**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

December 19, 1995

**NOTICE**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-0627-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**DECTOR L. ROBINSON,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Dector L. Robinson appeals from the judgment of conviction, following a jury trial, for first-degree recklessly endangering safety, and possession of a firearm by a felon, and from the order denying his motion for postconviction relief. He argues that the trial court erred in allowing two lines of testimony from a Milwaukee police detective, and in allowing the jury to view the pants the victim was wearing when shot in the leg.

Robinson and Quincy Ferguson were involved in a shooting that resulted from a neighborhood dispute over a missing baby car seat. The State contended that Robinson intentionally shot at the car in which Ferguson was attempting to leave the scene. Robinson maintained, however, that Ferguson accidentally shot himself as they struggled for the gun. Thus, the distance between the wound and the gun when it was fired became a critical issue in the trial.

The State called Milwaukee Police Detective Wayne Kozich, who testified about his visit to Ferguson at the hospital on the night of the shooting. Kozich testified that he examined Ferguson's pants to determine if they had been burned or if any gun powder residue was on them. The trial court sustained defense counsel's initial objection for lack of foundation to support Kozich's qualifications to testify "as an expert in gunshot residue testing." Detective Kozich then testified that in his fourteen years of law enforcement experience, he had observed hundreds of gun shot wounds. He also described training he had received regarding detection of close range gun shot wounds. The trial court then allowed Kozich to offer his opinion regarding the distance between the gun and the wound. Detective Kozich testified, "[T]here's no evidence that a weapon was anywhere close to the clothing when the hole was made," and that the gun was "probably more than two feet, easy." Robinson argues that the trial court erred in concluding that there was sufficient foundation for Detective Kozich to offer an expert opinion concerning the proximity of the weapon to the victim's clothing.

A trial court's decision to admit or exclude evidence is a discretionary one and we will not reverse a decision that was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). The admission or exclusion of scientific evidence through an expert is left to the trial court's discretion. ***State v. Hamm***, 146 Wis.2d 130, 142, 430 N.W.2d 584, 590 (Ct. App. 1988). Moreover, a trial court's conclusion that a witness is qualified to offer expert testimony is within the discretion of the trial court. ***State v. Elson***, 60 Wis.2d 54, 67, 208 N.W.2d 363, 370 (1973).

Section 907.02, STATS., provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, *experience, training, or education*, may testify thereto in the form of an opinion or otherwise.

(Emphasis added.) It is well settled that "[e]xperience is a proper basis for giving an expert opinion." ***State v. Johnson***, 54 Wis.2d 561, 565, 196 N.W.2d 717, 719 (1972). Although typically a ballistics expert would provide testimony regarding the proximity between a gun and a wound, a lay expert also may provide such testimony based on experience. In ***State v. Sarabia***, 118 Wis.2d 655, 348 N.W.2d 527 (1984), the supreme court permitted a coroner "to approximate the distance between the barrel and [the victim] at the time the gun was fired," based on the coroner's many years of experience in observing hundreds of gun shot wounds. ***Id.*** at 667-668, 348 N.W.2d at 534.

When one party lays a sufficient foundation for a lay witness to offer an opinion under § 907.02, STATS., the burden shifts to the adverse party to establish the insufficiency of the foundation to support the opinion. ***State v. Whitaker***, 167 Wis.2d 247, 257-258, 481 N.W.2d 649, 653 (Ct. App. 1992). In the absence of such contravening evidence, a trial court does not erroneously exercise discretion in allowing such testimony. ***Id.*** at 258, 481 N.W.2d at 653. In this case, defense counsel cross-examined Detective Kozich about his opinion but did not challenge his experience or training that formed the basis for the trial court's conclusion regarding his qualifications. We conclude that the trial court reasonably exercised discretion in permitting Detective Kozich to offer his opinion regarding the distance between the gun and the victim.

Robinson also argues that the trial court erred in allowing Detective Kozich to relate his conversation with the doctor at the hospital who described the trajectory of the bullet while viewing x-rays of the victim. At the trial, however, defense counsel did not object to this testimony and, therefore, we conclude that he waived this issue. *See* ***State v. Romero***, 147 Wis.2d 264, 274, 432 N.W.2d 899, 903 (1988). Absent any objection, and given the additional substantial evidence in this case, we decline Robinson's invitation to review his claim of plain error. *See* ***Virgil v. State***, 84 Wis.2d 166, 191, 267 N.W.2d 852, 865

(1978) (plain error determined, in part, according to "quantum of other evidence properly admitted").

Finally, Robinson argues that the trial court erred in allowing the jury to view the pants worn by Ferguson at the time of the shooting. He contends that "[w]hatever relevance these pants had was far outweighed by the danger of unfair prejudice," because the blood-stained pants could inflame the jury.

The trial court overruled the defense objection to the jury view of the pants, commenting that "the State introduced it to show a small, little bullet hole and it was almost impossible to see where the blood was." The trial court concluded that the probative value outweighed any unfairly prejudicial effect on the defendant.

Robinson concedes the relevance of the location of the bullet hole given that the trajectory of the bullet was probative of whether the shot was intentionally fired from a distance or accidentally at close range. Relevant evidence can produce unfair prejudice, however, if it improperly "appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish, or otherwise causes the jury to base its decision on extraneous considerations." ***State v. Patricia A.M.***, 176 Wis.2d 542, 554, 500 N.W.2d 289, 294 (1993). In this case, Robinson has offered nothing to suggest that pants with a small bullet hole and blood stains that were "almost impossible to see" provoked any such response from the jury. We conclude that the trial court properly exercised discretion in allowing the jury to observe the pants.

*By the Court.* – Judgment and order affirmed.

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