

**COURT OF APPEALS
DECISION
DATED AND FILED**

NOTICE

November 12, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-0195-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL S. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

NETTESHEIM, J. At his jury trial, Michael S. Johnson sought to introduce certain testimony as evidence of a prior inconsistent statement by a State's witness, Aaron P. The trial court rejected this proffered testimony. The jury found Johnson guilty as a party to the crime of two counts of attempted

first-degree intentional homicide while armed with identity concealed contrary to §§ 940.01, 939.32, 939.63 and 939.641(2), STATS., and two counts of attempted armed robbery with identity concealed contrary to §§ 943.32(2),¹ 939.32 and 939.641(2), STATS. Johnson appeals the trial court's evidentiary rulings.

Johnson's defense at trial was that Aaron, his companion at the time of the crimes, was the sole actor in committing the crimes. Aaron testified for the State, implicating Johnson as a party to the crimes. Johnson argues that the trial court erroneously rejected the testimony of two witnesses who testified via an offer of proof that Aaron made statements to them implicating himself as the sole actor in committing the crime. As to one of the witnesses, we agree with the trial court's ruling. As to the other witness, we conclude that the court erred because the proffered testimony constituted a prior inconsistent statement by Aaron. However, we conclude that the error was harmless. Accordingly, we affirm the judgment.

FACTS

On June 11, 1995, Theron Holmes and Danielle Keppler were seated in Holmes' car in the parking lot of Lee's True Value Hardware Store in Racine county. Holmes was in the driver's seat and Keppler was in the passenger seat. Keppler noticed a white male, later identified as Aaron, approach the driver's side of Holmes' vehicle. Holmes also noted this person and observed that the person was wearing a bandanna which covered the bottom half of his face.

¹ Section 943.32(2), STATS., was amended by 1995 WIS. ACT 288, § 3. The change does not affect our analysis.

At approximately the same time, Holmes observed a black male, later identified as Johnson, wearing a hooded jacket and a ski mask moving towards the vehicle. Holmes testified that Johnson had a gun in his right hand. Keppler then also noticed Johnson and locked her door as Johnson was reaching to open it. As Holmes backed up his vehicle in an attempt to flee the area, he saw the man holding the gun fire a shot at his vehicle. The gunshot hit the hood of Holmes' vehicle. As Holmes and Keppler were driving out of the parking lot they heard three additional shots fired.

Officer Eric Thill of the Racine police department was surveying the parking lot when he heard the first gunshot. He then observed a black male and a white male in his rear view mirror. After hearing several more gunshots, Thill reported that the suspects were fleeing westbound. Shortly thereafter, he was notified that another officer was following the white male suspect. Thill aided this officer in apprehending that suspect who was identified as Aaron.

Sergeant William King entered the True Value parking lot just after Holmes had driven away. After King identified himself as a police officer, shots were fired at him from the direction of the suspects who then fled. King did not see who fired the shots. The white suspect jumped over a fence. King pursued and apprehended the black suspect in the northwest portion of the True Value parking lot. King recovered a gun and mask that Johnson had allegedly worn during the robbery. The victims, Holmes and Keppler, who had returned to the parking lot, then identified Johnson and Aaron as the assailants by their clothing.

Johnson was charged, as a party to a crime, with two counts of attempted first-degree intentional homicide while masked and armed, and two

counts of attempted armed robbery while masked. In addition, he was charged with first-degree recklessly endangering safety while masked and armed.

Aaron testified on behalf of the State. He stated that he had met Johnson at Johnson's house earlier in the day. They were walking around their neighborhood when they decided that they were going to rob somebody for money. Aaron testified that when Johnson left his house he was carrying a gun. Aaron had used the gun earlier that day to commit a robbery. Johnson was not with Aaron during the earlier robbery. Aaron testified that after he and Johnson decided to commit a robbery together, they went to the hardware store parking lot and hid behind a house. When Holmes and Keppler entered the parking lot, Aaron and Johnson agreed that Aaron would distract the driver by asking for a cigarette so that Johnson could approach the passenger side of the vehicle. Aaron testified that before he spoke to the driver, the car backed up and he walked away. While walking away, Aaron testified that he heard gunshots. Aaron testified that he did not know where the gunshots came from. When Aaron noticed the police car, he began to run. Aaron testified that he then saw Johnson fire three gunshots.

