter of law, to convict the defendant-appellant, Antwaine Sago, of first degree intentional homicide where Sago agreed only to commit armed robbery and where the gunman shot and killed the victim without the knowledge of Sago (i.e. where the homicide was not a natural and *probable* consequence of the armed robbery)?

ANSWERED BY THE TRIAL COURT: Yes

SUMMARY OF THE ARGUMENT

Antwaine Sago and Kenny Williams concocted a plan to steal a drug dealer's money. The plan was to go to Brandon Martin's home when he was not there, find the money, and take it. Williams told Sago that he could get a gun but that nobody would get hurt. When Sago and Williams arrived at Martin's home, though, they found him there, as well as his friend Smith, and Martin was much bigger than they expected. Williams told Sago that they would have to "whack" Martin. Sago said he was not "down with it" if that was the plan. Nonetheless, Williams went into the bathroom for a moment and, when he walked out, he went up to Smith, who was seated on the couch, and shot him to death. Williams then ordered

Martin into the bedroom where he, too, was executed.

The evidence was insufficient to convict Sago of first-degree intention homicide because *deliberately* killing Martin was not a part of the original plan nor was it a natural and probable consequence of the original plan (i.e. burglary). When Williams changed the plan to robbery Sago informed Williams that he was not "down with it." Thus, Sago effectively withdrew from any conspiracy that existed and he did not rejoin the conspiracy merely by being present when Williams shot the two men.

STATMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The State filed a criminal complaint (R:1) that alleged that Antwaine Sago ("Sago") conspired with Kenny Williams to rob Brandon Martin at an apartment in Green Bay. Sago and Williams went to Martin's apartment, where Williams robbed, and then shot and killed both Martin and Ladell Smith. The State charged Sago with two counts of first-degree intentional homicide as party to a crime and two counts of armed robbery as party to a crime-one count of each offense for each victim.

At the first jury trial, the jury convicted Sago of Martin's homicide and both armed robbery counts; however, the jury acquitted him of Smith's homicide (R:39).

For Martin's homicide, the trial court sentenced Sago to life imprisonment with no extended supervision. *Ibid.* For each armed robbery, the court sentenced Sago to twenty years' confinement followed by twenty years' extended supervision. The armed robbery

sentences were consecutive to each other and concurrent to the homicide sentence. *Ibid*

Sago then filed a postconviction motion (1) alleging ineffective assistance of counsel for his failure to object to an erroneous jury instruction and (2) requesting resentencing on the grounds that his sentences were unduly harsh. The trial court denied Sago's motions. (R:56)

Sago appealed his judgment of conviction of the first-degree intentional homicide of Martin and the armed robbery of Smith to the Wisconsin Court of Appeals.

The Court of Appeals reversed Sago's conviction for the first-degree intention homicide of Martin for the reason that the jury instruction on conspiracy and armed robbery was erroneous. The instruction given to the jury in that regard told the jury that "Finally, consider whether first degree intentional homicide was committed in pursuance of armed robbery and under the circumstances was a natural and probable consequence of first degree intentional homicide."

A new trial was held beginning on September 26, 2005. The jury returned a verdict finding Sago guilty of first-degree intentional homicide. (R:104) The court sentenced Sago to life in prison. (R:111)

Once again, Sago appeals his judgment of conviction to the Court of Appeals.

II. FACTUAL BACKGROUND

At trial, Sabrea Hill testified that on July 18, 2001, Sago and

Kenny Williams ("Williams") had a discussion at her house regarding a "lick" (which Hill said was a "robbery"). (R:124-230) Hill did not recall whether the name of the "lick" was mentioned but she said that she did not know a Brandon Martin (R:124-231). According to Hill, Williams said he could get a gun but assured Sago that, "nobody would get hurt." (R:124-233)

Detective Christine Thiel testified that she interviewed Sago twice. During the first interview Sago denied any involvement in the robbery. (R:125-485 et seq.) However, during the second interview Sago admitted to her the plan was to steal Martin's money but that "he did not want anyone to get hurt." (R:125-485) Sago and Williams planned to burglarize Martin's apartment when Martin was gone (R:125-490). However, when they got to the apartment, Martin was there. Instead of leaving, Sago and Williams acted as if they were simply there to visit Martin. When Williams and Sago realized how large Martin was, Williams suggested that he just "whack him". (R:126-550) However, Sago told him, "No, man, it ain't that serious." *Ibid.* When Williams persists in wanting to shoot Martin, Sago says, "No, man, I'm not with that." *Ibid.*

According to Sago's statement, Williams went into the bathroom for a few minutes and then he came out and shot Smith who was sitting on the couch at the time. Williams ordered Martin into the bedroom. A few minutes later Sago heard a gunshot from the bedroom and assumed that Williams had shot Martin as well.

Detective Robert Haglund testified that he also interviewed Sago. On direct examination Haglund claimed that Sago told him that upon seeing how big Martin was that Sago and Williams

conferred and decided that Williams "would have to shoot him." (R:125-422) On cross-examination, though, Detective Haglund admitted that this statement, that Haglund attributed to Sago, appeared nowhere in Haglund's written reports concerning his interview with Sago. (R:125-465)

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT SAGO OF FIRST DEGREE INTENTIONAL HOMICIDE.

