COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP694-CR **Cir. Ct. No. 2014CF158**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEONTA L. BENTON,

DEFENDANT-APPELLANT.

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

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Deonta Benton was tried and convicted of felony murder and first-degree recklessly endangering safety, both as a party to the crime. He contends that he is entitled to reversal with no possibility of retrial as to his felony murder conviction because the evidence was insufficient when measured against the factual theory of the case incorporated into part of the felony murder jury instruction as read to the jury just before deliberations. Benton also contends that he is entitled to a new trial on both counts because the prosecutor, over Benton's objection, presented inadmissible hearsay indicating that Benton threatened one of the State's key witnesses. We reject both arguments and affirm.

Background

¶2 At a week-long trial, the State presented evidence that three men decided to enter what they believed to be a drug house and rob people of money and marijuana. One of the three men was armed with a .22 caliber rifle and one was armed with a .38 caliber revolver-style handgun.[1] After the three men broke in through a side door, an altercation took place between the three men and two of the occupants, R.M. and Nathaniel Jones. The intruder with the handgun shot and injured R.M. and shot and killed Nathaniel Jones. After the shooting, the three men immediately fled.

¶3 There was no dispute at trial that two of the intruders were Jerron Washington and Tynell McCoy. Police identified them through DNA found in a baseball cap that one of the intruders left at the scene. After police made contact

[1] There was some question as to whether the revolver was a .38 caliber or a .380 caliber. However, this factual issue was minor and had no arguable effect on the verdict. Although various witnesses described the revolver differently, we will speak as if each uniformly referred to it as a .38 caliber revolver handgun.

with Washington and McCoy, both men named Benton as the third man and as the person with the handgun who shot R.M. and Nathaniel Jones.

¶4 At trial, although two people in the house identified Benton as one of the intruders, it is clear that the strongest identification evidence was a combination of (1) the testimony of Washington and McCoy and (2) other evidence relating to the handgun and the beating of a cousin of Benton's. We will discuss in greater detail the beating of Benton's cousin in the body of this opinion. For now, it is sufficient to know that Washington and McCoy both testified that:

- Benton telephoned Washington and McCoy suggesting the robbery.
- Washington and McCoy met with Benton at Benton's aunt's house.
- Washington brought with him his .22 caliber rifle and that weapon remained with Washington.
- Benton produced a .38 caliber handgun and that weapon remained with Benton.
- The men walked about six blocks from Benton's aunt's house to the residence where they intended to rob people.
- Once inside the residence, McCoy took about $20 from R.M., and there was no evidence of any other robbery.
- Occupant Nathaniel Jones attempted to take the .22 caliber rifle from Washington, leading to an altercation.
- During the altercation, Benton, Washington, McCoy, Nathaniel Jones, and R.M. all ended up in the basement of the residence.
- In the basement, Benton shot and injured R.M. and shot and killed Nathaniel Jones.
- Washington, McCoy, and Benton immediately fled, running back to Benton's aunt's house.

- Washington and McCoy left the aunt's house shortly thereafter leaving behind Washington's .22 caliber rifle.
- Washington later retrieved his rifle from Benton's aunt's house.
- Neither Washington nor McCoy saw the handgun again after the day of the robbery, but Washington was told, first by an unnamed person and later by Benton, that one of Benton's cousins found the handgun and sold it, prompting Benton to severely beat his cousin.

¶5 There was no dispute at trial that Benton was acquainted with Washington. Five of Benton's relatives testified as alibi witnesses for Benton, and three of these alibi witnesses testified that they knew Washington.[2] The defense contended that Washington and McCoy falsely identified Benton as the third man. The defense evidence did not, however, suggest any reason why Washington or McCoy might falsely tell police officers that Benton was the third man. We acknowledge that, having identified Benton as the third man and the shooter, Washington and Benton had a motive to maintain that story at trial because each would benefit from a plea agreement if they testified against Benton. But that does not explain why Washington and McCoy would have falsely identified Benton as the third man in the first instance.