Aaron testified that he had been wearing a bandanna around his face when he and Johnson approached Holmes' car. Aaron did not know if Johnson had anything covering his face during the attempted robbery. Aaron then identified a blue and black mask as the one he wore during the earlier robbery. The mask had been in Aaron's back pants pocket when he fled from the police.

Johnson sought to introduce testimony from two juvenile witnesses to whom Aaron had allegedly admitted that he alone had committed the crimes.² After extensive discussion and debate, the trial court rejected the evidence because it was uncorroborated hearsay testimony. The jury found Johnson guilty of the attempted homicide charges and the attempted robbery charges, but not guilty of the reckless endangerment charge. The trial court sentenced Johnson to two concurrent fifty-year periods of confinement for the attempted homicide charges and two concurrent ten-year periods of confinement for the attempted robbery charges, to run consecutive to the fifty-year terms.

Johnson appeals, challenging the trial court's evidentiary rulings.

DISCUSSION

The Trial Court's Rulings

Johnson argues that Aaron made statements to two witnesses implicating himself as the sole actor in committing the robbery. He argues that the trial court erroneously excluded the testimony of these witnesses. Before addressing the merits of the issue, we first explain how the issue evolved both in the trial court and on appeal.

Johnson's defense at trial was that Aaron possessed the gun, that Aaron committed the crimes by himself, and that Johnson did not have knowledge that Aaron was planning to commit the crimes. On the first morning of trial, Johnson informed the court that he was expecting the two juvenile witnesses to testify regarding statements made to them by Aaron while they were in juvenile

² Actually, Johnson proffered the testimony of a third witness as well. However, he does not challenge the trial court's ruling rejecting the proffered testimony of this additional witness. We therefore limit our discussion to the two witnesses addressed on appeal.

detention. Johnson anticipated that the testimony of the two witnesses would support his defense that Aaron was the sole actor in committing the crimes. The trial court informed Johnson that before “jailhouse chat” would be admitted at trial, the court would conduct a hearing as to the admissibility of the testimony.

In anticipation of the issue, the trial court requested that counsel provide the court with case law concerning third-party confessions. In response, the State first cited to *State v. Denny*, 120 Wis.2d 614, 357 N.W.2d 12 (Ct. App. 1984), which governs the admissibility of evidence seeking to establish that someone other than the defendant had committed the crime. The trial court, however, determined that *Denny* was inapplicable and again asked counsel for cases governing “jailhouse confessions.” After reviewing the additional cases presented by counsel, the trial court made the following observation concerning the standard for admissibility of such statements:

What we’re talking about are hearsay statements and reliability statements, and in ascertaining trustworthy or hearsay testimony regarding third party statements against penal interest, factors to be considered at the time of the statement are[:] time of statement, party to whom statement was made, existence of evidence corroborating statement, extent which statement is self incriminating and against penal interest and presence of declarant in the courtroom to testify, if necessary.

Johnson disagreed with the trial court’s recital of the law. He argued that the cases upon which the trial court was relying “deal[t] with witnesses who did not testify either because of lack of presence or because they certain [sic] a Fifth Amendment privilege and became unavailable.” In arguing that the issue before the court was different, Johnson stated:

[Aaron is] going to get on the stand and testify one of two ways. He is either consistent with his affidavit which implicates [Johnson] or he’s going to ... go against his

affidavit in which case the state would impeach him with his affidavit, so the statements that I would then confront him with ... are either prior inconsistent statements or prior consistent statements. That's all they are. They're either inconsistent or consistent statements

The court responded to Johnson's argument stating, "I don't think it makes a difference. It's still hearsay."

