COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1645-CR **Cir. Ct. No. 2013CF1154**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ISIAH O. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 KESSLER, J. Isiah O. Smith appeals a judgment of conviction, following a jury trial, of one count of second-degree reckless homicide as a party to a crime. Smith also appeals from the order denying his postconviction motion

for relief pursuant to WIS. STAT. § 809.30 (2013-14).[1] On appeal, Smith argues that: (1) there was insufficient evidence to convict him of second-degree reckless homicide as a party to a crime; (2) the trial court erred in failing to issue a jury instruction used by the United States Court of Appeals for the Seventh Circuit addressing a party's "mere presence" during the commission of a crime; and (3) trial counsel was ineffective for failing to remove a juror, who was fearful of retaliation from Smith's family, from the jury panel during deliberations. We affirm.

BACKGROUND

¶2 On March 8, 2013, Smith was charged with first-degree reckless homicide, as a party to a crime, with the use of a dangerous weapon.[2] The charges stemmed from the shooting death of Marcell Alexander. According to the criminal complaint, Alexander was shot in the hallway of his apartment building on the night of March 4, 2013. Video surveillance from the apartment building showed Smith and Unquail Kennedy, a co-actor, enter the apartment building shortly before the shooting and then exit minutes later. The complaint alleged that the surveillance video showed Kennedy leaving the building with a cell phone in one hand and a gun in the other. Smith is shown exiting with a cell phone in hand. The complaint further alleged that Alexander's girlfriend, T.T., found Alexander after he had been shot. T.T. told police that Alexander identified his shooters as "the niggas from 38th street." T.T. also identified Smith and Kennedy from the surveillance video, telling police that she knew them. The complaint states that

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

[2] The use of a dangerous weapon penalty enhancer was dismissed before trial.

following the shooting, Alexander was rushed to Froedert Memorial Lutheran Hospital, where he died. Doctors at Froedert confirmed that Alexander died as a result of a gunshot wound.

¶3 The matter proceeded to a jury trial, where the State called multiple witnesses. Milwaukee Police Officer Kevin Gaulke testified that on the night of March 4, 2013, at approximately 10:27 p.m., he was dispatched to an apartment complex on Milwaukee's north side. Upon entering the complex, Gaulke found Alexander in the hallway of the first floor. Alexander was conscious and told Gaulke that he had been shot but was "unable to talk" after that.

¶4 T.T. testified that on the night of March 4, 2013, she was sleeping in the apartment she shared with Alexander—her boyfriend. She stated that earlier in the day, Alexander had a few friends over to play video games and gamble. One of the friends, K.O., was still there in the evening when T.T. went to sleep. T.T. stated that at some point after 10:20 p.m., K.O. came into T.T.'s bedroom and said "'get up, get up. [Alexander] got shot.'" T.T. stated that she found Alexander, still conscious, lying in the hallway outside of their apartment. Alexander told T.T. that he was shot by the "'the little niggers off 38th.'" T.T. also testified that she found a cell phone near Alexander that did not belong to him. She turned the phone over to police.

¶5 Following the shooting, Detective Shannon Lewandowski and T.T.'s landlord showed T.T. surveillance video covering the area outside of the apartment and the apartment's entryway. The video reflected the time-frame of the shooting. T.T. testified that on the night of the shooting, she identified Smith and Kennedy in the video, both of whom T.T. had known for "a couple of years." The surveillance video was then shown to the jury. T.T. again identified Smith

and Kennedy, telling the jury that the video shows Kennedy with a gun in one hand and a phone in the other. She also told the jury that the video shows Smith walking out with an object in his hand. T.T. guessed that the object was a gun, but could not confirm what Smith was holding. T.T. told the jury that Smith and Kennedy are associated with the area of 30th and Wright Streets in Milwaukee, but "hang" on 38th Street.