¶6 Consistent with the lack of evidence of a motive to initially falsely accuse Benton, Benton's trial counsel never suggested to the jury any reason why Washington and McCoy might be lying about Benton. Rather, the focus of the

[2] We include J.M. as one of Benton's relatives. Benton's aunt referred to J.M. as her husband and said they were together for 35 years. J.M. also referred to Benton as his nephew, whom J.M. seemed to indicate he had known all of Benton's life. But J.M. also spoke of Benton's aunt as his fiancée, suggesting that they were not married. Regardless, it would have been clear to the jury that J.M. and Benton's aunt considered Benton as J.M.'s nephew. In the remainder of this opinion, we refer to J.M. as Benton's uncle.

defense was the proposition that Benton could not have been with Washington and McCoy at the time of the robbery and shooting because he was at his uncle's birthday party. Benton's mother, his aunt and uncle, and two of his cousins testified that, during the time frame of the shooting, about 6:30 to 6:45 p.m. on April 17, 2013, Benton was at the uncle's birthday party at his aunt's house about six blocks from the scene of the crimes.

¶7 Accordingly, the primary issue at trial was whether the State proved beyond a reasonable doubt that Benton was the third man with Washington and McCoy. Benton's defense attorney did not suggest that, if Benton *was* the third intruder, the jury should not believe that Benton was the shooter. Rather, the defense attacked the identification evidence from two occupants of the robbed residence and, for the most part, otherwise relied on the alibi witnesses' testimony that Benton was at his aunt's house attending his uncle's birthday party at the time of the robbery and shooting.

¶8 With this general background in mind, we address Benton's claims of error.

Discussion

¶9 Benton argues that his trial was flawed two ways. We reject both arguments.

A. Instructional Error: Comparing the Evidence to an Oral Closing Jury Instruction on Felony Murder

¶10 Benton argues that the evidence was insufficient to prove felony murder under the factual theory presented in the closing jury instruction. In particular, Benton contends that, per that instruction, the underlying felony was the

armed robbery of Nathaniel Jones, the murder victim. However, as Benton correctly points out, there is no evidence that Nathaniel Jones was robbed. Rather, the only evidence of a robbery related to the armed robbery of another occupant of the residence, R.M. According to Benton, because the evidence was insufficient to prove the underlying robbery of Nathaniel Jones, the evidence was necessarily insufficient to prove felony murder based on that robbery. It follows, according to Benton, that his felony murder conviction must be reversed with no possibility of retrial. *See* ***State v. Henning***, 2004 WI 89, ¶22, 273 Wis. 2d 352, 681 N.W.2d 871 ("[D]ouble jeopardy principles prevent a defendant from being retried when a court overturns his conviction due to insufficient evidence.").

¶11 The State does not dispute, and we agree, that there was no evidence that Nathaniel Jones was robbed. But, as we shall see, the issue here does not turn out to be a true sufficiency-of-the-evidence issue. Rather, what we have here is an instance of instructional error that did not interfere with the jury's understanding of the elements of the charged felony murder.

¶12 Felony murder, under WIS. STAT. § 940.03,[3] is committed when a defendant causes the death of a person while committing or attempting to commit a felony specified in that statute. The qualifying underlying crime here was armed robbery. The jury was correctly told that Benton was guilty of felony murder if Benton was a "party to the crime of armed robbery and the death of Nathaniel Jones was caused by the commission of the armed robbery."

[3] All references to the Wisconsin Statutes are to the 2015-16 version.

¶13 This issue arises because there is an inconsistency between, on the one hand, the oral instruction given to the jury after the close of evidence and, on the other hand, pre-evidence instructions, trial evidence, the prosecution's argument, opening oral instructions, and the written closing jury instructions given to the jury. The oral instruction given to the jury at the end of the trial identified Nathaniel Jones, rather than R.M., as the alleged armed robbery victim. The other information presented to the jury correctly informed the jury that the alleged robbery victim was Nathaniel Jones's cousin, R.M.

¶14 Benton correctly asserts that the evidence was insufficient to support guilt on the theory that the qualifying crime was the armed robbery of Nathaniel Jones. As noted, there was no evidence that Jones was a robbery victim. We conclude, however, that reversal is not required. As we explain below, the inconsistency between the oral instruction and the case, as tried, is treated as instructional error that is subject to harmless error analysis. And, we are confident that the error was harmless. Before explaining why, we pause to question whether there actually was an error in the oral instruction, or instead a transcription error.

