COURT OF APPEALS DECISION DATED AND FILED

August 4, 2009

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. 2008AP2745-CR

Cir. Ct. No. 2005CF1149

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHEFFIELD GROVES, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and M. JOSEPH DONALD, Judges. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Sheffield Groves, Sr., *pro se*, appeals from a judgment of conviction entered after a jury found him guilty of two counts of first-degree intentional homicide as a party to a crime. *See* WIS. STAT. §§ 940.01(1)(a),

939.05 (2003-04).[1] Groves also appeals from an order denying his *pro se* motion for postconviction relief.[2] Groves argues that the evidence at trial was insufficient to sustain his convictions, the jury was improperly instructed, his trial counsel was ineffective in failing to challenge the jury instructions, and the verdicts were inconsistent. We reject his contentions and affirm.

BACKGROUND

¶2 This case arises from the shooting deaths of Austin J. Howard and John Tolefree in a Milwaukee residence on February 15, 2005. The State charged Groves with two counts of first-degree intentional homicide while armed with a dangerous weapon, as a habitual offender and as a party to the crime. The State also charged Groves with possession of a firearm by a felon as a habitual offender. Groves entered pleas of not guilty, and the matters proceeded to a jury trial.[3]

¶3 Although Groves presented an alibi defense, numerous witnesses placed Groves at the scene of the homicides, and two witnesses testified that they saw Groves shoot the victims. The jury found Groves guilty of two counts of first-degree intentional homicide as a party to a crime. The jury found, however, that Groves did not commit the offenses by use of a dangerous weapon. The jury further found Groves not guilty of being a felon in possession of a firearm.

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

[2] The Honorable Charles F. Kahn, Jr., presided over the jury trial. The Honorable M. Joseph Donald presided over the postconviction proceedings.

[3] This appeal arises from Groves's second jury trial. The first trial ended in a hung jury.

¶4 At sentencing, Groves stipulated to prior felony convictions and the circuit court determined that he was a habitual criminal. *See* WIS. STAT. § 939.62 (2003-04). The court imposed two concurrent life sentences without the possibility of extended supervision, and the court added an additional six years of imprisonment to each life sentence as a penalty for committing the offenses as a habitual criminal.

¶5 Groves discharged his appointed postconviction and appellate counsel and filed a *pro se* postconviction motion. The circuit court denied the motion, and this appeal followed.

DISCUSSION

¶6 Groves first claims that the evidence at trial was insufficient to support the convictions. We review the sufficiency of evidence using a strict standard.

> [A]n 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.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶7 The evidence included testimony from Darlene Whitelow that, on February 15, 2005, she went to 2847 North 10th Street in Milwaukee, where she smoked marijuana and crack cocaine. Other people, including Groves, were also

in the residence. Groves asked for "a little privacy" and went into the living room, closing the door behind him. According to Whitelow, Maurice Batchelor and Joe King were in the living room when Groves closed the door. Whitelow heard shots coming from the living room, and she fled from the residence.

¶8 Batchelor and King both testified that they were with Groves on February 15, 2005, in the living room of 2847 North 10th Street, when Groves shot and killed Howard and Tolefree. Sammie Riley testified that he was in a bedroom of the residence when he heard gunshots coming from behind the closed living room door. Riley testified that Groves and Batchelor came out of the living room shortly after the shots were fired, and Groves told Riley, "don't call the police or anything. If they come, just tell them some n*****s came and did the shooting." According to Riley, Batchelor made a similar statement while wiping the living room doorknob with a cap.

¶9 Riley testified that after Groves and Batchelor left the residence, another man in the house looked into the living room and said: "these guys got shot." Riley and a companion then went to a pay phone to call the police. City of Milwaukee Police Officer Brian Shull testified that he was dispatched to 2847 North 10th Street on February 15, 2005. He discovered the bodies of two men who had been shot multiple times.

