COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2008

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. 2007AP2721-CR **Cir. Ct. No. 2005CF6697**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE A. PAYNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Antoine A. Payne appeals from a judgment of conviction for felony murder-armed robbery, criminal damage to property and

driving a vehicle without the owner's consent, all as a party to a crime, contrary to WIS. STAT. §§ 940.03, 943.01(2)(d), 943.23(3) and 939.05 (2005-06).[1] He argues that the evidence introduced at his trial was insufficient to support his conviction for felony murder-armed robbery because it failed to demonstrate that he aided or abetted the armed robbery.[2] Payne also argues that the sentence he received is unduly harsh and that the trial court erroneously exercised its discretion when it sentenced him. We conclude that there was sufficient evidence to support the conviction and that Payne waived his challenge to his sentence by not filing a motion for sentence modification in the trial court. Accordingly, we affirm.

BACKGROUND

¶2 This case involves an early morning carjacking that led to the shooting death of the car's driver, Terrance J. Thomas. Four individuals were driving around in a car at approximately 1:00 a.m. on August 30, 2005, after visiting several taverns. The individuals included Payne, Dominique Grafton, Jerome Davis, and Keith L. Hughes, Jr. As they were driving, they passed a white Chevrolet Suburban with expensive chrome rims parked at a gas station. Grafton told the driver, Davis, to turn the car around.

¶3 At the gas station, Grafton exited the car with a gun, approached Thomas, fatally shot him, forced Thomas's companion out of the Suburban and drove the Suburban away. During this shooting, Payne had also exited the car,

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

[2] Payne does not challenge his convictions for criminal damage to property and driving a vehicle without the owner's consent.

and was standing at the gas station when Thomas was shot. What he was doing at the time of the shooting is the subject of this appeal, and is addressed in greater detail below.

¶4 Grafton drove the Suburban into an alley while Davis, Payne and Hughes followed in their car. Grafton exited the Suburban and entered Davis's car. Payne and Hughes got into the Suburban, and Hughes drove away with Payne in the passenger seat. They drove the Suburban to Davis's house, and then later to another location where it was stripped of its parts and set on fire.

¶5 Payne was interviewed by the police. He denied assisting Grafton in the armed robbery, but acknowledged being present for numerous events that night. Payne was initially charged with felony murder in connection with the armed robbery and shooting of Thomas. The charges of criminal damage to property and driving a vehicle without the owner's consent, both of which related to driving and then destroying the Suburban, were subsequently added. The case proceeded to trial.

¶6 Payne's defense at trial was that he did not intentionally aid and abet the commission of the armed robbery. He did not testify in his own defense, but his trial counsel argued there was no evidence that Payne agreed to participate in the robbery or did anything to assist Grafton. Counsel argued that Payne only exited the car because Grafton, holding a gun, told Payne to get out of the car. Counsel asserted that all Payne did was walk to a garbage cart by the gas station, where he could not even see the shooting. Counsel also acknowledged that Payne was present when the Suburban was later stripped and that Payne had admitted handling a wrench while the tires were removed, but argued that under the facts, Payne was not guilty of any of the charged crimes.

¶7 The jury found Payne guilty of all charges. He was convicted and sentenced to a total of twenty years of initial confinement and ten years of extended supervision. This appeal followed.

DISCUSSION

¶8 On appeal, Payne challenges the sufficiency of the evidence for felony murder-armed robbery, as well as the severity of his sentence. We examine each issue in turn.

I. Sufficiency of the evidence.

¶9 Payne challenges the sufficiency of the evidence. An appellate court must give deference to the trier of fact when considering a criminal defendant's challenge to the sufficiency of the evidence supporting his or her conviction. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). ***Poellinger*** explained:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact 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. 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. Furthermore, "[t]he credibility of the witnesses, the weight of the evidence, and resolving inconsistencies in a witness's testimony all are for the trier of fact. Because the rules governing our review strongly favor a jury verdict, the

challenger of a verdict has a heavy burden." ***State v. Bowden***, 2007 WI App 234, ¶14, 306 Wis. 2d 393, 742 N.W.2d 332 (citation omitted).

