

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2009AP2018-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2004CF1237

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARVEL L. WILLINGHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marvel Willingham appeals from a judgment of conviction of party to a crime of first-degree intentional homicide by use of a dangerous weapon. He challenges the admission of a security videotape and identification based on the videotape and the sufficiency of the evidence. We

conclude that the admission of the videotape and identification was a proper exercise of discretion and the evidence supports the conviction. We affirm the judgment.

¶2 George Mitchell was shot and killed at a gas station. Witnesses saw two men running from Mitchell's car. Officers reviewed the security videotape from inside the gas station just before the shooting. A police detective identified Willingham inside the gas station just before the shooting.

¶3 Willingham twice moved in limine to exclude admission of a slow-downed version of the security videotape and still photos made from the videotape.¹ He argued that the prosecution could not adequately authenticate the videotape without testimony from the person who set up the security camera system, a person familiar with its operation, and the person who recovered the videotape after the shooting and that the prosecution could not establish the change of custody of the original videotape. He claimed that the videotape was not reliable in the reconstruction of what occurred immediately before the shooting since it had two different time stamps that had a three minute time difference.² He also challenged the admission of any identification made from viewing the videotape because the image was grainy, noncontinuous, and the individual identified was only seen for a few seconds. The altered version of the

¹ Willingham's first trial in December 2006 resulted in a hung jury. His second trial commenced May 21, 2007.

² The videotape contained three different views from cameras located in different locations in the store. There were two military time clocks showing elapsed time, one using 14:00 and the other 15:00. The one hour difference between the time stamps was not problematic.

videotape, still photographs from the videotape, and the identification of Willingham from the videotape were admitted at trial.³

¶4 On appeal, we will affirm the trial court's admission of evidence if it is a proper exercise of discretion. *State v. Sorenson*, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988). We will not find an erroneous exercise of discretion if there is some reasonable basis for the trial court's determination. *Id.*

¶5 To the extent Willingham challenges the authenticity or foundation for admission of the videotape shown to the jury, we reject that challenge. Testimony about the technical details of how the videotape came into existence is not necessary where a witness can testify based on personal knowledge that the videotape is a fair and accurate representation of what is depicted. *State v. Peterson*, 222 Wis. 2d 449, 455-56, 588 N.W.2d 84 (Ct. App. 1998). A sales representative, who was working inside the gas station at the time of the shooting, testified that she was on the videotape and the videotape was a fair and accurate representation of what happened inside the station at that time. This testimony was sufficient to authenticate the videotape. A recording is properly identified and authenticated when a person depicted on the recording identifies the recording and confirms that it accurately depicts what occurred. *State v. Curtis*, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (Ct. App. 1998). The trial court recognized that the sale representative's testimony was sufficient to authenticate and permit admission

³ The original videotape was admitted into evidence but not shown to the jury. The original videotape was a time-lapse recording that, when played back in a standard VCR, displays images too quickly to be viewable without pausing the tape. The version shown to the jury was prepared by the state crime laboratory. The copy was recorded at a slower speed.

of the videotape. The court's exercise of discretion was based on the proper standard of law.

¶6 Willingham argues the videotape should not have been admitted because it was a duplicate and not the original. As observed in *Curtis*, 218 Wis. 2d at 556, WIS. STAT. § 910.03 (2007-08)⁴ “allows the admission of duplicate recordings as long as there is no genuine question raised as to their authenticity.” An imaging specialist at the state crime laboratory testified about the procedures he went through to create a viewable copy of the security videotape and to capture the still photos. He explained that his process did not involve any manipulation of the images on the original videotape. This explanation, coupled with the authenticating testimony from the sales representative, supports the decision to display to the jury the altered copy of the videotape rather than the original. *See Curtis*, 218 Wis. 2d at 556. The three minute difference between the two time elapse clocks on the videotape did not affect its authentication or validity of the copy because that was the condition of the original videotape. Which time clock reflected the accurate time was a determination for the jury.⁵ *See State v. O'Brien*, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999) (“It is within the province of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony.”).

⁴ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

⁵ A police investigator testified that by comparing the time clocks to the police call logs, which indicated that the shooting was reported at 3:18 p.m., the clock running at 14:00 hours appeared to display the correct time.

