COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1539-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALTER SMITH,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Walter Smith appeals from the judgment of conviction, entered after a jury trial, for first-degree intentional homicide as a party to a crime, contrary to §§ 940.01 and 939.05, STATS. Smith first contends that because the State charged him with the direct commission of the murder and, in the alternative, as a member of a conspiracy that committed the murder, the

State was required to prove both theories, and since he claims there was insufficient evidence presented to convict on either theory, he is entitled to a reversal. Moreover, he argues that it was improper for the trial court to give the conspiracy instruction at all. Next, he argues that the trial court improperly admitted Smith's statement acknowledging participation in the shooting, and the trial court erroneously exercised its discretion when it allowed a firearms expert to testify about the similarity between two types of guns. Finally, he contends that the second trial was barred by double jeopardy.[1] We are not persuaded by any of his arguments. The State was required to prove only one theory of liability, not both, although our review of the record finds ample evidence to convict the defendant both as the actual shooter and as a member of a conspiracy that shot the victim. Smith's statement was properly admitted, and the expert witness's testimony that the two types of guns resembled one another was appropriate. Finally, Smith's double jeopardy arguments fail. Accordingly, we affirm the judgment of the circuit court.

I. BACKGROUND.

Walter Smith was charged and convicted of the first-degree intentional homicide of Travis Craig, as a party to a crime, pursuant to §§ 940.01 and 939.05, STATS. After a jury found him guilty, Smith filed a postconviction motion seeking a new trial. The trial court denied the motion, and Smith brought his first appeal. This court reversed his conviction due to the trial court's refusal to allow the defense to use certain impeachment evidence against three of the

[1] Smith also challenges the constitutionality of the Wisconsin conspiracy law. This argument was not raised at the trial court level. Therefore, he has waived appellate review of the issue. *See* ***State v. Rogers***, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995).

State's witnesses. Accordingly, we remanded the case to the trial court for a new trial.

Prior to the second jury trial, Smith argued that there was insufficient evidence to retry him, and that to do so would constitute double jeopardy. Smith's motion was denied and he filed an interlocutory appeal to this court. This court declined to hear the appeal.

The second trial proceeded. The testimony revealed that on July 15, 1993, at around 8:00 p.m., Smith and Troy Jackson argued with George Owens over drugs sold by Jackson to Owens's girlfriend, Myrtle Robertson. The argument became physical and a shot was fired, but no one was injured. Robertson testified that later that evening Jackson and Smith came to her house armed with a gun similar in appearance to an Uzi, and asked the whereabouts of Owens. Meanwhile, Owens met his nephew, Travis Craig, and they went to Gloria Wilson's house to avoid people outside of Owens's apartment, including Smith, who were armed and mentioning Owens's name. Owens and Craig left Wilson's house and walked outside to make a telephone call at a phone booth. At the phone booth, Craig was shot and killed while standing near Owens. No one testified to seeing the shooter.

Robertson testified that Smith returned to her apartment later that evening while she was on a telephone call with Jeanette Owens, Doris Owens and Dornice Gales. Smith told her he would kill her if she told anyone about his visits.[2] He also made a remark which she interpreted to mean that he had just been

[2] It should be noted that the identification of the shooter was in dispute at trial as originally Robertson told the police it was Jackson who came back to her apartment. At trial, she testified it was not Jackson, but Smith, who came back.

involved in a shooting. All three women on the phone testified that they heard someone knock on Robertson's door and then heard a man's voice state, "[W]e popped that nigger," or similar words.

From a police photo display, Robertson picked out an Ingram firearm as resembling the gun Smith possessed when he came to her house. A firearms expert testified that the Uzi and the Ingram semi-automatic handguns have similar physical configurations. The expert witness also testified that an analysis of the bullet and casings found at the scene revealed that the shots were fired from an Uzi or a Springfield semi-automatic pistol.

At Smith's second trial he renewed his pretrial motion, claiming that there was insufficient evidence to convict him, and asked for a directed verdict. The trial court denied his motion. He renewed his motion at the completion of testimony and the trial court again denied his motion. The jury convicted Smith of first-degree intentional homicide. Smith was sentenced to life imprisonment with a parole eligibility date in the year 2030. Smith appeals.

II. ANALYSIS.

A. The evidence was sufficient to support the conviction.

Smith contends that because the State prosecuted him on two alternative theories—that he was either the actual shooter or a co-conspirator to the shooting—the State was obligated to prove both theories of liability beyond a reasonable doubt. Smith also contends that there was insufficient evidence to convict him of both theories. We reject Smith's legal contention and we conclude, under the circumstances present here, that the State need prove only one of the

theories beyond a reasonable doubt. Further, we are satisfied that there was sufficient evidence to support the conviction under either theory.

