COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2390-CR **Cir. Ct. No. 2006CF700**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY JAVONE OLIVER, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. A jury found Kelly J. Oliver, Jr., guilty of first-degree recklessly endangering safety by use of a dangerous weapon as a party to a crime (PTAC). He contends the evidence was insufficient to convict him, that the

PTAC instruction was structurally flawed, requiring reversal, and that, because he is African-American, the striking of the only black juror was a violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986). We disagree and affirm.

¶2 The State charged Oliver with PTAC first-degree recklessly endangering safety while armed, as a repeater, in violation of WIS. STAT. §§ 941.30(1), 939.50(3)(f), 939.05 and 939.63(1) (2005-06).[1] The following facts are taken from the complaint, a statement Oliver gave to the police,[2] and the trial testimony of Officer Todd Yde, an investigator with the City of Racine Police Department. Oliver was the driver of a minivan involved in a shooting at 18th and Howe Streets in a residential area of Racine at about 2:00 a.m. Also in the van were Adrian Harlan, Anthony Mullins and LaRon Winston. Tony Woods, a friend of Harlan and Mullins, had been shot some hours earlier on Racine's north side. Harlan and Mullins wanted to go to the south side to look for "southsiders," members of the Gangster Disciples, to avenge his shooting.

¶3 Believing they would not find anybody, Oliver agreed to drive them. Oliver first told Yde he did not know there was a gun in the van but after Yde said he disbelieved him because of physical evidence recovered from the scene, Oliver admitted he knew that Harlan had a large handgun or rifle. When they encountered people on a street corner, Harlan told Oliver to slow down. The other parties opened fire. Harlan opened the van's sliding door, leaned out of the van to shoot back and was shot in the face and leg. Oliver drove him to the hospital.

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

[2] The trial court denied Oliver's motion to suppress his statement.

Other State's witnesses testified that Harlan's fingerprints were on the gun found at the scene and that seven shell casings found there were fired from that gun.

¶4 Oliver testified in his own defense. He said he gave his passengers a ride to a gas station and came to be in the area of 18th and Howe on their way home from "riding around." Oliver testified that until he drove Harlan to the hospital he was unaware that Woods had been shot, but acknowledged telling Yde his passengers were upset about it, saying he lied so Yde would let him go home. He denied telling Yde he or his passengers had been looking for the Gangster Disciples. At one point Oliver acknowledged telling Yde that Harlan opened the sliding door to fire at people in the street. At another he testified that although Harlan sat directly behind him in the minivan, he did not know Harlan opened the door or had a gun and fired seven times.

¶5 Oliver's counsel affirmatively accepted the jury instructions the State submitted and, after closing arguments, the court instructed the jury accordingly. The jury found Oliver guilty and the court imposed an eleven-year sentence of six years' initial confinement followed by five years' extended supervision. Oliver appeals.

¶6 Oliver first contends the evidence was insufficient to support the jury verdict. An appellant attacking a jury verdict has a heavy burden. ***State v. Hahn***, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

> We affirm the verdict if "the evidence adduced, believed and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." In reviewing the evidence, we view it in the light most favorable to the verdict, and, if more than one reasonable inference can be drawn from the evidence, we draw the inference that supports the verdict. The credibility of the witnesses and the weight of the evidence [are] for the trier

> of fact, as is the resolution of inconsistencies within a witness' testimony.

Id. (citations omitted).

¶7 The jury found Oliver guilty of PTAC first-degree recklessly endangering safety. A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another is committing or intends to commit a crime, knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of the willingness to assist. *See* WIS JI—CRIMINAL 405; *see also* WIS. STAT. § 939.05. The elements of first-degree recklessly endangering safety are (1) endangering the safety of another human being by (2) conduct the actor was aware created an unreasonable and substantial risk of death or great bodily harm[3] to another person, and (3) the circumstances of the actor's conduct show utter disregard for human life. *See* WIS JI—CRIMINAL 1345; *see also* WIS. STAT. § 941.30(1).

¶8 The jury heard testimony that Oliver drove his companions to a specific area looking for Gangster Disciples to avenge Woods' shooting; that upon seeing several people on a nearby street corner, Harlan, seated directly behind Oliver, slid open the van door and fired seven shots from a "big" gun; that the area was residential; that Harlan himself was shot in the face and leg; and that Oliver admitted lying to the police earlier when he thought it would serve his interest. The jury also heard that Oliver was surprised to encounter anyone on the street at 2:00 a.m.; that Harlan shot only in response to the Gangster Disciples opening fire; and that Oliver denied seeing the gun or knowing of his companions' plans.

