COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2972-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY A. APEL,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 VERGERONT, P.J. Terry A. Apel appeals judgments of conviction for homicide, attempted homicide, and conspiracy to commit homicide related to the death of Pamela Schultz, his fiancée's daughter. Apel contends the trial court erred in denying his motions to suppress the evidence resulting from a warrantless search of Apel's shed. In that search, a police officer discovered Pamela's body

and her mother, Renee Schultz, who was injured. Apel also contends the court erred in failing to instruct the jury on the defense of entrapment for the conspiracy charge.

¶2 We conclude that the facts known to the police officer at the time he searched the shed were sufficient to constitute the emergency rule exception to the Fourth Amendment search warrant requirement and, therefore, Apel's motion to suppress evidence found in the shed was properly denied. We also conclude that the record presented no evidence that Apel was not predisposed to commit the crime of conspiracy prior to law enforcement's involvement and, therefore, the trial court properly exercised its discretion in declining to instruct the jury on an entrapment defense. Accordingly, we affirm.

BACKGROUND

¶3 Apel lived with his fiancée, Renee Schultz, and her two children in a mobile home in Beaver Dam, Wisconsin. On October 30, 1998, Apel spent the afternoon at his brother Rick's house. According to testimony at trial, they had a few beers and then went to a tavern later in the day. Sometime between 11:30 p.m. and midnight, Apel's brother took Apel home. At this time, Renee was at home with her daughter, Pamela. Her younger child was away from the home with the child's father.

¶4 According to Renee's testimony at trial, when Apel arrived home, they began to fight. The fighting soon escalated to physical violence. Renee testified that Apel would not let her or Pamela leave the mobile home and he forced them out to an adjacent shed with his shotgun. According to Renee, Apel loaded his shotgun and after approximately fifteen or twenty minutes of talking, told both Renee and Pamela to kneel in front of a bench in the shed. Renee

testified that the next thing she recalled was waking up in pain and seeing Pamela lying beside her.

¶5 That same night, Karen Mola, who lived in the mobile home next to Apel's, discovered Apel on her steps, and he said he had been shot. She immediately contacted 911. Dodge County Sheriff's Department Lt. James Rohr received the dispatch saying that someone had been shot. The time was 12:22 a.m. He arrived at Mola's home and found Apel lying on the deck face down, with a small puddle of blood near his head. Rohr checked for a pulse, found one, and called for an ambulance. He asked Apel who had done this to him and Apel said that it hurt. The officer then looked more closely at the wound and asked Apel if he had done this to himself, and Apel responded "yes" in a muffled tone.

¶6 According to Rohr, Mola was standing nearby and told Rohr that Apel lived next door, that about ten minutes before he showed up on her deck she heard a loud bang, and that sometime just prior to that she heard a more muffled bang, which she believed was the shed door.

¶7 Rohr testified that he knew from a complaint he had taken the previous week that Apel had a girlfriend and that she and her two children had been living with Apel. He told Sergeant Douglas Ninmann, who had just arrived, to go Apel's mobile home to try and secure a weapon and check on Apel's girlfriend and her two children. When another officer arrived, that officer stayed with Apel and Rohr went to assist Ninmann. Rohr observed there were no signs of blood the entryway and he asked Ninmann if he had found anyone or anything yet. Ninmann had not, but told Rohr he had seen lights on in the shed between Apel's mobile home and Mola's.

¶8 Rohr testified that he then went to the shed to check on the welfare of Renee Schultz and her two children and to locate the weapon. He felt it was necessary to secure the weapon because it was unknown where it was, there were children involved, and the weapon might be within the children's reach. The doors of the shed were closed, but not latched. Upon opening the doors, Rohr saw two female bodies, later identified as Pamela and Renee Schultz, lying in blood, and a shotgun lying next to one of the bodies. Rohr called for two more ambulances.

¶9 Pamela Schultz was pronounced dead shortly thereafter. Renee Schultz suffered serious injuries but survived. The medical testimony at trial was that both Renee's and Pamela's injuries were caused by forceful blows to their heads with an instrument.

