COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP790-CR **Cir. Ct. No. 2006CF450**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAMELL E. STARKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Tramell E. Starks appeals from a judgment entered after a jury convicted him of first-degree reckless homicide contrary to WIS. STAT. § 940.02(1), and being a felon in possession of a firearm, contrary to WIS. STAT.

§ 941.29(2)(a) (2005-06).[1] Starks asserts the following claims of error: (1) the trial court erred when it denied his request for the lesser-included offense instruction on second-degree reckless homicide; (2) the trial court should have granted his motion for a mistrial based on an alleged violation of the witness sequestration order; (3) the trial court erred in failing to dismiss the case based on the prosecutor's failure to turn over information relating to Junebug; and (4) the evidence was inconsistent and therefore insufficient to support the verdict. We reject each of Starks's claims and affirm.

BACKGROUND

¶2 On March 31, 2005, there was a confrontation between Starks and the victim in this case, Lee Weddle. Starks was waiting in Weddle's apartment, the lower flat of a duplex located at 3014 North 23rd Street in Milwaukee. Several other individuals, including Antwon Nellum and Wayne Rogers were present. When Weddle arrived at his apartment, Starks confronted him about being "out of order" with Starks's girlfriend. Starks and Weddle then engaged in a fist fight. At some point, Starks retrieved a semi-automatic handgun from his associate, Mario Mills, and then shot at Weddle. Seven shots were fired, with three bullets striking Weddle. The first bullet hit Weddle in the left buttock, traveling through to the right buttock. The second bullet struck Weddle in the left thigh, passed through his scrotum and struck his right inner thigh. The third bullet entered the left inner thigh, traveled through and struck the right thigh.

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

¶3 During and after the shooting, all others in the apartment scattered. The occupant of the upper duplex phoned police to alert them to the struggle occurring in the lower flat and to tell them that gunshots were fired. When police arrived, they found Weddle lying on the kitchen floor in a pool of blood. He was transported to the hospital, where he was pronounced dead as a result of exsanguination. A few days later, police received an anonymous tip that Starks was responsible for the shooting. The tip also alerted police to the fact that Nellum, Rogers and others were present during the incident.

¶4 On April 20, 2005, Nellum was arrested for a domestic violence matter and a parole violation. During initial police interviews with Nellum, he would not give any information to police except to say that it was a "lose-lose situation" for him because the police would not be able to protect him or his family.

¶5 On April 21, 2005, Starks voluntarily talked with police as he had heard they were looking for him. He denied having anything to do with the Weddle murder. On April 22, 2005, Nellum was interviewed again. He told police that he was very afraid of Starks and that during his initial police interviews he was too afraid to tell the police what had happened. Nellum proceeded to tell the police that he was present when Starks confronted Weddle and witnessed the fist fight. At some point, he became very frightened because he felt Starks was going to do something "real crazy." As Nellum scrambled to leave the flat, he heard four or five gunshots going off. Nellum was released from custody on July 7, 2005. On July 31, 2005, he was murdered.

¶6 Rogers was arrested on a drug offense in August 2005. When questioned about the Weddle murder, he told police, "ya'll already know who

killed him," but would not say anything more. When he was re-interviewed, Rogers told police he had not given them all the information he had about the Weddle murder. He said Weddle was his best friend and he wanted to do the right thing. Rogers then told police that Starks verbally confronted Weddle on the night in question about being "out of order" with Starks's girlfriend. He then described the same physical fist fight Nellum described. Rogers saw Starks go over to Mills, get the semi-automatic handgun, and fire twice at Weddle. Rogers heard Weddle say "man, you killed me," and then Rogers ran out of the house. As he was running, he heard three or four more shots. Rogers also told police that shortly after he left the house, he called Mills and asked if Weddle was okay. Mills and Starks were together at the time because Starks got on the phone and told Rogers "Fuck Lee," and hung up the phone.[2]

¶7 Starks was arrested and charged with first-degree intentional homicide as a party to a crime and possession of a firearm by a felon. Starks pled not guilty and the case was tried to a jury in December 2006. At the instruction conference, the State requested the jury be given the lesser-included instruction on first-degree reckless homicide. Starks objected to the request, but stated that if the trial court gave the lesser-included instruction requested by the State, it should also give the lesser-included instruction on second-degree reckless homicide. The trial court decided to give the instruction on first-degree reckless homicide, but found that the evidence did not support also giving the instruction on second-degree reckless homicide.

