COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal Nos. 2017AP648-CR
2017AP649-CR

Cir. Ct. Nos. 2015CF002249
2015CF003518

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FERNANDO CORTEZ JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 PER CURIAM. Fernando Cortez Johnson appeals from the judgments of conviction for strangulation, misdemeanor battery, disorderly

conduct and intimidation of a victim in furtherance of a conspiracy, following a joint jury trial of two related cases against him.[1] He also appeals the denial of his postconviction motions.

¶2 On appeal, Johnson contends that the trial court violated his constitutional right to confrontation by admitting victim P.B.'s out-of-court statements at trial under the forfeiture by wrongdoing doctrine.[2] He also contends there is insufficient evidence to support the conspiracy to intimidate a victim conviction. We disagree and, therefore, affirm.

¶3 These background facts provide context for the issues raised on appeal. Additional relevant facts are included in our discussion.

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[1] Appellate case No. 17AP648 is an appeal from the three convictions in Milwaukee County case No. 15CF2249, which arose from a May 18, 2015 incident between Johnson and the victim, P.B. We refer to the case as the domestic abuse case. We note that the jury found Johnson not guilty of a suffocation charge.

Appellate case No. 17AP649 is an appeal from the conspiracy to intimidate a victim conviction in Milwaukee County case No. 15CF3518. We refer to the case as the intimidation case, and note that the case arises from Johnson's recorded phone calls of May 19 and May 24, 2015. Johnson was also convicted of an intimidation of a witness charge in that case. He does not appeal that conviction.

The State agrees that Johnson has preserved his confrontation clause claim. Therefore, we will not address Johnson's claim, in the alternative, of ineffective assistance of counsel. *See* ***State v. Wilson***, 2017 WI 63, ¶3 n.3, 376 Wis. 2d 92, 896 N.W.2d 682 (declining to address alternative ineffective assistance of counsel claim where the court addressed the merits of the defendant's incorporated substantive claim).

[2] The forfeiture by wrongdoing doctrine is a common law exception to the Confrontation Clause that permits the introduction of statements of a witness who is "detained" or "kept away" by the "means or procurement" of the defendant; the doctrine was adopted in 2007 by the Wisconsin Supreme Court in ***State v. Jensen***, 2007 WI 26, ¶57, 299 Wis. 2d 267, 727 N.W.2d 518. However, the forfeiture by wrongdoing test adopted in ***Jensen*** has now been superseded by ***Giles v. California***, 554 U.S. 353, 360-65 (2008). *See* ***State v. Baldwin***, 2010 WI App 162, ¶32, 330 Wis. 2d 500, 794 N.W.2d 769.

BACKGROUND

¶4 On May 18, 2015, after P.B., Johnson's girlfriend, called out asking neighbors to call the police to report domestic abuse, one of her neighbors called them. When the officers arrived, P.B. described what had happened that day.[3] Based upon her statement and the officers' observations, Johnson was arrested and taken to the Milwaukee County Jail.

¶5 On May 19, 2015, Johnson called P.B. from the jail pod where he was being held.[4] During the recorded call, Johnson said to P.B., "[c]an you please not come to court tomorrow?" He further said, "[n]o, I promise, I promise, [I'll] do whatever you want me to, though. Just please don't come to court."

¶6 On May 20, 2015, Johnson was charged in a three-count complaint with strangulation and suffocation, misdemeanor battery, and disorderly conduct. At a May 20, 2015 initial appearance, the trial court expressly told Johnson that it was issuing a no-contact order and he was to have "[n]o contact and no communication … in any way" with P.B. and that he could not "call, or write, or text, or have any of [his] friends, family, or other people pass along messages to her." The no-contact order was issued on May 20, 2015.

¶7 The next day, on May 21, 2015, P.B. called the DA's office and spoke with a victim-witness advocate and told her that Johnson had been calling

[3] The details of what occurred are discussed in paragraphs twenty through twenty-two of this opinion.

[4] Johnson does not dispute making the phone calls in this case.

from jail and telling her not to cooperate because he was sorry and this would ruin his life.