¶10 The police eventually obtained a search warrant for the shed and recovered a shotgun and two hammers.

¶11 After Apel's arrest, he was placed in the Dodge County jail, where he shared a cell with Thomas Weisleder, Jr., during January to March 1999. Weisleder testified at trial that in February 1999, Apel asked him if he knew anybody who could make somebody disappear, and Weisleder responded that it was possible. Weisleder testified that the person Apel wanted to disappear was Renee Schultz and that Apel had given him a note describing Renee's car and place of employment. According to this testimony, Apel also provided a map showing where Renee's mother and brother lived. Weisleder turned these documents over to his attorney. Weisleder further testified that he heard Apel on the telephone asking someone to send him a photo of Renee, which Apel later gave to Weisleder so whoever was to take care of this knew what she looked like.

Weisleder and his attorney met with police, and he gave them the photo and related what had occurred.

¶12 A police officer created a letter for Weisleder to give to Apel that was purportedly from someone whom Weisleder had contacted in response to Apel's request. The letter asked for $500 in advance and a total of $5,000 for "the job." Weisleder testified that he showed the letter to Apel and later overheard Apel making telephone calls trying to raise the money. Apel's sister and cousin both testified that they received letters from Apel while he was in prison requesting $500 to aid him in ensuring that the main witness did not show up for trial.

¶13 Apel was charged with homicide for the death of Pamela Schultz, attempted homicide for the injuries to Renee Schultz, and in a separate information that was joined for trial, conspiracy to commit homicide for his actions in enlisting Weisleder to make Renee "disappear." Apel was convicted of all three charges following a jury trial and sentenced to life imprisonment for the homicide and thirty years consecutive each for the attempted homicide and conspiracy charges.

DISCUSSION

Search of Shed

¶14 Apel moved in the trial court to suppress the evidence the police found in the shed on the ground that the warrantless search of the shed violated his rights under the Fourth Amendment to the United States Constitution. The trial court denied the motion, concluding that Rohr's search of the shed came within the emergency rule and therefore was lawful even though he did not have a

warrant.[1] On appeal, Apel contends that the trial court erred in concluding that the facts justify the application of the emergency rule exception.

¶15 The Fourth Amendment prohibits unreasonable searches and seizures. ***State v. Horngren***, 2000 WI App 177, ¶8, 238 Wis. 2d 347, 617 N.W.2d 508. Warrantless searches are per se unreasonable under the Fourth Amendment with certain exceptions, one of which is the emergency rule. ***State v. Rome***, 2000 WI App 243, ¶¶ 10-11, 239 Wis. 2d 491, 620 N.W.2d 225, *review denied*, 2001 WI 43, 242 Wis. 2d 546, 629 N.W.2d 785. The State bears the burden of proving that the emergency rule exception applies. ***Id.*** at ¶11. The emergency rule exception to the warrant requirement is based on the concept that "the preservation of human life is paramount to the right of privacy protected by the fourth amendment." ***State v. Boggess***, 115 Wis. 2d 443, 450, 340 N.W.2d 516 (1983).

¶16 In order for the emergency rule to apply, the facts must satisfy a two-part standard: first, the searching officer must actually be motivated by a perceived need to render aid or assistance; second, the facts known to the officer must be such that a reasonable person in those circumstances would think an emergency existed. ***Id.*** at 450-51. In other words, the officer must subjectively observe a need to provide immediate assistance and intend to do so, and the facts viewed objectively must support the conclusion that the officer had probable cause to believe there was an emergency and immediate action was necessary. ***Rome***, 2000 WI App 243 at ¶13.

[1] The trial court stated that the search may have also been authorized under the community caretaker exception, but Apel does not raise that issue on appeal.

¶17 When analyzing the objective component, the inquiry is whether specific facts known to the officer, taken together with the rational inferences from those facts, reasonably warrant the intrusion into an area in which a person has a reasonable expectation of privacy. ***Id.*** at ¶16. This inquiry is to be made in light of "the circumstances then confronting the officer, including his or her need for a prompt evaluation of possibly ambiguous information concerning potentially serious consequences." ***Id.***

¶18 When we review a decision on the reasonableness of a warrantless search, we affirm the trial court's findings of fact unless they are clearly erroneous, but we decide de novo whether the facts meet the constitutional standard. ***Id.*** at ¶14.

