COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP501-CR **Cir. Ct. No. 2003CF1018**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY LEON COBBS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: GERALD PTACEK, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Courtney Cobbs appeals from a judgment of conviction of being a party to the crime of armed robbery, attempted first-degree homicide, first-degree recklessly endangering safety, and possession of a firearm as a felon. He argues that the stop of his vehicle was unreasonable, that he was

deprived of a unanimous jury verdict on the firearm possession conviction, that the evidence does not support the attempted homicide conviction, and that portions of his statement to police should have been redacted. We reject his claims of reversible error and affirm the judgment of conviction.

¶2 The jury found that Cobbs was involved in a Racine County bank robbery by two masked robbers brandishing weapons. Shots were fired inside the bank. Shots were also fired at the car of a witness outside the bank.

¶3 On the night of the robbery, Cobbs was stopped in Marathon County, approximately 250 miles from Racine County. At 10:00 p.m. officers observed Cobbs, an African-American, standing with three other men outside an SUV at a gas station. The men watched the police cruiser intently as it drove by the station on two occasions. The officers thought it was suspicious behavior. The officers ran the plate on the SUV and found it was a rental vehicle from out of town. The officers observed the men from across the street. Two men got into the SUV and the officers followed it. They stopped the SUV after a cigarette was thrown from the car. Inside the vehicle the officers discovered packaging for a face mask, brown work gloves, a black plastic bag consistent with the bag into which the stolen money was placed, various items of clothes, bullet fragments, and a Colt AR-15 semiautomatic weapon. Cobbs's motion to suppress the evidence seized as a result of the vehicle stop was denied.

¶4 When an appellate court reviews an order denying a motion to suppress evidence, it will uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). However, whether an investigatory stop meets constitutional standards is a question of law subject to de novo review by this court. ***Id.***

¶5 In ***Terry v. Ohio***, 392 U.S. 1, 22 (1968), the Supreme Court held that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." The police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21. The issue is reasonableness. The essential question which must be addressed by the reviewing court is "whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." ***State v. Jackson***, 147 Wis. 2d 824, 831, 434 N.W.2d 386 (1989) (citing ***State v. Guzy***, 139 Wis. 2d 663, 679, 407 N.W.2d 548 (1987)).

¶6 Cobbs argues that the officers were suspicious of Cobbs and his companions at the gas station only because they were three African-Americans in a predominately white community. The officers observed Cobbs violate a littering ordinance when the cigarette was thrown out the window. An officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. ***State v. Colstad***, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. There is no reason a violation of the littering ordinance should be treated any differently. The officers having observed the violation, more than a reasonable suspicion existed and the stop was reasonable. The officers' subjective reason for following and stopping the SUV, even if pretextual, is irrelevant to Fourth-Amendment analysis because there was a legally permissible basis for the stop. ***State v. Gaulrapp***, 207 Wis. 2d 600, 610, 558 N.W.2d 696 (Ct. App. 1996). The motion to suppress the evidence was properly denied.

¶7 The jury heard that the gun was recovered from the SUV and therefore was in Cobbs's possession in Marathon County. Cobbs was charged with possessing a firearm while committing the bank robbery in Racine County. Cobbs contends that his right to a unanimous verdict was violated because there were two possible bases for finding him guilty of being a felon in possession of a firearm and it is not clear if the jury agreed on where the possession occurred. *See* ***State v. Tulley***, 2001 WI App 236, ¶14, 248 Wis. 2d 505, 635 N.W.2d 807 (the denial of the right to jury unanimity may occur when there is evidence of multiple acts not conceptually similar which may establish the criminal offense and jurors do not unanimously agree which acts the defendant committed).

¶8 Cobbs did not object to the standard unanimity instruction that was given to the jury, did not raise a unanimity problem at trial, and did not file a postconviction motion raising the issue. The claim may be waived. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."); ***State v. Monje***, 109 Wis. 2d 138, 153-54, 325 N.W.2d 695, 327 N.W.2d 641 (1982) (on reconsideration) (for issues on appeal to be considered as a matter of right, a postconviction motion must be made except as provided in WIS. STAT. § 974.02(2) (2005-06)[1]); § 974.02(2) (a postconviction motion is not necessary prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised).

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶9 Cobbs argues that this is the type of error that must be reviewed regardless of waiver. We need not decide if waiver applies. The jury was read the information which charged Cobbs as possessing the firearm *in Racine County*. The jury was instructed to address the charges as set forth in the information. We presume the jury follows the instructions. ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992). Additionally, the verdict required the jury to find guilt as charged in the information. There was no reason for the jury to consider possession of the firearm in Marathon County. Cobbs was not denied a unanimous verdict on that charge.

¶10 We turn to Cobbs's argument that there was not sufficient evidence of intent to convict him of attempted first-degree homicide. We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must accept the reasonable inferences drawn from the evidence by the jury. ***Id.*** at 506-07.

