COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1593-CR **Cir. Ct. No. 2008CF1051**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. HARPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Harper appeals from a judgment of conviction entered after a jury found him guilty of attempted first-degree intentional homicide while armed, disorderly conduct while armed, and recklessly endangering safety by use of a firearm. He argues that the trial court erred by:

(1) precluding cross-examination of the State's ballistics expert with a report issued by the National Academy of Science (NAS); and (2) declining to suppress all portions of Harper's custodial statement to police. We affirm the judgment. While we agree that the trial court erroneously precluded cross-examination with the NAS report, we conclude that the error was harmless. We further hold that the portion of Harper's statement admitted at trial was voluntarily made to police.

¶2 During a nine-hour period between September 20 and 21, 2008, three different firearms were discharged at three different times into the upstairs apartment of Harper's former girlfriend. Soon after the third shooting, based on the victim's report that Harper may have been the shooter, police went to Harper's residence to investigate. A struggle ensued and officers tased Harper while attempting his arrest. Harper was taken to the hospital and was released less than two hours later to police custody. After waiving his ***Miranda***[1] rights, Harper admitted that he bore "anger toward" the victim and had visited her apartment the previous day. Harper admitted that the victim's current boyfriend had answered the door, and that before leaving, Harper said something like "I see what I need to see." Harper denied involvement in any of the shootings. Based on officers' discovery of firearms at Harper's residence and witness statements placing his truck at the scene of all three shootings, Harper was charged.

¶3 Arguing that his custodial statement was involuntary, Harper moved for suppression. At a hearing, the State agreed it would only use the first twelve pages of the transcribed interrogation. Though Harper requested suppression of

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

the entire statement, the trial court concluded it was "satisfied those first 12 pages are admissible as voluntary."

¶4 At trial, officers testified that they had seized three firearms and assorted items of ammunition from Harper's residence. Kyle Anderson, a firearms expert from the State Crime Lab, testified to a reasonable degree of scientific certainty that bullets and casings found at the crime scene had been fired from two of Harper's guns.[2] During cross-examination, Harper sought to impeach Anderson with a Ballistics Imaging report produced by the NAS. Harper argued that the report was an exception to the hearsay rule because it was a public record or report under WIS. STAT. § 908.03(8) (2009-10).[3] The trial court concluded that the NAS was a private agency and refused to admit the report.

The trial court erroneously refused to admit the NAS report, but the error was harmless.

¶5 The trial court ruled that the NAS was not a public office or agency and therefore, its report was not an exception to the hearsay rule under WIS. STAT. § 908.03(8). On appeal, the State concedes that the trial court erred in excluding the NAS report. We agree with the parties that the Ballistics Imaging report of the NAS is an admissible report of a public office or agency under § 908.03(8).[4]

¶6 We review a trial court's decision to admit or exclude evidence under the erroneous exercise of discretion standard. ***Sullivan v. Waukesha***

[2] Anderson was unable to reach a conclusion about whether a recovered shotgun shell was fired from Harper's third firearm, a shotgun. He testified it was a possible match.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] Because we agree that the report was admissible under WIS. STAT. § 908.03(8), we will not address Harper's alternative argument that the report is learned treatise under § 908.03(18).

County, 218 Wis. 2d 458, 470, 578 N.W.2d 596 (1998). A misapplication or erroneous view of the law constitutes an erroneous exercise of discretion. ***Id.*** "Accordingly, a court erroneously exercises its discretion if it bases its decision on an erroneous view of WIS. STAT. § 908.03(8)." ***Id.***

¶7 Pursuant to WIS. STAT. § 908.03(8), the following are exceptions to the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶8 The Ballistic Imaging report was produced after the U.S. Department of Justice asked the NAS to appoint a committee to address issues raised by computerized ballistic imaging technology. The NAS is a federally chartered corporation that "[o]n request of the United States Government … shall investigate, examine, experiment, and report on any subject of science or art." 36 U.S.C. §§ 150301 and 150303. Courts construing the Federal Rules of Evidence have held that the NAS is a quasi-public agency because it was created by an Act of Congress in order to serve its needs. *See, e.g.*, ***Erickson v. Baxter Healthcare, Inc.***, 151 F. Supp. 2d 952, 966-67 (N.D. Ill. 2011) (report produced by NAS's private subsidiary was admissible as an exception to the hearsay rule under Fed. R. Evid. 803(8)(C), the federal analogue of WIS. STAT. § 908.03(8)). In the present case, we conclude that the NAS's ballistic imaging report was a "report[] … of [a] public agenc[y], setting forth … factual findings resulting from an investigation made pursuant to authority granted by law." Sec. 908.03(8). The NAS report was

an exception to the hearsay rule and the trial court erroneously precluded its admission.

