COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0566-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO D. TABORN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, P.J., Snyder and Langhoff,[1] JJ.

¶1 PER CURIAM. Antonio D. Taborn appeals from a judgment convicting him of second-degree intentional homicide with enhancers for being

[1] Circuit Judge Gary Langhoff is sitting by special assignment pursuant to the Judicial Exchange Program.

armed and a gang member, endangering safety by discharging a firearm from a vehicle in association with a gang, and felon in possession of a firearm, all as a habitual offender. On appeal, Taborn challenges the sufficiency of the evidence, whether the circuit court should have granted a mistrial in light of the prosecutor's opening statement remarks about his prior convictions and the testimony of a deputy sheriff regarding Taborn's threatening remark to a rival gang member, and whether a new trial is necessary because the real controversy was not fully tried. We are not persuaded by Taborn's arguments and affirm.

¶2 Toward the end of her opening statement, the prosecutor stated that Taborn was charged with being a felon in possession of a firearm. The prosecutor informed the jury that evidence of Taborn's status as a felon would be presented "in the form of certified exhibits … showing that Antonio Taborn has four prior convictions for felony offenses in the State of Wisconsin … and [through] the testimony from a court clerk …."

¶3 Taborn objected to the prosecutor's reference to the number of his prior felony convictions and argued that the prosecutor should have limited her remarks to the mere existence of a prior felony conviction, which is an element of felon in possession of a firearm. Taborn argued that the prejudicial effect of referring to the number of prior felony convictions outweighed the probative value of the information. The prosecutor responded that Taborn had not offered to stipulate that he had a prior felony conviction and therefore the State was free to refer to Taborn's entire felony history. Taborn sought a mistrial on this basis.[2]

[2] Taborn also sought a mistrial because the prosecutor characterized a witness as having fled the jurisdiction. This issue is not raised on appeal.

¶4 While the court opined that it was unnecessary for the prosecutor to advise the jury that Taborn had more than one prior felony conviction, the court nevertheless denied the mistrial motion because the case was prepared for trial, trial witnesses had been located (despite earlier difficulties) and a several-month delay would ensue if the trial had to be rescheduled. These considerations outweighed any prejudice to Taborn from the prosecutor's revelation of the number of his prior felony convictions.

¶5 Taborn argues that the circuit court erred in denying his mistrial motion and that the prosecutor's reference to four prior felonies forced him to testify at trial. We may affirm the circuit court's denial of Taborn's mistrial request on other grounds. *See* ***Badtke v. Badtke***, 122 Wis.2d 730, 735, 364 N.W.2d 547, 549 (Ct. App. 1985). We conclude that the prosecutor did not err in referring to the number of Taborn's prior convictions and therefore a mistrial was not necessary.

¶6 A defendant's status as a convicted felon is an element of the offense of felon in possession of a firearm. *See* WIS J I—CRIMINAL 1343; *see also* ***State v. McAllister***, 153 Wis.2d 523, 529, 451 N.W.2d 764, 766-67 (Ct. App. 1989). If the defendant is willing to stipulate to his or her status as a convicted felon, evidence relating to the nature of the prior felonies can be excluded from proof of the prior felony element of the crime. *See* ***id.*** at 529, 451 N.W.2d at 767. We will apply this rule to evidence of the number of prior felonies. *See* ***State v. Alexander***, 214 Wis.2d 628, 651, 571 N.W.2d 662, 672 (1997) (where defendant stipulates to a status element and the sole purpose of the proffered evidence is to prove the status element, the probative value of the evidence is outweighed by the danger of unfair prejudice

and the evidence should not be admitted). Taborn did not stipulate pretrial to his status as a convicted felon.[3]

¶7 In ***State v. Wallerman***, 203 Wis.2d 158, 167-68, 552 N.W.2d 128, 132-33 (Ct. App. 1996), we approved a procedure whereby a defendant can stipulate to an element of the crime, which then allows the court to relieve the State from proving that element. This procedure was an option in Taborn's case to relieve the State of the opportunity to discuss his status as a convicted felon by reference to the number of his prior felony convictions. However, Taborn did not avail himself of this procedure prior to opening statements.[4] Therefore, the prosecutor did not err and a mistrial was not necessary.