¶8 On May 24, 2015, a phone call to an unidentified male was made from the jail using Johnson's inmate number. During the recorded call, Johnson directed the unidentified male to dial a phone number. The unidentified male asked, "[a]nd who is this, man?" Johnson responded, "I can't really say, man, 'cause I can't, I ain't supposed to be dialing that number" and "[t]ell them to get … a notary letter saying that shit ain't true, man, and take it to the DA office."[5] After the phone rang, P.B. answered the phone. During the conversation, with the unidentified male acting as an intermediary, Johnson stated several times that P.B. should write and deliver a notarized letter to the office of the district attorney, stating that she had lied about what Johnson did. During the call, Johnson stated "it's a felony … they gonna sanction—they gonna boost my bail and [I'm going to] lose my trucking [license]."

¶9 On May 26, 2015, P.B. called and spoke with another victim-witness advocate and stated that "she was not going to have anything to do with the case." On May 29, 2015, P.B. was present for Johnson's preliminary hearing. P.B. told the victim-witness advocate who was at the hearing that she was just there to observe.

¶10 On August 6, 2015, Johnson was charged with intimidation of a witness (count one), based on the May 19, 2015 phone call, and intimidation of a victim in furtherance of a conspiracy (count two), based on the May 24, 2015

[5] In quoting Johnson's May 24, 2015 phone call, the court has eliminated "um" and "uma."

phone call. Subsequently, in the domestic abuse case, the State filed a four-count amended information, revising count one to strangulation (rather than strangulation and suffocation in a single count), and adding count four charging Johnson with suffocation.

¶11 On August 11, 2015, P.B. hand-delivered a letter to the DA's office asking that all charges be dropped and noting that Johnson has a commercial driver's license.

¶12 On August 17, 2015, P.B. filed a letter with the trial court asking that it lift the no-contact order and indicating that she was no longer interested in pressing charges against Johnson.

¶13 During a September 8, 2015 joint hearing on the domestic abuse and intimidation cases, the trial court ordered that the two cases be joined for trial and scheduled a single joint final pretrial conference for October 8, 2015, and a jury trial for November 16, 2015. The State informed the court and trial counsel that based on a letter sent to the court and numerous letters sent to its office, it had reason to believe that P.B. would not appear for trial and that it would be filing a motion to admit P.B.'s out-of-court statements, based on the forfeiture by wrongdoing doctrine.

¶14 On September 9, 2015, P.B. called the second victim-witness advocate. They discussed the trial, and the victim-witness advocate told P.B. that she needed to appear in court on the trial date.

¶15 On October 8, 2015, the State told the trial court that

> I don't know regarding witnesses unavailability. So, it doesn't make sense to litigate forfeiture by wrongdoing. So, I let defense counsel know that is a potential theory and

> I will provide him with the motion in advance, if he wants to respond in writing or be prepared to argue it on the day of trial.

¶16 On November 4, 2015, at 4:33 p.m., a process server went to P.B.'s home to serve her with a trial subpoena and received no answer. The process server left a card at the residence and a message on P.B.'s phone. On November 6, 2015, at 10:13 a.m., the process server went to P.B.'s home again and got no response at either the front or side doors. The process server left a card on the side door of the residence. At 3:29 p.m. on November 6, 2015, the process server attempted service again at P.B.'s home with no response. Then, after verifying that P.B. owned the residence, the process server posted the subpoena on the side door of P.B.'s home.

¶17 On November 16, 2015, the State filed a motion seeking admission of P.B.'s out-of-court statements based on the forfeiture by wrongdoing doctrine. The motion included transcriptions of the May 19 and 24, 2015 phone calls, which the State contended had caused P.B. to be largely uncooperative with the DA's office since the end of May 2015 and were a factor in her failure to appear for trial. The trial subpoena that the State had attempted to serve upon P.B. was filed with the motion.

¶18 On the morning of the November 16, 2015 trial, P.B. did not appear. Relying on its motion, the State requested that the trial court admit P.B.'s statements to police without her in-court presence, based on Johnson's statements in the recorded calls telling P.B. not to come to court. The trial court granted the motion, noting that "this is as strong as it gets in terms of repeated efforts to … persuade someone not to come to court, and, therefore, cause them not to come to court."

¶19 At trial, the police officer who responded to the May 18, 2015 domestic abuse call, testified. The officer began by describing what he observed when he arrived at the scene. He saw Johnson standing outside P.B.'s residence, he found P.B. inside the residence, and he saw that P.B. was crying and that she had red marks and a couple of scratches on her neck, and blood on her lip. After talking to P.B., the officer arrested Johnson at the scene.

¶20 The police officer testified about P.B.'s statements to him. He stated that once she collected herself, P.B. told him what happened that day. P.B. said that earlier on May 18, she had gotten into a text message argument with Johnson. Johnson left the residence. He returned later that day and knocked on the side door. P.B. came to the door with their son in her arms and let Johnson inside, but stated that he should not start any trouble.