¶10 The foregoing evidence amply supported the jury's conclusion that Groves committed two homicides as a party to the crimes. Groves argues, however, that the evidence was insufficient because he effectively impeached the various witnesses against him, and because Riley's testimony conflicted with the testimony of other State's witnesses. We must reject these arguments. "Where there are inconsistencies in the testimony of a witness or between witnesses, the

jury may choose to disbelieve either version or make a choice of one version rather than another." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). This court will not reweigh the testimony of the witnesses and reach a conclusion regarding credibility contrary to that reached by the fact finder. *See* ***Lessor v. Wangelin***, 221 Wis. 2d 659, 669, 586 N.W.2d 1 (Ct. App. 1998).

¶11 Groves also asserts that "the jury's decision as to the use of a dangerous weapon shows that the evidence was insufficient to prove all the elements of the underlying crime." Groves misunderstands the implications of the jury's verdicts. The jury's decision not to convict him of using a dangerous weapon when committing the homicides says nothing about the sufficiency of the evidence. "Juries have always had the inherent and fundamental power to return a verdict of not guilty irrespective of the evidence." ***State v. Thomas***, 161 Wis. 2d 616, 630, 468 N.W.2d 729 (Ct. App. 1991).

¶12 We next address Groves's contention that the circuit court erred by instructing the jury on party to a crime liability. The court instructed the jury that a person may be a party to a crime if the person either directly commits a crime or intentionally aids and abets the commission of a crime. *See* WIS. STAT. § 939.05(2)(a)-(b).[4] The evidence supported the instruction.

¶13 The testimony of Whitelow and Riley permits a reasonable inference that Batchelor was the principal actor and that Groves aided and abetted in the offenses. Moreover, Groves's trial counsel acknowledged this inference during the instruction conference and, for this reason, withdrew an objection to

[4] The jury was not instructed in regard to conspiracy, the third way in which a defendant may be concerned in the commission of a crime. *See* WIS. STAT. § 939.05(2)(c).

instructing the jury on party to a crime liability.[5] Thus, Groves waived any contention that the instruction was improper. *See* ***Bethards v. State***, 45 Wis. 2d 606, 616, 173 N.W.2d 634 (1970) (withdrawing objection to jury instruction constitutes a waiver).

¶14 Groves next weaves several arguments around one theory: the State charged him with two counts of first-degree intentional homicide by use of a dangerous weapon, and therefore he could not be convicted of the homicides unless the jury found that he used a dangerous weapon to commit the crimes. Thus, Groves believes that: (1) the circuit court should have instructed the jury to find him not guilty of the homicides if it rejected the State's proof that he used a dangerous weapon; and (2) his trial counsel was ineffective by not asking for such an instruction. Groves's theory is incorrect, however, and the arguments that he makes in reliance on that theory are without merit.

¶15 When a defendant commits a crime while possessing, using, or threatening to use a dangerous weapon, the defendant's sentence may be increased. *See* WIS. STAT. § 939.63. Thus, § 939.63 is a penalty enhancer. ***State v. Villarreal***, 153 Wis. 2d 323, 328, 450 N.W.2d 519 (Ct. App. 1989). To invoke the penalty enhancer, the State must prove at trial both the facts supporting the allegation that the defendant used a dangerous weapon and the elements of the underlying offense. ***Id.*** at 328-29. "Thus, use of a dangerous weapon is not only a penalty enhancer. It is also an element of the crime charged." ***Id.*** at 329 (citation omitted).

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[5] Groves does not contend that his trial counsel was ineffective in regard to the jury instructions on party to a crime liability.

