COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2369-CR **Cir. Ct. No. 2005CF1881**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK J. MEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Mark Mey appeals from a judgment of conviction. The main issue is sufficiency of the evidence. We affirm.

¶2 The State alleged that Mey was one of a number of people who jumped from three vehicles in the street, fired a hail of bullets up a driveway towards a group of people near a garage, and then quickly fled. At trial, the State presented several witnesses who claimed to have been among the shooters, and who testified as to the involvement of Mey and three other co-defendants tried at the same time. The jury found the defendants guilty on three counts each of attempted first-degree intentional homicide while armed, and three counts each of endangering safety by use of a firearm, under WIS. STAT. § 941.20(2)(a) (2007-08).[1] The jury was instructed on three theories of defendant liability, namely, as direct actors, as aiders and abetters, and as co-conspirators. The jury was not asked to indicate which theory its verdicts were based on, so we do not know which theory or theories it relied on. Because the defendants were charged under aiding and abetting and conspiracy theories of liability, intent to kill by any one of the shooters would be sufficient to convict the remaining defendants.

¶3 Mey argues that the evidence was insufficient to convict on the attempted homicide counts. We affirm the verdict "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that … no [reasonable] trier of fact … could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Mey's argument is based in part on the jury instruction. As to attempted first-degree intentional homicide, the jury was instructed on the following elements, along the lines of WIS JI—CRIMINAL 1070:

> 1. The defendant or another person intended to kill [the three victims].
>
> "Intent to kill" means that the defendant or another person had the mental purpose to take the life of another human being or was aware that his or her conduct was practically certain to cause the death of another human being.
>
> 2. The defendant or another person did acts toward the crime of First Degree Intentional Homicide which demonstrate unequivocally, under all of the circumstances, that the defendant or another person intended to kill and would have killed [the three victims] except for the intervention of another person or some other extraneous factor.
>
> **Meaning of "Unequivocally"**
>
> "Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.

Mey focuses on this definition of "unequivocally." That word appears in the statute defining the crime of attempt. *See* WIS. STAT. § 939.32(3) (attempt requires, among other things, "that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor"). However, the instruction's definition of "unequivocally" is not provided by the statute.

¶5 Mey argues that his conviction must be reversed because the acts shown by the evidence are equivocal as to what the intent of the shooters was. He argues that because they initially shot from the street, and did not then further

approach their intended victims more closely in a manner that would be likely to kill them, it would be reasonable for a jury to infer that they lacked intent. Mey argues that while it might also be reasonable for his jury to find intent existed, the above definition of "unequivocally" required the jury to acquit if there were competing reasonable inferences about the shooters' intent.

¶6 Mey may be correct as to the meaning of the definition when applied by the jury, but he disregards the role that the standard of review plays in appellate review of the verdict. We have previously rejected an argument that we should apply this definition of "unequivocally" when reviewing sufficiency of the evidence. *See* ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393. In ***Hauk***, the defendant made essentially the same argument on appeal from a conviction for solicitation. The instructions on solicitation used the same definition of "unequivocally," in the context of intent, as in the case before us. ***Id.***, ¶¶27-28. We likened this instruction to the general one given to all criminal juries that requires them to exclude every reasonable hypothesis of the defendant's innocence before returning a guilty verdict. ***Id.***, ¶29. We pointed out that under existing case law, that instruction plays no role in our review of sufficiency of the evidence, which is based on deference to a jury's choice between conflicting reasonable inferences, regardless of this instruction. ***Id.***, ¶12. "The jury must draw all reasonable inferences in favor of the defendant, but we must make all reasonable inferences in favor of the jury's decision." ***Id.***, ¶29.

¶7 Thus, the practical effect of that standard of review, as interpreted by ***Hauk***, is that in reviewing Mey's verdict we disregard the requirement that the shooters' intent be "unequivocally" shown by their acts. We do not ask whether the shooters' acts unequivocally showed intent to kill. Instead, we ask whether a jury could reasonably conclude that intent to kill was present. If it could, we

affirm, even if a jury could also have reasonably concluded that such intent was *not* present. In other words, we defer to the jury's choice between reasonable inferences.

¶8 We turn now to applying that standard. In the course of Mey's argument, he concedes that "there is evidence that one may point to as indicative of a possible intent to kill." He does not argue that no reasonable jury could find intent to kill on these facts. Therefore, we reject his argument that the evidence was insufficient.

¶9 Mey also argues that the evidence was insufficient to show that he would have killed the three victims "except for the intervention of another person or some other extraneous factor," as provided in the jury instruction. He argues that there is no evidence of another person or extraneous factor interfering with their intent to kill. We reject this argument because the extraneous factor need not be some agency outside the shooters themselves, but can simply be the shooters' own lack of marksmanship.

¶10 Finally, Mey argues that we should grant a new trial on the homicide charges in the interest of justice under WIS. STAT. § 752.35, on the ground that the real controversy was not fully tried. It was not fully tried, Mey argues, because the jury was not given a lesser-included instruction for recklessly endangering safety. Mey concedes that, in light of his defense at trial that he was not present at the shooting, it is understandable why he or his trial counsel would have chosen not to ask for this instruction, which might be viewed as undermining that defense. We conclude the real controversy was fully tried. The controversy was over whether Mey was present and what the intent of the shooters was. The jury heard the relevant evidence and, as far as we know, received accurate instructions.

Those instructions would have led the jury to consider whether Mey was present and what the intent of the shooters was. An additional instruction was not necessary for the controversy to be fully tried.

By the Court.—Judgment affirmed.

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