¶21 P.B. told the officer that after entering the residence, Johnson took the child from P.B.'s arms and placed him on the hallway floor. He then went back to the kitchen where P.B. was standing and extended one hand to grab P.B. by the neck and clenched it tightly, which hurt and restricted P.B.'s breathing. Holding P.B. by the neck, Johnson knocked her onto a chair. Next, holding P.B. by the neck, Johnson slammed her into the stove. Then still holding P.B. by the neck, Johnson took her to the bedroom, threw her on the bed, placed a pillow over her face and pushed down for a few seconds, causing P.B. to be unable to breathe, while saying to P.B., "I'm going to kill you." Johnson let go.

¶22 Then, P.B. went into the living room and sat in a chair. Johnson followed, grabbed her again and started choking her. After a few seconds Johnson released P.B. She went outside and yelled out for a neighbor to call the police.

¶23 An analyst from the DA's office also testified regarding the recording of Johnson's telephone calls of May 19 and May 24, 2015. She laid the foundation for the jury to hear the recordings of the telephone conversations and the introduction of the recorded phone calls' transcripts. After presenting the two witnesses, the State rested. The following morning, trial counsel told the court that Johnson had decided not to testify and that he had no witnesses to call.

¶24 The trial court then addressed its forfeiture by wrongdoing ruling stating that: (1) it found that the proof of the State's efforts to secure P.B.'s appearance at trial, which were attached to the State's motion to admit, "were more than reasonable"; and (2) it found by a preponderance of the evidence that Johnson's efforts, as reflected in the phone calls and his own words, were about as explicit as one could get to dissuade or convince a witness from appearing in court.

¶25 On November 17, 2015, the jury found Johnson not guilty of suffocation and guilty of strangulation, misdemeanor battery, and disorderly conduct in the domestic abuse case. It also found Johnson guilty of both counts in the intimidation case.

¶26 On December 21, 2015, the trial court imposed global sentences of two years of initial confinement and four years of extended supervision. Johnson filed motions for postconviction relief. On March 20, 2017, after the motions had been briefed, the trial court issued a written order denying Johnson's postconviction motions. These appeals followed. Upon Johnson's motion, we consolidated the appeals for briefing and disposition.

STANDARDS OF REVIEW

¶27 "Although a [trial] court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *See* ***State v. Baldwin***, 2010 WI App 162, ¶30, 330 Wis. 2d 500, 794 N.W.2d 769 (citation and one set of quotation marks omitted). Whether a witness is unavailable for confrontation purposes presents a constitutional fact, which is also reviewed *de novo*. ***State v. King***, 2005 WI App 224, ¶11, 287 Wis. 2d 756, 706 N.W.2d 181. The trial court's findings of fact are accepted on appeal unless they are clearly erroneous. ***Baldwin***, 330 Wis. 2d 500, ¶30.

¶28 The deferential standard for review of the sufficiency of evidence to support a conviction is as follows:

> [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 [S]tate 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).

DISCUSSION

¶29 Johnson contends that the State did not establish that P.B. was actually unavailable or that Johnson caused her unavailability and, therefore, the

forfeiture by wrongdoing exception did not apply and his right to confrontation was violated by the admission of P.B.'s out-of-court statements. He also contends that there was not sufficient evidence to convict him of conspiring to intimidate a witness.

I. Johnson's Confrontation Clause Rights were not Violated

¶30 "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Confrontation Clause applies to the states through the Fourteenth Amendment. ***Pointer v. Texas***, 380 U.S. 400, 403 (1965). Courts may admit prior testimony against a defendant only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004).

¶31 However, the forfeiture by wrongdoing doctrine is an exception to the Confrontation Clause. ***Giles v. California***, 554 U.S. 353, 359 (2008). The doctrine permits the introduction of statements of a witness who is "detained" or "kept away" by the "means or procurement" of the defendant. ***Id.*** (citations omitted). In its 2008 ***Giles*** decision, the United States Supreme Court held that "forfeiture by wrongdoing required not just that the defendant prevented the witness from testifying, but that the defendant *intended* to prevent the witness from testifying." ***Baldwin***, 330 Wis. 2d 500, ¶39. The forfeiture by wrongdoing doctrine is based on equitable grounds and arises from public policy against a defendant profiting from his own wrongdoing. ***Id.***, ¶35.

