COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1520-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NATE WILSON, A/K/A TAY,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

PER CURIAM. Nate Wilson has appealed from a judgment convicting him after a jury trial of one count of attempted first-degree intentional homicide by use of a dangerous weapon in violation of §§ 939.32(1)(a), 939.63(1)(a)2 and 940.01(1), STATS. He has also appealed from a judgment convicting him of one count of possession of a firearm by a felon in violation of §

941.29(2), STATS. Both convictions were as a repeat offender under § 939.62(1), STATS.

Wilson raises two issues: (1) whether the trial court erred when it denied Wilson's request to instruct the jury on the offense of attempted second-degree intentional homicide; and (2) whether the trial court committed prejudicial error when it permitted the State to cross-examine Wilson concerning paternity and child support proceedings against him. We conclude that the trial court properly refused to instruct the jury on attempted second-degree intentional homicide. While we conclude that the trial court erroneously exercised its discretion in permitting questioning on the paternity and child support matters, we also conclude that this error was harmless. We therefore affirm the judgments of conviction.

Whether a lesser-included offense should have been submitted to the jury is a question of law which we review independently. *See* ***State v. Martin***, 156 Wis.2d 399, 402, 456 N.W.2d 892, 894 (Ct. App. 1990), *aff'd*, 162 Wis.2d 883, 470 N.W.2d 900 (1991). The analysis has two steps, requiring a showing that the crime is a lesser-included offense of the crime charged, and reasonable grounds in the evidence for acquittal on the greater offense and conviction on the lesser offense. *See* ***id.***

The key word in this rule is "reasonable." *See* ***State v. Sarabia***, 118 Wis.2d 655, 661, 348 N.W.2d 527, 531 (1984). However, the evidence must be viewed in a light most favorable to the defendant. *See* ***State v. Morgan***, 195 Wis.2d 388, 434, 536 N.W.2d 425, 442 (Ct. App. 1995). Additionally, the trial court must submit a requested lesser-included offense instruction even when the defendant has given exculpatory testimony, provided that a reasonable view of the

evidence, including the nonexculpatory testimony of the defendant, supports acquittal on the greater charge and conviction on the lesser charge. *See* ***State v. Jenkins***, 168 Wis.2d 175, 202, 483 N.W.2d 262, 272-73 (Ct. App. 1992).

Wilson contends that the evidence reasonably permitted the jury to find that the crime was caused under the influence of adequate provocation, and thus to acquit him of attempted first-degree intentional homicide and to convict him of attempted second-degree intentional homicide. *See* § 940.01(2)(a), STATS. We disagree. "Adequate provocation" is defined in the statutes as provocation sufficient to cause a complete lack of self-control in an ordinarily constituted person. *See* §§ 939.44(1)(a) and 940.01(2)(a), STATS. "Provocation" is defined as something the defendant reasonably believes the intended victim has done which causes the defendant to lack self-control completely at the time of the crime. *See* § 939.44(1)(b).

Under this standard, nothing in the evidence reasonably could have permitted the jury to acquit Wilson of attempted first-degree intentional homicide and convict him of attempted second-degree intentional homicide. The evidence at trial indicated that the victim, William Hastings, was shot in the back while fleeing up a driveway after a fistfight with Wilson. Conflicting evidence was presented at trial as to whether Wilson was the shooter, thus clearly providing a basis for acquittal of attempted first-degree intentional homicide. However, nothing in the evidence reasonably supported a finding that if Wilson was the shooter, the shooting was the result of adequate provocation.

The evidence at trial was undisputed that Hastings and a companion drove up to an area where Wilson and at least a dozen other bystanders had congregated, parked their car and approached the group. Shortly thereafter

Hastings began arguing with Wilson, uttered at least one profanity and said, "It's on." The men then began wrestling and fistfighting until Wilson's mother intervened and the physical fighting ceased without evidence of significant injury to either participant. Hastings, who was unarmed, then began running along a driveway away from the scene of the fight and was shot in the back.

On appeal, Wilson argues that the evidence supported a finding that he reasonably believed Hastings had run off to arm himself. He relies on the testimony of two witnesses indicating that Hastings yelled for someone to get his gun, and on his own testimony that he heard his mother say he should run because Hastings was going to get something. He contends that the evidence thus supported a finding that at the time the fighters separated, their street fight had escalated to the level of adequate provocation.

Standing alone, the evidence that Wilson and Hastings had argued and engaged in a fistfight did not demonstrate that Wilson was subjected to the kind of provocation which would cause an ordinarily constituted person to completely lose self-control. Moreover, even considering the testimony that Hastings yelled for his gun, there was no evidence that he had a gun or was anywhere near a gun when he was shot in the back. The undisputed evidence was that the fighting had stopped at that point in time and that Hastings was running in the opposite direction of the scene of the fight, with his back to the scene of the fight. Under such circumstances, it cannot reasonably be said that an ordinarily constituted person would have been so provoked as to completely lose self-control and shoot the fleeing person in the back. Refusal to submit an instruction on attempted second-degree intentional homicide therefore was proper.