The standard for appellate review of the sufficiency of evidence is whether a trier of fact, acting reasonably, could find the defendant guilty beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis.2d 493, 503-504, 451 N.W.2d 752, 756 (1990) (citations omitted). All inferences are to be viewed in the light most favorable to the conviction. *See* ***id.*** This court is not to determine the credibility of the evidence or the witnesses. *See* ***id.*** The standard is the "same whether the evidence presented at trial is direct or circumstantial." ***Id.*** at 503, 451 N.W.2d at 756.

A defendant may be held liable as a party to a charged offense through the two alternative theories of liability the State presented—direct commission or conspiracy. *See* § 939.05, STATS.

1. The verdict must be upheld if the evidence is sufficient on either theory of liability.

Smith's argument—that the evidence must be sufficient on both theories of criminal liability before he can be convicted—is flawed. "The Wisconsin case law is very clear that the jury need not unanimously agree as to which of the alternative ways a defendant has committed an offense under the party to a crime theory. Rather the jury must unanimously agree as to the defendant's *participation in the crime*." ***State v. Hecht***, 116 Wis.2d 605, 619, 342 N.W.2d 721, 729 (1984). In ***Hecht***, the court reasoned that party to a crime theory involved three alternative bases for liability—direct commission, aiding and abetting, or conspiracy—but only one underlying offense. Therefore, there need only be sufficient evidence to support one theory of liability. *See* ***id.***; *see also*

Griffin v. United States, 502 U.S. 46, 56-57 (1991) ("Petitioner cites no case and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional ... nor even illegal ... but merely unsupported by sufficient evidence.").

Applying ***Hecht***'s reasoning to the facts here yields the same result. Smith was charged with the crime of first-degree intentional homicide as a party to a crime. The only issue was whether, under the alternative theories of liability, Smith was liable for the direct commission of the crime, or as a party to a conspiracy. The facts and the charged offense remained the same. Under ***Hecht***, the jury must simply agree that Smith participated in the crime. Here, the jurors analyzed the evidence, followed the trial court's instructions, and found Smith guilty after concluding there was sufficient evidence that he participated in the crime. Consequently, on appeal, we need only determine whether there was sufficient evidence for the jury to convict Smith under one theory of liability.

Smith argues that ***State v. Crowley***, 143 Wis.2d 324, 422 N.W.2d 847 (1988), controls. In ***Crowley***, the State charged the defendant with aggravated battery, but employed "two disparate modes of proof–direct and presumptive." ***Id.*** at 331, 422 N.W.2d at 850. Specifically the State attempted to demonstrate that the defendant's conduct created a high probability of bodily harm either through direct testimony regarding his intentional conduct, or by relying on the statutory presumption created when the victim is physically disabled.[3] ***Id.*** at 327-28, 422

[3] In ***State v. Crowley***, 143 Wis.2d at 324, 331, 422 N.W.2d 847, 850 (1988), the defendant was charged with "aggravated assault of a disabled person, contrary to sec. 940.19(3)(b), Stats." At that time § 940.19(3)(b), in pertinent part, read:

> Whoever intentionally causes bodily harm to another by conduct which creates a high probability of great bodily harm is guilty

(continued)

N.W.2d at 849. The jury returned a guilty verdict without specifying which method of proof it had relied on. The ***Crowley*** court concluded that where the jury returns a general verdict of guilt, the conviction "may have been predicated on a mode of proof which did not produce evidence of guilt beyond a reasonable doubt." ***Id.*** at 331-32, 422 N.W.2d at 850. Such a conviction violates the defendant's constitutional due process rights. *See* ***id.*** at 332, 422 N.W.2d at 850.

We conclude that ***Crowley*** is distinguishable. In ***Crowley***, the jury considered "different evidence, subject to proof by different methods." ***Id.*** Here the State did not rely on "alternative methods of proof" as in ***Crowley***; rather, Smith was charged under alternative theories of liability. Party to a crime theories of liability do not trigger the due process concerns raised in ***Crowley***, because the focus is not on the methods of proof, but rather on the defendant's level of participation in the charged crime. As long as there is sufficient evidence to establish the defendant's participation under either the direct commission or conspiracy theories, his due process rights have not been violated. *See* ***Hecht***, 116 Wis.2d at 619, 342 N.W.2d at 729. Therefore, we are satisfied that, under ***Hecht***, only one theory of liability must be supported by sufficient evidence to uphold Smith's conviction.