On the final day of trial, Johnson made an offer of proof presenting the testimony of two juvenile witnesses, Darcel W. and Deondre W. Darcel testified that he was in juvenile detention with Aaron and recalled Aaron telling him about the "robbery and some shooting and opening the car door." When asked whether Aaron indicated who did the shooting and opening the car door, Darcel replied that Aaron told him "he did it." However, when pressed on the matter, Darcel could not recall what Aaron specifically said.

The second witness, Deondre, testified that he was in juvenile detention with both Johnson and Aaron. Deondre testified that Aaron told him he was in detention for "armed robbery, and he shot at some people." The trial court stated that Deondre's statement had "some evidentiary value. Obviously you have the state's position here is that Mr. Johnson is the shooter.... [O]bviously there's a difference with the statements."

The trial court nevertheless excluded the testimony of both witnesses. The court ruled that the statements did not qualify as prior inconsistent statements or as statements against penal interest. The court also rejected the statements because they were neither corroborated nor trustworthy.

Standard of Review

The decision to admit evidence lies within the sound discretion of the trial court. See *State v. Morgan*, 195 Wis.2d 388, 416, 536 N.W.2d 425, 435

(Ct. App. 1995). This court will uphold the trial court's exercise of discretion if the record shows a process of reasoning dependent on facts of record and a conclusion based on a logical rationale founded upon proper legal standards. *See State v. Shanks*, 152 Wis.2d 284, 289, 448 N.W.2d 264, 266 (Ct. App. 1989).

The Parties' Conflicting Trial Court and Appellate Court Arguments

The appellate arguments of both Johnson and the State represent a reversal, in whole or in part, from their respective arguments in the trial court.

In the trial court, Johnson argued for admissibility of the evidence under the law of prior inconsistent statements while the State, at least initially, argued against the evidence under *Denny*, which governs the admissibility of evidence seeking to prove that someone other than the defendant committed the crime. However, on appeal the parties have reversed their positions. Johnson now argues for admissibility under *Denny* while the State argues against admissibility under the law of prior inconsistent statements and statements against interest.

State v. Denny

We first address Johnson's argument under *Denny*. Johnson contends that the trial court erroneously exercised its discretion "in refusing to allow the testimony of witnesses who would have implicated a third party as the sole actor in the commission of criminal offenses." In support of his argument, Johnson relies on the "legitimate tendency" test set forth in *Denny*. *See Denny*, 120 Wis.2d at 623-24, 357 N.W.2d at 17. Johnson contends that the testimony presented by Darcel and Deondre was corroborated by the evidence presented at trial and that there is a "legitimate tendency" that a third person—Aaron—committed the crimes.

We agree with the trial court that this is not a *Denny* case. There, Denny attempted to introduce evidence that a nonwitness, third person had committed the crime with which the defendant was charged. *See id.* at 621, 357 N.W.2d at 16. The competing interests in *Denny* were the defendant's right to present evidence in his own defense versus the degeneration of a criminal trial into collateral issues. *See id.* at 622-24, 357 N.W.2d at 16. To resolve this conflict, *Denny* adopted the "legitimate tendency" test which requires the defendant to show that the third person had motive, opportunity and a direct connection to the crime. *See id.* at 625, 357 N.W.2d at 17-18.

In this case, however, the competing interests of *Denny* did not come into play. Aaron's testimony already implicated him as a party to the crimes and established his motive, opportunity and direct connection to the crimes charged against Johnson. Moreover, the State conceded that Aaron was involved in the crimes since it charged Johnson as a party to the crimes with Aaron as the coactor. Instead, the question before the trial court in this case was the extent to which Aaron could be properly impeached with his alleged prior statements. The facts of *Denny* did not present that issue; nor does the law of *Denny* address that issue.

Just as the trial court rejected the State's trial court argument based on *Denny*, we reject Johnson's appellate argument based on *Denny*. Instead, we turn to the rules of evidence already in place which govern the appellate issue.

Statements Against Interest and Prior Inconsistent Statements

The State asserts that "[t]here are two possible theories for the introduction of these statements: (1) the statements are declarations against penal

interest admissible under sec. 908.045(4); and (2) the statements are prior inconsistent statements admissible under sec. 908.01(4)(a)1.”

