COURT OF APPEALS
DECISION
DATED AND RELEASED

February 26, 1997

Nos. 95-3280-CR
95-3281-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KARSHRA C. ARMSTRONG,

Defendant-Appellant.

APPEALS from judgments of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Karshra C. Armstrong appeals from judgments of conviction of first-degree intentional homicide and delivery of cocaine, both while armed with a dangerous weapon and as party to a crime. He argues that his due process rights were violated because his custodial interview was not electronically recorded, that instructional and evidentiary

errors occurred at trial, and that a mistrial should have been declared when the prosecutor's closing argument commented on his failure to testify. We reject his claims and affirm the judgments.

The death of Robert Wilmington occurred during a drug transaction with Armstrong. Drugs were delivered to Wilmington as he sat in his truck on a street corner. Wilmington attempted to leave without paying for the drugs. Armstrong or his accomplice, Demetrius Johnson, fired a gun at Wilmington's pickup truck. Wilmington died from a gunshot wound to the head.

Armstrong first argues that the statement he gave to police should have been suppressed because it was not electronically recorded. He claims that his due process rights under Art. I, § 8 of the Wisconsin Constitution, can only be protected by the adoption of a rule requiring electronic recording of custodial interrogations conducted in a place of detention. He points out that Alaska courts have adopted such a rule. *See* ***Stephan v. State***, 711 P.2d 1156, 1158-59 (Alaska 1985).

We decline to adopt the rule Armstrong suggests. This court is not charged with the adoption of new rules regarding procedural safeguards. The law-developing or law-declaring function is exclusively delegated to the Wisconsin Supreme Court. *See* ***State v. Perez***, 170 Wis.2d 130, 137, 487 N.W.2d 630, 632 (Ct. App. 1992). Additionally, this State follows the test for the need to preserve evidence set forth in ***California v. Trombetta***, 467 U.S. 479, 489 (1984).

See ***State v. Greenwold***, 189 Wis.2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994). Even the Alaska Supreme Court concluded that interrogations need not be electronically recorded to satisfy the due process standard recognized in ***Trombetta***. *See* ***Stephan***, 711 P.2d at 1160.

Finally, the majority of jurisdictions which have addressed whether electronically recording statements is a constitutional necessity have rejected that requirement. *See* ***State v. Kilmer***, 439 S.E.2d 881, 893 n.16 (W. Va. 1993) (and cases cited therein); *see also* ***State v. Kekona***, 886 P.2d 740, 745-46 (Haw. 1994); ***Commonwealth v. Fryar***, 610 N.E.2d 903, 909-10 n.8 (Mass. 1993); ***People v. Eccles***, 367 N.W.2d 355, 356 (Mich. Ct. App. 1984); ***State v. Grey***, 907 P.2d 951, 955-56 (Mont. 1995); ***Jimenz v. State***, 775 P.2d 694, 696-97 (Nev. 1989). We share not only the opinion of those courts that electronically recording statements is good police work but also their views that it is not constitutionally required.

Armstrong contends that the jury should have been instructed on the lesser included offense of first-degree reckless homicide because there was evidence that the gun was shot indiscriminately at the truck. Whether a lesser included offense instruction should be submitted to a jury is a question of law which we determine de novo. *See* ***State v. Echols***, 152 Wis.2d 725, 739, 449 N.W.2d 320, 325 (Ct. App. 1989). The instruction is appropriate only when there are reasonable grounds in the evidence both for the acquittal on the greater charge and conviction on the lesser offense. *See* ***id.*** The lesser included

offense instruction is not to be given where the physical evidence leads to only one conclusion:

> Where a defendant's testimony appears to offer a reasonable basis for submission of instructions on a lesser offense, but the physical evidence contradicts that testimony so as to leave no reasonable basis for a finding of the lesser offense, the refusal to give such instructions is not error.

Boyer v. State, 91 Wis.2d 647, 669, 284 N.W.2d 30, 39 (1979). Moreover, the "evidence must throw doubt upon the greater offense. Juries cannot rightly convict of the lesser offense merely from sympathy or for the purpose of reaching an agreement." ***State v. Melvin,*** 49 Wis.2d 246, 253, 181 N.W.2d 490, 494 (1970).

We focus here on whether there were reasonable grounds in the evidence for the jury to conclude that the shooter, either Armstrong or his accomplice, Johnson, lacked the intent to kill.[1] Intent may be inferred from conduct. *See* ***Schimmel v. State,*** 84 Wis.2d 287, 300, 267 N.W.2d 271, 277 (1978), *overruled on other grounds by* ***Steele v. State***, 97 Wis.2d 72, 76, 294 N.W.2d 2, 3 (1980). The aiming of a gun at a vital part of the body and discharging it gives rise to only one inference—that the person intended the natural, usual, and ordinary consequences of such an act. *See* ***State v. Kramar***, 149 Wis.2d 767, 793, 440 N.W.2d 317, 328 (1989).

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[1] The jury was instructed on party to a crime liability. Either Armstrong directly committed the crime or he aided and abetted its commission. *See* WIS J I—CRIMINAL 400.

Armstrong characterizes the evidence as demonstrating that in an apparent attempt to scare the driver, the gun was fired indiscriminately at the truck from sixteen to eighteen feet away. There was no direct testimony that the gun was fired indiscriminately. An eyewitness reported that as the truck pulled away, Armstrong pulled a gun, aimed at the person in the truck, and fired twice. One bullet hole was found in the middle of the rear window of the pickup truck. Another bullet hole was found in the metal frame of the cab of the truck just to the left of the rear window. The victim was killed by a shot to the head. This evidence is consistent with the finding that the shooter took calculated aim at the driver's head and did not act merely recklessly.