¶15 The written "Closing Jury Instructions" correctly identify R.M. as the victim of the robbery. It is also apparent that the circuit court read from the written instructions. It is odd then that the court would have said the wrong name when it was simply reading the correct name in the written instructions. Transcription errors do occur, but this possibility was not investigated, perhaps because there was no postconviction proceeding before the circuit court.

¶16 We could further inquire into whether there was a transcription error, which would likely involve remanding the matter to the circuit court. But we conclude that this case is easily resolved on the basis of harmless error.

Accordingly, we will assume for purposes of our analysis that the oral closing instruction misidentified Nathaniel Jones as the robbery victim. We begin by explaining why this issue is properly treated as instructional error.

¶17 In ***State v. Williams***, 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736, our supreme court explained that cases are treated as a matter of instructional error when jury instructions "instruct the jury on a theory of the crime that was not presented to the jury." ***Id.***, ¶56. In the words of ***Williams***, such "jury instructions are erroneous because they do not 'accurately state the statutory requirements for the crime charged' *as applicable to the facts presented*." ***Id.***, ¶57 (quoting ***State v. Beamon***, 2013 WI 47, ¶24, 347 Wis. 2d 559, 830 N.W.2d 681). And, as we have seen, this precisely describes the disconnect here between a fact incorporated into the oral jury instruction—the identity of the robbery victim—and the facts presented to the jury.

¶18 Because this topic is instructional error, the error is subject to harmless error analysis. The harmless error test in this context is whether we are "convinced beyond a reasonable doubt that the jury still would have convicted the defendant of the charge had the correct jury instruction been provided." ***Id.***, ¶59. Thus, the question is whether we are convinced beyond a reasonable doubt that the jury would have convicted Benton if the *oral* closing instruction had correctly identified R.M. as the robbery victim. Applying this test, we are convinced beyond all doubt that the reference in the oral instruction at the end of trial to Nathaniel Jones was harmless because, despite the error, the jury would have correctly understood that the felony murder charge was premised on the robbery of R.M.

¶19 First, during the opening oral instructions, and consistent with the evidence that the jury would hear, the circuit court correctly identified R.M. as the alleged robbery victim.

¶20 Second, Benton did not challenge the State's theory as to what occurred in R.M.'s home. That is, Benton did not challenge evidence proving the armed robbery of R.M. or challenge the State's argument that this robbery resulted in the death of Nathaniel Jones. Rather, Benton's defense was that Benton was wrongly identified as one of the three intruders. Benton presented evidence that he was, at the time of the intrusion, in the home of his aunt about a half mile away. And, importantly, the *only* evidence of a completed armed robbery was the armed robbery of R.M. There was no evidence that anyone robbed or attempted to rob Nathaniel Jones and no evidence of a completed armed robbery of any other person in the residence. Thus, the later oral instruction naming Nathaniel Jones as the robbery victim would have made no sense to the jurors unless they assumed that the court simply misspoke.

¶21 Third, during closing arguments, the prosecutor's sole armed robbery argument was that R.M. was robbed. When the prosecutor summarized the evidence, he twice referred to McCoy taking $20 or $30 dollars from a man that other evidence made clear was R.M. No other argument by either the prosecutor or the defense attorney touched on the robbery. Benton's defense attorney neither challenged R.M.'s assertion that he was robbed, nor did counsel suggest that anyone else was robbed. Indeed, because the case hinged on Benton's

alibi defense, the vast majority of closing argument for both sides was directed at the evidence identifying Benton as an intruder and Benton's alibi evidence.[4]

¶22 Fourth, the written instructions given to the jury for use during deliberations identified R.M. as the robbery victim. And, there is no doubt the written instructions were given to the jury. WISCONSIN STAT. § 972.10(5) requires that jurors be given "one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided." Moreover, the circuit court told the jurors that it would give them a written set of the instructions and noted, when the court excused the jurors to deliberate, that it "sent back the instructions and verdict forms." The court told the jurors: "You do not have to memorize [the instructions], but I would ask you to pay careful attention. You will have a copy of the instructions with you when you deliberate tomorrow after closing arguments.... But, again, you do not have to memorize them, and you will have them with you tomorrow." Thus, it is all the more clear that the jurors would have assumed that the court simply misspoke when it gave the oral closing instruction referencing Jones as the alleged robbery victim.