[2] A separate record reference recounts Starks's comment as "Fuck Flea." "Flea" was Weddle's nickname. This discrepancy is irrelevant to the resolution of the issues in this case.

¶8 The jury convicted on the lesser-included offense of first-degree reckless homicide and also on the felon in possession of a firearm charge.[3] Starks was sentenced to forty-five years on the homicide charge, consisting of thirty-one years of initial confinement followed by fourteen years of extended supervision. He was sentenced to ten years on the firearm charge, consisting of five years of initial confinement followed by five years of extended supervision to be served consecutively. Judgment was entered. Starks now appeals.

DISCUSSION

A. Lesser-Included Offense.

¶9 Starks argues that the trial court erred when it failed to give the lesser-included offense instruction of second-degree reckless homicide. The State responds that there was no basis in the evidence to charge the jury with the lesser-included offense instruction on second-degree reckless homicide. The trial court found that the facts did not support giving the second-degree reckless homicide instruction. We agree.

¶10 A criminal defendant is entitled to a lesser-included offense instruction "'*only* when there exists reasonable grounds in the evidence both for acquittal on the greater [offense] and conviction on the lesser offense.'" ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995) (citation omitted). "A

[3] Contrary to what is shown in the corrected judgment of conviction, Starks was not convicted as a party to a crime of first-degree reckless homicide. Although he was originally charged as a party to a crime of first-degree intentional homicide, the charges presented to the jury did not include the party to a crime allegation. Upon remittitur, the circuit court is directed to issue a corrected judgment of conviction that does not include the party to a crime reference. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (courts may correct clerical errors at any time).

challenge to [the] trial court's refusal to submit a lesser-included offense instruction presents a question of law which we review *de novo*." ***Id.*** A "'lesser-included offense [instruction] should be submitted only if there is a reasonable doubt as to some particular element included in the [greater offense].'" ***Id.*** (citation omitted).

¶11 A lesser-included offense instruction is not warranted when it is supported by a "mere scintilla" of evidence. ***Ross v. State***, 61 Wis. 2d 160, 171, 211 N.W.2d 827 (1973). It must be supported by a reasonable view of the evidence; there must be some appreciable evidence supporting the lesser-included offense instruction. *See* ***id.*** at 171-72. A lesser-included offense instruction is not warranted when it is supported by mere conjecture. *See* ***Johnson v. State***, 85 Wis. 2d 22, 34-35, 270 N.W.2d 153 (1978).

¶12 Here, the only difference between first-degree reckless homicide and second-degree reckless homicide is that first-degree requires proof of the additional element of "utter disregard for human life." *Compare* WIS. STAT. § 940.02 (first-degree reckless homicide) *with* WIS. STAT. § 940.06 (second-degree reckless homicide); *see also* ***State v. Jensen***, 2000 WI 84, ¶¶16-19, 236 Wis. 2d 521, 613 N.W.2d 170 (utter disregard for life aggravates second-degree reckless injury to first-degree reckless injury). Thus, if there was any reasonable view of the evidence in which the jury could have found that Starks's conduct was reckless but did not evince "utter disregard for human life," then the second-degree reckless homicide should have been given.

¶13 Starks contends that the evidence in the record demonstrates that he shot Weddle below the waist, that Starks believed you could not be charged with homicide if you shot someone below the waist and that he expressed distress when

he found out Weddle had died. Starks contends that all of these factors could result in the finding that he did not have the intent to kill Weddle and that he had some regard for Weddle's life. We review the record to determine if the evidence created a reasonable doubt as to whether Starks's conduct constituted "utter disregard for human life."