The facts here are analogous to those in ***State v. Moffett***, 147 Wis.2d 343, 433 N.W.2d 572 (1989). There the victim tried to thwart a robbery by getting into his car. *See* ***id.*** at 347, 433 N.W.2d at 573. The robber fired a bullet through the car window, hitting the victim in the neck. *See* ***id.*** The court concluded that there was no reasonable basis in the evidence to support an acquittal on the greater offense of attempted first-degree murder. *See* ***id.*** at 352, 433 N.W.2d at 575.

Similarly here, a shot was fired through a car window and aimed at a vital part of the victim's body. We acknowledge that the distance from which the shot was fired was greater than that in ***Moffett***. However, the distance was not so great as to negate intent. We conclude it was not error to deny Armstrong's request for an instruction on the lesser included offense.

Armstrong next argues that there was insufficient evidence to instruct the jury on party to a crime liability as an aider and abettor. Even accepting his argument, the error was not prejudicial.

This issue is governed by ***Griffin v. United States***, 502 U.S. 46 (1991). There, the instructions given told the jury that it could return a verdict of guilty against the defendant if it found her to have participated in either one of the two objects of a drug conspiracy. *See* ***id.*** at 48. The Court held that the due process clause does not require that general guilty verdicts in a multiple-object conspiracy be set aside if the evidence is insufficient to support a conviction as to one object. *See* ***id.*** at 60; *see also* ***State v. Wulff***, ___ Wis.2d ___, 557 N.W.2d 813 (1977). Here, even if there was insufficient evidence to instruct the jury on party to a crime liability as an aider and abettor, like ***Griffin***, the jury was instructed on more theories than that which is possibly supported by the evidence.

For this same reason, we reject Armstrong's claim that submission of the aiding and abetting instruction prevented the real controversy from being tried. The prosecution's closing argument advanced the theory that Armstrong was guilty for having directly committed the shooting. The evidence supports that theory. The real controversy was tried.

Two evidentiary errors are alleged. Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court misused its discretion. *See*

Shawn B.N. v. State, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *See* ***id.*** at 367, 497 N.W.2d at 149.

The first involves Armstrong's statement to police that he and Johnson were both members of the Vice Lords gang.[2] Armstrong argues that evidence of mutual gang affiliation was irrelevant to proving the elements of aiding and abetting liability and far more prejudicial than probative. The trial court found the evidence relevant to Armstrong's ability to identify Johnson and the potential aiding and abetting of the drug sale. Evidence of the gang affiliation was relevant to an aiding and abetting theory of liability because it established that the two had a mind set to work together and back each other up if there was trouble. It also established the circumstances of the crime. The prejudice was minimized by the fact that both were said to be gang members. Thus, the evidence did not give any cause to assume that Armstrong, rather than Johnson, was the shooter simply because Armstrong was a gang member. Further, there was ample evidence that Armstrong directly committed the crime rendering the error in admission of the gang evidence, if any, harmless.

The other evidentiary claim of error is the admission of evidence that Armstrong carried a pager when he surrendered to police eight days after the shooting. Armstrong argues that his possession of a pager and the police

[2] Armstrong told police that he knew Johnson because, "he's Vice-Lord, and I'm Vice-Lord."

officer's testimony that a pager is often a tool of a drug dealer should have been excluded. He contends the inference of drug dealing is highly prejudicial. The error, if any, in admitting this evidence was undoubtedly harmless. Armstrong's statement to police admitted that he was selling drugs to the victim. In addition, the eyewitness saw Armstrong engaged in what she believed to be a drug deal. Regardless of the evidence of the pager, the only reasonable inference from the evidence was that Armstrong was dealing drugs.

The final claim is that during closing argument the prosecutor improperly commented on Armstrong's failure to testify. During his argument, the prosecutor referred to a gap in time between the shooting and when Armstrong surfaced in Chicago, Illinois. The prosecutor remarked, "Where is that day and a half gap? I don't know, I can't tell you. I don't have the ability to find out." Outside the presence of the jury Armstrong objected and moved for a mistrial.

A reference to a defendant's decision not to testify violates the Fifth Amendment only if "`the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" ***State v. Werlein***, 136 Wis.2d 445, 456, 401 N.W.2d 848, 853 (Ct. App. 1987) (quoted source omitted). The decision of whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a

new trial. *See* ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995).

We view the prosecutor's comment to be innocuous in light of the principal issues of the trial. The comment was not a manifest attempt to comment on Armstrong's failure to testify. The prosecutor may have wanted to show flight or consciousness of guilt by Armstrong's "disappearance." Even that concept had little impact on the determination of guilt or innocence because Armstrong voluntarily surrendered to police and gave a statement. Moreover, the prosecutor's comment was isolated. In the final instructions, the jury was instructed not to draw any inferences from Armstrong's decision not to testify. Danger of prejudice is cured when admonitory instructions are given because juries are presumed to follow all of the instructions given. *See* ***State v. Grande***, 169 Wis.2d 422, 436, 485 N.W.2d 282, 286-87 (Ct. App. 1992). We conclude that the comment in closing argument was harmless.

By the Court.—Judgments affirmed.

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