

No. 96-1898-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERRATA SHEET

DION W. DEMMERLY,

Defendant-Appellant.

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PLEASE TAKE NOTICE that the attached opinion, adding a before line on page 1, is to be substituted for the opinion in the above-captioned opinion which was released on December 27, 1996.

Dated this 7th day of December, 2006.

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

DECEMBER 27, 1996

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(1), STATS.

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

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v.

DION W. DEMMERLY,

Defendant-Appellant.

APPEAL from judgment and an order of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dion Demmerly appeals his conviction for first-degree intentional homicide and the denial of his postconviction motions. Demmerly asserts that the State improperly failed to disclose to defense counsel a reenactment of the crime scene performed by Demmerly while in custody and that the court erroneously allowed the State to introduce the reenactment at trial. Demmerly claims he was prejudiced by this evidence that violated his discovery demand, and that the failure to disclose exculpatory evidence violated his constitutional right to due process. He seeks a new trial. Because Demmerly failed to object to the introduction of the evidence at trial on the grounds that it violated his discovery demand, he waived the error. Further,

although the State concedes it was error not to produce the reenactment evidence pursuant to a pretrial discovery demand, it contends the error was harmless and did not violate Demmerly's constitutional rights. We agree and affirm the conviction.

This case arose when Demmerly's fireworks business was burglarized. Demmerly suspected that James Lane was responsible for the burglary and, that night, approached the Lane residence with his nephew to investigate. Demmerly looked into one of the windows of the Lane residence and saw the occupants handling fireworks similar to those Demmerly sold. Demmerly's nephew testified that Demmerly told him he saw a gun in the Lane residence.

Demmerly and his nephew returned home, picked up Demmerly's brother and Brandon Brownlee, and returned to the Lane residence to demand return of the stolen goods. Demmerly wore a bullet-proof vest¹ and armed himself with a sawed off shotgun. The shotgun had an automatic safety mechanism that, once loaded, must be deliberately disengaged by the user before being fired. Demmerly's brother also carried a .22 caliber pistol.

Upon the Demmerlys arrival, Lane and his brother emerged from the house. Lane was armed with a .22 caliber rifle. A confrontation ensued, and Demmerly demanded the stolen items be returned. It is disputed whether Demmerly pointed his shotgun at Lane or whether Lane pointed his rifle at Demmerly, or both.

Demmerly and Lane approached each other and subsequently Lane was fatally wounded by a shotgun blast to the chest. No one observed the shot except Demmerly and Lane. Lane's brother had left the scene to call 911;

¹ Demmerly argues that there is no evidence in the record to show that the vest Demmerly wore to the crime scene was bullet-proof. The record reveals that one witness described the vest as having a collar that looked "like almost a life preserver." Furthermore, the defense expert testified that the vest appeared to be a "flack jacket" that "was designed to stop rather low-velocity fragmentation type of injuries." On the basis of this testimony, we conclude that there was sufficient evidence for the jury to infer that the vest was a bullet-proof vest.

Demmerly's nephew and Brownlee had left the scene to return home and Demmerly's brother was crouching behind a car.

In a written statement given to police, Demmerly claimed that the two principals were about three feet apart when Lane swore and turned toward Demmerly while raising his rifle. Demmerly claims that upon seeing Lane raise his rifle, he pushed out with both hands, accidentally discharging his shotgun. After the shooting, Demmerly and his brother fled the scene, abandoning their weapons. After they returned to their residence, Demmerly mentioned spending the rest of his life in jail to his brother, who told him not to talk about the incident further.

Shortly after his arrest, Demmerly gave two written statements to Deputy Frank Szczepanec. While giving one of the statements, Demmerly reenacted the events that led up to the shooting. The fact of a reenactment was not revealed in either written statement. In his statement, Demmerly claimed the discharge was accidental and that he did not intend to kill Lane.

Demmerly was charged with first-degree intentional homicide. Before trial, Demmerly served requests for discovery upon the State as follows:

(2) Furnish the defense with a written summary of all oral statements of Defendant which the State intends to use during the course of trial, sec. 971.23(1), Wis. Stats.;

....

(5) Furnish the defense with notice of any conduct of Defendant that the State intends to introduce as an implied admission or as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident pursuant to secs. 904.04(2), 908.01(4), or 908.045, Wis. Stats.

In response, the State provided Demmerly with his statements, but did not reveal the fact or substance of Demmerly's reenactment.

At trial, Szczepaniec described the reenactment before the jury, over a defense objection. Szczepaniec testified that Demmerly, in his reenactment, positioned himself about five to six feet away from Lane when the shot was fired, considerably farther than Demmerly claimed in his written statement. However, experts for both the State and the defense testified that in their opinion the blast came from a very short distance away—less than one foot.

At the close of trial, the jury returned a guilty verdict. Demmerly raised numerous issues in a postconviction motion for relief, which the court denied. Demmerly now contends that a new trial is warranted because the State failed to inform defense counsel of the reenactment and that failure prejudiced his defense.

We consider Demmerly's arguments waived. Defense counsel entered the following objection to the reenactment evidence:

Your Honor, excuse me. I object to this. I think that the statement explains in the defendant's words what happened, and if there is no other recording of this or anything else, that there is no basis or foundation.