¶7 Exclusion of the identification of Willingham from the videotape because the image was grainy was not required. The State acknowledged that due to quality of the image, Willingham could not be identified by most people by his face alone. The State presented the testimony of a police detective familiar with Willingham in appearance and mannerisms. In laying a pretrial foundation for admission of the identification, the detective testified that he identified Willingham on the videotape by his walk and sculpted appearance of his cheekbones. Willingham inaccurately states that he was only identified by his walk. At trial, the detective testified he had known Willingham a little more than ten years but he was not asked the basis of his identification. The quality of the videotape does not go to admissibility but only the weight of the evidence. Whether the detective could make an accurate identification of Willingham on the videotape was a question for the jury to resolve in determining the detective's credibility in light of the quality of the tape. *See id.* The trial court properly exercised its discretion recognizing that the quality of the tape only presented a question for the jury.

¶8 Willingham sets forth what he believes to be the critical evidence: the detective's identification from the grainy videotape that Willingham was inside the gas station just before the shooting, an eyewitness who could not identify the two men who approached and shot the victim, a license plate number which was close to, but not exactly, the license plate number of the car belonging to Willingham's girlfriend, and testimony of a co-actor who was given a deal dismissing the homicide charge against him. Willingham characterizes the evidence as "sketchy at best." We do not look for evidence that sustains Willingham's claim that the evidence as insufficient. Rather, our standard of review requires that we view the evidence most favorably to the State and the

conviction. *State v. Forster*, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. “Upon a challenge to the sufficiency of the evidence, the test we apply is whether the evidence is so insufficient in probative value and force that, as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt.” *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). We must accept the reasonable inferences drawn from the evidence by the jury. *State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶9 Willingham focuses on the testimony of Bernard Bush because it is the only evidence not presented at the first trial that resulted in a hung jury. He claims Bush’s testimony was inherently and patently incredible. Bush testified that he was in the car at the gas station with Willingham and Jerrod Patterson. He said only Willingham approached and got into the victim’s car, that Willingham was holding a firearm after the shot was fired, and that Willingham fled the victim’s car. Willingham characterizes Bush’s testimony as patently incredible because it conflicts with a citizen witness’s account that two men approached the victim’s car. He also suggests Bush’s entire testimony is suspect since he originally denied any knowledge of the shooting when first questioned by police. Evidence is inherently or patently incredible when it conflicts with the laws of nature or with fully established or conceded facts. *Tarantino*, 157 Wis. 2d at 218. It was not a fully established or conceded fact that both Willingham and Patterson approached the victim’s car. Bush’s testimony only reflects a conflict in the evidence and the sort of inconsistencies that the jury must sort out. See *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980); *Kohlhoff v. State*, 85 Wis. 2d 148, 154, 270 N.W.2d 63 (1978).

¶10 The jury was free to believe Bush’s testimony that Willingham was the shooter. That alone is sufficient to support the verdict. In addition, there was

evidence that three weeks before the shooting Willingham made a controlled drug buy from the victim at the same gas station. On the day of the shooting, Willingham called the victim six times over two hours with the last call made at 3:09 p.m. The security videotape showed Willingham going inside the gas station at 3:10 p.m. and both Willingham and the victim are absent from the inside the station about two minutes before the shooting. Willingham purchased a bottle of soda in a green bottle. An unopened bottle of 7-Up, a green bottle, was found in the cup holder of the victim's car. A witness indicated that the license plate of the car in which the two men fled after the shooting was "552 VET." The license plate on the car registered to Willingham's girlfriend was "552 FET." Willingham was known to drive his girlfriend's car on previous occasions. An acquaintance of Willingham's testified that five days after the shooting, Willingham admitted his mistake in shooting the victim. Willingham contacted police when he discovered they were looking for him, indicated that he would come in, never showed up, was found two weeks later in Arkansas, and ran away when officers approached. Evidence of an accused person's flight is admissible "as circumstantial evidence of consciousness of guilt and thus of guilt itself." *State v. Winston*, 120 Wis. 2d 500, 505, 355 N.W.2d 553 (Ct. App. 1984). We conclude that there was ample evidence to support Willingham's conviction.

By the Court.—Judgment affirmed.

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

