COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 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. 97-0769-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HERBERT W. MCGEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN and MICHAEL J. BARRON, Judges. *Affirmed.*

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

PER CURIAM. Herbert W. McGee appeals from a judgment entered after a jury found him guilty of attempted first-degree intentional homicide, party to a crime, *see* §§ 940.01(1), 939.32 and 939.05, STATS., and first-degree recklessly endangering safety, party to a crime, *see* §§ 941.30(1) and

939.05, STATS. McGee also appeals from the trial court's order denying his motion for postconviction relief. McGee argues that: (1) the evidence was insufficient to support his convictions; (2) the trial court erred in denying his motion for a mistrial; and (3) the trial court erred in instructing the jury on the weight to be afforded to expert testimony. We affirm.

I. BACKGROUND

On September 12, 1995, at about 8:30 p.m., Isaac Henard, Patrick Felder, Edward Wright, and James Clincy walked to the Gas 'N Go station at 2173 North 35th Street, in Milwaukee, to buy some cigarettes. While they were at the station talking to some friends, McGee and a gang of companions confronted them. McGee began arguing with Henard and his friends and told them to leave the area; however, they refused to leave.

McGee and his companions then left the station and went to a vacant lot to the west of the station. McGee pulled a shotgun from a shrub and began firing at Henard and his friends. McGee's companions then began firing handguns at Henard and his friends. Both Henard and Felder were hit by shotgun pellets. The shotgun pellets hit Henard's face and neck, passing through his jugular vein. The shotgun pellets hit Felder in the shoulder. A jury convicted McGee of attempted first-degree intentional homicide with respect to Henard, and of first-degree recklessly endangering safety with respect to Felder. The trial court entered judgment accordingly.

II. DISCUSSION

McGee argues that the evidence is insufficient to support his convictions. He argues that the testimony identifying him as the person who fired the shotgun "is so inherently suspect and incredible that it is incapable of supporting the convictions." Brief of Defendant-Appellant at 5. McGee contends that the evidence shows that the witnesses did not see the person who fired the shotgun, but that they agreed to identify McGee as the shooter "after hearing rumor and innuendo around the neighborhood." ***Id.*** at 7. In support of this argument, McGee points to evidence that the witnesses did not tell the police his name until a few days after the shooting. He also asserts that Wright, one of three witnesses who testified that McGee was the shooter, had told the police on the night of the shooting that he was unable to see who was firing the shotgun.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citations omitted). Thus, "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible - that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The evidence discloses that Wright, Felder and Henard all testified that McGee was the person who fired the shotgun. Both Wright and Felder also chose McGee from a lineup a few days after the shooting. Wright and Henard testified that although they did not know McGee's name at the time of the shooting, they recognized him from the neighborhood. They testified that they saw him pick up the shotgun and begin firing it after he had confronted them. Further, the officer who wrote the report containing Wright's alleged statement that Wright did not see the shooter testified that he wrote the report from memory, and that the notes he took during his investigation did not reflect such a statement; the officer also testified that his notes of the investigation contained a description of the person whom Wright said he saw reach down and pick up a shotgun. The identification evidence is not inherently incredible. Any inconsistencies in the identification evidence were before the jury, and were to be evaluated by them. *See* ***State v. Pankow***, 144 Wis.2d 23, 30–31, 422 N.W.2d 913, 915 (Ct. App. 1988) (the jury is to resolve conflicts in the testimony). "We will not substitute the judgment of the jury merely because certain evidence is in conflict or would support a different result." ***Id.***, 144 Wis.2d at 30, 422 N.W.2d at 914. McGee's argument asks us to reweigh the evidence, which we cannot do. We therefore reject McGee's argument that the evidence is insufficient to support his convictions.