¶14 In assessing the "utter disregard for human life" element, we do not focus on Starks's *actual* subjective mental state; rather, we apply an objective standard, reviewing "what a reasonable person in the defendant's position would have known." *See* ***Jensen***, 236 Wis. 2d 521, ¶17. The evidence in the record shows that Starks was angry with Weddle and went to confront him. When Weddle fought back, Starks retrieved a semi-automatic handgun from his accomplice and shot at Weddle from about ten to twelve feet away. Starks fired at least seven times, shooting even after Weddle had fallen to the ground and after Weddle had made the statement that Starks was going to kill him.

¶15 After Starks stopped shooting, Weddle was clearly seriously injured and Starks knew that. He could see Weddle was bleeding and heard him say, "man, you killed me." Yet, Starks fled the premises, did not phone for medical help and did not return to offer any assistance. In fact, when asked shortly after the shooting if Weddle was okay, Starks's response was "Fuck Lee." These actions do not leave any reasonable doubt that Starks showed a complete lack of concern for Weddle's life. Starks's conduct in shooting Weddle and in failing to render any aid to Weddle after the shooting establishes his utter disregard for Weddle's life. *See* ***State v. Sutton***, 2006 WI App 118, ¶¶20-23, 294 Wis. 2d 330, 718 N.W.2d 146.

¶16 We also reject as unreasonable Starks's contention regarding his personal belief that a below-the-waist shooting could not be charged as a homicide. For the lesser-included offense instruction to be given, the evidence must present reasonable grounds for the lesser instruction. Given the number of times Starks shot at Weddle (seven), the fact that after shooting him Starks left Weddle bleeding to death on the floor and later said, "Fuck Lee" in response to a question as to how Weddle was doing, there are no reasonable grounds to find that Starks showed some regard for Weddle's life.

¶17 In looking at the element of "utter disregard for human life," the test is not what Starks subjectively believed, but what a reasonable person in the same or similar circumstances would know. And even if Starks believed that shooting below the waist would immunize him from a homicide charge, that is not the same as showing some regard for Weddle's life. At best it shows Starks's regard for Starks's life, not Weddle's. But even if it could be construed as regard for Weddle, that belief when coupled with the rest of the facts here fail to meet the objective standard of reasonable evidence of Starks's regard for Weddle's life. Accordingly, the evidence would not create a reasonable probability that the jury would acquit on first-degree reckless homicide and convict on second-degree reckless homicide. Thus, the trial court did not err in so ruling. *See* ***State v. Estrada***, 63 Wis. 2d 476, 483, 217 N.W.2d 359 (1974) ("only an 'unreasonable view of the evidence' would give credence to the defendant's version of the [events] and require the submission of a lesser included crime").

B. Sequestration.

¶18 Starks's next claim is that the witness sequestration order was violated when two prosecution witnesses, Trenton Gray and Wayne Rogers, were

transported to the courthouse together. The State responds that the sequestration order was not violated, but even assuming it was violated, Starks was not prejudiced by it. The trial court ruled that the prosecutor had not violated the order, but that the two witnesses were in fact inadvertently transported from Dodge to Milwaukee in the same sheriff's van and placed in the same booking area.

¶19 The prosecutor had sent three faxes to the federal authorities who were holding Gray and Rogers in custody advising them that the two witnesses needed to be kept separate due to the sequestration order. When the Milwaukee County Sheriff went to pick them up from federal custody, the sheriff put them in the same van and then put them in the same booking room. It is clear from the record that the prosecutor was not responsible for Gray and Rogers being transported to court in the same vehicle and that he made several requests to the proper authorities to keep the witnesses separated. There is an insufficient basis in the record for the trial court to have decided there was prejudice or misconduct on the prosecutor's part.

¶20 The record also shows there was no prejudice. Gray testified that he was in the same van with Rogers and the same booking room, but that they did not discuss the case, they were in separate cells and they did not yell through the cells. Gray added that Rogers was his enemy and rival from another gang and they would have kept separate even if they did not have a sequestration order in the case. Gray testified that he thought they were being kept separate because they were from competing gangs, not because of a sequestration order. Gray testified several times that he and Rogers did not talk about their testimony. But when asked if "you sat in the van you didn't even talk about this case is that what you are saying?" Gray answered, "yeah, I talked about it. I said something to them."

What was said, however, was never elicited. Nonetheless, it is clear from the context of all of the rest of his comments that they did not talk about the substance of their testimony.

