COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2782-CR **Cir. Ct. No. 2005CF7024**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEWITT ANTONIO FAULKNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Kessler and Brennan, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Dewitt Antonio Faulkner appeals a judgment convicting him of one count of first-degree reckless homicide with use of a dangerous weapon, as a party to a crime, one count of conspiracy to commit armed

robbery, and two counts of felon in possession of a firearm, as a habitual criminal. He also appeals the circuit court's order denying his postconviction motion.

¶2 We address whether: (1) Faulkner's second trial was barred by double jeopardy and due process; (2) Faulkner was improperly convicted as a party to a crime; (3) the prosecutor's closing argument and the jury instructions misled the jury; (4) the circuit court should have suppressed an illegally seized pistol; (5) Faulkner's co-actors should not have been allowed to testify against him because they received concessions from the State; (6) it was error to charge Faulkner with the firearm enhancer; and (7) Faulkner was denied a fair trial based on an aggregation of these issues. We affirm.

¶3 Glenn Taylor, Larry Jones and Faulkner decided to rob Terry Clayborn because Taylor believed Clayborn had been cheating him in various drug deals. The men armed themselves and drove to Clayborn's home. After parking in the alley, Taylor and Faulkner approached the home from the rear. As they drew near, Taylor fired repeatedly into the house. Faulkner also fired into the house. The men then fled. One of bullets from Taylor's gun killed Dorothy Evans, Clayborn's grandmother.

¶4 Faulkner was initially convicted for his role in these crimes in 2006. He filed a successful postconviction motion, arguing that his trial lawyer provided constitutionally ineffective assistance because he failed to raise a challenge to the State's use of a preemptory challenge to strike the sole African-American on the jury panel. *See* ***Batson v. Kentucky***, 476 U.S. 79, 96 (1986). The circuit court ordered a new trial because the prosecutor testified that he could not remember why he struck the juror, and therefore could not meet his burden of providing a

race-neutral explanation for his decision. *See* ***id.*** at 97. After a second trial, Faulkner was again convicted.

¶5 Faulkner first argues that his right to be free from double jeopardy was violated when he was tried for the second time. The Double Jeopardy Clauses of the United States Constitution and the Wisconsin Constitution prohibit a person from being twice put in jeopardy for the same offense. U.S. CONST. amend. V; WISCONSIN CONST. art. I, § 8. "[O]nce a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." ***Sattazahn v. Pennsylvania***, 537 U.S. 101, 106 (2003).

¶6 When a defendant's trial, or direct appeal taken from the defendant's conviction, "is terminated, the circumstances of the termination govern whether the double jeopardy clause bars retrial." ***State v. Lettice***, 221 Wis. 2d 69, 80, 585 N.W.2d 171 (Ct. App. 1998). The general rule is that retrial is not barred when the proceeding is terminated at the defendant's behest—on the defendant's motion in the trial court or when a defendant successfully appeals, resulting in his conviction being set aside. ***Id.***; ***Sattazahn***, 537 U.S. at 106. However, there is an exception to this rule when the prosecutor engages in misconduct to provoke the defendant into moving for a mistrial or the prosecutor otherwise acts with the intent to subvert the defendant's double jeopardy or other constitutional protections. ***Lettice***, 221 Wis. 2d at 81.

¶7 Faulkner contends that the circuit court should have held a hearing before denying him relief on double jeopardy grounds so that he could present evidence to support his claim that the prosecutor had an improper motive for striking the sole African-American juror.

¶8 Faulkner was not entitled to a hearing on his claim because he presented only conclusory allegations that the prosecutor's motive was improper. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996) (a defendant is entitled to a hearing on a postconviction motion only if he alleges facts that, if true, would entitle him to relief). On appeal, Faulkner baldly asserts that the prosecutor's decision to strike the juror was "by definition an intentional perfidious racial discrimination," but does not explain why this is so, especially in light of the prosecutor's testimony that he could not remember the reason he struck the juror. Therefore, the general rule that double jeopardy does not bar retrial after a successful appeal applies in this case. We reject Faulkner's double jeopardy argument.

¶9 In the alternative, Faulkner contends that his retrial was barred by the Due Process Clause, which provides protection against government conduct that "shocks the conscience." *See* ***State v. Schulpius***, 2004 WI App 39, ¶35, 270 Wis. 2d 427, 678 N.W.2d. 369 (internal quotation marks and citation omitted). Again, Faulkner's argument is unavailing. He has provided no factual basis for his claim that the prosecutor's conduct was motivated by racism, and no legal basis to support his claim that improper motive should be constructively attributed to the prosecutor. Although Faulkner won a new trial because the prosecutor could not meet his burden of showing that he had a race-neutral reason for striking the juror, that does not mean that the prosecutor's conduct was outrageous or shocked the conscience. Faulkner is not entitled to relief based on due process.

¶10 Faulkner next argues that he should not have been found guilty of first-degree reckless homicide as a party to a crime. He contends that the evidence adduced at trial may have been sufficient to show that he aided and abetted an attempted robbery, but not that he aided and abetted reckless homicide.

¶11 A defendant is guilty of first-degree reckless homicide if the defendant causes the death of another person by criminally reckless conduct that shows utter disregard for human life. WIS. STAT. § 940.02(1) (2013-14).[1] A person may be charged and convicted as a party to a crime if the person "is concerned in the commission of a crime … although the person did not directly commit it." WIS. STAT. § 939.05(1). A person is concerned in the commission of the crime if the person "[i]ntentionally aids and abets the commission of it." § 939.05(2)(b).

> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he knowingly either (a) renders aid to the person who commits the crime, or (b) is ready and willing to render aid, if needed, and the person who commits the crime knows of his willingness.