While the trial court properly denied the requested instruction, it erroneously exercised its discretion in permitting questioning of Wilson concerning paternity and child support proceedings against him. Over repeated objections by defense counsel, the trial court permitted the prosecutor to ask Wilson whether an unnamed Chicago woman with whom Wilson stayed in the two months prior to his arrest had sued him in a paternity and child support action. Wilson contends that this evidence was irrelevant and unfairly prejudicial, admitted solely to impugn his character and credibility. He further contends that his credibility was crucial because the ultimate issue at trial was whether he was the person who shot Hastings.

When reviewing evidentiary issues, the question is not whether this court agrees with the trial court's ruling, but whether the trial court exercised discretion in accordance with accepted legal standards and the facts of record. *See* ***State v. Mainiero***, 189 Wis.2d 80, 94-95, 525 N.W.2d 304, 310 (Ct. App. 1994). This court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. *See* ***id.*** at 95, 525 N.W.2d at 310. However, the record should indicate that the trial court exercised its discretion and the basis for its decision. *See* ***id.***

The record reveals that when defense counsel initially objected to the prosecutor's questions, the trial court overruled the objection with no explanation. When the questioning continued, counsel objected again and the trial court called counsel to the bench for an unrecorded sidebar conference, a practice criticized by this court in ***Mainiero***. *See* ***id.*** at 95 n.3, 525 N.W.2d at 310. As in ***Mainiero***, although it is clear that the trial court overruled Wilson's objections, the use of a sidebar conference deprived this court of the basis for the trial court's

decision. We direct the trial court's attention to ***Mainiero*** and strongly suggest that in the future all sidebars be recorded.

When the record inadequately sets forth the reasons for the trial court's ruling, we independently review the record to determine whether it provides a basis for the trial court's exercise of discretion. *See* ***id.*** at 95, 525 N.W.2d at 310. We will uphold the trial court's decision if the record contains facts which would support the decision had the court fully exercised its discretion. *See* ***id.*** at 96, 525 N.W.2d at 310.

We discern no facts which support the trial court's decision to permit this questioning.[1] The paternity and child support proceedings were in no way connected with the charges against Wilson in this case. Evidence concerning those proceedings was not "other acts" evidence admissible and admitted under the established three-step analysis discussed in ***State v. Sullivan***, 216 Wis.2d 768, 771-73, 576 N.W.2d 30, 32-33 (1998). The evidence was simply unnecessary, possessing no relevance or materiality to the issues being tried.

We caution the trial court that both the rules of evidence and constitutional protections designed to guaranty a fair trial apply regardless of whether the trial court agrees with them. We are concerned that such a cavalier admission of unnecessary and immaterial evidence will someday compel the difficult and heart-wrenching reversal of a judgment convicting a defendant of a heinous crime. Although disciplinary reversals based on prosecutorial misconduct are generally impermissible, *see* ***State v. Ruiz***, 118 Wis.2d 177, 202, 347 N.W.2d

[1] In its respondent's brief, the State concedes that "both the relevance and the legitimate impeachment value of this evidence are limited at best" and makes no meaningful attempt to defend the admission of the evidence.

352, 364 (1984), we also admonish the prosecutor that prosecutorial efforts to elicit testimony so clearly outside the rules of evidence will not be tolerated.

Having concluded that it was error to admit the paternity and child support evidence, we nevertheless also determine that admission of the evidence was harmless. The test for determining harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See* ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41. The burden of proving no prejudice is on the State. *See* ***id.*** The defendant's conviction must be reversed unless this court is certain that the error did not influence the jury. *See* ***id.***

There is no reasonable possibility that the error in the admission of this evidence contributed to Wilson's convictions. The questions and answers concerning the paternity and child support proceedings, including those portions of the objections which were recorded, constituted only three pages out of thousands of pages of trial transcript. Moreover, the prosecutor made no further use of the evidence, either in other testimony or in closing argument. In contrast, Wilson's trial lasted eight days, focusing primarily on the disputed issue of the identity of the shooter. The State's evidence against Wilson included eyewitnesses who directly identified him as the shooter and other witnesses whose testimony provided circumstantial evidence of his guilt. The State also presented evidence of statements made by Wilson and his relatives concerning the shooting and evidence linking Wilson to a weapon which expert testimony additionally linked to the shooting.

It is also noteworthy that Wilson's defense was not totally dependent on his own testimony. Other defense witnesses also offered testimony disputing the State's evidence that he was the shooter, thus establishing that neither the

prosecution nor the defense was significantly dependent on Wilson's personal credibility. The minimal scope and tangential nature of the paternity and child support evidence, combined with the vast amount of evidence directly related to the shooting, thus lead us to conclude that the erroneously admitted evidence had no effect on the jury's verdict.

By the Court.—Judgments affirmed.

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