The State first argues that the statements do not qualify as statements against interest under § 908.045, STATS. Section 908.045 recites exceptions to the hearsay rule. It provides in relevant part:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(4) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant’s position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

Section 908.045(4).

In rejecting the testimony of Darcel and Deondre, the trial court stated that the testimony was hearsay and the court placed great emphasis on the lack of corroboration. Thus, it appears that the court was relying on the corroboration provision of this section of the evidence code pertaining to admission of statements against interest. However, this provision clearly applies when “the declarant is unavailable as a witness.” We agree with the State that this provision did not apply because Aaron, the declarant, was available and, in fact, testified as a witness at trial. Therefore, although the court analysis of this evidence under the “corroboration” provision of § 908.045, STATS., was misplaced, we nonetheless uphold the court’s ultimate ruling because the statute did not apply to the question.

We therefore turn to the other possible ground for admissibility addressed by the State—that the statements are prior inconsistent statements admissible under § 908.01(4)(a)1, STATS. That section provides:

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant’s testimony, or

Section 908.01(4)(a)1.

In the trial court, Johnson argued for admission of the evidence under this provision. The trial court rejected the evidence as inadmissible hearsay. This ruling was error. The very title of § 908.01(4), STATS., recites: “STATEMENTS WHICH ARE NOT HEARSAY.” Pursuant to that statute, a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination. Here, Johnson sought to introduce the statements as inconsistent with Aaron’s testimony. Aaron testified at trial and was subject to cross-examination. As such, we determine the admissibility of the statement under § 908.01(4)(a)1.

At the close of Aaron’s cross-examination, Johnson’s counsel asked Aaron if he had discussed his case with anyone while he was in juvenile detention. Aaron responded that he had discussed it with “[a] couple people.” Counsel then asked the following questions:

Q Did you ever tell any of these people that Michael Johnson was not involved in this robbery and that you’re the one that did it?

A Not that I can recall.

Q Did you ever tell any people that you’re the one that shot the gun?

A. No.

Johnson then made an offer of proof presenting testimony from Darcel and Deondre which he believed contradicted Aaron's testimony. Darcel testified that Aaron told him about the "robbery and some shooting and opening the car door." When asked whether Aaron indicated who did the shooting and opened the car door, Darcel replied that Aaron told him "he did it." However, when pressed to testify precisely as to what Aaron said, Darcel said only that Aaron talked about "a shooting and opening a car door. That's all I can recall."

The threshold inquiry regarding an alleged prior inconsistent statement is whether the statement is, in fact, inconsistent. The proponent of evidence has the burden to show why the evidence is admissible. See *State v. Jenkins*, 168 Wis.2d 175, 188, 483 N.W.2d 262, 266 (Ct. App. 1992). Here, Darcel's testimony as to what Aaron actually said was ambiguous and wavering. When asked to actually recite what Aaron had said, Darcel merely alluded to "a shooting and opening a car door." That statement did nothing to contradict Aaron's testimony. If anything was inconsistent, it was Darcel's testimony. As such, Darcel's testimony did not demonstrate an inconsistent statement by Aaron, and the trial court properly rejected this evidence.

However, we conclude that Deondre's testimony did establish a prior inconsistent statement by Aaron. Deondre testified that Aaron told him "he was in [juvenile detention] for armed robbery, and he shot at some people." When asked if Aaron told him who he shot at, Deondre replied, "I think some people in the car." In ruling on the admissibility of Deondre's testimony, the trial court acknowledged, "Well, obviously, I believe this has some evidentiary value. Obviously you have the state's position here is that Mr. Johnson is the shooter.... [O]bviously there's a difference with the statements."