McGee next argues that the trial court erred in denying his motion for mistrial, which he made after a witness testified that McGee was known for dealing drugs in the area of the shooting. Although McGee asserts that "the court sustained defendant's motion to strike this testimony, and may have admonished the jury to disregard it," McGee never moved to strike this answer. Rather, he immediately moved for a mistrial. He argues on appeal that he "was indelibly

tainted as soon as the jury heard this statement." Brief of Defendant-Appellant at 9.

The decision as to whether or not to grant a mistrial is within the sound discretion of the trial court. *See* ***Pankow***, 144 Wis.2d at 47, 422 N.W.2d at 921. The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial to warrant a new trial. ***Id.*** The denial of a motion for mistrial will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Id.*** Because the grant of a mistrial is a drastic sanction, less drastic alternatives are to be taken if available and practical. *See* ***State v. Bunch***, 191 Wis.2d 501, 512, 529 N.W.2d 923, 927 (Ct. App. 1995). A trial court's instruction to disregard testimony cures any prejudicial effect of the testimony, *see* ***Pankow***, 144 Wis.2d at 47, 422 N.W.2d at 921–922, and we presume that the jury follows such instructions, *see* ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). McGee, however, did not seek this less-drastic remedy.

The trial court sustained McGee's objection to the testimony; thus any prejudice from the testimony was cured. Significantly, the State made no reference to the drug-dealing testimony during closing argument. After reviewing the record of the proceedings as a whole, we are satisfied that the single isolated reference about McGee dealing drugs had little impact on the jury, and thus the testimony was not sufficiently prejudicial to warrant a mistrial. The trial court did not erroneously exercise its discretion.

McGee's final argument is that the trial court erred in giving the jury the following instruction on expert testimony:

> The general rule is that a witness may testify only to facts known by him. A witness, however, who has special knowledge, experience, skill, training, or education in a particular profession or occupation is permitted to give an opinion as an expert in the field. In determining the weight to be given to the opinion of an expert, you should consider the qualifications and credibility of the expert, whether the opinion is based upon established facts or agreed facts in the case, and the reasons given for the opinion. Such evidence is received for the purpose of aiding you in arriving at a conclusion, if it does aid you. You are not bound by the opinion of any expert. You should consider carefully the opinion evidence with all other evidence in the case, giving to it just such weight as you decide it is entitled to receive.

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McGee argues that no witness was qualified to give expert testimony and that, by giving the instruction on expert testimony, the trial court invited the jury to give undue weight to the testimony of a police officer who testified about the injuries likely to result from being shot with a shotgun.

At the jury instruction conference, McGee objected to the expert testimony instruction, and the trial court ruled that it would not give the instruction; however, the trial court mistakenly read the instruction to the jury. After the trial court finished instructing the jury, McGee requested a sidebar to discuss the mistake. As a remedy, the trial court prohibited the state from arguing that the police officer was an expert and removed the instruction from those that were sent to the jury room. McGee agreed that this remedy was acceptable. Therefore, because McGee agreed to the trial court's remedy and did not move for a mistrial, he cannot now complain about the alleged error. *See* ***Wells v. State***, 40 Wis.2d 724, 734–735, 162 N.W.2d 634, 639–640 (1968) (a party waives the right to assert an error by adopting a deliberate strategy to proceed with trial despite the error); *see also* ***State v. Robles***, 157 Wis.2d 55, 59–60, 458 N.W.2d 818, 820–821

(Ct. App. 1990) (a party who acquiesces in the trial court's course of action cannot later allege error because of that action), *aff'd,* 162 Wis.2d 883, 470 N.W.2d 900 (1991). Moreover, the instruction would have been warranted in any event. *See* ***id.*** The record discloses that the police officer was qualified to give an opinion on the effects of shotgun pellets. Section 907.02, STATS., provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The officer testified that he had both military and law-enforcement training and experience regarding the effects of shotgun pellets. This knowledge of the likely effect of the shotgun pellets assisted the jury in determining McGee's intent when he fired the shotgun at Henard and Wright from the vacant lot next to the gas station.

By the Court.—Judgment and order affirmed.

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