Having determined that the jury's verdict must be upheld if there is sufficient evidence of either theory of liability—direct commission or

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…. A rebuttable presumption of conduct creating a high probability of great bodily harm arises:

…

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, which is discernible by an ordinary person viewing the physically disabled person.

conspiracy—we must determine whether a jury, acting reasonably, could have found Smith guilty under either theory.

2. The evidence supports a conviction based on the direct commission theory of liability.

Smith argues there was insufficient evidence to convict him as the actual shooter. Again, we disagree.

The record shows that Craig died from gunshot wounds. Owens testified that there was a drug deal between Robertson and Jackson, and an argument ensued among himself, Smith and Jackson over the drug deal; and on the evening of the shooting, he saw Smith and Jackson outside of his building. Robertson testified that Jackson cheated her in the drug deal and she told Owens about it. Robertson asserted that Smith and Jackson came to her house looking for Owens on the night of Craig's death and, when Smith arrived, he was carrying a gun that looked like an Uzi. She also testified that Smith later returned to her apartment while she was talking on the phone with Jeanette Owens, Doris Owens and Dornice Gales. She further related that when Smith came to her house the second time, he threatened to harm her if she told anyone his name and he remarked that he had been involved in a shooting. Jeanette Owens, Doris Owens and Dornice Gales all testified to participating in the same phone conversation and to hearing a man at Robertson's apartment admit to killing a man.

We are required to draw all reasonable inferences to support the conviction. ***Bautista v. State***, 53 Wis.2d 218, 223, 191 N.W.2d 725, 727-28 (1971). Under this standard, the State provided evidence of a motive, an opportunity, an argument with Owens, the pursuit of Owens, proximity to the victim, Smith's possession of a gun similar to the murder weapon, and an

admission. There was sufficient circumstantial evidence for a reasonable jury to find that Smith directly committed first-degree intentional homicide.

3. The evidence also supports a conviction based on the conspiracy theory of liability.

Smith also contends that the evidence was insufficient to support the conspiracy theory of liability. Again, we disagree. We conclude that there was sufficient evidence for the jury to find that Smith was a co-conspirator in Craig's murder.

A conspiracy is an agreement between two people to "'direct their conduct toward the realization of a criminal objective'" and each conspirator "'must individually consciously intend the realization of the particular criminal objective.'" ***Hecht***, 116 Wis.2d at 625, 342 N.W.2d at 732 (quoted source omitted). As we are required to view all the aforementioned evidence in the light most favorable to the conviction and to take all inferences to support the conviction, we conclude that a reasonable jury could determine that Smith and Jackson agreed to intentionally kill Owens or one of Owens's friends after the earlier argument, and that they carried out this plan. Thus, a reasonable jury could find that Smith helped Jackson kill Craig.

4. The trial court correctly applied the conspiracy theory.

Next, Smith asserts that the trial court erroneously exercised its discretion in giving the conspiracy instruction because the State never argued that Jackson directly committed the homicide. After reviewing the record, we conclude that this is an inaccurate statement. The State argued that Smith directly committed first-degree intentional homicide or, in the alternative, conspired with Jackson to commit the offense. The State is allowed to plead in the alternative.

See generally ***id.*** at 618, 342 N.W.2d at 728. The trial court's decision to give the conspiracy instruction was proper.

B. An admission by a party opponent qualifies as admissible non-hearsay.

Smith also asserts that the three witnesses who claimed to have heard his admission should not have been allowed to testify concerning the statements they overheard while on the phone with Robertson, because they did not have personal knowledge of the person making the statement and because the evidence was neither authenticated nor identified. We disagree, and therefore, we conclude that the testimony was properly admitted.

A trial court's decision to admit evidence must be reasonably based on accepted legal principles and the facts of the record. *See* ***State v. Brewer***, 195 Wis.2d 295, 305, 536 N.W.2d 406, 410 (Ct. App. 1995). Here, the trial court properly admitted Smith's statement because it was not hearsay. An admission by a party opponent, by definition, is not hearsay. *See* § 908.01(4)(b), STATS. An admission by a party opponent is a statement offered against a party and is the party's own statement, in either the party's individual or a representative capacity. *See* § 908.01(4)(b)1, STATS. An admission by a party opponent is admissible testimony. *See* ***State v. Patino***, 177 Wis.2d 348, 363, 502 N.W.2d 601, 607 (Ct. App. 1993); ***State v. Johnson***, 121 Wis.2d 237, 256, 358 N.W.2d 824, 833 (Ct. App. 1984). The three women testified to hearing a man over the phone come to Robertson's door and tell Robertson he and another person had killed a man. Robertson testified that the man at the door was Smith. Therefore, what the women heard was an admission by Smith, and thus, the statements fall outside the hearsay rule.