¶23 These facts persuade us that the oral instructional error did not cause the jury to misunderstand that the issue, as to the predicate robbery offense, was whether there was an armed robbery of R.M. It defies reason to think that the oral reference misled the jury when (1) the initial oral instruction, (2) all pertinent trial evidence, (3) the entirety of closing argument, and (4) the written instructions given to the jury all pointed to R.M. as the alleged robbery victim for purposes of the felony murder charge. *See* ***Beamon***, 347 Wis. 2d 559, ¶38 ("[T]he multiple

[4] In the next section, we further discuss Benton's alibi evidence and its role in the trial.

instances in which the jury was properly told the statutory requirements are a factor in our harmless error analysis.").

¶24 Benton's various arguments contesting harmless error do not undercut our analysis.

¶25 Benton argues that it is not clear that there was only evidence of a robbery of R.M. Benton writes: "The evidence at trial however indicated that the *intended* crime was not the robbery of $20 to $30 from R.M., but was the taking of marijuana from someone else in the house" (emphasis added). Benton misunderstands the issue. As pertinent here, the question for the jury was not whether particular robberies were *intended*. Rather, the question was whether there was a *completed* armed robbery that resulted in a death. *See* WIS JI—CRIMINAL 1030. And, the only evidence and argument regarding a *completed* armed robbery was the robbery of R.M.

¶26 In his reply brief, Benton seemingly questions the sufficiency of the evidence to show that he committed or assisted in the armed robbery of R.M. as a party to the crime. If Benton means to make this argument, it comes too late in his reply brief. The argument is also undeveloped and wholly without merit. The evidence was easily sufficient to prove Benton's party-to-a-crime status with respect to the armed robbery of R.M. There was evidence that Benton needed money because he had just been released from jail and that he entered the residence armed, with two other men, intending to rob the occupants. Contrary to suggestions by Benton, there was no requirement that the State prove that Benton intended to take property from R.M. in particular.

¶27 Benton argues that the situation here aligns with ***State v. Wulff***, 207 Wis. 2d 143, 557 N.W.2d 813 (1997), and, therefore, that our analysis should be

the same as in ***Wulff***. That is, Benton argues that we should not apply harmless error analysis, but rather should assess the sufficiency of the evidence by comparing the trial evidence with, in the words of ***Wulff***, "the charge submitted to the jury *in the instructions*." *See* ***id.*** at 153 (emphasis added).

¶28 The problem with this argument is twofold. First, the instructions here did not uniformly mistakenly identify Nathaniel Jones as the robbery victim, and, we have concluded, the jury would have had the correct understanding of the charge based on multiple sources of information. Second, the argument fails to come to grips with language in the subsequent supreme court ***Williams*** decision that "clarified" ***Wulff***. The ***Williams*** court explained that the situation in ***Wulff*** would now be analyzed to determine whether instructional error was harmless. *See* ***Williams***, 364 Wis. 2d 126, ¶¶51-60, 63 n.11, 64, 69. More specifically, the ***Williams*** court explained: "***Wulff*** was not analyzed under the harmless error framework because it predated this court's adoption of the harmless error analysis in ***State v. Harvey***, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189. The court stated that if it were to decide ***Wulff*** today, it would do so under ***Harvey***'s harmless error framework." ***Id.***, ¶63 n.11.

¶29 Thus, we see no reason to doubt that, if presented with the instant case, the supreme court would conclude, as it did in ***Williams***, that the oral instruction at issue was instructional error and thus amenable to harmless error analysis. Indeed, in ***Williams***, the court went so far as to explain that one way such instructional error can occur is what happened in ***Wulff***, namely, a jury instruction that is a mismatch between the factual theory of the crime presented by the prosecution and the instruction given. *See* ***Williams***, 364 Wis. 2d 126, ¶¶56-57. With respect to the closing oral instruction, that is what occurred here.

¶30 In sum, we conclude that the closing oral instructional error was harmless.

B. The Erroneous Admission of Threat Evidence

¶31 Benton argues that he is entitled to a new trial because the circuit court improperly admitted hearsay evidence indicating that Benton had threatened one of the primary witnesses against him, co-actor Tynell McCoy. We accept, for purposes of this opinion, the State's implicit concession that the admission of this evidence was error. But we also agree with the State that its admission was harmless.