[3] "Great bodily harm" means serious bodily injury. *See* WIS JI—CRIMINAL 1345.

¶9 Oliver correctly asserts that to win a conviction for PTAC liability, the State had to prove that he knew another was committing or intended to commit the underlying criminally reckless conduct. Oliver also asserts, however, that the Gangster Disciples, not Harlan, were the principals. Absent proof, he continues, that he knew in advance of the Gangster Disciples' plan, driving a minivan cannot constitute conduct which creates the requisite risk of harm and he therefore cannot be guilty of PTAC recklessly endangering safety.

¶10 We disagree. Oliver was charged with aiding and abetting Harlan. The jury heard evidence that Oliver knew Harlan wanted revenge for Woods' shooting; that Harlan wanted to go to this area to look for "southsiders"; that Oliver drove him there; and that Harlan had a large gun and slid open the van door to shoot at people in the street. The jury also heard Oliver's testimony that he knew none of this when he and his passengers were "riding around." It was for the jury to weigh all the evidence, assess the witness' credibility and resolve any conflicts in the testimony. The jury reasonably concluded that shooting seven times at people on the street from a moving van in a residential neighborhood created a substantial risk of bodily harm, even if those people also engaged in similar conduct.

¶11 Oliver next asserts that the trial court did not properly instruct the jury that to find him guilty of aiding and abetting, it had to be convinced beyond a reasonable doubt that Harlan, the principal, committed all the elements of the underlying crime. The State provided the substantive instructions on PTAC and first-degree recklessly endangering safety. The one for first-degree recklessly endangering safety instructed that the State bore the burden of proving the three elements of that crime beyond a reasonable doubt. The PTAC instruction, however, did not state that the jury needed to be satisfied beyond a reasonable

doubt of Harlan's guilt before it could find Oliver guilty of aiding and abetting him. For several reasons, Oliver's argument fails.

¶12 First, Oliver's counsel affirmatively stated at the instruction conference that he had read the State's proposed instructions and had no objections. He also voiced no objection after the court read the instructions to the jury.[4] Thus, under WIS. STAT. § 805.13(3), he waived his challenge. *See* ***State v. McDowell***, 2003 WI App 168, ¶73, 266 Wis. 2d 599, 669 N.W.2d 204. Once an instructional error is waived, we may reverse the trial court only if we are persuaded that the real controversy has not been fully tried or that a new trial is required in the interest of justice. ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994); *see* WIS. STAT. § 752.35. We are not so persuaded.

¶13 Oliver urges, however, that a defective reasonable-doubt instruction is a "structural" defect subject to automatic reversal. *See* ***State v. Gordon***, 2003 WI 69, ¶35, 262 Wis. 2d 380, 663 N.W.2d 765. Structural errors, which comprise only "a very limited class" of cases, "infect the entire trial process" and "necessarily render a trial fundamentally unfair." ***Neder v. United States***, 527 U.S. 1, 8 (1999) (citations omitted). A reasonable doubt instruction that

[4] Oliver asserts that where trial counsel fails to object to a jury instruction that omits an essential element of the crime, we may conclusively presume prejudice under ***Strickland v. Washington***, 466 U.S. 668 (1984). *See* ***State v. Gordon***, 2003 WI 69, ¶33, 262 Wis. 2d 380, 663 N.W.2d 765. Since he does not further develop the ineffective assistance of counsel issue, we need not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

misdescribes the burden of proof is a structural error because it "vitiates *all* the jury's findings." ***Sullivan v. Louisiana***, 508 U.S. 275, 281 (1993).[5]

¶14 ***Sullivan*** illustrates how narrowly "structural error" applies. There, the court used a reasonable-doubt instruction in a first-degree murder death-penalty case essentially identical to one the Supreme Court recently had declared unconstitutional. ***Id.*** at 277. Such a fundamentally flawed instruction does not produce a *jury* verdict of guilt beyond a reasonable doubt, and thus denies the defendant his or her Sixth Amendment right to a jury trial. ***Id.*** at 280-81 (emphasis added). But that is a far cry from what occurred here. The trial court did not constitutionally "misdescribe" the burden of proof, *see* ***id.*** at 281, or reference any lesser burden. We conclude there was no structural error.

