COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP130-CR **Cir. Ct. No. 2006CF588**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. SHANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Antonio ("Tony") Shannon appeals from a judgment convicting him after a jury trial of first-degree intentional homicide while armed and discharging a firearm from a vehicle, as party to a crime. Tony

contends that the trial court erroneously excluded as hearsay a statement that actually was an exception to the hearsay rule and that was material to his defense. While we agree that exclusion was error, we affirm because it was harmless.

¶2 Tony's brother, Terry Shannon, and Bennie Smith had a confrontation outside an IHOP restaurant. About an hour later, Bennie, Calvin Miller, Kinte Scott and Courtney Taylor were in a parked car on a city street conversing and flirting with two women they had met for the first time that night. The women were in their parked car on the other side of the street. Tony and Terry drove up and pulled alongside the men's car. An immediate shoot-out between the cars' occupants ensued. Bennie was killed.

¶3 The Shannons offered two theories of defense at their joint trial: (1) that Bennie was shot and killed by someone in his car, and (2) that the Shannons acted in self-defense. The jury returned guilty verdicts. Tony appeals. Additional facts will be supplied as the discussion requires.

¶4 Only the self-defense theory is at issue. During the trial, Tony sought to introduce the testimony of Logan Tyler, a long-time friend of the Shannons. Logan would testify that Kinte told him that Bennie was upset with Terry after the IHOP incident and had said, "I'm gonna fuck up Terry." The trial court sustained the State's objection that the proffered testimony was hearsay.

¶5 "A trial court's decision to admit or exclude evidence is a discretionary determination that will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992) (citations omitted). A decision based on an error of

law constitutes an erroneous exercise of discretion. ***State v. Jorgensen***, 2003 WI 105, ¶12, 264 Wis. 2d 157, 667 N.W.2d 318.

¶6 Tony contends the trial court erred in excluding the double-layered statement that Bennie told Kinte who told Logan that Bennie said he was "gonna fuck up Terry" because it was admissible under WIS. STAT. § 908.03(3) (2011-12)[1] as a statement of Bennie's "then existing state of mind."

¶7 The State analyzes the statement as hearsay-within-hearsay. As to the Kinte-to-Logan segment, Kinte denied on cross-examination that he made the statement to Logan. Logan's excluded testimony thus was nonhearsay because it was "[i]nconsistent with the declarant's [Kinte's] testimony." WIS. STAT. § 908.01(4)(a).

¶8 The Bennie-to-Kinte portion was hearsay, however, because it was offered for the truth of the matter. To bolster his claim of self-defense, Tony wanted to show that Bennie meant it when he said he was "gonna fuck up Terry." The hearsay nonetheless was admissible as "[a] statement of the declarant's [Bennie's] then existing state of mind … such as intent, plan, motive, design, mental feeling …." WIS. STAT. § 908.03(3). "[A] statement of a present intent to do an act in the future is admissible to prove that the declarant acted in conformity." ***State v. Everett***, 231 Wis. 2d 616, 630, 605 N.W.2d 633 (Ct. App. 1999) (citation omitted). We agree that excluding Logan's statement was error.

¶9 The erroneous exclusion of evidence does not warrant a new trial if the error was harmless. *See* ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555,

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

745 N.W.2d 397. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction. A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted).

¶10 We conclude the error was harmless. First, the jury heard other testimony, including from Logan, that at least Bennie was out to get Terry. It heard that Kinte "got into it" with Terry at the IHOP, that the situation "escalated," that Terry and Bennie got into a confrontation in which both were "aggressive," that Bennie "wanted to fight" Terry but Terry repeatedly said, "I ain't gonna fight," and that when Bennie, Calvin, Kinte and Courtney left the IHOP, they drove to "where Terry Shannon baby mama was living." The jury reasonably could have inferred that the men were looking for Terry and initiated the shootout when he drove up. Therefore, the testimony the jury did hear "functionally conveyed the same theory of defense." ***Everett***, 231 Wis. 2d at 631.

¶11 Next, as the State cogently argues, the error also was harmless because there is no reasonable possibility that Tony's self-defense theory would have succeeded. *See* WIS. STAT. § 939.48(1); *see also* WIS JI—CRIMINAL 805, 815. Five witnesses—Courtney, Kinte, Calvin and the two young women in the car parked across the street—described a scene of relaxed and friendly flirting and talking, with Bennie "laughing," "friendly," and not appearing "to be jumpy or nervous." Having just met the men, the women were impartial witnesses.

¶12 A wholly impartial witness, a newspaper employee filling newspaper racks, testified that he saw a red car[2] circling the area just minutes before hearing

[2] The Shannons drove a red car.

ten shots. The women and the three survivors in Bennie's car all testified that shooting immediately began when the Shannon vehicle pulled up, leading to the reasonable inference that someone in the Shannon vehicle fired first. Kinte and Courtney testified that Tony shot first.

¶13 The jury had before it evidence of Bennie's aggression toward Terry, of prodding him to fight, of going to his "baby mama" house, and of Bennie's and Courtney's stated desire to kill Terry. It even heard evidence that Kinte said he killed Bennie and that Calvin said Courtney killed him. It either did not believe some, or all, of that testimony or found it less compelling than evidence demonstrating that the Shannons literally came gunning for Bennie and his companions. If the more specific evidence did not persuade the jury to acquit Tony, the vague "I'm gonna fuck up Terry" would not have tipped the balance in favor of believing that Tony acted in self-defense. We conclude there is no reasonable possibility that the error contributed to the conviction.

By the Court.—Judgment affirmed.

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