¶11 The attempted first-degree homicide conviction arises from the shots fired at a witness and his car outside of the bank. Cobbs contends that there is no evidence of his intent to kill a person since the shots went past the victim's car and did not even hit the car itself. He calls the conduct reckless not intentional. Intent can be inferred from conduct and there is a presumption that one intends the natural and probable consequences of his or her acts. ***Johnson v. State***, 85 Wis. 2d 22, 32, 270 N.W.2d 153 (1978). The shooting victim observed Cobbs and his companion enter and leave the bank. He was a witness who could identify the robbers by clothing and size. Under the circumstances, there was reason for the

robbers to want to eliminate the possibility that the witness would identify them. Further, more than a single "warning" shot was fired. The victim testified that seven or eight shots from a semi-automatic weapon were directed at him. A natural and probable consequence of discharging a weapon several times in the direction of a person is that death may result. There was sufficient evidence to permit an inference of intent to kill. The conduct is not reduced to mere recklessness just because the shooter was a poor shot.

¶12 At trial a police officer testified that after confronting Cobbs with a written statement that his sister gave implicating Cobbs in the robbery, Cobbs told the officers "he was not putting himself in the pen. He was not going back to the pen and … he's not putting himself there." Cobbs moved to have that portion of his statement redacted so that the jury would not learn that he had actually been in prison before. The trial court decided the evidence was relevant, and although somewhat prejudicial, the probative value outweighed the danger of prejudice. *See* WIS. STAT. § 904.03.

¶13 Evidentiary rulings are addressed to the trial court's discretion. ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. ***Id.*** at 585 n.1. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). "Unfair prejudice arises either when the evidence admitted has a tendency to influence the outcome of the jury deliberations by the use of improper means, or when it arouses in the jury a sense of horror or desire to punish." ***State v. Opalewski***, 2002 WI App 145, ¶23, 256 Wis. 2d 110, 647 N.W.2d 331. The opponent of admitting evidence on the ground of unfair prejudice has the burden

of showing that the danger of unfair prejudice substantially outweighed the probative value of the evidence. ***State v. Schutte***, 2006 WI App 135, ¶51, 295 Wis. 2d 256, 720 N.W.2d 469, *review denied*, 2006 WI 126, 297 Wis. 2d 320, 724 N.W.2d 203.

¶14 We recognize the difference between informing the jury that Cobbs had a prior felony conviction (for the purpose of being a felon in possession of a firearm) and informing the jury that Cobbs had actually been in prison before. Because of the difference, two members of this panel question whether the evidence that Cobbs had been in the "pen" was even necessary. The remaining member of this panel would conclude that Cobbs's statement regarding the "pen" was relevant and admissible as a voluntary statement in reaction to truthful information that his sister had implicated him in the bank robbery. However, we need not decide the relevancy issue as we exercise our appellate prerogative to conduct a harmless error analysis.[2] The entire panel concludes that the refusal to redact that portion of Cobbs's statement, if error, was harmless error.

¶15 "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998) (citations omitted).

[2] *See, e.g.*, ***State v. Koller***, 2001 WI App 253, ¶64, 248 Wis. 2d 259, 635 N.W.2d 838 (choosing not to resolve whether the trial court erred but instead assuming trial court error for purposes of the decision and proceeding directly to a harmless error analysis), *modified on other grounds*, ***State v. Schaefer***, 2003 WI App 164, ¶52, 266 Wis. 2d 719, 668 N.W.2d 760. *See also, e.g.*, ***State v. DeMars***, 171 Wis. 2d 666, 492 N.W.2d 642 (Ct. App. 1992) (assuming "for the sake of discussion that the trial court's rulings were error" we then concluded "any error was harmless … because the state [proved] beyond a reasonable doubt that the error did not contribute to the verdict").

Cobbs's statement that he was not going to put himself back in the "pen" did not implicate him in the robbery. On cross-examination of the officer, reference was made to that statement to explain that Cobbs terminated the interview with police. The prosecutor did not mention that statement in closing arguments. Moreover, the jury was informed that Cobbs was previously convicted of a felony. It is within a juror's common knowledge or expectation that a person who has been convicted of a felony has served some time in prison, or at least jail. There is no suggestion that the admission of the statement led the jury to convict on improper grounds. We are confident that Cobbs's reference to "the pen" did not contribute to the conviction.

¶16 Counsel for the appellant has provided a false certification that the appendix complies with WIS. STAT. RULE 809.12(2)(a), which requires that the appendix include the record items essential to understanding the issues raised. The appendix only includes the judgment of conviction and two exhibits from the suppression hearing. It is essential that the appendix include the record items truly relevant and essential to understanding the issues raised. *See* ***State v. Bons***, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367. The judgment of conviction tells this court nothing about the trial court's suppression and evidentiary rulings. *See* ***id.*** The filing of a false certification is an infraction justifying a sanction. ***Id.***, ¶25. Accordingly, we sanction Attorney Angela Kachelski and direct that she pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment affirmed.

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