COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0140-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES W. JONES,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. James W. Jones, *pro se*, appeals from a judgment of conviction entered after a jury found him guilty of attempted first-degree intentional homicide. *See* §§ 940.01(1), 939.63, 939.32, STATS. Jones argues: (1) that the trial court erred in admitting identification evidence; (2) that the evidence is insufficient to sustain his conviction; (3) that the trial court erred in instructing

the jury on the issue of intent; and (4) that the State destroyed exculpatory evidence. We affirm.

BACKGROUND

Shortly after 2:00 a.m. on March 30, 1996, several police officers responded to a shooting at a Milwaukee tavern. When Officer Mark Steffen arrived at the tavern, he saw someone run into an alley, and he then heard gunfire. Officer Steffen approached the alley, saw Jones, identified himself as a police officer and ordered Jones to show his hands. Jones then raised a gun and fired several shots at Officer Steffen. When Jones began shooting, Officer Steffen fell to the ground, and rolled away from the gunfire.

Officer Sarah Blomme, who had begun following Officer Steffen when he approached the alley, fired two shots at Jones, and Jones then fled. Officer Blomme broadcast a description of Jones to the officers in the vicinity, reporting that he was a black male who was wearing blue jeans and a Brewer's jacket. Less than a minute later, Officer Karen Asplund and Officer Steven Kelley apprehended Jones after he came running towards them from between two homes. They took Jones back to the alley, where Officer Steffen and Officer Blomme identified Jones as the man who shot at Officer Steffen.

A jury subsequently tried and convicted Jones of attempted first-degree intentional homicide. The trial court entered judgment accordingly.

DISCUSSION

Jones argues that the trial court erred in admitting testimony that, shortly after the shooting, Officer Steffen and Officer Blomme made out-of-court identifications of him as the shooter. He further argues that the in-court

identifications of him were tainted by the allegedly impermissible out-of-court identifications. Jones, however, did not object to the admission of the challenged identification evidence. RULE 901.03(1)(a), STATS., requires a party to make a specific and timely objection to the admission of evidence in order to preserve the issue for appeal. Jones, therefore, waived any challenge to the identification evidence by failing to object to its admission. *See* ***Caccitolo v. State,*** 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975).

Jones next argues that the evidence is insufficient to sustain his conviction. In order to convict Jones of attempted first-degree intentional homicide, the jury had to conclude beyond a reasonable doubt that Jones had the intent to kill Officer Steffen, that Jones acted in furtherance of that intent to kill, and that Jones's action "'would have caused the death of [Officer Steffen] except for the intervention of some extraneous factor.'" ***State v. Webster***, 196 Wis.2d 308, 320–321, 538 N.W.2d 810, 815 (Ct. App. 1995) (quoted source omitted). To support a finding that Jones acted with the intent to kill, the evidence must be sufficient to establish that Jones "'had the mental purpose to take the life of another human being or was aware that his conduct was practically certain to cause the death of another human being.'" ***Id.***, 196 Wis.2d at 321, 538 N.W.2d at 815 (quoted source omitted). "This '[i]ntent may be inferred from the defendant's conduct, including his words and gestures taken in the context of the circumstances.'" ***Id.*** (alteration in original) (quoted source omitted).

> [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 Officer Steffen saw Jones, identified himself as a police officer and ordered Jones to show his hands. Jones then fired several shots at Officer Steffen, and fled. Both Officer Steffen and Officer Blomme identified Jones as the shooter, and they testified that Jones aimed at Officer Steffen's upper body from approximately ten feet away. This evidence is sufficient to sustain Jones's conviction. *See* ***Webster***, 196 Wis.2d at 322, 538 N.W.2d at 815 ("When one intentionally points a loaded gun at the vital part of the body of another and discharges it, it cannot be said that [that person] did not intend the natural, usual, and ordinary consequences.") (internal quotation marks and quoted source omitted) (alteration in original).

Within his sufficiency argument, Jones raises two additional issues. He asserts that the State destroyed exculpatory evidence when it disposed of the Brewer's jacket he was wearing during the shooting, and that the trial court erroneously instructed the jury on how to determine whether Jones had the requisite intent to kill. Jones did not raise an objection to the trial court's intent instruction, however. He, therefore, waived any alleged error with respect to the instruction. *See* ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680

(1988) (if a party fails to object to an instruction at the instructions conference, that party has waived any objection to the instruction) (construing RULE 805.13(3), STATS.). As we explain below, the alleged evidentiary value of the Brewer's jacket is cumulative to the evidence placed before the jury. We therefore reject Jones's argument that the State destroyed exculpatory evidence.

"[T]he suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment." ***State v. Pettit***, 171 Wis.2d 627, 644, 492 N.W.2d 633, 641 (Ct. App. 1992). Evidence is material "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Id.*** (quoted source omitted).

Jones asserts that the Brewer's jacket is exculpatory because it was a pullover jacket, and its admission would have impeached Officer Steffen's identification of him. Officer Steffen testified that the shooter was wearing a Brewer's jacket, and that the jacket was open or unzipped, exposing a white T-shirt underneath. On cross-examination of Officer Steffen, Jones presented evidence that the police inventory of Jones's property at the time of his arrest indicated that the Brewer's jacket was a pullover jacket. The jury also saw a photograph of Jones wearing the jacket on the night of the shooting; the photograph showed that the jacket had a zipper that was partially unzipped. In light of the foregoing evidence, there is no reasonable probability that the admission of the Brewer's jacket would have resulted in an acquittal.

By the Court.—Judgment affirmed.

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