The gist of this objection is that the reenactment was cumulative, and that because the reenactment was not recorded in some way it lacked proper foundation. Because Demmerly did not object on the basis of the State's failure to comply with discovery rules, that objection was waived.² See *State v.*

² The reason this court requires a proper objection at trial is to give the trial court an opportunity to correct its own errors and thus avoid the raising of issues on appeal for the first time. *Bavarian Soccer Club v. Pierson*, 36 Wis.2d 8, 15, 153 N.W.2d 1, 4 (1967).

Hoffman, 106 Wis.2d 185, 214, 316 N.W.2d 143, 159 (Ct. App. 1982); § 901.03(1)(a), STATS.³

Demmerly argues that no objection was required to preserve the issue because the introduction of the reenactment violated his constitutional rights. See *Hoffman*, 106 Wis.2d at 215, 316 N.W.2d at 159 (court of appeals will review a constitutional error regardless of waiver if it is in the interest of justice and where there are no factual issues in need of resolution). Demmerly cites *Brady v. Maryland*, 373 U.S. 83 (1963), to support his argument that the failure to disclose Demmerly's reenactment rises to a constitutional violation. However, *Brady* only compels disclosure of evidence "favorable to an accused." *Id.* at 87. Here, the reenactment is not claimed as exculpatory. To the contrary, Demmerly asserts that the reenactment **hurt** his credibility. Because the reenactment is not exculpatory, the violation of Demmerly's discovery rights does not rise to constitutional dimensions. See *Hoffman*, 106 Wis.2d at 214, 316 N.W.2d at 159. A proper objection was therefore necessary to preserve the issue for appeal.

Even after addressing Demmerly's contention on the merits, in light of the State's concession that failure to disclose was error, we uphold the trial court's order. We review an order denying a postconviction motion seeking a new trial under the erroneous exercise of discretion standard. *State v. Randall*, 197 Wis.2d 29, 36, 539 N.W.2d 708, 711 (Ct. App. 1995). We uphold a trial court's discretionary decision where the record demonstrates a reasonable basis for the decision. See *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Denny*, 163

³ Section 901.03, STATS., states in part as follows:

- (1) EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
 - (a) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context
-

Wis.2d 352, 359, 471 N.W.2d 606, 609 (Ct. App. 1991). To ascertain whether the same result would have occurred without the evidence, we look at the total record and determine whether the error contributed to the trial's outcome. *Id.*

Demmerly asserts that he was prejudiced by the evidence because it negatively affected his credibility. Specifically, Demmerly points to the fact that there is an apparent contradiction between his written statement, which claims he was about three feet away from Lane when the shot was fired, and the reenactment, where Szczepaniec testified Demmerly claimed to be five or six feet from Lane.

We disagree that the reenactment was a significant factor at trial. Demmerly's own expert concurred with the State's expert that Lane's wound was consistent with a blast that came from a shotgun less than one foot away. Furthermore, the record reveals that the State did not argue the discrepancy in distance in its closing statement. To the contrary, the State conceded that the issue was not in dispute. We cannot agree that the issue of the distance between Lane and Demmerly "played a significant and perhaps decisive role in this case," thereby requiring a new trial. See *State v. Romero*, 147 Wis.2d 264, 278, 432 N.W.2d 899, 905 (1988).

Apart from the question of the distance between the principals at the time of the shooting, there were a number of other incriminating circumstances that contributed to the strength of the State's case. Demmerly armed himself with a shotgun and a bullet-proof vest and approached the victim's home to confront him, accompanied by another armed individual. Demmerly had to have disengaged the automatic safety on his weapon. He had an angry confrontation, shot Lane with a close range blast and immediately fled the scene. He also made incriminating statements to his brother after the shooting. The totality of these circumstances gave the trial court a sufficient basis upon which to conclude that a new trial was unwarranted.

Finally, a new trial would not necessarily result in the evidence being suppressed. While suppression is one sanction available to the court should it find that the State violated the discovery statute, suppression is not mandatory if the State can show good cause. *State v. Wild*, 146 Wis.2d 18, 27-

28, 429 N.W.2d 105, 108-09 (Ct. App. 1988); § 971.23(7), STATS.⁴ Demmerly does not argue that the reenactment is otherwise inadmissible under the Wisconsin Rules of Evidence. Thus, the reenactment is potentially admissible in any subsequent trial, and Demmerly could face the same credibility problems he complains of in this appeal. We cannot conclude in such a situation that the result would be any different upon retrial.

To conclude, because Demmerly did not object that the reenactment evidence violated his discovery rights, he has waived that issue. However, even if we were to address his arguments, we cannot conclude that the outcome would be different on retrial. Therefore, the trial court did not erroneously exercise its discretion by denying Demmerly's postconviction motions, and the conviction is affirmed.

By the Court.— Judgment and order affirmed.

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

⁴ Section 971.23(7), STATS., states:

CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production hereunder, the party shall promptly notify the other party of the existence of the additional material or names. **The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply.** The court may in appropriate cases grant the opposing party a recess or continuance. (Emphasis added.)