¶8 Taborn next argues that the circuit court misused its discretion when it permitted a deputy sheriff to testify that Taborn threatened a rival gang member while both were in jail. The incident occurred eight days after the shooting for which Taborn stood trial and approximately one month after Taborn was shot in other gang-related violence. While being escorted by the deputy within the jail, Taborn noticed a rival gang member. As Taborn began to walk toward this gang member, the deputy tried to place himself between them. The deputy heard Taborn say to the rival gang member that "we'll get all you." The deputy characterized the remark as made in a threatening and confrontational manner.

[3] During the State's case, Taborn stipulated to his status as a convicted felon in order to satisfy that element of the felon in possession of a firearm charge.

[4] Notwithstanding Taborn's failure to enter into a pretrial stipulation regarding his status as a felon, we note that he was not prejudiced by this failure because there was sufficient other evidence of his guilt. There is no reasonable possibility that evidence of Taborn's four prior convictions contributed to his conviction. *See* ***State v. Alexander***, 214 Wis.2d 628, 653, 571 N.W.2d 662, 672 (1997).

Taborn then told the deputy that the inmate was one of the people who had shot him.

¶9 Taborn objected at trial and claims on appeal that the deputy sheriff's testimony should have been excluded as irrelevant because it postdated the shooting charges against him, and, if relevant, it should have been excluded because it was more prejudicial than probative. At trial, the prosecutor argued that the evidence was relevant in light of the State's theory that the shooting by Taborn was in retaliation for his having been shot a month before and because his girlfriend was threatened and treated disrespectfully by rival gang members after she appeared in court in connection with the shooting of Taborn. The prosecutor contrasted the State's theory with Taborn's self-defense theory, which was based on his claim that he was merely driving home when he was threatened by rival gang members on a street corner.

¶10 The circuit court ruled that evidence of Taborn's post-shooting statements was relevant to his state of mind at the time of the shooting eight days before and that the jury could determine the weight of this evidence. The court ruled that the probative value of the post-shooting statements substantially outweighed their prejudicial effect. The court also denied Taborn's motion for a mistrial due to the admission of these statements.

¶11 The admission or exclusion of evidence is within the discretion of the circuit court and its rulings in that regard will not be overturned on appeal absent a misuse of discretion. *See* ***State v. Lindh***, 161 Wis.2d 324, 348-49, 468 N.W.2d 168, 176 (1991). The term "discretion" contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record and a conclusion based on a logical rationale founded on proper legal

standards. *See* ***Christensen v. Economy Fire & Cas. Co.***, 77 Wis.2d 50, 55-56, 252 N.W.2d 81, 84 (1977).

¶12 Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). Although motive is not an element of any crime, *see* ***State v. Berby***, 81 Wis.2d 677, 686, 260 N.W.2d 798, 803 (1977), "[m]atters going to motive ... are inextricably caught up with and bear upon considerations of intent ...," ***State v. Johnson***, 121 Wis.2d 237, 253, 358 N.W.2d 824, 832 (Ct. App. 1984).

¶13 We conclude that the circuit court properly exercised its discretion because evidence of Taborn's post-shooting statements was relevant to his motive for shooting from his vehicle. Taborn's motive bears upon the intent element of the first-degree intentional homicide charge.[5] Evidence of the statement makes the existence of Taborn's intent more probable than it would have been without the evidence. We also conclude that the evidence's probative value is not outweighed by the danger of unfair prejudice. Relevant evidence can be, and often is, prejudicial to the opposing party. *See* ***State v. Mordica***, 168 Wis.2d 593, 604, 484 N.W.2d 352, 357 (Ct. App. 1992). The test is whether the evidence is unfairly prejudicial. *See* ***id.*** at 605, 484 N.W.2d at 357. Unfair prejudice occurs where the evidence has a tendency to influence the outcome by improper means. *See* ***id.*** We do not see improper influence here.

