COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2516 **Cir. Ct. No. 2000CF81**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FONTAINE L. BAKER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Sherman, Blanchard, and Kloppenburg, JJ.

¶1 PER CURIAM. Fontaine Baker was charged with first-degree intentional homicide while armed in the shooting death of Frankie Jenkins. At the jury trial, Baker admitted that he had shot Jenkins in the head and that he had fled the area after doing so. However, Baker testified that he shot Jenkins by accident, and fled because he "just panicked" and "didn't know what to do." Baker was convicted of first-degree reckless homicide. Baker appealed the judgment of conviction and an order denying post-conviction relief, and this court affirmed both. Baker subsequently appealed an order denying his motion for post-conviction relief on the ground of ineffective assistance of counsel, which we also affirmed.

¶2 Baker filed a post-conviction motion that the circuit court denied without a hearing. The motion was based entirely on a post-trial diagnosis by a psychologist that Baker suffered from post-traumatic stress disorder (PTSD) at the time of the shooting. On appeal, Baker argues that the post-trial PTSD diagnosis constitutes mitigating evidence about his mental state when he fled following the shooting, and therefore a new trial is merited based on newly discovered evidence or in the interest of justice, or, in the alternative, that his sentence should be modified. We affirm for reasons explained below.

BACKGROUND

¶3 Our 2002 opinion affirming the judgment of conviction and an order denying post-conviction relief contained the following pertinent background, explaining the State's theory at trial, which was that Baker murdered the victim to keep her from revealing what she knew about an earlier homicide:

> Baker was charged with first-degree intentional homicide while armed for the January 2, 2000 killing of thirteen-year-old Frankie Jenkins. In the same complaint,

Dontrell LeFlore[] was charged with the first-degree intentional homicide while armed of Tillie Mitchell. Neither was charged as party to the crime of the other killing; the [State's] theory, however, was that Baker's killing of Jenkins related to Jenkins's knowledge of LeFlore's killing of Mitchell and [Baker's] participation in the events leading to Mitchell's death.

The trial evidence established that on the New Year's Eve 1999, Baker and three friends, LeFlore, Alphonso Miller and Tywee Turner, met Frankie Jenkins, Brenda Green and another girl, identified only as Baby Doll, at a liquor store. The girls accompanied the men to a party, where they stayed until about 10:30 p.m., when Green and Baby Doll decided to leave. Jenkins remained at the party until midnight when she, Baker, and Baker's friends left to buy cigarettes. While traveling in the vicinity of 41st Street, LeFlore told his friends to park the car and wait for him while he took care of some business. Miller testified that shortly after LeFlore exited the car, he (Miller) heard gunshots. Moments later, LeFlore returned to the car and said that he had shot someone, later identified as Tillie Mitchell. According to Miller, Baker then yelled at LeFlore, telling him to shut up because Jenkins was in the car.

Miller also testified that after the shooting, he, Baker, LeFlore and Jenkins went to a residence on 36th Street to spend the night. The following day, the men dropped Jenkins off at home, only to retrieve her later that afternoon. That evening, Baker obtained a bullet from Darren Alexander and then, in the company of Miller, drove to an alley in the area of 17th and Keefe. According to Miller, Baker then exited the car, asked Jenkins to come with him, and the two walked down the alley. Miller said that while he was waiting in the car, he heard a single gunshot. Moments later, Baker returned to the car and said that he had just "offed that bitch." The men then fled.

The following afternoon, Baker took a bus to Chicago, where he was arrested on January 12. After making various statements denying the offense and implicating others, Baker finally acknowledged that he had killed Jenkins but claimed that the shooting was accidental. At trial, Baker testified that on the night of her death, Jenkins had repeatedly asked him if she could fire the gun, noting her excitement about having fired one the previous night. He said he accompanied her to an alley, where she attempted to shoot at some dogs which were penned in a yard off the alley. According to Baker, the gun jammed

> and he took the gun from Jenkins and attempted to fix it. Explaining what occurred, Baker said: "So I grab it, I'm like here.... So I got the gun like this in my hand, I get to shaking it. I'm shaking it, the shell pop out, and I let the slide go, and the gun go off."
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> The trial court instructed the jury on first-degree intentional homicide, first-degree reckless homicide, second-degree reckless homicide, and homicide by negligent handling of a dangerous weapon. The jury convicted Baker of first-degree reckless homicide.