State v. Sharlow, 110 Wis. 2d 226, 238-39, 327 N.W.2d 692 (1983) (citation and quotation marks omitted).

¶12 We will sustain the jury's conclusion that Faulkner acted as a party to the crime of reckless homicide unless "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. Hughes***, 2011 WI App 87, ¶10, 334 Wis. 2d 445, 799 N.W.2d 504 (citations and internal quotation marks omitted). "Reasonable inferences drawn from the evidence can support a finding

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

of fact and, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict." ***Id.***

¶13 The jury heard testimony that Faulkner procured guns for both himself and Taylor because the men had decided to rob Clayborn. The jury also heard testimony that both Taylor and Faulkner fired into Evans' home, although Taylor fired the shot that killed Evans, and that the men then ran from the scene to a car and drove away. Based on this testimony, the jury could reasonably infer that Faulkner rendered aid to Taylor in the commission of reckless homicide.

¶14 Faulkner next argues that the jury was misled by the substance of the jury instructions with regard to party-to-a-crime liability, the order in which the jury instructions were given and the prosecutor's closing argument. A defendant must contemporaneously object to preserve most trial errors. *See* WIS. STAT. § 805.13(3) ("Failure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions or verdict."); ***State v. Miller***, 2012 WI App 68, ¶17, 341 Wis. 2d 737, 816 N.W.2d 331 (when a defendant does not object to the prosecutor's comments or move for a mistrial, he forfeits his challenges). Here, Faulkner did not object to the substance of the jury instructions with regard to party-to-a-crime liability, the order in which the instructions were given or the prosecutor's closing argument. Therefore, he has forfeited the right to raise these claims.

¶15 Faulkner next argues that the circuit court should have suppressed a .22 caliber pistol that the police took from an inside back stairway of his apartment building without a warrant. On appeal, the State concedes that the pistol was improperly seized because the Fourth Amendment protects the curtilage of a house, which in this instance would include the inside back stairway of the duplex

where Faulkner lived. *See* ***United States v. Dunn***, 480 U.S. 294, 300 (1987). We agree with the State, however, that the error was harmless.

¶16 An error is constitutionally harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189. Even if the pistol had not been introduced as evidence tying Faulkner to the crime, there was ample evidence presented at trial that showed Faulkner was at the scene. Taylor testified that he and Faulkner formed a plan to rob Clayborn because Taylor believed Clayborn had been cheating him in various drug deals. Taylor testified that Faulkner and Jones picked him up at a party and they drove to Faulkner's house, where Faulkner retrieved a shotgun and a .22 caliber handgun. They then drove to Evans' home, where Clayborn was staying. Taylor testified that they planned to enter the home from the back and rob Clayborn but, as they approached, he started firing shots into the home because he did not want to go inside.

¶17 Jones testified that he, Faulkner and Taylor drove to Clayborn's house and parked in the alley. He testified that Taylor had a shotgun and Faulkner had a pistol. He testified that he waited in the car while Taylor and Faulkner approached the house, and that he then heard shots that sounded to him like both guns firing. He testified that Taylor and Faulkner returned to the car and they all drove to Faulkner's house.

¶18 Evidence was introduced showing that multiple phone calls were made between Faulkner and Taylor on the day of the crimes, which lends credence to the testimony of Taylor and Jones because it shows that Faulkner and Taylor were in close contact with one another. Detective Mark Peterson testified at trial

that Jones told him during questioning that the shotgun the men had belonged to Faulkner and that Faulkner told him to retrieve the .22 caliber handgun from Taylor's mother's house after his arrest, which was kept in a shoebox in the basement. Based on this evidence, it is clear beyond a reasonable doubt that a rational jury would have found Faulkner guilty of the charges even if his pistol had not been admitted into evidence. Therefore, the error in admitting the pistol was harmless.[2]

¶19 Faulkner next argues that his co-actors should not have been allowed to testify against him because they received concessions from the State for providing testimony. Where, as here, the State grants concessions in exchange for testimony, "the defendant's right to a fair trial is safeguarded by (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements …; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony." ***State v. Nerison***, 136 Wis. 2d 37, 46, 401 N.W.2d 1 (1987).

¶20 Taylor and Jones both testified about the concessions they received from the State in exchange for their testimony and were cross-examined about the concessions they received. The jury was instructed to consider their testimony with "caution and care." Faulkner contends the State's agreements with the men were improper because the agreements called for them to testify truthfully *consistent with their testimony at the first trial*. Faulkner argues that this

[2] Faulkner also argues that the circuit court erred in refusing to allow him to discover or present evidence related to the credibility of the police officer who conducted the search. Because the State has conceded that the search violated the Fourth Amendment, we need not address this issue.

requirement was flawed because it disregarded whether their testimony at the first trial was, in fact, truthful. We disagree. The men agreed to testify *both* truthfully and consistently with their prior testimony. Faulkner's claim is unavailing.

¶21 Faulkner next argues that the firearm enhancer for the homicide conviction should not have been applied to him because he brought the gun to commit a robbery, not a homicide. He cites ***State v. Peete***, 185 Wis. 2d 4, 9, 517 N.W.2d 149 (1994), which provides that "the state must prove that the defendant possessed the weapon to facilitate commission of the predicate offense." We agree with the State's analysis: "Faulkner again ignores the fact that he fired the pistol after Taylor began firing the shotgun. He used the pistol to aid Taylor's commission of [the crime of first-degree reckless homicide]. The evidence fully satisfies [the] nexus requirement."

¶22 Faulkner next contends that the cumulative errors he has raised rendered his trial unfair. Because we have rejected Faulkner's arguments, we also reject this argument.

¶23 Finally, Faulkner raises other issues in his brief, but he does not adequately develop his arguments with regard to those issues. Therefore, we do not consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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