[5] The jury was instructed on second-degree intentional homicide as a lesser included offense of first-degree intentional homicide, the charged offense.

¶14 We turn to Taborn's claim that the evidence was insufficient to convict him of second-degree intentional homicide and endangering safety by use of a dangerous weapon. Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, we may not substitute our judgment for that of the jury "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." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See* ***id.*** at 506, 451 N.W.2d at 757.

¶15 The jury was instructed that in order to convict Taborn of second-degree intentional homicide, the jurors would have to find that Taborn caused Laron Barry's death, that he intended to kill Barry and that he did not reasonably believe that the force he used was necessary to prevent imminent death or great bodily harm to himself.[6] To convict Taborn of endangering safety by use of a dangerous weapon, the jury had to find that Taborn intentionally discharged a firearm from a vehicle while on a highway at or toward another person (Daz Pierce). The jury was also instructed on self-defense.

¶16 While Taborn argues that there were inconsistencies in the evidence, this does not require reversal. Rather, it was for the jury to resolve these conflicts

[6] Taborn does not challenge any of the jury instructions on appeal.

and determine the credibility of the witnesses. Taborn argued self-defense; the jury was free to weigh his testimony and that of the other witnesses.

¶17 Turning to the record, we conclude that it contains evidence which satisfied the elements of second-degree intentional homicide and endangering safety. Tanisha Norris testified that she saw Taborn's vehicle drive up to the front of her home, which was in a rival gang's area. Words were exchanged between the occupants of the vehicle and people on the street in front of her house. The vehicle then drove away. Approximately ten minutes later, Taborn's vehicle returned and she heard shots fired. Sha'Queta Streeter testified that the shooting victim, Barry, and the victim on the endangerment charge, Pierce, were on the street corner when the vehicle returned for the second time, just before the shooting started. Khadell Richardson testified that he saw Taborn shoot out of the driver's side window as he passed by the street corner where Barry and Pierce were located. There was conflicting testimony as to whether Taborn or an individual on the street corner fired first. Taborn did not dispute that he fired a weapon out of his vehicle while passing an intersection located in a rival gang's area. There was evidence that Taborn intended to and did cause Barry's death and that he intentionally discharged a firearm from a vehicle at or toward Pierce.

¶18 As to Taborn's reasonable belief regarding the need to use the amount of force he did to prevent imminent death or great bodily harm to himself, the jury was free to find that Taborn did not act reasonably. The jury was instructed that reasonableness is defined as what a person of ordinary intelligence and prudence would have done in Taborn's position under the circumstances existing at the time of the alleged offense. The jury could have viewed Taborn's decision to fire his weapon as unreasonable given that he could have avoided the confrontation altogether.

¶19 Finally, Taborn asks for a new trial under our discretionary reversal power, *see* § 752.35, STATS., because the real controversy was not tried. A claim that the jury was not given the opportunity to hear important testimony that bore on an important issue in the case tends to fall under the "real controversy not fully tried" category. *See* ***State v. Schumacher***, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988). We need not find a probability of a substantially different result on retrial in order to require a new trial under this theory. *See* ***id.*** at 401, 424 N.W.2d at 676-77.

¶20 As grounds for his request for a new trial, Taborn criticizes the manner in which the police obtained statements from witnesses in the case. A police detective testified that he let it be known in the community that persons not involved in the shooting but having relevant information could come forward without being arrested. Thereafter, witnesses came forward who implicated Taborn. Taborn complains that the detective exercised undue influence over several witnesses in the case.

¶21 Taborn does not carry his burden to show that the real controversy was not tried. The detective's investigative methods were the subject of cross-examination by Taborn's counsel at trial. The jury had before it the information Taborn now contends was not fully aired. *See* ***id.*** at 400, 424 N.W.2d at 676. There is no basis for ordering a new trial.

By the Court.—Judgment affirmed.

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