State v. Baker, No. 01-2059-CR, unpublished slip op. ¶¶2-6 (WI App June 25, 2002) (footnote omitted).

¶4 In his post-conviction motion, Baker contended that he was first diagnosed with PTSD by a psychiatrist in 2005, and that in 2016 he asked psychologist Steven Kaplan "to evaluate whether a person with PTSD like Baker might be expected to flee the scene of an accidental shooting for which that person was responsible." After reviewing Baker's treatment history and interviewing Baker, Kaplan produced a report, which was attached to the post-conviction motion and included the following findings or conclusions:

- Between the ages of 13 and 23, Baker was himself "shot multiple times" and "witnessed a great deal of violence …, including watching as his friends were murdered."
- Baker "began to experience PTSD-related symptoms as a 13 year-old, but he did not report them to anyone," and has symptoms that include "flashbacks, nightmares, intense fear leading to a flight response and intrusive thoughts," "is often depressed," and "(over) reacts with either aggression or panic when he feels threatened."
- Baker "was suffering from chronic, untreated PTSD at the time he committed his crime. His responses to the tragic, traumatic events around his crime, particularly those related to his flight from the scene, are fully consistent with the known effects of PTSD, and were not simply the result of premeditated, well considered, or conscious choices. Mr. Baker reacted to the scene with an intensity of fear that was, in a

very real, concrete and present way, the sum of every act of violence he had witnessed or suffered up to that point in his life."

¶5 The circuit court denied the post-conviction motion, ruling in pertinent part, including facts not disputed in this appeal:

> [T]here is not a reasonable probability that had the jury heard the evidence, there would have been a different outcome. The defendant offers his PTSD diagnosis to explain that he fled from the scene out of an "intensity of fear." While this arguably corroborates his own testimony as to why he immediately fled from the shooting without rendering aid (i.e., he "was scared," "panicked" and "didn't know what to do"), the PTSD explanation is severely undercut by his continued efforts to evade responsibility for what he characterized as an accidental shooting for days and weeks afterwards. His continued actions in disposing of the firearm, fleeing to Chicago, lying to police about being in Milwaukee on the date of the shooting, and blaming the shooting on Alphonso Miller were more consistent with a concerted effort to evade responsibility for his role in a reckless homicide than an "impulsive behavior" motivated by an "intensity of fear" upon "witnessing gun violence."
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> … The evidence was that the defendant was drunk, attempted to assist a thirteen year-old girl in firing a handgun in an alley in the city, shot her in the head, left her in the alley, disposed of the gun and fled to Chicago. This was more than sufficient to demonstrate utter disregard for human life regardless of his newly-acquired PTSD diagnosis.

DISCUSSION

¶6 We now explain why we conclude that: assuming without deciding that the PTSD diagnosis is newly discovered evidence, there is not a reasonable probability that a jury would reach a different result if the PTSD evidence were presented; Baker is not entitled to a new trial in the interest of justice; and the

circuit court properly exercised its discretion in denying Baker's sentence modification motion.[1]

I. REASONABLE PROBABILITY OF DIFFERENT RESULT

¶7 Putting aside requirements that we do not address, in order to show that a new trial based on newly discovered evidence is merited a defendant must show that there is "a reasonable probability" of a different result at a new trial, so that a jury presented with "both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *See* ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60.

¶8 We agree with the State that, given the testimony that Baker gave at trial, the PTSD diagnosis would likely add little or nothing at a new trial. This is because the jury at a new trial would likely draw either one of two conclusions, neither of which would avoid a conviction for first-degree reckless homicide: (1) if the jury were to credit Baker's testimony that he fled in panic, then Kaplan's opinion probably adds little because the jury would not think that the flight was, in Kaplan's words, "simply the result of premeditated, well considered, or conscious choices;" or (2) if the jury were to discredit Baker's testimony that he fled in panic, then Kaplan's opinion probably adds little because the flight was deliberate and conscious. These may not be the only conceivable conclusions, but we see no

[1] Given these decisions, we need not and do not reach disagreements between the parties on the following issues, and assume each in Baker's favor: whether the PTSD diagnosis qualifies as newly discovered evidence; whether the reason why Baker fled the scene could be considered material to the element of first-degree reckless homicide that "the circumstances of the defendant's conduct showed utter disregard for human life"; and whether the PTSD diagnosis is a new sentencing factor.

reason to think that a jury would not likely pick a route that strongly resembles one of these.