¶21 In reviewing a trial court's decision on a motion for a mistrial, our review involves determining whether the trial court erroneously exercised its discretion. *See* ***State v. Foy***, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). The trial court must determine "whether the claimed error is sufficiently prejudicial as to warrant a mistrial." ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). A "manifest necessity" must exist before a trial is terminated. ***State v. Givens***, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998) (citations and two sets of quotation marks omitted). We will reverse a trial court's decision denying a motion for a mistrial only when there is a "'clear showing'" of an erroneous exercise of discretion. *See* ***State v. Adams***, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998) (citation omitted). The test we apply is "whether, under all the facts and circumstances, [and] giving deference to the trial court's firsthand knowledge, it was reasonable to grant [the] mistrial under the 'manifest necessary'" standard. ***State v. Reid***, 166 Wis. 2d 139, 145-46, 479 N.W.2d 572 (Ct. App. 1991) (citation omitted).

¶22 The purpose of sequestration is to separate witnesses so that they remain true to their own testimony and so they do not influence each other's testimony. *See* ***State v. Green***, 2002 WI 68, ¶40, 253 Wis. 2d 356, 646 N.W.2d 298. Here, there was no evidence that Gray or Rogers altered their testimony as a result of sharing transportation to the courthouse or booking time. There is no evidence that one or the other influenced each other's testimony. Further, these two witnesses testified about completely different things. Gray, who was not at the shooting, testified about admissions Starks made later. Rogers testified about

what happened immediately before the shooting and at the scene. Based on the foregoing, we cannot conclude that Starks was prejudiced when the trial court permitted these witnesses to testify. We hold that the trial court did not erroneously exercise its discretion in allowing Gray and Rogers to testify in this case, and the trial court properly exercised its discretion in denying Starks's motion seeking a mistrial.

C. Junebug Issue.

¶23 Starks argues that the trial court erred in denying his motion for mistrial based on the prosecutor's failure to tell him Junebug's name. The State responds that the information was not in the exclusive possession of the State and that it was not exculpatory. The trial court denied the motion for mistrial, finding that the evidence was neither exculpatory nor in the State's exclusive possession. We agree with the trial court that the information was not in the exclusive possession of the State and therefore we do not reach the issue of whether the evidence was exculpatory under either ***Brady v. Maryland***, 373 U.S. 83 (1963) or ***State v. Harris***, 2004 WI 64, 272 Wis. 2d 80, 680 N.W. 2d 737.

¶24 WISCONSIN STAT. § 971.23 compels the prosecutor to disclose to the defense all exculpatory materials, "if it is within the possession, custody or control of the state." ***Id.***; *see also* ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979) (citing ***Brady***, 373 U.S. at 87) (due process requires prosecutor to produce all exculpatory material within its exclusive possession). We find that the material requested by Starks here, i.e. Junebug's name, was not in the exclusive possession of the State because the State had already turned it over to the defense.

¶25 The exculpatory material requested in this case was Junebug's name. Starks's trial counsel filed a motion for exculpatory evidence before trial asking

for "[t]he name of Junebug, referred to by Trent Gray in his report as the owner of the phone used to call Tramell Starks." Starks argues that he wanted Junebug's name "so that he could obtain the cell phone records of Junebug to show that Junebug's cell phone was never used to call any of the cell phones that Starks owned."

¶26 The record is uncontroverted that prior to trial, the prosecutor gave Starks Gray's cell phone directory showing only one Junebug listed and showing that Junebug's phone number was 745-5349. Additionally, the prosecutor turned over documents showing that the name of the person who subscribed to phone number 745-5349 was Willie R. Gill. Thus, months before trial, the prosecutor gave Starks the information he requested. It was no longer in the State's exclusive possession.