¶16 ***Villarreal*** reflects that the fact finder may determine separately whether the defendant committed only the underlying crime or committed the greater crime with the added element. ***Id.*** at 330. Indeed, in ***Villarreal*** we approved such separate determinations as "convenient and efficient." ***Id.*** Further, an appellate court will sustain a guilty verdict for an underlying crime when the State fails to secure a valid conviction for committing the crime by use of a dangerous weapon. *See* ***id.*** at 332 (affirming defendant's conviction for second-degree murder while reversing as invalid defendant's conviction for committing the offense with a dangerous weapon); *see also* ***State v. Peete***, 185 Wis. 2d 4, 23, 517 N.W.2d 149 (1994) (affirming defendant's conviction for possession of cocaine with intent to deliver while reversing the determination that defendant committed that crime while possessing a dangerous weapon). Groves's theory that the State cannot prove a defendant guilty of an underlying crime without also proving an alleged penalty enhancer is baseless.

¶17 In light of the foregoing, we reject Groves's claim of "plain error" in the jury instruction on whether Groves used a dangerous weapon to commit homicide. The circuit court in this case instructed the jury in accordance with WIS JI—CRIMINAL 990:

> The information alleges not only that the defendant committed the crime of first-degree intentional homicide but also that the defendant as party to the crime did so while using a dangerous weapon. If you find the defendant guilty of [first degree intentional homicide] you must answer the following question: Did the defendant commit the crime of first degree intentional homicide while using a dangerous weapon?
>
> Dangerous weapon means any firearm whether loaded or unloaded. A firearm is a weapon that acts by force o[f] gun powder. Before you may answer this question yes you must be satisfied beyond a reasonable doubt that the defendant as party to the crime committed

> the act – committed the crime while using a dangerous weapon. If you are not so satisfied, you must answer the question no.

The court properly instructed the jury to consider the dangerous weapon element separately from the underlying crime. *See* ***Villarreal***, 153 Wis. 2d at 330.

¶18 Groves further asserts that his trial counsel was ineffective by "not object[ing] to a mandatory conclusive presumption as to the (while using a dangerous weapon) element." (Parentheses in original.) Groves does not point to the text of any specific instruction that gave rise to a "conclusive presumption." We have already explained that the circuit court properly instructed the jury on the issue of whether Groves committed the homicides while using a dangerous weapon. Accordingly, Groves fails to demonstrate that his trial counsel had an obligation to object to the jury instructions. An attorney is not ineffective for failing to pursue a meritless argument. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶19 We turn to Groves's suggestion that the verdicts are inconsistent and therefore cannot be sustained. He contends that the jury could not properly find him guilty of two homicides in which the victims were shot while also finding that he did not use a dangerous weapon. We disagree.

> "It has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted."

State v. Thomas, 2004 WI App 115, ¶41, 274 Wis. 2d 513, 683 N.W.2d 497 (citation and emphasis omitted). The rule is based on the reviewing court's

inability to determine whether a jury's inconsistencies are the result of leniency, mistake, or compromise. *See **id.***, ¶42.

¶20 In his reply brief, Groves asserts for the first time that the circuit court erred by omitting the words "as party to a crime" from the verdict forms asking the jury to decide whether he used a dangerous weapon to commit homicide.[6] We do not address issues raised for the first time in a reply brief. *See **State v. Marquardt***, 2001 WI App 219, ¶14 n.3, 247 Wis. 2d 765, 635 N.W.2d 188. Moreover, were we to consider the issue, we would conclude that Groves cannot seek relief based on any alleged defect in the forms of the verdict related to whether he used a dangerous weapon. The jury found that Groves did not use a dangerous weapon. Assuming without deciding that the verdict forms as to this issue contain an error, Groves is in no way aggrieved by such an error and cannot complain about it.[7] *See **Production Credit Ass'n v. Nowatzski***, 90 Wis. 2d 344, 356, 280 N.W.2d 118 (1979).

By the Court.—Judgment and order affirmed.

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

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[6] Groves states in his reply brief that the circuit court erred "by not including the words party to a crime [in] the instructions" on use of a dangerous weapon; his record reference demonstrates that he is discussing the verdict forms.

[7] The printed verdict forms are not in the record. The circuit court read the jury's verdicts into the record.