COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3766-CR
98-0354-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRANCE C. HARRIS,

DEFENDANT-APPELLANT,

LARRY D. HARRIS AND
WILLIE O. JOHNSON,

DEFENDANTS.

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

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

PER CURIAM. Terrance C. Harris appeals from a judgment of conviction entered after a jury found him guilty of first-degree intentional

homicide, party to a crime, while armed with a dangerous weapon, contrary to §§ 940.01(1), 939.05, and 939.63, STATS., and attempted first-degree intentional homicide, party to a crime, while armed with a dangerous weapon, contrary to §§ 940.01(1), 939.05, 939.63, and 939.32, STATS. Harris also appeals from the order denying his motion for postconviction relief. On appeal, Harris claims that: (1) the trial court erred in admitting his statement because it was involuntary; (2) the evidence at trial was insufficient to sustain the guilty verdicts; and (3) the trial court erroneously exercised its discretion when it denied his postconviction motion for production of physical evidence for DNA testing.[1] We reject his arguments and affirm.

I. BACKGROUND.

The testimony of the State's witnesses at trial revealed the following. On June 25, 1996, Terrance Harris, in the company of his brother, Larry Harris, and Willie Johnson, was driving his car in pursuit of Darryl Rollins, a man with whom Larry had fought earlier in the day. Upon spotting Rollins, Larry fired an assault rifle out of the car window in the direction of Rollins, who was in a white car. The shot missed Rollins, but two young girls, Shalonda Young and Laquaan Moore, who were standing on a nearby porch, were struck by a stray bullet, which first entered and exited Laquann and then struck Shalonda. Laquann died as a

[1] Harris argues for the first time on appeal that he was denied a fair trial because his brother, a co-defendant, was absent during a portion of the preliminary stages of the *voir dire*. He asserts that he "was denied the insight and perceptions of the co-defendant and his attorney to jurors' attitudes and partiality," thus resulting in a "less-reasoned utilization of peremptory strikes and questions of the jury …." In addition, he claims that his being exposed to the jury without his brother's presence unfairly prejudiced him. We decline to address these issues raised for the first time on appeal, pursuant to ***State v. Rogers***, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995) (failure to raise specific challenges in the trial court waives the right to raise them on appeal).

result of her injuries and Shalonda was seriously wounded. Although no one actually saw the bullet from Larry's weapon hit the girls, an expert witness testified that the bullet that killed Laquann and wounded Shalonda came from the rifle recovered from the home of Willie Johnson. Johnson testified for the State in exchange for a reduction in charges. He related how Terrance drove the car in pursuit of Rollins and that he saw Larry fire the assault weapon toward the white car. He also explained that the police recovered the rifle from his home because Larry gave him the gun after the shooting and he took it home.

Two detectives testified that after Terrance was arrested, he gave a statement to them concerning his involvement in the shooting. Terrance also took the police to the scene of the incident and led them to Johnson's home where the rifle used in the shooting was recovered. Before trial, Terrance brought a motion to suppress this statement, claiming that the statement was inaccurate; that he was not advised of his ***Miranda*** rights before he gave a statement; and that his statement was involuntary due to police misconduct. This motion was denied.

The matter was set for trial on September 23, 1996. Although Terrance and his counsel were present for the entire trial, including the *voir dire*, Larry missed the very beginning of the *voir dire* because he had not yet been transported from the Dodge Correctional Institution. No one objected to Larry Harris's absence.

Terrance was convicted of both charges by the jury and the trial court sentenced him to life imprisonment with a parole eligibility date in the year 2031 for the first charge, and gave him a twenty-year consecutive sentence on the second charge. After sentencing, Terrance filed a postconviction motion seeking independent DNA testing of the blood sample found on the bullet, recovered by

the police. He theorized that if the DNA test results identified the blood of only one girl on the bullet, that he could not be held legally responsible for the harm that occurred to the other girl. The trial court denied his postconviction motion.

II. DISCUSSION.

A. Voluntariness of Harris's Statement

The appropriate standard of review regarding evidentiary or historical facts found by a trial court is that those facts may not be overturned unless they are against the great weight and clear preponderance of the evidence. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987). The application of constitutional principles to the facts found, however, will be determined independently. *See* ***id.*** Whether a defendant's confession was voluntary is a constitutional question, which this court reviews *de novo*. *See* ***State v. Coerper***, 199 Wis.2d 216, 222, 544 N.W.2d 423, 426 (1996).