¶32 Johnson contends that "the record simply does not indicate that P.B. refused to attend court" and that the State was required to show that Johnson

caused it. As will be further explained, we disagree with Johnson's contention regarding the record.

¶33 The trial court granted the State's motion to admit P.B.'s out-of-court statements under the forfeiture by wrongdoing doctrine. In its ruling on the motion prior to trial, the trial court noted that any time a witness does not come to court, the court does not know with "absolute certainty that the defendant's actions were the cause," acknowledging that it was possible that P.B. had been involved in a car accident or that she had a medical emergency. However, the trial court found that "there seem[ed] to be an awful lot in the [motion] alleging that [Johnson] tried to convince her not to come to court." The trial court also noted that there was "very strong evidence—more than [courts] usually see in most cases—that [Johnson] was responsible for her not to come to court" and that "this is as strong as it gets in terms of repeated efforts to … persuade someone not to come to court." After the evidentiary portion of the trial was complete, the trial court also stated that it found by a preponderance of the evidence that Johnson's efforts, contained in the phone calls and his own words, were about as explicit as one could get to dissuade or convince a witness from appearing in court.

¶34 The trial court's findings of fact are supported by the record, including the words of Johnson's May 19 and May 24, 2015 calls to P.B. Johnson contacted P.B. via telephone twice. He asked her not to testify and to tell the DA that she had lied about his alleged domestic violence. One day after the second call, P.B. told a victim-witness advocate that she would not have anything to do with the case. Johnson's actual words when he asked P.B. not to go to court and to tell the DA that she had lied when she reported Johnson's acts of domestic violence against her are evidence that he *intended* to prevent P.B. from testifying at his criminal trial. *See* ***id.***, ¶39. The trial court reasonably determined that

Johnson's phone calls were a cause of P.B.'s failure to appear to testify at trial and that he intended to persuade her not to testify at his criminal trial.

¶35 Johnson suggests that "[i]t is just as likely that [P.B.] simply mixed up the dates or encountered an emergency given her multiple court dates and correspondence with the trial court," citing P.B.'s phone call to the State on May 26, her contact with State agents in court on May 29, at the DA's office on August 11, and over the phone on September 9, 2015. However, the trial court considered and dismissed the likelihood that some other intervening event caused P.B. not to come to court.

¶36 In reviewing the trial court's factual findings, the question before this court is not whether another inference could be drawn from the facts, but whether Johnson has shown that the trial court's factual determinations and the inferences that it drew from the facts were clearly erroneous. *See* ***id.***, ¶30. Johnson has not made that showing. Therefore, we affirm the trial court's factual determinations. Based on those factual determinations, we concur with the trial court's conclusion that the State showed by a preponderance of the evidence that Johnson's statements to P.B. on the phone caused her not to testify at his trial and that Johnson intended to prevent her from testifying by means of persuasion.

¶37 What the jury found beyond a reasonable doubt, the trial court, as we have explained, earlier found by a preponderance of the evidence. The jury found that Johnson intimidated P.B., the witness, and had conspired to intimidate P.B., the victim. Those jury findings confirm the sufficiency of the evidence to support the trial court's earlier conclusion by a preponderance of the evidence that Johnson had intimidated P.B. "[W]here the jury finds beyond a reasonable doubt that the defendant intimidated the person who was a witness, the defendant has forfeited,

by his own misconduct, his right to confront that witness." ***State v. Rodriguez***, 2007 WI App 252, ¶19, 306 Wis. 2d 129, 743 N.W.2d 460. Thus, Johnson's intimidation convictions[6] also provide the basis for the admission of P.B.'s out-of-court statements under the forfeiture by wrongdoing exception. *See* ***id.***

¶38 Johnson also contends that the State was required to show that P.B. was actually unavailable, citing ***Baldwin***, 330 Wis. 2d 500, ¶51. He cites WIS. STAT. § 908.04(1)(e) (2015-16)[7], which provides that "'[u]navailability as a witness' includes situations in which the declarant … [i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." Johnson also states that in ***Baldwin***, 330 Wis. 2d 500, ¶¶48-49, this court used § 908.04 to determine whether a witness was unavailable for confrontation purposes.

