COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP152-CR **Cir. Ct. No. 2011CF806**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHALIF A. LOVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Khalif Love appeals a conviction for second-degree reckless homicide by use of a dangerous weapon, as a party to a crime, and possession of a firearm by a felon, both as repeaters. Love argues that the circuit court: (1) erred by giving the lesser included jury instruction for second-degree

reckless homicide; (2) violated Love's right to a fair trial by its conduct during and after testimony given by his brother, Litwain Love; and (3) improperly denied Love's motion for a mistrial. Love also argues that Wisconsin "must change the way it handles felon-in-possession of a firearm trials." We reject Love's arguments and affirm.

¶2 On February 6, 2011, Tasnique's bar on North 27th Street in Milwaukee was reserved for a surprise birthday party.[1] There were close to one hundred people in the bar when a fight broke out between party attendees and the bar regulars sometime between 2:00 a.m. and 2:30 a.m. Testimony established that "the whole bar basically" became involved in the fight and the scene was "chaotic." The bar's proprietors deemed it appropriate to expel some participants, and others rushed out of the bar.

¶3 Fighting continued outside, and an unidentified man fired a gun into the air. People scattered in terror. Witnesses testified that Love shot at individuals running north on North 27th Street. One individual was killed, and another was shot in the foot.

¶4 An information charged Love with one count of first-degree reckless homicide by use of a dangerous weapon, as a party to a crime, and one count of possession of a firearm by a felon, both as repeaters. At the jury instruction conference, the circuit court granted the State's request for a lesser included instruction of second-degree reckless homicide. The court denied a motion for a mistrial based upon the court's conduct during and after Litwain Love's testimony.

[1] Tasnique's is a bar owned by the ex-wife of Love's brother, Litwain Love.

A jury returned guilty verdicts of second-degree reckless homicide by use of a dangerous weapon, as a party to a crime, and felon in possession of a firearm. Love now appeals.

¶5 Love argues that the circuit court erred by giving the lesser included jury instruction for second-degree reckless homicide. According to Love, "[t]his case presents a classic example of a trial court giving a 'doubtful lesser included offense' [instruction] that was 'likely to result in a jury's compromise to the detriment of the defendant.'" Love argues "[t]he evidence simply did not support a middle ground …." Love insists the proper alternatives for the jury should have been either conviction on the greater offense or a complete acquittal. We disagree.

¶6 "A circuit court has the duty to accurately give to the jury the law of whatever degree of felonious homicide the evidence tends to prove …." ***State v. Kramar***, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989). If a reasonable view of the evidence supports a guilty verdict on the lesser included offense beyond a reasonable doubt but casts reasonable doubt as to some element or elements of the original offense, then both verdicts should be submitted to the jury upon request. ***State v. Chapman***, 175 Wis. 2d 231, 241, 499 N.W.2d 222 (Ct. App. 1993).

¶7 First-degree reckless homicide requires proof of the commission of the homicide with "utter disregard for human life." *See* ***State v. Edmunds***, 229 Wis. 2d 67, 74-77, 598 N.W.2d 290 (Ct. App. 1999). Second-degree reckless homicide requires proof that the defendant caused the victim's death, and that he or she did so recklessly. *See* WIS JI—CRIMINAL 1060. If the State fails to prove "utter disregard," but does prove that the defendant's criminal recklessness caused the victim's death, then the jury may convict the defendant of second-degree reckless homicide.

¶8 We conclude that a reasonable view of the evidence at trial supported the lesser included instruction. The scene at Tasnique's bar on the date in question was chaotic, involving a moving, violent skirmish between two groups of people. A jury could reasonably have concluded that Love was caught up in the excitement, confusion, and panic of the moment and was recklessly using his gun, as opposed to having no regard whatsoever for human life. The circuit court did not err in instructing the jury on the lesser-included offense of second-degree reckless homicide.