In order for a statement to be found involuntary in violation of a defendant's Fifth Amendment rights, evidence of "coercive means" or "improper pressures" must be established. *See* ***Clappes***, 136 Wis.2d at 235-36, 401 N.W.2d at 765. If the defendant establishes coercive or improper conduct, the court needs to engage in a balancing test which examines "the totality of the facts and circumstances surrounding the confession." *See* ***id.*** at 236, 401 N.W.2d at 765-66. Conversely, if the defendant fails to establish coercive or improper conduct on the part of the police, no balancing test is required.

Harris challenges the trial court's decision to permit his statement, given to the police shortly after his arrest, to be admitted into evidence. He claims that the statement should have been suppressed because his statement was

involuntary. He contends that the statement is involuntary because of the "improper physical and psychological tactics employed by the police." Harris contends that the police used coercion in obtaining his statement. He claims he was told that if he confessed, the police said they would recommend to the judge that he be given a break, and they further threatened him that if he did not confess, he would go to prison where he would be sexually assaulted by other prisoners. He also contends that he was suffering from asthma attacks at the time he gave his statement and that the police refused to provide him with treatment. He further insists that he was handcuffed during the entire questioning and he only signed what he claimed were the blank pages put before him by the police to stop the harassment. He claims the improper police tactics overwhelmed his will at the time of questioning as he was only seventeen years old, still in high school, with no previous experience with the criminal justice system, and while questioned, he was handcuffed and ill. He submits that a review of the totality of the circumstances requires a finding that his confession was involuntary.

The detectives' testimony disputed most of Harris's allegations. The detectives testified that: no promises or threats were made to Harris; Harris was never handcuffed at any time during the interview; Harris was permitted to use the restroom and provided with two sodas during the interview; and Harris never told them that he was suffering from asthma, nor did he appear ill.

The trial court adopted the police version of the events as its factual findings, concluding that the testimony of the police officers was more credible than Harris's testimony. As a consequence, the trial court found that the State met its burden of proof that the statement was voluntarily and intelligently made after Harris had been informed of his ***Miranda*** rights. Thus, the trial court rejected

Harris's claim that he was under any physical or psychological pressure while giving the police a statement.

We conclude that the trial court's factual findings are well supported by the record and, therefore, are not clearly erroneous. After a review of the facts as found by the trial court, we independently conclude that the trial court properly admitted Harris's statement at the jury trial as Harris's statement was the product of a "free and unconstrained will, reflecting deliberateness of choice." ***Clappes***, 136 Wis.2d at 236, 401 N.W.2d at 765 (citation omitted).

B. Sufficiency of the Evidence

When reviewing the sufficiency of the evidence we may only reverse if "the evidence, viewed most favorably to the state and the conviction, is so insufficient 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." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

Harris challenges his convictions, arguing that there was insufficient evidence to convict him. Harris claims that the bullet that struck Shalonda and Laquann could not have been shot from his vehicle. Although Harris acknowledges that the recovered bullet came from the rifle recovered from Willie Johnson's house, he claims, nevertheless, that it could not have been shot from his vehicle because the angle was wrong. He submits that Laquann Moore was several feet below Shalonda when struck and that the bullet could not have entered Laquann and traveled upward to strike Shalonda. Thus, he insists the girls must have been shot by some other bullet that came from the identical gun. He contends that this fact demonstrates that no credible evidence exists for his convictions.

The State proffered a theory that a single bullet fired from the assault rifle by Larry missed the car carrying Darryl Rollins and struck Laquann and Shalonda. The State presented an expert witness who theorized that the bullet entered Laquann on her right side, traveled through her body at a ten-degree angle, exited and then struck Shalonda. This theory was supported by the fact that only one bullet was found after a thorough search of the area and the porch. The bullet found that came from the rifle fired by Larry was discovered lodged between the two doors. Lending support to the State's theory of how the girls were struck was an expert witness who opined that a bullet from such a high caliber rifle, shot from a car, would have passed through both porch doors unless it hit an object that slowed it down beforehand.

We are satisfied that the State presented sufficient credible evidence to permit the jury to find that Larry's errant shot hit the girls. Harris offers no evidence to show that the bullet could not have struck the two girls when fired from such an angle. Indeed, it was undisputed that Harris was driving towards the porch when the shots were fired at the car directly in front of his.