¶39 The State counters that it is not at all clear that the State must prove unavailability in the traditional hearsay sense for forfeiture by wrongdoing to apply. It suggests that because ***Baldwin*** first pointed out that defendant Baldwin's argument was unsupported, the remaining discussion should be viewed as dicta. It also states that, based on ***Giles***'s consistent reference to a witness who is "detained" or "kept away," *see* ***id.***, 554 U.S. at 359-61, that a witness's absence on the day of trial is all the State need prove if it proves the defendant caused the absence with the intent to prevent the witness from testifying.

[6] As noted earlier, Johnson does not appeal his intimidation of a witness conviction.

[7] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶40 Because we hold that the record supports the trial court's unavailability finding under WIS. STAT. § 908.04, we need not consider whether a lesser standard would suffice. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (stating that appellate courts should resolve appeals "on the narrowest possible grounds"). In ***State v. Williams***, our supreme court stated that the proponent of the evidence must demonstrate a good-faith effort and due diligence in trying to locate and produce an absent witness. ***Id.***, 2002 WI 58, ¶¶62-63, 253 Wis. 2d 99, 644 N.W.2d 919. Here, the trial court found that the proof of the State's efforts to secure P.B.'s appearance at trial "were more than reasonable." The record supports the trial court's conclusion.

¶41 The evidence establishes that the process server received no answer when the process server attempted to serve P.B. personally with a trial subpoena at 4:33 p.m. on November 4, 2015, at her home. The process server left a card at the side door and a message on P.B.'s phone. Service of P.B. at her home was again attempted on November 6, 2015, first, at 10:13 a.m., with no response at the front or side doors—a card was left on the side door, and later at 3:29 p.m., with no response. Then, after confirming that P.B. owned the residence, the process server posted the subpoena on the side door of P.B.'s residence. We agree with the trial court that the State established that it made a good-faith effort and due diligence in attempting to procure P.B.'s attendance at the trial.

¶42 Johnson acknowledges that P.B. was properly served with the criminal subpoena, citing ***State v. Wilson***, 2017 WI 63, ¶46, 376 Wis. 2d 92, 896 N.W.2d 682. However, Johnson argues that minimum compliance with subpoena service does not automatically equate to an unavailability finding if the subpoenaed party fails to comply, citing WIS. STAT. § 908.04(1)(e) and ***Williams***. ***Williams*** addressed whether the defendant had satisfied the requirement of

§ 908.04(1)(e) by showing that he had attempted to "'procure the declarant's attendance by process or other reasonable means.'" ***Williams***, 253 Wis. 2d 99, ¶62. Williams, the defendant, had not used process. The issue in ***Williams*** was whether due diligence had been used to locate the witness, not the adequacy of process. *See* ***id.***, ¶¶57, 64-68 (holding that the defendant failed to establish that he had exercised due diligence in attempting to locate the witness where there was conflicting information about whether the witness resided in Chicago or Milwaukee and the defendant's efforts to locate the witness were limited to asking other defense witnesses whether they knew where the witness lived and checking for him at the Racine and Milwaukee County jails). By comparison, the State used process in this case. *See* § 908.04(1)(e).

¶43 Johnson also maintains that the State used insufficient process in this case because a body attachment was not used, citing ***State v. Zellmer***, 100 Wis. 2d 136, 145, 301 N.W.2d 209 (1981). However, the facts of ***Zellner*** are distinguishable from those of this case. ***Zellner*** involved a witness who testified at the preliminary hearing, moved out-of-state prior to trial, and informed the DA that he would not appear at trial. ***Id.*** at 142. Although the State had not made any effort to compel the witness's appearance, the trial court denied the defendant's Confrontation Clause objection and admitted the preliminary hearing testimony. ***Id.*** The Wisconsin Supreme Court held that the State had not made a "good faith effort" to compel the absent witness because it had not used the Uniform Act for the Extradition of Witnesses in Criminal Actions to obtain an order requiring the witness's attendance at trial. ***Id.*** at 145. In this case, the subpoena was properly served on P.B.—the subpoena is the Wisconsin equivalent of an order issued pursuant to the Uniform Extradition Act.

¶44 Moreover, in ***Zellner*** the court also explained, "[w]e do not find the use of process to be, in every case, essential to a determination of unavailability[.]" ***Id.***, 100 Wis. 2d at 148-49. Neither ***Williams*** nor ***Zellner*** provides authority for the proposition that the State had to use a body attachment to demonstrate a reasonable effort or due diligence to compel P.B.'s appearance.