¶15 The State submits that, if the trial court did err, all instructional errors now are subject to a harmless error analysis.[6] *See* ***Neder***, 527 U.S. at 15; ***Gordon***, 262 Wis. 2d 380, ¶40. An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (citation omitted).

[5] Besides a defective burden of proof instruction, the other structural errors are complete denial of counsel; biased trial judge; racial discrimination in grand jury selection; denial of self-representation at trial; and denial of a public trial. *See* ***Neder v. United States***, 527 U.S. 1, 8 (1999); *see also* ***State v. Ford***, 2007 WI 138, ¶43 n.4, 306 Wis. 2d 1, 742 N.W.2d 61.

[6] We take the State's broad statement to mean all instructional errors not falling within the very limited set of cases described in ***Neder***, 527 U.S. at 8. We do not read ***Neder*** as abolishing this narrow niche of cases that "defy analysis by 'harmless error' standards." *See* ***id.*** at 7, 8 (citation omitted).

¶16 Granted, the trial court gave no specific instruction that the State must prove the elements of PTAC liability beyond a reasonable doubt. But instructions to the jury are to be considered as a whole. ***Robinson v. State***, 100 Wis. 2d 152, 166, 301 N.W.2d 429 (1981). The court instructed the jury that Oliver had pled not guilty to PTAC first-degree recklessly endangering safety "which means that the State must prove every element of the offense charged beyond a reasonable doubt." The court then instructed the jury that it should be satisfied beyond a reasonable doubt that all three elements of first-degree recklessly endangering safety were present. The jury also received the standard burden-of-proof instruction which directs jurors that they must find the defendant not guilty unless the evidence satisfies them beyond a reasonable doubt that the defendant is guilty. *See* WIS JI—CRIMINAL 140. Taken as a whole, the instructions properly set out the burden of proof on PTAC liability. If there was error, it was harmless.

¶17 Finally, Oliver challenges the trial court's ruling that the State gave a sufficiently race-neutral explanation for its peremptory strike of Juror No. 95, the sole African-American in the jury pool. It is a violation of a defendant's right to equal protection of the law for the State to use a peremptory challenge to remove a potential juror from the venire solely because of race. ***Batson***, 476 U.S. at 84.

¶18 Wisconsin has adopted the ***Batson*** principles and analysis. ***State v. Lamon***, 2003 WI 78, ¶22, 262 Wis. 2d 747, 664 N.W.2d 607. The burden-shifting analysis comprises three steps: (1) the defendant must make a prima facie showing that the prosecutor acted with discriminatory intent; (2) the State then must articulate a race-neutral explanation for the strike; and (3) the trial court must determine whether the defendant has carried its burden. ***Id.***, ¶¶28-32. The trial court's finding of whether the prosecutor had the discriminatory intent necessary

to support a ***Batson*** challenge is reviewed as a finding of historic fact, which we will not overturn unless it is clearly erroneous. ***State v. Gregory***, 2001 WI App 107, ¶5, 244 Wis. 2d 65, 630 N.W.2d 711.

¶19 Oliver made a prima facie showing because Juror No. 95, the lone African-American, is a member of a cognizable group and the prosecutor exercised a peremptory strike to remove him. *See* ***Lamon***, 262 Wis. 2d 747, ¶28. The burden then shifted to the State. The prosecutor explained that Juror No. 95's "mumbling, rambling answers" during voir dire and somewhat confused demeanor led him to strike the eighty-one-year-old. This clear, reasonably specific and facially nondiscriminatory reason satisfies the second step of the ***Batson*** inquiry, although Oliver asserts that the reason proffered by the State is a pretext for racial discrimination. *See* ***Lamon***, 262 Wis. 2d 747, ¶¶31-32.

¶20 The trial court observed, however, that Juror No. 95 spoke "with some difficulty," leading the court itself to "have some concerns about his ability to take in the testimony and to listen and then fully participate as a juror." The court concluded that while a for-cause strike might not be warranted, it found the State's explanation clear, reasonably specific and with a nexus to legitimate factors. *See* ***id.***, ¶29. The trial court's findings are not clearly erroneous. Since the trial court is in the best position to determine the credibility of the State's race-neutral explanations, we give great deference to that ruling. ***Id.***, ¶42. We see no ***Batson*** violation.

By the Court.—Judgment affirmed.

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