COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0594-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTONIO MCAFEE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Antonio McAfee appeals from an order denying his motion for postconviction discovery following his conviction for first-degree intentional homicide while armed. He challenges the trial court's determination that the evidence he sought to discover would not have been material. We

conclude the that the trial court erroneously exercised its discretion when it denied the motion because the evidence sought is material to the issue of intent.

BACKGROUND

¶2 On the evening of September 7, 1996, City of Milwaukee Police Officers Wendolyn Tanner and Brian Ketterhagen attempted to detain McAfee in an alley to investigate possible drug activity. McAfee fled and Tanner gave chase on foot while Ketterhagen followed in the squad car. During the chase, McAfee fired seven shots at Tanner, and Tanner fired several shots at McAfee. After hearing gunfire, Ketterhagen exited his vehicle and began firing at McAfee as he ran away.

¶3 Tanner suffered three gunshot wounds in the shootout and was pronounced dead shortly thereafter. The fatal shot passed under one armpit through his heart and lungs and out the other side of his body, severing his aorta. The source of the bullet that caused the heart wound was not identified. Another "potentially fatal" shot severed Tanner's spinal cord, ricocheted through his chest cavity, and lodged a bullet near his collar bone.[1] The bullet recovered from Tanner's body from this shot was linked to McAfee's gun. A third shot which passed through Tanner's arm would not have been fatal. McAfee sought postconviction discovery of the source of the bullet that caused the heart injury.

¶4 The defense theory was that McAfee did not intend to kill Tanner, but merely fired backwards through the bushes without aiming as he ran, in order to slow down the pursuit. The defense also argued that the fatal shot could

[1] Because Tanner died from the wound to the heart, it was speculative whether the spinal injury alone would have been fatal.

actually have been fired by Ketterhagen, based on angles calculated using the positions of Tanner's body, the recovered shell casings and damage caused to a nearby fence during the shootout. Ketterhagen, however, testified that he saw McAfee stop running, hide around a corner and ambush Tanner face-to-face as he came through the opening in the fence. Ketterhagen also said that Tanner was already down before Ketterhagen got out of his vehicle and began firing at McAfee. The parties stipulated to the submission of first-degree reckless homicide, but the jury rejected the lesser included offense and found McAfee guilty of first-degree intentional homicide.

¶5 After his conviction, McAfee filed a motion for postconviction discovery, seeking chemical identification of the metal trace alloys of the bullet recovered from Tanner's body to be compared to microscopic evidence from Tanner's shirt, the tissue from the aorta wound track, and the fence. McAfee alleged the scientific evidence could prove that the bullet which severed Tanner's aorta was not of the same metal composition as the bullet from McAfee's gun which caused the spinal injury, thus supporting the defense theory that Ketterhagen had fired the fatal heart shot. He also alleged that physical evidence that Ketterhagen had fired the fatal shot would undermine Ketterhagen's testimony that Tanner was already down before Ketterhagen began shooting, and therefore could also impair Ketterhagen's credibility sufficiently to draw into question his testimony that McAfee was directly facing Tanner as he shot at him. McAfee further argued there was a reasonable probability that he would have been convicted of reckless, rather than intentional, homicide, if the jury had accepted his testimony that he fired backwards while running, instead of Ketterhagen's testimony that he had faced Tanner as he shot him, because the variations in

McAfee and Ketterhagen's accounts of what happened were highly relevant to the issue of intent.

¶6 The trial court denied McAfee's motion without a hearing after discussing a series of cases dealing with causation, from which it concluded that McAfee could be held legally responsible for Tanner's death even if Ketterhagen had fired the fatal shot, because McAfee's conduct was a substantial factor in causing Ketterhagen to fire his gun.

STANDARD OF REVIEW

¶7 We may set aside the trial court's determination as to the materiality of evidence sought to be discovered in postconviction proceedings if it is clearly erroneous. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 322, 588 N.W.2d 8 (1999).

ANALYSIS

¶8 Although Wisconsin provides no statutory mechanism for the postconviction discovery of scientific evidence, such discovery may be obtained upon a showing of materiality. *See* ***O'Brien*** at 319-20. Sought-after evidence is material, that is, relevant to an issue of consequence, when there is a reasonable probability that its disclosure would produce a different outcome of the case. *See* ***id.*** at 320-21.