¶45 Additionally, Johnson fails to show how the issuance of a body attachment would have made a difference in this case. Johnson made two phone calls to dissuade P.B. from testifying. The impact of those calls is illustrated by P.B.'s four contacts with the victim-witness advocates, her letter to the DA, and her letter to the court. P.B. told one of the victim-witness advocates that "she was not going to have anything to do with the case." The process servers could not locate P.B. prior to trial despite three attempts to serve her with a trial subpoena and leaving contact information indicating that the process servers were looking for her. If P.B. could not be found for service with a subpoena, it is not likely that she could be served with an arrest warrant. Here, we conclude that the State met its burden of showing that it made a good-faith effort to procure P.B.'s appearance at trial by process. *See* ***King***, 287 Wis. 2d 756, ¶17 (stating that a subpoena is necessary if it is a "foreseeable potential condition" on the witness' presence at trial and serving the witness with a subpoena was possible).

¶46 In sum, we uphold the trial court's determination that Johnson intended his conduct to cause P.B. not to testify and that the conduct caused P.B. not to appear at trial. We also uphold the trial court's unavailability finding.

II. The Trial Court Properly Found that Sufficient Evidence Supports the Conspiracy to Intimidate a Victim Conviction

¶47 Johnson also contends that his conviction for conspiracy to intimidate a victim is not supported by sufficient evidence because there was no agreement between him and the third party. In other words, he asserts that there was no evidence at trial of any mutual understanding to accomplish some common criminal objective.

¶48 Johnson was convicted of conspiring to intimidate a witness in violation of WIS. STAT. § 940.45(4). There are three elements to a criminal conspiracy: "(1) an intent by the defendant that the crime be committed; (2) an agreement between the defendant and at least one other person to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." ***State v. Routon***, 2007 WI App 178, ¶18, 304 Wis. 2d 480, 736 N.W.2d 530. The focus of the conspiracy in violation of WIS. STAT. § 939.31 is on the intent of the individual defendant. ***State v. Sample***, 215 Wis. 2d 487, 501-02, 505, 573 N.W.2d 187 (1998).

¶49 The evidence introduced at trial provides a factual basis for the conspiracy to intimidate a victim charge, and it was sufficient for the jury to find Johnson guilty beyond a reasonable doubt. Johnson claims that there is simply no evidence that the third party to the May 24 phone call had the intent necessary to participate in a conspiracy. However, as the trial court properly instructed the jury, intent can be found from a person's "acts, words and statements, if found at all, and from all of the facts and circumstances in this case bearing upon knowledge and purpose."

¶50 The evidence shows that the third party agreed to proceed in a prohibited manner to attempt to dissuade P.B., the victim, from assisting in the prosecution of the crime. *See* ***id.*** at 497. On May 24, 2015, Johnson used an unidentified third party to place the three-way call to P.B. Johnson tried to conceal his actions because he knew that he was not supposed to contact P.B. For that reason, Johnson did not use P.B.'s name or initially disclose his purpose, and the third party may not have initially understood what the call was about.

¶51 However, the evidence shows that the third party gained an understanding quickly because he said to P.B., "[h]e wants you to get a notary letter and take it to the DA's office and tell them it ain't true so he can get out." While this statement is similar to what Johnson told him a moment earlier, Johnson had not told the third party that it was so he could get out of jail. The third party clearly understood what was at stake in Johnson's call, and after the discussion of Johnson's abuse and P.B. stating that she was not willing to say she had lied, the third party told her, "[h]e said you got[]to, it's a felony." Even though the statement was made at Johnson's request, a reasonable jury could conclude that the third party understood the nature of the call and knew what he was telling P.B. to do.

¶52 Intent does not require that the crime was the third party's purpose or that the third party be particularly interested in the result, i.e., have a "stake in the outcome." *See* ***id.*** at 504 (citation omitted). Through the conversation as directed by Johnson and P.B.'s response, a reasonable jury could conclude that the third party knew that he was participating in an attempt to intimidate a victim. Therefore, there was sufficient basis for the jury to find conspiracy beyond a reasonable doubt. *See* ***Poellinger***, 153 Wis. 2d at 507. Consequently, the trial

court properly rejected Johnson's contention that his conspiracy to intimidate a victim conviction was not supported by sufficient evidence.

CONCLUSION

¶53 We conclude that the trial court properly admitted victim P.B.'s out-of-court statements under the forfeiture by wrongdoing doctrine. We also conclude that there is sufficient evidence to support the conspiracy to intimidate a victim conviction. Therefore, we affirm the judgments and orders.

By the Court.—Judgments and orders affirmed.

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