¶9 However, we also conclude that the error was harmless beyond a reasonable doubt. As error is harmless if based on the totality of the record, it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See* ***State v. Harris***, 2008 WI 15, ¶¶43, 48, 307 Wis. 2d 555, 745 N.W.2d 397. Aside from Anderson's ballistics-matching testimony, the trial evidence against Harper was overwhelming.[5]

¶10 First, other firearms evidence at trial connected Harper to the shootings. With regard to the first shooting, witnesses heard two shots and officers located two bullet holes. At the scene, no casings were found and one .357 caliber bullet[6] was recovered. Trial testimony confirmed that police seized a .357 revolver from Harper's home and that it contained six casings, two of which were empty. Officers testified that the two empty casings appeared to have been fired, and that the revolver would not have ejected the casings. This correlates with the discovery of two bullet holes and no casings.

¶11 After the second shooting, officers recovered eleven shell casings from .40 caliber Smith and Wesson ammunition manufactured by Remington.

[5] Though not necessary to our conclusion that the error was harmless, we note that despite the unavailability of the NAS report, trial counsel was able to effectively cross-examine Anderson at trial. Trial counsel elicited from Anderson that there is no research establishing probability or error rates for ballistics matches, that Anderson had no set standard for determining whether a match was sufficient, that other experts may use different criteria for their determinations, and that mismatches may occur.

[6] Aside from the ballistics matching, Anderson identified the recovered bullet as a .357 caliber bullet. The science of determining a bullet's diameter is neither the subject of the NAS report nor of trial counsel's cross-examination.

During the search of Harper's residence, officers located a .40 caliber handgun as well as a magazine loaded with this same .40 caliber Remington ammunition. Officers also recovered a partially empty tray of this same ammunition.

¶12 The last shooting involved damage caused by shotgun pellets. Officers recovered a shotgun from Harper's residence and testified that, based on the odor of gunpowder, the shotgun appeared to have been fired within the preceding four to six hours.

¶13 Second, in addition to the firearms evidence, the testimony of six witnesses tied Harper to the shootings. The victim testified that she and Harper were previously in a relationship. It is undisputed that on the evening of September 20, prior to the shootings, Harper went to the victim's apartment where her current boyfriend answered the door. The victim testified that Harper then entered the bathroom where she was taking a shower and said "I see what I want to see now" and "I should do you in." The victim testified that after leaving, Harper called her numerous times. Officers verified that they examined the victim's phone and that during the relevant nine-hour time period, there were numerous calls received from the number attributed to Harper. The victim testified that during one of those calls, sometime around the time of the first shooting, Harper called and said "[y]ou're not going to want to hear this but, bitch, I'm going to kill you."

¶14 The victim's downstairs neighbor testified that she was acquainted with Harper prior to the shootings. With regard to Harper's visit earlier in the day on September 20, she testified that Harper said he wanted to take the victim out for her birthday and headed upstairs to the victim's apartment. The neighbor then heard "a lot of yelling, screaming, arguing." Immediately after the second

shooting, the neighbor looked out her window and "saw Mr. Harper jumping in his truck."[7] She further testified that she called Harper at around 7:00 a.m. on September 21, and that he admitted shooting at the house because "he caught [the victim] playing and he's gonna kill the bitch."

¶15 Three additional neighbors testified that after some or all of the shootings, they looked outside and saw a red truck driving away.[8] All three testified that the size and color of Harper's truck were consistent with the truck seen driving away from the shootings. One of the neighbors recognized the truck as the vehicle used when "the lady next door" moved into her apartment. The victim's testimony confirmed that she used Harper's truck when moving into her apartment. Another of the three neighbor-witnesses testified that after the shootings, he saw a stocky black male climb into the red truck and that he was carrying what looked like a pistol.