¶27 Additionally, the prosecutor has no obligation under ***Brady*** to investigate the information further for the defense. Here, long before trial, the defense could have obtained, or tried to obtain, the phone records of Willie R. Gill or phone number 745-5349. The defense could have interviewed, or tried to interview, Willie R. Gill or Starks's cousin, Gray. There is nothing in the record showing that Starks attempted to follow up on the evidence regarding Junebug's phone or interview any of the witnesses involved, such as Willie R. Gill or Gray. The prosecutor is not obliged to investigate the information for the defense. The evidence was made available to the defense and Starks did not follow up on it. "***Brady*** requires production of information which is within the exclusive possession of state authorities. Exclusive control will not be presumed where the witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question him." ***Sarinske***, 91 Wis. 2d at 36. Here the evidence, Junebug's name and the cell phone number, was available to the defense, was not

in the State's exclusive control, and there are no facts in the record that disclose an excuse for the defense's failure to investigate them further.

¶28 Starks does not deny he received the phone number and name Willie R. Gill from the prosecutor. But he argues that the prosecutor should have told him that Junebug was Ray Gill. Stark argues that because the federal agent knew two months before trial that Junebug's name was Ray Gill, the State prosecutor was required to tell Starks that information. The record is clear from the arguments on the motion for mistrial that the prosecutor had no *actual* knowledge of the federal agent's information until Gray testified. Trial defense counsel did not dispute that fact. Instead Starks's trial defense counsel argued that under ***Brady*** and ***State v. DeLao***, 2002 WI 49, ¶¶21-24, 252 Wis. 2d 289, 643 N.W.2d 480, the federal agent's knowledge was imputed to the state prosecutor. Although it is generally true that there are situations where a law enforcement officer's knowledge is imputed to a prosecutor, this is not one of those cases. Here, because the prosecutor had already given Starks the information of Junebug's phone number and the subscriber name of Willie R. Gill, it is immaterial that a federal agent knew that Junebug was Ray Gill. Starks already possessed the information of Junebug's name and could have pursued an investigation into Willie R. Gill and the cell phone records to make whatever impeachment use he could of them at trial. The information was not in the prosecutor's *exclusive* possession; the defense had it also.

¶29 Based on the foregoing, we conclude that the trial court did not erroneously exercise its discretion in denying Starks's motion for a mistrial because the information involved was not in the exclusive possession of the prosecutor.

D. Sufficiency of the Evidence.

¶30 Starks's last claim is that the evidence was insufficient to support the jury's verdict because there were so many inconsistencies in the testimony of the various witnesses. Specifically, Starks claims that some of the witnesses who were present in the house at the time of this incident provided inconsistent testimony regarding who exited the house first, whether they left before or after the shooting, and whether Weddle was shot in the living room or kitchen. He also alleges that some of the physical evidence is inconsistent with the witnesses' testimony. In response, the State refutes much of what Starks contends are inconsistencies. In reviewing a sufficiency of the evidence claim, we:

> may not substitute [our] 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) (citation omitted). Under this standard of review, we conclude that the record is sufficient to uphold the conviction. In reviewing the record, we conclude that the jury could reasonably find Starks guilty based on the evidence presented.

¶31 Testimony recounting eyewitness accounts to an event often presents inconsistencies. This is true because not every witness sees the event in an identical manner. Issues such as inconsistencies in the testimony or contradictory evidence are for the trier of fact to resolve. *See* ***State v. Perkins***, 2004 WI App 213, ¶15, 277 Wis. 2d 243, 689 N.W.2d 684. In doing so, the factfinder assesses

which witness is being truthful or even which parts of a particular witness's testimony should be accepted as true. *See* ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972). Accordingly, we reject Starks's claim that the evidence was insufficient to support the verdict. The State's case was strong. It had eyewitness testimony that Starks confronted Weddle, they engaged in a fist fight, after which Starks retrieved a gun and shot Weddle multiple times. Weddle was then left to die and eventually did die as a result of exsanguination. The jury heard additional testimony that Starks confessed to killing Weddle. Although some of the State's witnesses were criminals themselves, the jury was made aware of that fact and certainly took that into consideration in reaching its conclusion. As the State points out: "[E]ven a liar tells the truth once in a while." ***United States v. Williams***, 216 F.3d 611, 614 (7th Cir. 2000). If the jury determined that the State's witnesses were not telling the truth, they were free to acquit Starks. Based on their verdict, we can infer that they resolved any inconsistencies in the testimony and other evidence in this case in favor of the State.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.