¶10 Payne was charged with felony murder-armed robbery, as a party to a crime. A conviction for felony murder requires a showing that the defendant committed or attempted to commit one of the felonies listed in WIS. STAT. § 940.03 (which includes armed robbery) and that a death occurred as a result. ***Id.***; *see also* ***State v. Krawczyk***, 2003 WI App 6, ¶24, 259 Wis. 2d 843, 657 N.W.2d 77 ("[F]elony murder liability exists if a defendant is a party to one of the listed felonies from which a death results.").

¶11 At issue is whether Payne aided and abetted the crime of armed robbery. *See* WIS. STAT. § 939.05(2)(b) (defining one who is a party to a crime as one who "[i]ntentionally aids and abets the commission of it"). The jury was properly instructed using WIS JI—CRIMINAL 400 (2005), which provides:

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, (he) (she) knowingly either:
>
> ● assists the person who commits the crime; or
>
> ● is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

See ***id.***; *see also* ***State v. Howell***, 2007 WI 75, ¶46, 301 Wis. 2d 350, 734 N.W.2d 48 (citing with approval WIS JI—CRIMINAL 400).

¶12 Applying these standards here, we conclude there is sufficient evidence to support Payne's conviction for aiding and abetting the armed robbery. The jury heard evidence that Payne was aware that Grafton wanted to take Thomas's Suburban. An officer testified Davis said that Grafton instructed him to

turn the car around so that he could take the Suburban. Another officer testified Payne said that he heard Grafton say he was going to go get the Suburban because his "kids need[ed] some clothes," and that he saw Grafton take out the gun and pull back a lever on the gun. Thus, before Grafton exited the car, Payne was aware that Grafton planned to steal the Suburban and had armed himself.

¶13 Next, the jury heard evidence that Payne got out of the car either at the same time or shortly after Grafton and stood at the gas station. One officer testified that Payne said he went with Grafton because he was scared of him. Another officer testified that Davis said Payne left the car only after Hughes encouraged him to do so, saying something to the effect of "Get out of the car and help him, man. What you scared?"

¶14 It is undisputed that Payne was standing near the gas station itself during the time of the shooting. The jury heard evidence that Payne told police he could not see Grafton robbing Thomas. However, the jury also heard testimony from a detective who went to the gas station and stood where Davis said Payne stood during the shooting. The detective said that from that location, you could see the gas pumps where the Suburban was parked and, therefore, Payne could have seen the shooting.

¶15 It is undisputed that after the shooting, Payne ran back to the car and fled with Davis and Hughes. Shortly thereafter, Davis testified, both the car and the Suburban stopped and Payne and Hughes got in the Suburban, which they drove to Davis's house. A man who had been staying with Davis, Frederick Brookshire, testified that a short time after the Suburban was stolen, he saw the Suburban drive up slowly to Davis's house with its music playing loudly and Payne sitting on the hood of the car. Brookshire said the four men (Grafton,

Davis, Hughes and Payne) entered Davis's house and proceeded to have a discussion about where to take the Suburban. Brookshire further testified that he heard Grafton "chew out" Payne for running back to the car as soon as he heard the gunshot.

¶16 We conclude that this evidence supports the jury's verdict that Payne assisted Grafton or was "ready and willing to assist" him. *See* WIS JI—CRIMINAL 400. Payne disagrees, asserting that he "did nothing to assist Grafton in the armed robbery" and suggesting that he was merely present at the scene and displayed "ambivalent conduct," which does not prove that he aided and abetted Grafton. We reject this argument. It is enough that Payne was "ready and willing to assist" Grafton in the armed robbery, which the jury could infer from Payne's act of exiting the car and standing at the gas station while Grafton confronted Thomas. Moreover, the jury heard evidence that shortly after the shooting, Payne and Hughes took over driving the Suburban and then participated in a discussion of where to take the Suburban so it would not be detected while it was stripped. In summary, the evidence was sufficient for the jury to find that Payne aided and abetted the armed robbery.

II. Challenge to the severity of the sentence.

¶17 Payne argues that the trial court erroneously exercised its discretion because his sentence for felony murder was too severe. However, as the State noted in its brief when it argued that Payne had waived this issue,[3] Payne did not

[3] Payne did not address the State's waiver argument in his reply brief. "An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted." ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75.

move the trial court for sentence modification under WIS. STAT. § 809.30, and that omission is fatal to his appeal. *See* ***State v. Chambers***, 173 Wis. 2d 237, 261, 496 N.W.2d 191 (Ct. App. 1992) (This court will not review a sentence on appeal if the defendant failed to move for sentence modification under § 809.30).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.