¶19 Apel contends that the subjective part of the standard is not met because Officer Rohr did not testify that he believed anyone was hurt or in need of assistance, and the court did not specifically find that Rohr had a subjective belief that an emergency existed.[2] We disagree on both points. Rohr testified that he believed it was necessary to find the weapon because there were children around and the weapon could be within their reach. The trial court made a long recitation of the facts as testified to by Rohr and Ninmann, and it is evident that the court accepted their testimony as credible. The court found that Rohr wanted to secure the weapon and check on the safety of Apel's girlfriend and her children. It also found that "whether anybody else is shot, whether anybody else is present,

[2] In his first brief, Apel's challenge is directed only at the objective part of the standard, and the State's response therefore does not address the subjective part. However, in his reply brief Apel does argue that the subjective standard is not met. Although we ordinarily do not address arguments made for the first time in a reply brief because the respondent has no opportunity to respond, we choose to address Apel's argument on the subjective part of the test.

whether anybody else is being held hostage, they really do not know." The court's findings are supported by the record and we are satisfied they meet the requirement that Rohr is actually motivated by what he perceived as a need to render assistance to the woman and children who lived with Apel.

¶20 With respect to the objective part of the standard, Apel argues that the police had no reason to believe that anyone else was in danger because the officers knew only that a shot had been fired and that Apel admitted he shot himself. According to Apel, the only reasonable belief from the facts known to the officers was that there had been a botched suicide attempt and no one else was involved. We disagree.

¶21 Officer Rohr knew Apel lived with his girlfriend and her children. It is reasonable to assume that they would normally be in their home with Apel at that hour of the night. Therefore, upon learning that Apel had been shot and was outside the neighbor's house, a reasonable officer would wonder why his girlfriend was not with him. A reasonable officer could believe that, even though Mola stated that she thought one of the two bangs she heard was the shed door, there may have been more than the one shot that wounded Apel: Apel could have shot his girlfriend before he shot himself, or a third person could have shot both Apel and his girlfriend. A reasonable officer could also believe that, even if there was only one shot, Apel could have harmed his girlfriend or her children in some other way before shooting himself. A reasonable officer could also decide not to rely on Apel's answer, reasoning that he might not be coherent or accurate because of his injured state, and could consider that his girlfriend had shot him and might harm herself or her children, or that a third person had shot him and might harm his girlfriend or her children. Finally, Officer Rohr's concern that a gun was lying somewhere accessible to the children was also reasonable. Anyone of these

scenarios would justify a reasonable officer looking in their mobile home for Renee and her children, the weapon, or some evidence of what had happened to them.

¶22 Upon not finding Renee, her children, or a weapon in the trailer, not seeing blood in the entryway, and knowing Mola thought she heard the shed door and Ninmann saw a light on in the shed, it was reasonable for Officer Rohr to look in the shed. A reasonable officer could conclude that the incident leading to Apel's injuries had occurred in the shed, that the weapon that had caused Apel's injury might be in the shed, and that something had happened to Renee and her children.

¶23 Apel cites ***Mincey v. Arizona***, 437 U.S. 385 (1978), in support of his argument that the warrantless search did not fall under the emergency exception, but we agree with the State that the facts of that case are distinguishable in a key respect. In ***Mincey***, all people living in the defendant's apartment had been located prior to the police's search for a weapon and, therefore, there was no reason to believe that the weapon could pose an imminent threat to them. ***Id.*** at 393. The police in ***Mincey*** could have awaited a warrant. In this case, such a wait may have resulted in greater injury to the residents whose whereabouts were unknown.

¶24 We conclude that the trial court correctly determined that the standard for the emergency rule exception to the warrant requirement was met and therefore correctly denied the motion to suppress.

