COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2092-CR **Cir. Ct. No. 01CF002458**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAREEM Q. CURRY,

DEFENDANT-APPELLANT.

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

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Kareem Q. Curry appeals a judgment convicting him of discharging a firearm from a vehicle, WIS. STAT. § 941.20(3)(a)2 (2001-

02),[1] first-degree recklessly endangering safety, WIS. STAT. § 941.30(1), both as a party to the crime, and obstructing an officer, WIS. STAT. § 946.41(1). He also appeals an order denying postconviction relief. The issues concern a charging delay, the jury instructions, the sufficiency of the evidence and the effectiveness of trial counsel. We affirm on all issues.

¶2 On January 26, 1999, shooting erupted in a parking lot filled with cars and people. In May 2001, the State charged Curry as one of the shooters.

¶3 The trial court denied Curry's motion to dismiss based on the twenty-eight month charging delay and proceeded with a jury trial. There was testimony that at least some of the shooting came from the car Curry was riding in at the time. There was also evidence that one of the shooters was Curry.

¶4 After Curry's conviction he moved for postconviction relief. The trial court denied relief on briefs and without a hearing, resulting in this appeal.

¶5 Curry first contends that the twenty-eight month delay in charging him impeded his ability to present a defense because he was unable to find two eyewitnesses who he believed would provide exculpatory testimony. Consequently, he argues that the delay violated his due process rights. *See* ***State v. Wilson***, 149 Wis. 2d 878, 903-05, 440 N.W.2d 534 (1989). However, Curry failed to show the prejudice to his defense that he now claims or that he can attribute it to the charging delay. He did not begin to look for the witnesses until June 2002, more than a year after he was charged. If passage of time made it difficult to find

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the witnesses, then Curry was substantially responsible, under any reasonable view, and he can only speculate that the State's portion of the delay made any difference in locating the two potential witnesses.

¶6 Curry next argues that the evidence was insufficient to convict him as a party to discharging a firearm from a vehicle. The crime requires proof that the vehicle was either on a highway or in a parking lot open to the public when the shooting occurred. *See* WIS. STAT. RULE 809.941.20(3). However, the trial court instructed the jury that the crime required proof that "the defendant or another person discharged a firearm from a vehicle while on a highway," leaving out the phrase "or in a parking lot open to the public." That omission, in Curry's view, requires his acquittal because the evidence showed beyond any doubt that the car in question was in a parking lot when the shots were fired.

¶7 The trial court's omission in the instruction was harmless. The car's location was simply not an issue at trial. It was undisputedly in a parking lot open to the public and, therefore, within the area designated in the statute. Consequently, with or without the omission in the instructions, the State proved the element of location beyond a reasonable doubt. An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189. Such is the case here.

¶8 Curry's third contention is that the trial court gave erroneous and confusing jury instructions on both the discharging a firearm and reckless endangerment charges. On the former, the court instructed the jury that "If you are satisfied, beyond a reasonable doubt, that the defendant or another person intentionally discharged a firearm from a vehicle …, you should find the

defendant guilty." In the latter instructions, the court informed the jury that "If you are satisfied beyond a reasonable doubt, that the defendant or another person intentionally aided and abetted the commission of this offense, you should find the defendant guilty if the State proves this … beyond a reasonable doubt." In both cases, Curry contends that the instructions literally directed the jury to convict Curry if anyone committed the crime in the first instance or anyone aided and abetted it in the second. He concedes that he did not object to the instruction at trial but contends that we should grant relief anyway under our discretionary power to do so where the real controversy has not been fully tried. *See* WIS. STAT. § 752.35; *see also* ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (Erroneous jury instruction may prevent real controversy from being fully tried.).[2]

¶9 The instructions quoted above do not provide a basis for discretionary reversal. Although they are problematic, the trial court also instructed the jury as follows:

> Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he did not directly commit it.
>
> The defendant is charged with being concerned in the commission of the following crimes by aiding and abetting the person who directly committed it.
>
> …
>
> If a person intentionally aids and abets the commission of a crime, then that person is guilty of the

[2] Curry makes no claim that justice miscarried because of the instruction, which is the other ground for discretionary reversal under WIS. STAT. § 752.35.

> crime as well as the person or persons who directly committed it.
>
> A person intentionally aids and abets the commission of a crime when acting with knowledge or belief that another person is committing or intends to commit a crime he knowingly either A) Assists the person who commits the crime; or B) Is ready and willing to assist and the person who commits the crime knows of the willingness to assist.
>
> However, a person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent and does nothing to assist the commission of a crime.
>
> Before you may find the defendant guilty of any of the crimes charged in counts one and two, you must be satisfied beyond a reasonable doubt that the crime was committed and that the defendant intentionally aided and abetted the commission of that crime. (Emphasis added.)

This specific direction to weigh Curry's involvement in the offenses under the standard of aiding and abetting, and to acquit if the State did not prove his involvement beyond a reasonable doubt, allowed the jury to fully and fairly determine Curry's guilt under the correct legal standards.

¶10 Curry also argues there was insufficient evidence to find him guilty of the endangering safety charge. He was charged and found guilty as a party to the crime. However, he contends that while there was some credible evidence that he was the shooter, none existed to show that he aided and abetted some other shooter. However, the party to the crime statute, WIS. STAT. § 939.05, abolished the common law distinction between principal and accessories. ***Harrison v. State***, 78 Wis. 2d 189, 210, 259 N.W.2d 220 (1977). In a given case the court may instruct the jury on both theories and the jury may convict on either. ***Id.*** Consequently, charging Curry as a party to the crime did not prevent the State from obtaining a conviction based on evidence that he was the principal actor in the crime.

¶11 Finally, Curry contends that the trial court erred by denying his ineffective assistance of counsel claim without an evidentiary hearing. Curry was unsuccessful in his attempt to suppress a statement he made to police after his arrest. Curry testified that he asserted his ***Miranda*** rights but then gave a statement because the police continued to pressure him while he was in a great deal of pain from injuries he had suffered. The trial court rejected that testimony and held that Curry's statement was voluntary. In his postconviction motion, Curry alleged that medical records would have corroborated his testimony about the pain he was in, had counsel introduced them into evidence. The trial court denied the ineffectiveness claim without affording Curry an evidentiary hearing on the issue.

¶12 The trial court properly denied the ineffectiveness claim. The trial court may deny a motion alleging ineffective assistance of counsel if the defendant fails to allege sufficient facts to raise a question of fact, or presents only conclusory allegations or if the record conclusively demonstrates that the defendant is not entitled to relief. ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). Here, the trial court based its suppression decision primarily on its determination that the police witnesses testified truthfully and that Curry did not. Whether or not he had some injury that might have caused him pain was a peripheral issue, at best. Curry's motion and postconviction brief contain no facts that would create any question of fact as to whether counsel's omission prejudiced him. On that issue they are conclusory only. He therefore provided an insufficient basis to proceed with a hearing.

By the Court.—Judgment and order affirmed.

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