

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2007

David R. Schanker
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. 2006AP1981-CR

Cir. Ct. No. 2001CF913

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTWAIN SAGO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
PETER NAZE, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Antwaine Sago appeals from a judgment convicting him of being party to the crime of first-degree intentional homicide. He challenges the sufficiency of the evidence to establish that the homicide was a natural and probable consequence of an armed robbery which he had agreed to

participate in. For the reasons discussed below, we conclude the evidence was sufficient to support the judgment. Accordingly, we affirm.

BACKGROUND

¶2 Sago was initially charged as party to the crime of two counts of armed robbery and two counts of first-degree intentional homicide based on allegations that he had participated in the killings of Brandon Martin and Ladell Smith for drug money. Sago was convicted of the armed robberies and Martin's murder and acquitted of Smith's murder at an earlier trial. However, this court reversed Sago's conviction for Martin's murder based upon an erroneous jury instruction, and the matter was remanded for a new trial on that charge. Sago now challenges the sufficiency of the evidence to convict him of Martin's murder at the second trial. We will set forth more detailed facts in the course of our discussion.

STANDARD OF REVIEW

¶3 When reviewing the sufficiency of the evidence, we will sustain the verdict "unless the evidence, viewed most favorably to the State 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. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted); *see also* WIS. STAT. § 805.14(1) (2005-06).¹ We will uphold a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

witnesses and drawing of inferences to the jury. *Richards v. Mendivil*, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

DISCUSSION

¶4 Sago argues that the evidence was insufficient for the jury to conclude that the homicide was a natural and probable consequence of the armed robbery. We disagree.

¶5 We first note that, to the extent that Sago is asking this court to expound upon the legal meaning of the phrase “a natural and probable consequence,” his argument goes beyond the scope of our review set forth above. It is implicit in the concept of reviewing a jury verdict that we review the verdict in light of the jury instructions that were actually given. Otherwise, we would be making conclusions about the validity of a verdict that might have been rendered under different instructions, that is, a verdict different from the verdict that was actually reached by the jury. To do so would evade the waiver rule of *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (court of appeals lacks power to review unobjected-to jury instructions). In other words, a defendant may not evade *Schumacher* by arguing after trial that the evidence was insufficient under an instruction that the defendant thinks should have been given. Therefore, our review in this case does not focus on possible definitions of the phrase “natural and probable consequence,” but simply on whether a jury could reasonably conclude that the facts of record met the standard as it had been instructed.

¶6 Here, the trial court instructed the jury, in relevant part:

Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a

crime, is party to that crime and may be convicted of that crime, although the person did not directly commit it.

If a person is a member of a conspiracy to commit a crime and that crime is committed by any member of the conspiracy, then that person and all members of the conspiracy are guilty of a crime. A member of a conspiracy is also guilty of any other crime which is committed as a natural and probable consequence of the intended crime.

....

Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant was a member of a conspiracy to commit the crime of armed robbery, that first degree intentional homicide was committed in the pursuance of armed robbery, and that under the circumstances, first degree intentional homicide was a natural and probable consequence of the armed robbery.

....

A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees or joins with another for the purpose of committing that crime. The conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose....

....

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.

Sago has not specified any point in the record where he objected to these standard instructions, or requested additional instructions. Therefore, we now consider whether the evidence at trial was sufficient for the jury to find beyond a reasonable doubt that Sago was a member of a conspiracy to commit armed robbery, that first-degree intentional homicide was committed in the pursuance of the armed

robbery, and that under the circumstances, the homicide was a natural and probable consequence of the armed robbery.

¶7 Sago's membership in a conspiracy to commit armed robbery was established primarily by testimony from Sabrea Hill and Sago's own statements to police. Hill testified that Kenny Williams had come to the apartment she shared with Sago on the morning of July 18, 2001, and informed Sago that he had "came upon a lick," meaning a target for a robbery. Sago was interested in how much money there was, and Williams estimated the target had drugs and perhaps as much as \$10,000. According to Hill, Sago initially indicated that he did not want to be involved if anything was going to go wrong or if anyone was going to get hurt. However, Williams reassured Sago, saying that the robbery would be easy and nobody would get hurt. Williams also said that he would find a gun.