¶6 Lewandowski told the jury that she obtained video surveillance on the night of the shooting. As the jury was shown the video, Lewandowski walked the jury through the contents, explaining that the video showed the alley behind the apartment complex and the back entrance into the complex. Lewandowski explained that the video shows an SUV pulling into the alleyway with its lights on. Because the surveillance camera was motion-sensored, Lewandowski explained, she did not see anyone exit the vehicle. However, "two people all of a sudden appear after that vehicle pulls up. [The car's] lights get turned off and the two individuals are now walking along [a] fenced area … along the sidewalk." The video jumps to Alexander letting the two individuals into the apartment. The video then jumps to Alexander and the two individuals, whom Lewandowski identified as Smith and Kennedy, in the apartment entrance and shows them walking towards a hallway before going out of view. The video is timestamped, showing that the individuals entered the apartment at 10:23:07 p.m. Approximately fifty seconds later, the video jumps to Smith and Kennedy exiting the building. Kennedy is holding a firearm and a phone, while Smith is holding a phone. The video then shows Kennedy getting into the rear driver's side of the SUV and Smith getting into the passenger side. Lewandowski was unable to determine whether Smith entered the front or rear passenger side, but stated that

neither Smith nor Kennedy entered the driver's seat in the SUV, suggesting that another person was driving. The car then drove away.

¶7 L.M., Smith's girlfriend, testified that on March 4, 2013, she and Smith went to her cousin's house at about noon. L.M. testified that later that evening she went to dinner while Smith and her cousin remained at the cousin's home. L.M. left her car—a Ford SUV—at her cousin's home, with the keys, as she frequently did. L.M. stated that when she returned to her cousin's home at approximately 9:30 p.m., neither her cousin nor Smith was there, and her car was gone. L.M. stated that she fell asleep at approximately 10:30 p.m., at which time neither Smith, her cousin, nor her car, had returned. L.M. testified that she woke up in the middle of the night and saw through a window that her car was back. L.M. told the jury that Smith had also returned by the time she woke up. She asked Smith why he did not call her. Smith responded that he either lost or broke his phone.

¶8 Milwaukee Police Detective Doreen Ducharme, a detective within the High Technology Unit, testified that a cell phone with a cracked screen was left at the scene of the shooting. Through forensic testing, the phone was identified as belonging to Smith.

Jury Instructions.

¶9 Defense counsel asked the trial court to include a jury instruction from the Seventh Circuit which would have provided: "If a defendant performed acts that advanced the crime but had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish the defendant's guilt." The State objected to the instruction, stating that the "mere presence instruction … is covered by the party

to a crime statute." Ultimately, the trial court rejected defense counsel's request, finding the instruction inapplicable because "[t]here's circumstantial evidence from which the jury could infer the defendant's knowledge."

Deliberations.

¶10 During deliberations, Assistant District Attorney Mark Williams[3] explained to the trial court that another assistant district attorney, Janet Protasiewicz, approached him and informed him that the previous week, she received a text message from a friend—the mother of one of the jurors—stating that the juror was worried about retaliation from the defendant's family if the jury returned a guilty verdict. Specifically, the text stated: "The family of the accused is present behind glass. They are loud and distracting. They are acting very inappropriately. [Juror] is worried if there is a verdict of guilty, the family of the Defendant is going to go ballistic, and he is scared for retaliation against the jury…. He was identified by name and the Defendant's family could hear his name. I thought jurors' names were confidential. [Juror] is worried." ADA Williams informed the court that ADA Protasiewicz responded to the text. Defense counsel told the court that Smith's family was not in the court room, but family members of the victim and Kennedy were present.

¶11 The trial court determined that it needed to ascertain whether the juror "can remain and in fact is a fair and impartial juror," and then would make a determination about whether to call back an alternate juror. The court also deemed it necessary to discuss the contents of the text messages with ADA Protasiewicz. In the presence of the parties, ADA Protasiewicz stated that her

[3] Assistant District Attorney Denis Stingl represented the State at trial; however, Assistant District Attorney Mark Williams brought the text messages to the trial court's attention.

friend, the mother of one of the jurors, texted her the previous week and stated that the juror feared retaliation from the family of the defendant based on the family's behavior in court. ADA Protasiewicz told the court that she texted her friend, assuring her that jury lists are kept sealed and that family members of defendants cannot access the lists. ADA Protasiewicz stated that the following day, the juror's mother texted her again, saying that she (the mother) and her husband were still "panicked if it's a guilty verdict." ADA Protasiewicz stated that she sent two additional text messages reassuring her friend that there was nothing to worry about and that "no one has ever been hurt here." ADA Protasiewicz said that she did not know whether her friend communicated the contents of the text messages to the juror. The trial court told ADA Protasiewicz that it was "extreme[ly] displeas[ed]" with her failure to inform the court that the parent of a juror was communicating with her. The court then conducted a colloquy with the juror.