Entrapment Instruction

¶25 Apel contends the trial court erroneously denied his request to give a jury instruction on the defense of entrapment on the conspiracy charge.[3] He argued to the trial court that the jury could find that Weisleder had pushed Apel into asking him to get someone to make Renee "disappear" because Weisleder could use that to his advantage, and, since Detective Beier had drafted the letter requesting money, law enforcement was involved. The trial court declined to give the instruction. It concluded that there was no reasonable view of the evidence upon which a jury could find that Apel was not already disposed to commit the crime before the officer wrote the letter, and there was no evidence that Weisleder was an agent for law enforcement when he had the initial discussion with Apel and received the documents from him.

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[3] WISCONSIN JI—CRIMINAL 780 provides in relevant part:

> In law, the term "entrapment" refers to a defense available to a defendant whenever a law enforcement officer has used improper methods to induce him to commit an offense and by the use of such methods has succeeded in inducing him to commit an offense which he was not otherwise disposed to commit.
>
> ….
>
> The law recognizes that, in the enforcement of the law, it is often necessary for law enforcement officers to set traps to catch criminals by affording them the freest opportunity to commit offenses which they are disposed to commit. Some inducement, encouragement, or solicitation by law enforcement officers is, therefore, permissible. But it is not proper for them to use excessive incitement, urging, persuasion, or temptation which is likely to induce the commission of an offense by a person not already disposed to commit an offense of that kind. It is the duty of law enforcement officers to detect criminals but not to create them.

(continued)

¶26 A trial court is justified in declining to give a requested instruction in a criminal case if it is not reasonably required by the evidence. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999), *review denied*, 228 Wis. 2d 175, 602 N.W.2d 760 (1999). When a trial court declines to give a requested instruction, we review the evidence in the light most favorable to the accused to determine whether the instruction was warranted. ***Id.***

¶27 Apel points out that the only evidence that he initiated the conspiracy was from Weisleder, and he argues that a reasonable jury could disbelieve Weisleder, instead deciding that Weisleder induced Apel to devise the plan to make Renee disappear and brought that plan to the attention of law enforcement in order to reduce his own sentence. Apel also argues that a reasonable jury could find that Weisleder began to work as an agent for the police before he persuaded Apel to make the plan. Apel bases this latter argument on Weisleder's testimony at the preliminary hearing that he first obtained documents from Apel on February 27, 1999, and his testimony at trial that he met with Detective Beier "a couple days after the 23rd." According to Apel, this evidence

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> Therefore, if the law enforcement officer, for the purpose of obtaining evidence on which to prosecute the defendant, used excessive incitement, urging, persuasion, or temptation and, thus, created more than the usual or ordinary opportunity to commit the offense, and, prior to the inducement, the defendant was not already disposed and ready and willing to commit such an offense, the defense of entrapment is established, and you should find the defendant not guilty.
>
> On the other hand, if the law enforcement officer created only the usual or ordinary opportunity to commit the offense, or, if the defendant, prior to the inducement, was already disposed and ready and willing to commit such an offense, the defense of entrapment is not established, and the defendant should not be acquitted on that ground.

permits an inference that Weisleder met with Detective Beier before he persuaded Apel to make the plan.

¶28 We conclude that, viewing the evidence most favorably to the defense, a reasonable jury could not find entrapment. Apel did not testify. A disbelief by the jury in Weisleder's testimony that Apel initially proposed the plan does not constitute evidence that Weisleder induced Apel to propose it. Moreover, even if a jury were to believe that Weisleder did induce Apel to propose the plan, it could not reasonably find that Weisleder was acting as an agent of law enforcement when he did so. Weisleder's complete answer to the question at trial "When did you meet with the police officers? Detective Beier?" was "A couple days after the 23rd, I believe. Well, I seen my attorney, and it was a couple days after I seen my attorney." His testimony was consistent at the preliminary hearing and at trial that he received the documents from Apel before he talked to his attorney and that he talked to his attorney before he met with Detective Beier.

¶29 Accordingly, the trial court did not err in deciding not to give the entrapment instruction.

By the Court.—Judgments affirmed.

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