¶8 Sago gave multiple stories to the police about his involvement. The lead investigator testified that Sago ultimately admitted that Williams had come to Hill's house with the idea of robbing Martin, and Sago had "sanctioned it" or agreed to go along with the plan. Sago said he needed the money to buy presents for his daughter's birthday, and that he thought robbing a drug dealer would be no harm to society. Sago said that he spent most of the day with Martin to put him at ease, and that at one point, Sago had unlocked the back sliding door to Martin's apartment.

¶9 Williams showed Sago the gun he was going to use prior to the robbery. Sago identified the gun as a Ruger Mark II .22 caliber. Sago said that later that day he and Williams went back into Martin's apartment with the intention of robbing him. Martin's cousin Ladell Smith came over while they were in the apartment.

¶10 Sago and Williams discussed what to do about Smith. Williams said Smith was too big to wrestle down, and Sago said they would have to shoot him.² Williams then went to the bathroom, came back out and shot Smith in the back of the head in the kitchen area, while Sago was still sitting on the couch. Williams then dragged Martin into the bedroom and demanded to know where the money was. Williams eventually got Martin to retrieve the money from the pocket of a shirt or jacket in the closet. Sago stood in the bedroom doorway and watched Martin pleading for his life. Williams then shot Martin twice, and Williams and Sago ran out of the apartment through the sliding glass door Sago had previously unlocked. They went to Hill's apartment, where they divided the money. Later that evening, Sago made a phone call on Smith's cell phone, which police recovered among Sago's possessions.

¶11 Sago told another officer that he accompanied Williams to his cousin's house to get the gun. Sago insisted that although Williams initially wanted to "whack" Martin, Sago thought they could just "rough him up." Then, Sago said, "what completely changed the outlook how everything went was his cousin showed up, the big guy."

¶12 Hill's cousin Tara Francisco testified that she once overheard Sago telling Hill that he trusted her because he and Williams had come to her covered in blood, and she "put away" or hid his gun. On another occasion Francisco asked

² Sago asserts a somewhat different version of facts in his brief—ignoring the testimony that he himself had suggested shooting Smith and emphasizing his own assertions to the police that he had told Williams that he did not want to kill Martin. However, the jury was entitled to decide which, if any, of the multiple accounts Sago gave to the police to believe, and to discount Sago's more self-serving statements if it chose.

Sago why he had killed Martin, and he responded “for the money.” Sago told Francisco he knew the money was there because he had seen it earlier.

¶13 Other witnesses testified that Sago displayed a large amount of cash later in the evening after the murder, that he was buying things for others, and that he spent a lot of money on presents for his daughter’s birthday.

¶14 The testimony at trial was more than sufficient to establish that Sago had entered into a conspiracy with Williams to commit armed robbery by forcing Martin to give them his drug proceeds at gunpoint, and that Williams committed first-degree homicide during the course of that robbery by shooting Martin in the head after he had turned over the money. Sago accompanied Williams into Martin’s apartment knowing that Williams had a gun, and that Williams had expressed the idea of “whacking” Martin earlier that morning. Sago did not leave the apartment when Martin’s cousin Smith showed up, instead expressing the possibility that Smith would need to be shot. Nor did Sago leave the apartment after Williams shot Smith, which obviously increased the likelihood that Martin would also be shot. Instead, Sago stood watching while Williams obtained money from Martin at gunpoint and killed him. Sago later split the robbery proceeds with Williams. Under those circumstances, a jury could very reasonably conclude that Martin’s murder was a natural and probable consequence of the armed robbery conspiracy, and that Sago did not withdraw from the conspiracy prior to Martin’s murder.

By the Court.—Judgment affirmed.

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