¶9 Love next argues he is entitled to a new trial based on the circuit court's conduct during and after his brother's trial testimony. Love emphasizes several specific remarks he deems inappropriate treatment by the court to suggest that the court did not remain impartial and disinterested. Love contends that the court severely discredited Litwain Love in the minds of the jury by its conduct which, among other things, included the court advising Litwain Love to answer fully, honestly, and responsively. The court also remarked that Litwain Love had "given so many answers about what he's heard and not heard with the shooting, maybe he should start answering clearly." The court also advised Litwain Love to "[a]nswer the questions and answer them truthfully. You're under oath."

¶10 The record fails to show that the circuit court's individual comments, or the collective impact of those comments, were sufficient to have deprived Love of a fair trial. The court's interjections and admonitory remarks were made in the course of the court's duty to control the trial and aid in the discovery of the truth. *See* ***State v. Bembenek***, 111 Wis. 2d 617, 636-37, 331 N.W.2d 616 (Ct. App. 1983).

¶11 Contrary to Love's argument, this was not a situation where the court in effect tells a witness to "stop lying." The circuit court's comments were appropriate exercises of the court's authority under WIS. STAT. § 906.11(1) (2011-12),[2] to manage Litwain Love's apparently evasive, non-responsive, or inconsistent answers made primarily during cross-examination. *See* ***State v. Ross***, 2003 WI App 27, ¶¶49-51, 260 Wis. 2d 291, 659 N.W.2d 122. As discussed below, the court made findings, supported by the record, that Litwain Love was a difficult witness who was prone to give "speeches" and otherwise avoid direct answers to questions. Defendant Love fails to point to record support for the proposition that these findings were clearly erroneous.

¶12 In addition, the circuit court instructed the jury that if they believed that any of the parties or the court had an opinion as to the credibility of certain witnesses, they were to disregard and not consider it, "as you are the sole judges of the credibility of every witness." We reject Love's suggestion that the instruction was too broad or that its cautionary effect was significantly diminished.

¶13 Love also points to an incident that occurred after Litwain Love left the witness stand in support of his claim for a new trial. At the end of his testimony, the circuit court instructed Litwain Love to step down and told the defense to call its next witness. The record then reflects the following:

> [THE PROSECUTOR]: Your Honor, may the record reflect that the witness was smiling and laughing as he was getting off the stand at what the Court was saying.
>
> THE COURT: Sure. He thinks this is amusing.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> THE WITNESS: (inaudible).
>
> [THE PROSECUTOR]: I'm sorry, sir?
>
> THE COURT: Jury goes out right now. Everyone in the gallery stays seated. He goes into custody. Take the jury out. No one moves from the gallery.
>
> (Whereupon, the jury panel was excused from the courtroom).

¶14 After a recess, a record was made of what occurred at the end of Litwain Love's testimony. The prosecutor recounted that after the witness was excused:

> I saw him smiling and laughing. That's why I asked the record to reflect it…. I saw him walking towards me…. When he got, approximately, towards my left, I saw him lean in and he said something…. I didn't hear what he said…. I spoke to my Detective, who is seated to my right …. [A]s Mr. Love was walking [past] me and leaning in towards me, Detective Formolo stood up because he stated that Mr. Love pretty much had his eyes on me from the moment he got off that witness stand towards that door. So he stood up as a precaution.

¶15 The circuit court summarized its impressions:

> I will just add to that that when [the prosecutor] asked me to have the record reflect that the last witness, Litwain Love, was laughing or smirking when he left the stand, I granted that request…. As he was leaving the courtroom, he walked directly [past the prosecutor]. He ... leaned in. I'm probably 25 or 30 feet away, so I did not hear what was said. I also saw the Detective get up. I was concerned that there was going to be a confrontation beyond what occurred, concerned briefly for maybe a second that there's potentially going to be a physical confrontation…. I don't know what was said. I will say that, for what it's worth, yes, the witness had an attitude the entire time he was on the stand.

Love argues that the court's ordering Litwain Love into custody "told the jury that the court believed Litwain had committed perjury or another crime" and therefore warrants reversal. We disagree.