¶16 In sum, given the strength of the witness testimony along with the firearms evidence that was not subject to impeachment by the NAS report, the trial court's refusal to admit the NAS report was harmless error.

Harper's custodial statement to police was voluntary.

¶17 At trial, the State was permitted to introduce the first twelve pages of Harper's custodial statement to police. Harper argues that due mostly to his

[7] The victim's boyfriend also testified that he saw Harper's truck driving away from the scene immediately after the second shooting.

[8] It is undisputed that Harper owns a red Mazda pickup truck with a matching top cover.

physical and emotional state his entire statement was involuntary and inadmissible. We disagree.

¶18 The question of voluntariness involves the application of constitutional principles to historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. On review, we will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Berggren***, 2009 WI App 82, ¶23, 320 Wis. 2d 209, 769 N.W.2d 110. "[W]hen a trial court fails to make express findings of fact necessary to support its legal conclusions, we assume that the trial court made such findings in the way that supports its decision." ***State v. Long***, 190 Wis. 2d 386, 398, 526 N.W.2d 826 (Ct. App. 1994). This court independently applies constitutional principles to the trial court's factual findings to determine whether the statement was voluntary. ***Hoppe***, 261 Wis. 2d 294, ¶¶34-35.

¶19 A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice. ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). In determining whether a statement is voluntary, we consider the totality of the circumstances and balance the personal characteristics of the defendant against the pressures imposed by law enforcement in inducing the statement. ***Hoppe***, 261 Wis. 2d 294, ¶38.

¶20 Harper argues that his statement was involuntary primarily due to his compromised physical and emotional health. He asserts that because he was tased and suffered some physical injuries during the struggle to take him into custody, his statement was involuntarily. In terms of coercive police tactics, Harper cites to the officer's alleged misrepresentation of the existing evidence and that the officer continued the interrogation after Harper requested to be either charged or released.

¶21 The record does not support Harper's assertion that his physical and mental condition impeded his ability to voluntarily give a statement. The mere existence of physical pain is insufficient to render a statement involuntary. ***Clappes***, 136 Wis. 2d at 240. In ***Clappes***, the defendants were questioned while receiving emergency treatment for serious physical injuries. ***Id***. at 226-27, 230. Both were "experiencing great pain" and one even lapsed into unconsciousness. ***Id.*** at 228, 230-31. The court held that the admissions were voluntary "since there was no affirmative police misconduct reflecting an attempt to improperly bring physical or psychological pressure to bear in order to compel the defendant to respond to police questioning." ***Id.*** at 225. The court explained that "[p]roof of physical pain … should not affect the admissibility of the evidence where there is no proof that the confessor was irrational, unable to understand the questions or his responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities." ***Id.*** at 241-42.

¶22 It is undisputed that Harper was tased while being taken into custody and that he received medical treatment. However, his injuries pale in comparison to those in ***Clappes***. Harper was treated at and quickly released from the hospital. The interviewing officer testified that Harper "had like a road rash raspberry by his check, a little mark above his eyebrow" and "some scrapes on his hands." While Harper contends his injuries were more severe, the trial court was entitled to and implicitly did believe the officer's testimony about the extent of Harper's injuries.

¶23 There is also no proof that Harper's condition affected his ability to consent to and provide a voluntary statement. The interviewing officer conceded that Harper was confused about the time of day but testified that Harper was "lucid, answered questions and provided, I guess, answers to every question and

… they made sense to what I was asking." The transcript of the recorded statement supports the trial court's implicit finding that Harper's answers were responsive and coherent and that Harper was rational.

¶24 Additionally, there is no proof that the police took advantage of Harper's physical state in order to obtain a confession. Harper argues that the police "plied" him by misrepresenting the existence of DNA and fingerprint evidence and by continuing the interrogation after Harper requested to be either released or charged. The alleged misrepresentations and Harper's requests for release all occurred later in the interview, well after the admitted portion of his statement. The alleged misrepresentations and continued interrogation did not induce or coerce the portion of Harper's statement admitted at trial.[9]

¶25 We conclude that under the totality of the circumstances, the portion of Harper's statement admitted at trial was voluntary.

By the Court.—Judgment affirmed.

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

[9] Harper also points to his lack of post-secondary education and inexperience with the criminal justice system as relevant personal characteristics. Considering the totality of the circumstances, these factors do not tip the balance in favor of suppression.