¶12 The juror admitted that concerns about retaliation "crossed [his] mind" and that he raised the issue with his parents. He stated that he was unaware of his mother's communication with ADA Protasiewicz. He also stated that he did not communicate any other information about the trial with his parents, nor did he communicate his concerns with any of the other jurors. He told the court and the parties that he did not communicate with anyone else about the jury trial, that he had no apprehension about rendering a verdict in the case, and that he could be a fair and impartial juror. Both defense counsel and the State agreed that they "[didn't] believe there's any problem … with this juror's impartiality." The trial court agreed, finding the juror's testimony "sincere," and allowed the jury to continue to deliberate.

¶13 Ultimately, the jury found Smith guilty of the lesser-included offense of second-degree reckless homicide as a party to a crime.[4]

Postconviction Motion.

¶14 Smith filed a postconviction motion, arguing that he was entitled to a judgment of acquittal, or in the alternative, a new trial, because: (1) the State provided insufficient evidence to "sustain the conviction for second-degree reckless homicide"; (2) the trial court erred in denying the defense's request for the "mere presence" jury instruction; and (3) counsel was ineffective because "[Smith's] attorney chose to allow the juror who had discussed with his parents his fear of retaliation from Mr. Smith's family to remain on the jury." (Some capitalization omitted.) The trial court denied the motion in its entirety and did not hold a ***Machner*** hearing.[5] This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

¶15 On appeal, Smith raises the same issues he raised in his postconviction motion. We address each in turn.

Sufficiency of the Evidence.

¶16 Smith argues that there was insufficient evidence to convict him of second-degree reckless homicide as a party to a crime because there was no evidence to suggest that he knew his co-defendant, Kennedy, was going to commit a crime, or that Kennedy even had a gun.

[4] The jury found Smith not guilty of armed robbery.

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶17 When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the [S]tate 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 (1990). If more than one inference can be drawn, the inference which supports the jury's verdict must be followed unless the evidence was incredible as a matter of law. ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982). "[I]f any possibility exists that the jury *could* have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, we will not overturn the verdict even if we believe that a jury *should* not have found guilt based on the evidence before it." ***Id.*** at 377 (emphasis added).

¶18 To prove that Smith was guilty of second-degree reckless homicide as a party to a crime, the State needed to show that Smith either directly committed the crime of second-degree reckless homicide or that Smith aided and abetted in the commission of the crime. *See* ***State v. Howell***, 2007 WI 75, ¶14, 301 Wis. 2d 350, 734 N.W.2d 48. The elements of second-degree reckless homicide are: (1) the defendant caused the death of the victim; and (2) the defendant caused the victim's death by criminally reckless conduct. *See* WIS JI—CRIMINAL 1022 (The difference between first and second-degree reckless homicide under WIS. STAT. § 940.06 is that the first-degree offense requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.). "Criminal recklessness" is defined as action that "creates an unreasonable and substantial risk of death or great bodily harm to ... another and the actor is aware of that risk." *See* WIS. STAT. § 939.24. The actor's awareness is the actor's subjective awareness at the time of the

conduct—not the actor's subjective awareness either before or after the conduct. *See* ***State v. Neumann***, 2013 WI 58, ¶138, 348 Wis. 2d 455, 832 N.W.2d 560 ("The statute and the jury instructions require only that the actor be subjectively aware that his or her conduct *created* the unreasonable and substantial risk of death or great bodily harm.").

¶19 Thus, contrary to Smith's assertions, neither theory of party to a crime liability under the statute requires a defendant's advance knowledge of the unreasonable and substantial risk the conduct created.