Next, Harris contends he is not guilty of first-degree intentional homicide or attempted first-degree intentional homicide because it was Johnson, rather than his brother, who fired the rifle. Harris states he was unaware of Johnson's intent to shoot and, therefore, is not guilty as a party to these crimes. Further, he contends that any shooting from his car was done in self-defense because people were shooting at them. We are not persuaded by either argument.

The jury rejected Harris's and his brother's testimony that Johnson was the shooter. Further, although Harris was not the shooter, he can be convicted regardless of who was shooting if he fulfills the definition of a party to a crime

found in § 939.05(1) and (2), STATS.[2] Ample evidence supports the jury's finding that Harris was guilty of first-degree intentional homicide, while armed, as a party to the crime. Harris was driving the car in pursuit of a man with whom his brother had argued earlier. During the search for Rollins, Harris stopped the car so that the assault rifle could be retrieved from the trunk. Not only did Harris "aid and abet," but also he conspired with others in the attempt to kill Rollins. Moreover, a defendant can be convicted of first-degree intentional homicide when he shoots with intent to kill one victim, but instead misses and strikes a second victim who dies. *See* ***Austin v. State***, 86 Wis.2d 213, 220-25, 271 N.W.2d 668, 671-73 (1978). Finally, we note that "[t]he test is not whether this court … [is] convinced [of the defendant's guilt] beyond a reasonable doubt, but whether this court can conclude [that] the trier of facts could, acting reasonably, be so convinced by

[2] Section 939.05(1), STATS., provides:

> **Parties to crime.**
>
> **(1)** Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> **(2)** A person is concerned in the commission of the crime if the person:
> (a) Directly commits the crime; or
> (b) Intentionally aids and abets the commission of it; or
> (c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

evidence it had a right to believe and accept as true[.]" ***Poellinger***, 153 Wis.2d at 503-04, 451 N.W.2d at 756). Here, sufficient evidence supports the jury's verdict. Harris was the driver of a car chasing another car in an urban area for the express purpose of attempting to shoot a person in the other car. Harris, the driver, permitted the assault rifle to be taken out of the trunk. Harris's brother, while shooting at the man in the car being chased, inadvertently killed a young girl and injured another while they played on a nearby porch. Clearly, Harris aided and abetted his brother's shooting. Harris was a willing participant in this incident. Accordingly, under these facts, the jury could find Harris guilty of both charges.

C. DNA Testing Motion

Harris claims that his postconviction motion seeking independent DNA testing of the blood sample found on the bullet recovered by the police was improperly denied by the trial court. Harris speculates that the DNA testing of the blood sample on the bullet might identify the blood of only one of the victims and, thus, he claims, might undermine the State's theory that a single bullet passed through both victims, and might bring into question the soundness of both of his convictions. He grounds his right to the test results on the fact that he is entitled to exculpatory evidence. Although no Wisconsin case supports his request, Harris then extrapolates from ***Brady v. Maryland***, 373 U.S. 83 (1963), and several cases from other jurisdictions and contends that he is entitled to information sought after conviction if it has a "high exculpatory potential." He then asserts that because the test results have a "high exculpatory potential," he is entitled to them. Thus, he argues, the trial court erroneously exercised its discretion in denying his motion.

We conclude that the trial court properly exercised its discretion in denying Harris's motion. Evidence was admitted that the bullet was sent to the crime lab for blood tests and that the test revealed that human blood was on the bullet, but that the sample was too small to subject it to additional tests. Moreover, even if the bullet contained sufficient amounts of blood to administer DNA testing, the test results would have limited relevance because Harris has presented no expert testimony stating that the presence of the blood on the bullet of only one of the victims conclusively proves that the bullet did not pass through both victims. Thus, the test results have little exculpatory potential. Because of the limited exculpatory potential and considering the State's interest in the finality of judgments, we are satisfied that the trial court properly exercised its discretion in denying Harris's motion to authorize postconviction DNA testing. *Cf.* ***State v. Nawrocke***, 193 Wis.2d 373, 534 N.W.2d 624 (Ct. App. 1995) (raising the burden required to overcome a guilty plea because the presumption of innocence no longer applies and the State obtains an interest in the finality of the conviction).

For the aforementioned reasons, we affirm.

By the Court.—Judgment and order affirmed.

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