The evidence was insufficient to convict Sago of first-degree intentional homicide because *deliberately* killing Martin was not a part of the original plan nor was it a natural and probable consequence of the original plan (i.e. burglary). When Williams changed the plan to include armed robbery Sago informed Williams that he was not "down with it." Thus, Sago effectively withdrew from any conspiracy that existed and he did not rejoin the conspiracy merely by being present when Williams shot the two men.

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 Sago became part of a conspiracy to burglarize (and later to rob) Brandon Martin of his drug money. The intentional shooting of Martin by Williams 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*[1] is not the natural and probable consequence of brandishing a shotgun 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, Sago was not charged with felony murder.

He was charged with first degree intentional homicide. The question, then, is whether *intentionally* causing the death of Martin was a natural and probable consequence of the plan that Sago and

1 940.03**Felony murder**. Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.19, 940.195, 940.20, 940.201, 940.203, 940.225 (1) or (2) (a), 940.30, 940.31, 943.02, 943.10 (2), 943.23 (1g), or 943.32 (2) may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt.

Williams formulated where there was a specific understanding that "no one would get hurt."

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).

However, a person may withdraw from a conspiracy if he changes his mind- for example, where the purpose of the conspiracy changes. Here, the jury was instructed that,

> 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 other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others 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.

Wis. JI-Criminal 412.

A. Purposely killing Martin is not a natural and probable consequence of the plan

The plan that Williams and Sago concocted is fairly well established. They planned to Martin's house when he was not there to steal his drug money. It was contemplated that Williams would have a gun but that there was no intention that anyone would get

hurt.

Of course, the best laid plans of mice and men oft go awry. When they got there they learned that Martin was home and that he was a large man. So the plan changed- it would have to be an armed robbery.

As mentioned above, death is a natural and probable consequence of brandishing a firearm during a robbery. However, in order to convict Sago of first-degree intentional homicide the State needed to prove more than death. The State needed to prove that *intentionally* killing Martin was a natural and probable consequence of the revised plan to commit armed robbery. Here is where the evidence fails.

When one examines the credible evidence in the record, and gives all reasonable inferences to the State, even then it is impossible to conclude that Sago knew that Williams intended to kill Martin and that he nonetheless persisted in the plan. Rather, this possibility (of whacking Martin) was specifically discussed by Sago and Williams and Sago informed Williams that if this was the plan then he was "not down with it."

No reasonable jury could conclude that Sago became part of a conspiracy where the natural and probable consequence was to deliberately kill Brandon Martin.[2]

2 The situation would be different if Sago had been charged with felony murder because Sago was still apparently willing to participate in the armed robbery of Martin. It certainly is foreseeable that an armed robbery might go wrong and someone gets killed.

B. Staying in the living room did not invalidate Sago's original refusal to be part of a plan to kill Martin

As set forth above, prior to the shootings Sago had every reason to believe that Williams would not purposely shoot and kill Martin. It was discussed and there was an apparent agreement not to do it.

However, once Williams came out of the bathroom and shot Smith on the couch, Sago certainly had every reason to believe that when Williams ordered Martin into the bedroom that Williams intended to kill Martin as well.

Does the fact that Sago stayed in the living room and later shared in the booty make him a part of a conspiracy to purposely kill Martin? Plainly it does not because Sago had already informed Williams that he (Sago) was *not* a part of any scheme to kill Martin. Morever, one does not become an "accessory after the fact" by sharing in the proceeds.

No reasonable jury could conclude that by merely remaining in the apartment once Williams took Martin into the bedroom that Sago implicitly became part of an agreement to kill Martin. As a practical matter, what was Sago supposed to do? Williams was armed and Sago was not. Running out of the apartment might have been better circumstantial evidence of Sago's unwillingness to participate but Sago had already voiced his objection directly Williams. Moreover, Sago was an eyewitness to the murder of Smith. Running out of the apartment immediately would have likely put Williams on notice that he might have to "whack" Sago as well.

C. Sharing in the proceeds of the robbery does not make Sago a party to the crime of first-degree intentional homicide.

What about sharing in the robbery proceeds, though, once the murders had been committed? This fact cannot make Sago a party to the crime of the murders. Wisconsin has long rejected the "accessory after the fact" theory. The Supreme Court wrote:

> It has been recognized that the "accessory after the fact, by virtue of his involvement only after the felony was completed, is not truly an accomplice in the felony. This category has thus remained distinct from others, and today the accessory after the fact is not deemed a participant in the felony but rather one who has obstructed justice. . . ." LaFave and Scott, Substantive Criminal Law sec. 6.6 at 125 (1986).

State v. Rundle, 176 Wis. 2d 985, 1006-1007 (Wis. 1993)

Thus, the fact that Sago later shared in the proceeds of the robbery does not make him party to the crime of first degree intentional homicide. Rather, this behavior is merely consistent with what Sago agreed to do in the first place.

CONCLUSION

For these reasons it is respectfully requested that the Court of Appeals reverse Sago's conviction for first-degree intentional homicide and order that a judgment of acquittal be entered.

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 2412 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

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COURT OF APPEALS
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STATE OF WISCONSIN,

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DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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.

A. Record on Appeal

B. Judgment of Conviction

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

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