¶20 Under the direct actor theory, there was sufficient evidence for the jury to conclude that Smith and/or Kennedy: (1) caused Alexander's death (2) by criminally reckless conduct. The evidence presented at trial establishes that Alexander was shot at close range during the one-minute time period when Smith and Kennedy were in Alexander's apartment building. It is undisputed that Alexander ultimately died as a result of that wound. Smith and Kennedy were present at the victim's apartment complex minutes before the shooting. Surveillance video showed two men, identified by witnesses as Smith and Kennedy, entering the building at 10:23 p.m. The men were let into the building by Alexander, who is also seen on the surveillance video at 10:23 p.m. One minute later, the video showed Smith and Kennedy leaving the building—Kennedy had a gun in his hand. The video captured the men leaving in an SUV, which, according to witness testimony, Smith had access to. A cell phone found at the scene of the shooting was identified as Smith's phone. The jury could draw only two conclusions from this evidence: either Smith shot Alexander, or Smith was present when Kennedy shot Alexander. Either way, the evidence is clear that the conduct created an unreasonable and substantial risk to Alexander and the jury could conclude that Smith was aware of the risk.

¶21 Under an aiding and abetting theory, a person may be convicted as a party to a crime, even if he did not directly commit the crime, if he intentionally aids and abets its commission. *See* ***State v. Sharlow***, 110 Wis. 2d 226, 238, 327 N.W.2d 692 (1983). A person intentionally aids and abets the commission of a crime when he knowingly either assists the person who commits the crime or is ready and willing to assist and the person who commits the crime knows of that willingness. *See* WIS JI—CRIMINAL 400. "Intent for purposes of establishing liability as an aider and abettor is evidenced by knowledge or belief that a person is committing or intends to commit a criminal act." ***State v. Ivy***, 119 Wis. 2d 591, 606, 350 N.W.2d 622 (1984).

¶22 A jury is allowed to make reasonable inferences. *See* ***Poellinger***, 153 Wis. 2d at 506. Here, Smith does not dispute that Kennedy committed a crime. Rather, Smith asserts that the State failed to prove that he had the requisite intent to aid or abet Kennedy's commission of *that* crime. The jury was entitled to infer from Smith's conduct that he intended to assist Kennedy in the commission of *a* crime and also that Smith participated in the commission of the crime himself because the jury could reasonably infer that Smith arranged for the getaway car (owned by his girlfriend) and a driver (his girlfriend's cousin). Smith had access to an SUV. L.M. testified that: she and Smith were at her cousin's home on the day of the shooting; she went to dinner but left her car and its keys at her cousin's house; when she returned at 9:30 p.m., her car, Smith, and her cousin were gone; and when she awoke in the middle of the night, her car and Smith had returned. Surveillance video shows: an SUV pulling up in the alleyway behind the apartment complex; Smith and Kennedy getting out of the SUV and entering the apartment complex; the SUV's headlights and brake lights turning off; Smith and Kennedy emerging from the apartment complex about one minute after they

entered, with Kennedy holding a gun; the SUV's headlights and brake lights coming back on before Smith and Kennedy reached the vehicle; and neither Smith nor Kennedy entering the driver's seat, but the SUV driving away.

¶23 While there may be room for other interpretations of the evidence, it is the jury's function, not ours, to resolve conflicts in testimony, draw inferences, and determine whether the evidence presented satisfies it beyond a reasonable doubt that the charged crime was committed. *See* ***State v. Wilson***, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989). There is a reasonable hypothesis from the evidence presented that supports the guilty verdict.

"Mere Presence" Jury Instruction.

¶24 Smith argues that the trial court erroneously rejected defense counsel's request for the Seventh Circuit's "mere presence" jury instruction. The instruction states:

> 5.11 MERE PRESENCE / ASSOCIATION / ACTIVITY
>
> (a) A defendant's presence at the scene of a crime and knowledge that a crime is being committed is not alone sufficient to establish the defendant's guilt. [A defendant's association with conspirators [or persons involved in a criminal enterprise] is not by itself sufficient to prove his/her participation or membership in a conspiracy [criminal enterprise].]
>
> (b) If a defendant performed acts that advanced a criminal activity but had no knowledge that a crime was being committed or was about to be committed, those acts alone are not sufficient to establish the defendant's guilt.

Smith contends that because "there was no direct evidence that Mr. Smith had any knowledge that Mr. Kennedy would engage in any criminal action against [Alexander][,] … it was essential for the jury to fully understand what exactly

would and would not be sufficient for the State to meet its burden to prove that Mr. Smith acted as a party to a crime."