¶16 To the extent the jury was focused on the incident following Litwain Love's testimony, the jury would not have reasonably concluded that the circuit court's conduct toward the witness "told the jury that it believed Litwain was a liar, a criminal, dangerous, or some combination of the three." Given the order of events, it is most likely that the jury assumed the court's verbal declaration that the witness was to be taken into custody arose from his concerning behavior in court following his testimony rather than anything else. Moreover, the witness was not arrested in the jury's presence. The court stated, "[h]e goes into custody" only after the prosecutor noted his disrespectful demeanor as he left the witness stand and leaned in close to the prosecutor as he apparently intended to say something to the prosecutor. The detective stood up as a precaution as if to protect the prosecutor from this unusual and possibly menacing conduct, which raised concerns. Regardless, any remote danger that the jury may have been affected in some way to view the defense at trial in a negative light by what occurred was mitigated by the curative jury instruction. In sum, Love fails to persuade us that the circuit court's conduct during and after his brother's trial testimony deprived him of a fair trial.

¶17 After the State's rebuttal case, Love moved for a mistrial. Defense counsel complained that the circuit court "constantly critiqued" Litwain Love's performance on the stand and subsequently ordered him arrested in front of the jury. Love argues that the circuit court erroneously denied the mistrial motion.

¶18 The decision whether to grant a motion for a mistrial lies within the sound discretion of the circuit court. ***Ross***, 260 Wis. 2d 291, ¶47. The circuit court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** The denial of a motion for a mistrial will be reversed only on a clear showing of an erroneous use of discretion by the circuit court. ***Id.***

¶19 Here, Love fails to provide a clear showing of erroneous exercise of discretion. We conclude that the circuit court was well within the proper range of its authority to control the courtroom. Contrary to Love's perception, the court neither constantly critiqued Litwain Love nor engaged in a pattern of behavior that destroyed his credibility.

¶20 Litwain Love's recollection at trial was essentially that nothing dramatically out of the ordinary happened at Tasnique's that night. He denied that a large portion of the bar was involved in a fight, contradicting the testimony of all the other witnesses at trial. He described a "scuffle" that "essentially was pushing" and the security guard "put six or seven people out." He testified that he heard gunshots when he was standing by the door, but denied seeing anyone shoot. He specifically denied telling detectives that he never heard any shots. He also denied telling detectives that the incident was so insignificant to him that no one from the bar called the police. A detective then testified in rebuttal. Litwain Love's recorded statement to police was played, and it contradicted his trial testimony.

¶21 Moreover, Litwain Love was a difficult and recalcitrant witness. As the circuit court noted in denying the mistrial motion:

> [Litwain Love] was very, at times, difficult with both the State and the Court…. [He] was asked more than once to answer the questions. His examination with [the prosecutor] was somewhat heated. [The prosecutor] asked him somewhat heated questions, and [he] was not exactly forthcoming at times. And at times he felt the need to give speeches and to answer questions or say things that were not before him.

¶22 As to the incident following Litwain Love's testimony, as explained above, the defendant's contention that the jury would have inferred that "Litwain was a liar" is not reasonable under the circumstances. In sum, the circuit court appropriately exercised its discretion by denying the mistrial motion.

¶23 Finally, Love argues Wisconsin "must change the way it handles felon-in-possession of a firearm trials." Love concedes that his stipulation to a prior felony supporting an element of the felon-in-possession-of-a-firearm charge was proper under Wisconsin precedent. *See* ***State v. McAllister***, 153 Wis. 2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989); ***State v. Nicholson***, 160 Wis. 2d 803, 807, 467 N.W.2d 139 (Ct. App. 1991). Love nevertheless insists that the procedure is inherently prejudicial.

¶24 Love acknowledges that this court is bound by its own precedent, and only our supreme court may overrule, modify, or withdraw language from a previously published decision of the court of appeals. *See* ***Cook v. Cook*** 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Love requests that we certify his appeal to our supreme court because it should "rectify" this issue. We reject his certification request.

By the Court.—Judgment affirmed.

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