COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-3667-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LORENZO WINFORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Lorenzo Winford appeals from a judgment of conviction entered after a jury found him guilty of second-degree intentional homicide. *See* § 940.05(1)(b), STATS.[1] He also appeals from an order denying his

[1] Section 940.05(1)(b), STATS., provides in relevant part:

(continued)

motion for postconviction relief. Winford argues that the evidence was insufficient to support the jury's verdict, and that his thirty-year sentence violated his Eighth Amendment rights. We reject his arguments and affirm.

On October 7, 1995, sixteen-year-old Lorenzo Winford shot twenty-year-old Gerald Pitts in the head, killing him. Trial testimony established that the shooting followed a confrontation between Winford's girlfriend, Lisa G., and Pitts's cousin, Lewonda, during which Pitts intervened and slapped Lisa. In response to Pitts's aggression towards Lisa, Winford pulled a gun from his waistband, shot Pitts, and then fled the scene. Testimony also revealed that Winford armed himself and went to Pitts's residence, knowing that Lisa intended to confront Pitts's cousin regarding her gossip about Winford's alleged infidelities.

Winford argues that, given the mitigating factors in this case, the evidence was insufficient to establish his intent to kill, and insufficient to preclude his self-defense theory. Focusing solely on his own self-serving testimony, he claims that "[t]he record is devoid of evidence that proves beyond a reasonable doubt that [he] had a mental purpose to take the life of Gerald Pitts or was aware that his conduct was practically certain to cause the death of another human being." We disagree.

> **(1)** Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class B felony if:
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> ….
>
> (b) The state concedes that it is unable to prove beyond a reasonable doubt that the mitigating circumstances specified in s. 940.01 (2) did not exist. By charging under this section, the state so concedes.

We review a challenge to the sufficiency of evidence to determine whether the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *See* ***State v. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). The credibility of the witnesses and the weight of the evidence is for the trier of fact, and we review the evidence in the light most favorable to the verdict, drawing inferences from the evidence that support the verdict if more than one reasonable inference can be drawn. *See* ***State v. Poellinger***, 153 Wis.2d 493, 504, 451 N.W.2d 752, 756 (1990). We are not concerned with evidence that might support other theories of the crime; we decide only whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. *See* ***id.*** at 506-07, 451 N.W.2d at 757. Applying these standards, we conclude that sufficient evidence supported Winford's conviction for second-degree intentional homicide.

To convict Winford of second-degree intentional homicide, the jury had to find, beyond a reasonable doubt, that: (1) he caused the death of Gerald Pitts; (2) he intended to kill him; and (3) his conduct was not privileged under the law of self-defense. *See* WIS J I-CRIMINAL 1052. Ample evidence supported the jury's finding of guilt.

First, Dr. John Teggatz, Deputy Chief Medical Examiner for Milwaukee County, testified regarding the cause of death. He stated that Pitts died as a result of a single bullet entering the left side of his head and exiting his right temple. Second, evidence established that Winford acted with intent. City of Milwaukee Police Detective Randolph Olson testified that shortly after the

incident he took a statement from Michael Aaron, a witness to the shooting.[2] According to Detective Olson, Aaron stated that Winford was only five feet from Pitts when he pointed his gun at his (Pitts's) head and fired. Aaron also told him that Winford's gun fired twice, and that he never saw the victim with a gun. In addition, Aaron revealed that shortly after the shooting he overheard Lisa ask Winford if he had killed Pitts, and that in response, Winford replied that he didn't care if he had. Given this testimony, we conclude that the jury could have found that Winford pointed the gun at Pitts's head before firing and, therefore, that he acted with the requisite intent. *See* ***State v. LaTender***, 86 Wis.2d 410, 426, 273 N.W.2d 260, 267 (1979) (defendant's shooting victim in vital part raises presumption of intent to kill).

Finally, testimony established that Winford's conduct was not privileged under the law of self-defense. Mrs. Pearl Pitts, the victim's mother, testified that when her son went outside he was not armed. She explained that when her son learned of the confrontation that was occurring outside their home he was just coming out of the bathroom and was only wearing his trousers. She stated that when she asked him to find out what was happening outside, he grabbed his shirt and was putting it on as he walked out the door. Mrs. Pitts stated that moments later she heard two gun shots and observed her unarmed son fall to the ground. She testified that the gun found next to her son was not his; but

[2] Winford, citing Michael Aaron's trial testimony, argues that there was insufficient evidence to either establish his intent or preclude his self-defense claim. His reliance on this testimony is misplaced. Aaron's trial testimony differed from his pretrial statement to the police. Winford overlooks the fact that the jury heard both of Aaron's versions and, as the trier of fact, was vested with deciding which was more credible. As the State argues, "the jury was free to use Aaron's pretrial statement to Detective Olson as substantive evidence of [Winford's] intent." *See* ***State v. Horenberger***, 119 Wis.2d 237, 247, 349 N.W.2d 692, 697 (1984) (prior inconsistent statement by a witness at a criminal trial is admissible as substantive evidence against defendant).

rather, that it belonged to one of the men who was running from the scene. Mrs. Pitts explained that as she rushed outside to her son, one of the men across the street from the shooting tossed a gun near her son's corpse. Based on this testimony, the jury could have concluded that Winford was not privileged to use self-defense. Clearly, the evidence was sufficient to support the jury's verdict.

Winford also challenges his thirty-year sentence, claiming it constitutes an erroneous exercise of discretion and a violation of his Eighth Amendment rights. He contends that the trial court failed to consider several mitigating factors, including his age, lack of prior record, and participation in school and extracurricular activities. We disagree.

The principles governing appellate review of a trial court's sentencing discretion are well established. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). Appellate review is tempered by a strong policy against interfering with the trial court's sentencing discretion. *See* ***id***. We will not reverse a trial court's sentence absent an erroneous exercise of discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). In reviewing whether a trial court erroneously exercised sentencing discretion, we consider: (1) whether the trial court considered the appropriate sentencing factors; and (2) whether the trial court imposed an excessive sentence. *See* ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 182 (Ct. App. 1984). The primary factors to be considered by the trial court are the gravity of the offense, the character of the offender, and the need to protect the public. *See* ***Larsen***, 141 Wis.2d at 427, 415 N.W.2d at 541. The weight to be given each factor is within the trial court's discretion. *See* ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

In imposing sentence, the trial court indicated that the gravity of the offense and the need to protect the public from violent offenders were of paramount consideration. Noting the senselessness of the crime, the court explained:

> Somehow people have to understand that we cannot resolve things by gunfire. You cannot go to these disputes armed. If you choose to do that, you have to understand that the law of self-defense does not allow you to shoot first just because of some vague fear or concern about the situation. And there might be a better way to get that message across, but the only one I'm aware of is the imposition of severe penalties for this kind of conduct.

The court then sentenced Winford to thirty years' imprisonment. Considering the devastating effect of Winford's actions, we cannot conclude that the thirty-year sentence, which is well within the forty-year statutory maximum, is unduly harsh or excessive.

By the Court.—Judgment and order affirmed.

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