¶9 The State first argues that the discovery motion was facially insufficient to require a hearing because McAfee did not allege that the lab could conclusively establish that the fatal bullet had been fired from Ketterhagen's gun. However, we are satisfied such a conclusion could be fairly inferred from the allegation that the testing would conclusively establish that the fatal shot had not been fired from McAfee's gun.

¶10 The State further argues that, even if the testing indicated that Ketterhagen had fired the fatal shot, the tests results would not warrant a new trial unless McAfee also showed that the evidence was unavailable at the time of the first trial, or that counsel was ineffective for failing to discover the information earlier. It is clear from the record that the bullet recovered from Tanner's body, Tanner's shirt, the tissue from the aorta wound track, and the fence were all available for testing prior to trial. However, because there was no motion for a new trial, but rather a discovery motion whose purpose was to obtain evidence which could be used in support of a subsequent motion for a new trial, we will not decide the present appeal based on whether the McAfee would be able to meet the criteria necessary to granting a new trial. We will instead proceed to analyze whether test results favorable to McAfee could create a reasonable probability of a different result in the event of a new trial.

¶11 We agree with the trial court's conclusion that the evidence sought would not be material to the issue of causation, because McAfee's actions were a "substantial factor" in Tanner's death, even if the fatal shot came from Ketterhagen's gun. *See* ***State v. Oimen***, 184 Wis. 2d 423, 435-36, 516 N.W.2d 399 (1994) (Oimen's robbery plan "caused" death of co-felon who was shot by intended victim). We disagree, however, with the trial court's analysis of whether the evidence sought would be material to the issue of intent.

¶12 First, although the trial court instructed the jury on reckless homicide, the trial court's decision on the discovery motion now on appeal indicates that intent must be inferred from the fact that McAfee "pointed his gun at" Tanner. The trial court's decision does not acknowledge that McAfee only pointed his gun at Tanner in Ketterhagen's account of the incident, since McAfee himself denied ever aiming his gun at Tanner. The trial court did not consider

whether McAfee's version of the facts could support a mental state other than intent to kill, and it failed to distinguish cases in which similar fact scenarios were found to justify the submission of lesser degrees of homicide to the jury.

¶13 First-degree intentional homicide requires specific "intent to kill," while first-degree reckless homicide requires "utter disregard for human life." *See* WIS. STATS. §§ 940.01 and 940.02. A person who had the general intent to perform the acts which resulted in death, and was conscious of the nature and possible consequences of those acts but lacked the specific intent to kill, can be said to have acted with utter disregard for human life (or, what used to be called a depraved mind). *See* ***Terrell v. State***, 92 Wis. 2d 470, 473-74, 285 N.W.2d 601 (1979). In ***State v. McAllister***, 74 Wis. 2d 246, 246 N.W.2d 511 (1976), McAllister shot a man five times at close range, including twice in the head, in a parking lot following an altercation. The court approved the submission of second degree homicide based upon the defendant's testimony that he did not aim at his victim, but merely started shooting at him to scare him and to stop him from coming at him with a knife. *See* ***id.*** at 515-16. Similarly, in ***Terrell***, Terrell shot a man several times at close range after the man took offense at his comments and knocked him down. The court reasoned that evidence that the victim had been shot in widely separate parts of his body and that some shots had not hit him at all could reasonably demonstrate to a jury that the defendant had not aimed at the victim with the specific intent to kill. *See* 92 Wis. 2d at 474-75.

¶14 We are satisfied that McAfee's contentions that he shot to slow the officer down, not to kill him, and that he fired through the bushes without aiming, supported the submission of reckless homicide to the jury. The question then becomes whether there is a reasonable probability that the jury would have convicted McAfee of reckless, rather than intentional, homicide if it had

considered scientific evidence that Ketterhagen had fired the fatal shot in conjunction with the evidence already adduced at trial. We conclude that there is.

¶15 Ketterhagen testified that his partner was already down on the ground before he began firing at McAfee. However, the forensic evidence indicated that Tanner must have been standing when the fatal shot hit him. Therefore, if the scientific evidence shows Ketterhagen fired the fatal shot, he was mistaken about the fact that his partner was down when he began firing. Such a mistake by Ketterhagen could have caused the jury to believe McAfee fired through the bushes without aiming in order to slow down the officer's pursuit, which could have produced a higher probability that it would have returned a verdict of reckless, rather than intentional, homicide. We therefore conclude that the testing sought is material to the issue of intent, and the discovery motion should have been granted. We remand to allow the trial court to oversee the discovery process, as appropriate.

By the Court.—Order reversed and cause remanded with directions.

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