¶9 In his reply brief on appeal, Baker fails to come to grips with this argument. As best we can discern, Baker's response to this argument would be to posit that a jury with the benefit of the PTSD-related evidence would be more likely to credit Baker's "flight in panic" testimony, and also would conclude that his allegedly panicked flight did not represent any disregard for human life because it was wholly driven by PTSD.

¶10 One major problem with this view, however, was identified by the circuit court. Baker did not simply flee the immediate scene. It is undisputed that he took no steps to help Jenkins or her loved ones at any time—minutes, hours, or days after the shooting—and took many steps to distance himself from the shooting. Baker argues that his flight to Chicago "does not defeat the viability of his PTSD evidence" because what would matter most to a jury on the "utter disregard" issue is what Baker did in "the minutes after the shooting." However, this argument only serves to highlight the limited potential value of the PTSD-related evidence, because it frames the evidence as bearing strictly on the minutes that Baker himself testified were driven by panic instead of a cold-blooded mindset.

II. INTEREST OF JUSTICE

¶11 We have the discretionary authority to reverse a conviction in the interest of justice. WIS. STAT. § 752.35 (2015-16)[2]; ***State v. Armstrong***, 2005 WI

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. "However such discretionary reversal power is exercised only in 'exceptional cases,'" "'infrequently and judiciously,'" and "'with great caution.'" ***Avery***, 345 Wis. 2d 407, ¶38 (quoted sources omitted).

¶12 Baker argues that what makes this case exceptional is that the arguments both sides made at trial focused on the question of whether this was intentional homicide, and not on what level of non-intentional homicide or criminal negligence it might be. However, we have explained above why we conclude that, given Baker's trial testimony, the potential PTSD evidence would likely have little effect at a new trial. And, more broadly, Baker fails to persuade us that, given all of the other evidence about the circumstances surrounding the shooting and Baker's behavior in its aftermath, the jury would consider this evidence especially significant in evaluating Baker's culpability under any of the statutes at issue.

III. EXERCISE OF SENTENCING DISCRETION

¶13 A "new factor" meriting a sentence modification is information that is "'highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.'" ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted source omitted).

¶14 Sentencing decisions are reviewed under the erroneous exercise of discretion standard, which means that a decision must have "'the underpinnings of an explained judicial reasoning process.'" ***State v. Loomis***, 2016 WI 68, ¶30, 371 Wis. 2d 235, 881 N.W.2d 749 (quoted source omitted). "[A] sentencing court

erroneously exercises its discretion when its sentencing decision is not based on the facts in the record or it misapplies the applicable law." ***Id.***, ¶31.

¶15 Baker fails to persuade us that, even assuming that the potential PTSD evidence qualifies as a new factor, the circuit court did not properly exercise its discretion when it declined to modify Baker's sentence. The court had many pertinent factors to consider, including the highly aggravated nature of the offense, Baker's character, and the need to protect the community from violent crimes. The light that Baker now purports to shed on his immediate flight from the scene is not necessarily "highly relevant to the imposition of sentence" for reasons we have already discussed.

¶16 Baker contends that modification of the sentence is required because the sentencing court identified Baker's flight from the shooting as one aggravating factor. However, to repeat, there is no dispute that Baker in fact fled the shooting scene immediately and took many steps to distance himself from the shooting beyond that immediate flight. What Kaplan purports to add on the topic of what might have been going on in Baker's mind during the minutes after the shooting is not an obviously important aspect of the total picture.

CONCLUSION

¶17 For these reasons, we affirm the order denying the post-conviction motion and deny the request for a new trial in the interest of justice.

By the Court.—Order affirmed.

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