Smith also argues that the statement overheard by the three witnesses was neither authenticated nor identified. Section 909.01, STATS., states the necessary authentication and identification of evidence is satisfied when the "matter in question is what its proponent claims." We conclude that the State presented adequate evidence to prove the testimony was what it purported to be. All four women testified to participating in the phone call. The telephone company records of the call were presented which corroborated that a phone call to Robertson's number was made that evening during the timeframe in question. The authenticity of the testimony of the three women was not affected by the identity of the speaker. The witnesses testified only to hearing a man's voice; Robertson's testimony provided the identification of the man.

Thus, we conclude that the trial court's decision to admit their testimony was reasonably based on the facts of record and on valid legal principles.

C. The expert opinion was properly admitted.

Smith argues that the trial court committed reversible error when it permitted the State's expert witness to give an "irrelevant, unsupported, and prejudicial opinion as to the similarity in appearance between two firearms." We disagree. The expert's opinion was relevant and admissible.

The admission of expert testimony requires the trial court to exercise its discretion. *See* ***Brewer***, 195 Wis.2d at 305, 536 N.W.2d at 410-11. This court will not reverse the trial court's decision if the decision was reasonable and if "it was made 'in accordance with accepted legal standards and in accordance with the facts of the record.'" ***Id.*** at 305, 536 N.W.2d at 410 (quoted source omitted).

Certain requirements need be met for an expert opinion to be admitted in accordance with accepted legal standards and facts of record. *See* ***id.*** First, expert testimony must be relevant to be admissible evidence at trial. *See* ***State v. Pittman***, 174 Wis.2d 255, 267, 496 N.W.2d 74, 79 (1993). To be relevant, evidence must shed light on a valid issue in dispute. *See* § 904.01, STATS. Second, an expert opinion must also enable the trier of fact to better understand a fact in issue. *See* § 907.02, STATS. The trial court's decisions with respect to these issues must be reviewed on a discretionary basis. *See* ***Pittman***, 174 Wis.2d at 267-68, 496 N.W.2d at 79.

Viewing the record in the light most favorable to the State, the expert's opinion was clearly admissible and relevant. The evidence showed that the gun used to kill Craig was similar in appearance to the gun Robertson identified as in Smith's possession. This is information not necessarily within the knowledge of the average juror. Moreover, this information tended to shed light on the issue of what type of firearm was used to kill Craig and enabled the jury to better understand the nature of Robertson's identification of the gun. Therefore, the trial court properly admitted the expert opinion.

Smith also argues that the trial court erroneously exercised its discretion by admitting the expert witness's testimony on this point because it was unduly prejudicial. Although relevant, evidence may be excluded if the "danger of unfair prejudice" heavily outweighs its "probative value." *See* § 904.03, STATS. In this case, the expert opinion was not unduly prejudicial to Smith. The expert testified only that the appearance of the gun used to kill Craig was similar to the gun identified by Robertson. Without this opinion, the jury still would have seen the diagram of the firearms and would have assessed for itself the similar appearances of the two guns. Also, the lawyers would have been free to point to

the diagram to make the same observations. The admission of this evidence was reasonable, based on the facts of the record, and in accordance with accepted legal principles.

D. The court of appeals can only reconsider a prior decision on its own motion pursuant to RULE 809.24, STATS.

Finally, Smith contends this court violated the Double Jeopardy Clause of the United States Constitution when it did not decide the sufficiency of the evidence issue before the retrial and when it denied his petition for an interlocutory appeal. We conclude these matters are not properly before us, and thus, this court cannot review either of these claims.

Under the rules governing this court, we do not have jurisdiction to review our prior decision reversing Smith's first judgment of conviction. This court may only reconsider a decision on its own motion "at any time prior to remittitur ... or within 30 days of the filing of the petition for review." RULE 809.24, STATS. A petition for review was filed and the thirty-day period has long passed. Smith states no other grounds which would allow this court to reconsider its previous decision concerning his first trial.

Also, this court cannot reconsider its order denying Smith's interlocutory appeal. The record for review does not contain either Smith's petition or the order denying the appeal. This court can only review "those parts of the record made available to it." ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). Thus, this court cannot review Smith's appeal.

Having found no error upon which to reverse the conviction, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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