We agree. Aaron testified that Johnson was in possession of the gun and fired the gun at the time of the robbery. Deondre's testimony demonstrates a prior inconsistent statement. The trial court nevertheless excluded Deondre's testimony because it was not corroborated. However, § 908.01(4)(a)1, STATS., does not require corroboration as a condition for admissibility. The trial court's exclusion of Deondre's testimony on this ground was an erroneous exercise of discretion. We conclude that the testimony was admissible as evidence of a prior inconsistent statement by Aaron.³

Harmless Error

In spite of our conclusion that the trial court erred in excluding Deondre's testimony, we nevertheless uphold Johnson's conviction because we conclude that the error was harmless. The harmless error doctrine requires the appellate court to examine whether there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

We begin by recalling that Johnson was charged as a party to the crimes pursuant to § 939.05, STATS.⁴ Under this statute, a person may be

³ The State argues that Aaron's statement that he shot at some people was not inconsistent since, although not charged, he was acting as a party to the crime. This argument assumes that Aaron understood the complexities and nuances of the law regarding party to a crime. We reject this argument. Instead, we properly assess Aaron's statement as a recital by one not versed in the law. Viewed in that light, Aaron's statement was clearly inconsistent with his trial testimony.

⁴ Section 939.05, STATS., provides:

(1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(continued)

convicted of the commission of a crime even though he or she did not directly commit it; as long as that person aided and abetted in the commission of the crime, he or she may be found guilty. *See* § 939.05(1) and (2)(b).

The jury heard testimony from Holmes that he observed “an individual and [sic] a coat and mask coming towards the car and he had a gun at his side and he tried to open the door.” Holmes testified that this individual was black, although he could not identify this person’s gender. Holmes testified that he saw this individual raise a weapon and that he heard a gunshot fire which hit his vehicle. Holmes also testified that the other person, later identified as Aaron, wore a bandanna which covered the bottom of his face. This was consistent with Aaron’s testimony that he wore a bandanna. Approximately five to ten minutes following the shooting incident, the police brought Aaron and Johnson to be viewed by Holmes and Keppler. Holmes identified them as his assailants by their clothing.

(2) A person is concerned in the commission of the crime if the person:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

Keppler, the passenger in Holmes' vehicle, testified that the person who approached her side of the car was a black male with "a gun in his hand." Although Keppler was not able to identify her assailants by their faces and did not notice either having anything covering their faces, she was later able to identify them by their clothing.

Finally, King testified that he had the impression that the black male had a gun in his hand. King additionally testified that both Aaron and Johnson attempted to flee when he approached them and identified himself. Evidence of flight and resistance to arrest demonstrates consciousness of guilt and provides additional support for the jury's verdict. See *State v. Knighten*, No. 96-2595-CR, slip op. at 4 (Wis. Ct. App. Aug. 13, 1997, ordered published Sept. 30, 1997). In addition, the evidence recovered at the scene of the crime—a dark mask, a bandanna and a gun—were the very items which Holmes and Keppler had observed as *both* Johnson and Aaron carried out the attempted robbery. Moreover, photographs taken of Aaron and Johnson immediately following their apprehension were consistent with the various descriptions given by the witnesses.

Apart from Johnson's self-serving testimony that he was not involved, the testimony of Holmes, Keppler, Thill and King stand unimpeached in this case. Holmes' and Keppler's testimony clearly placed both Johnson and Aaron at the scene of the crime and clearly implicated both in the robbery attempt. Thill and King nearly caught Aaron and Johnson red handed, arriving on the scene just as Holmes drove off and gunfire erupted. The evidence recovered by the officers and the clothing worn by Aaron and Johnson when they were returned to the scene corroborated the version of the attempted robbery as reported by Holmes and Keppler.

If Aaron's inconsistent statement to Deondre had been admitted, it would have done nothing more than add to the "swearing contest" already played out at the trial between him and Johnson. *But the statement does nothing to impugn the testimony of the State's four eyewitnesses.* This evidence overwhelmingly implicates both Johnson and Aaron as parties to the crime. Simply put, Deondre's excluded testimony would not have offered the jury any plausible reason to reject the strong and direct evidence of Johnson's complicity in the commission of these crimes.

CONCLUSION

We hold that the evidentiary question in this case is not governed by *Denny*. We conclude that the trial court erred in excluding Deondre's testimony concerning Aaron's prior inconsistent statement. However, we also conclude that the error was harmless because there is no reasonable possibility that the error contributed to Johnson's conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