¶25 A defendant is entitled to a theory of defense instruction if it is timely requested and supported by credible evidence. ***State v. Bernal***, 111 Wis. 2d 280, 282, 330 N.W.2d 219 (Ct. App. 1983). On review, we consider the jury charge in its entirety to determine whether the jury was fully and fairly instructed. ***McMahon v. Brown***, 125 Wis. 2d 351, 354, 371 N.W.2d 414 (Ct. App. 1985). "[I]f the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions, even though the refused instructions themselves would not be erroneous." ***State v. Roubik***, 137 Wis. 2d 301, 308-09, 404 N.W.2d 105 (Ct. App. 1987) (footnote omitted).

¶26 The trial court denied defense counsel's request for the mere presence instruction, instead instructing the jury in accordance with WIS JI—CRIMINAL 400, stating: "a person does not aid and abet if he is only a bystander or spectator and does nothing to assist in the commission of a crime." The court reasoned that no evidence in the record supported "the proposition that Mr. Smith had no knowledge that the crime was being committed or about to be committed."

¶27 We addressed a similar issue in ***State v. Skaff***, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989). In that case, the defendant was charged with possession of cocaine with intent to deliver as a party to a crime. ***Id.*** at 50. The defendant requested the mere presence instruction; however, the trial court instead instructed the jury in accordance with WIS JI—CRIMINAL 400. On appeal, we concluded that there was no fundamental difference between the instructions so there was no cause to overturn the verdict:

> We are hard pressed to find any essential difference between Skaff's requested charge and that submitted by the court. Both advised the jury that a bystander, or a person merely present at a crime scene who has no unlawful intent and takes no action to assist commission of the crime, is not an aider or abettor. Skaff's proposed charge that his knowledge of the presence of cocaine is not sufficient to support a conviction paraphrases the court's charge respecting a spectator's nonassistance or nonencouragement of the crime. The court's charge clearly instructs the jury that a spectator, though aware of the happening, cannot be guilty unless he has an unlawful intent and takes some action to further the crime.

Skaff, 152 Wis. 2d at 60. In short, the jury *was* instructed that a defendant's role as a bystander is insufficient for a guilty verdict.

¶28 Moreover, contrary to Smith's assertion, the evidence presented at trial was not consistent with a "mere-presence" instruction. The evidence not only showed that Smith was present during the shooting, but showed, as stated, that: (1) he had access to a getaway SUV; (2) he had access to a third-party driver; and (3) he fled from the scene within minutes of entering the apartment complex. The most logical inference from this evidence is the one the jury reached. There is no evidence suggesting Smith was merely a passive bystander. We conclude, therefore, that the trial court did not err in refusing to issue the "mere presence" jury instruction.

Ineffective Assistance of Counsel.

¶29 Finally, Smith contends that his counsel was ineffective for "cho[osing] to allow a juror—who feared retaliation from persons he believed to be Mr. Smith's family—to remain on the jury." (Some capitalization omitted.)

¶30 In order to show ineffective assistance of counsel, the "defendant must show that counsel's performance was deficient" and "that the deficient

performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). "Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable." ***Strickland***, 466 U.S. at 687. We do not have to address both prongs of the ***Strickland*** test if a defendant makes an insufficient showing on one of the two prongs. ***Id.*** at 697.

¶31 "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." ***Strickland***, 466 U.S. at 698; ***Pitsch***, 124 Wis. 2d at 633-34. "The trial court's findings of fact will not be disturbed unless clearly erroneous." ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). The questions of whether counsel's performance was deficient and prejudicial are questions of law which we independently determine. ***Id.***

¶32 The heart of Smith's argument is that counsel was ineffective for failing to remove a "fearful juror" who "was comfortable disregarding the court's order" not to discuss the trial. Smith's argument fails to explain how he was prejudiced by this "failure." In the presence of the parties, the juror told the trial court that he did not actually discuss the case with anyone, but rather just shared his concerns about the defendant's family with his parents. The court explained that the defendant's family was not present during trial and that the juror's identities are kept confidential. The juror indicated that he could remain fair and impartial. Following the colloquy, the trial court found that the juror was "sincere" in declaring his ability to remain impartial. We see nothing in the record to suggest that the juror was biased or that the seating of this particular juror affected the outcome of Smith's trial. Smith's assertions are purely speculative.

Accordingly, trial counsel could not have been ineffective for failing to remove the juror during deliberations.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.