¶32 At trial, during direct examination, co-actor McCoy seemed to assert that Benton personally threatened McCoy while both men were in jail awaiting trial. According to McCoy, Benton indicated that there would be "consequences" if McCoy testified against Benton. The prosecutor asked McCoy if that was "part of the reason you appear to be scared to testify today," and McCoy responded, "[y]es."

¶33 On cross-examination, McCoy clarified that, a couple of weeks before trial, he was told by an unnamed jail inmate that Benton had told the inmate that, if McCoy testified, McCoy would "get hurt." After this clarification, Benton's attorney moved to strike the threat evidence as hearsay. The prosecutor responded that the threat evidence "goes to [McCoy's] state of mind." The court overruled the objection.

¶34 The State does not attempt to defend the circuit court's ruling. Instead, the State seemingly concedes that the evidence was erroneously admitted to prove that Benton told an unnamed inmate that McCoy would be hurt if he

testified against Benton. The State's only argument was that admission of the evidence was harmless error. Accordingly, we will assume without deciding that admission of this threat evidence was error, and we will address the parties' dispute over whether its admission was harmless.[5]

¶35 The State argues that the hearsay threat did not affect the verdicts because it was cumulative. The State argues that the threat amounted to evidence of consciousness of guilt, evidence undermining Benton's alibi, and evidence of witness tampering by Benton. According to the State, the hearsay threat was cumulative on these topics because the jury heard other evidence that Benton attempted to locate other individuals—who saw Benton, Washington, and McCoy approach the crime scene—and kill them. The State also points to evidence that Benton beat up a cousin because that cousin took the murder weapon and sold it.

¶36 Benton responds that the threat evidence was not used by the prosecution to prove consciousness of guilt or to undermine Benton's alibi: "It was not cumulative on those points, as argued by the State." Rather, according to Benton, the threat evidence was used to bolster the credibility of Benton's two co-actors, McCoy and Washington.

¶37 The harmless error arguments on both sides are spare. However, our review of the trial evidence gives us confidence that there was no reasonable

[5] It appears the prosecutor meant to argue that the threat evidence was relevant to assessing McCoy's in-court demeanor because McCoy believed Benton threatened him, and was not offered to prove that Benton threatened McCoy. However, defense counsel did not pursue the matter, and this limited theory of admission was not clarified and no limiting instruction was requested or given. We further observe that, even if the topic had been pursued, it is questionable whether the probative value of the evidence as demeanor evidence outweighed its potential for unfair prejudice.

probability that this threat evidence affected the verdicts. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 368-69, 588 N.W.2d 606 (1999) (to support reversal, there must be a "'reasonable probability that, but for ... [the] errors, the result of the proceeding would have been different'" (quoted source omitted)).

¶38 As we discuss in the first two subsections below, the challenged threat evidence is similar in nature to other evidence that was properly admitted.

¶39 Further, as we discuss in the final subsection, the evidence of guilt was overwhelming in light of the only reason the defense gave the jury to doubt the testimony of Washington and McCoy, namely, exceedingly weak alibi testimony from several of Benton's relatives.

1. Evidence that Benton attempted to silence witnesses who might identify him as one of the three men at the crime scene

¶40 Washington testified that when he, Benton, and McCoy approached the target residence, Washington stopped briefly to talk to a woman who was visiting a friend and looking out the window in the house next door to that residence. This testimony was corroborated by a witness, L.M., who told the jury that, near the crime scene, she talked with one of three men that were shown on a video captured by a neighbor's camera. It is undisputed that the three men in the video are the perpetrators and that Washington was one of those three men.

¶41 Washington testified that Benton and McCoy were angry with Washington for stopping because they were concerned that the two "girls" might be "the reason why we get caught or I get caught." Washington testified that when he later encountered Benton, while both were in jail, Benton told Washington that Benton went back to the area multiple times for the purpose of locating these

potential witnesses so he could "get them up out of there." Washington testified that "get them up out of there" meant "he's going to kill them basically."

¶42 This testimony regarding threatening behavior toward possible witnesses was, obviously, comparable to and at least as damaging as evidence that an unnamed inmate told McCoy that Benton said that McCoy would "get hurt" if he testified against Benton.

2. Evidence that Benton beat his cousin because the cousin stole from Benton the handgun used in the crime

¶43 Both Washington and McCoy testified that, after the shooting, the three men returned to Benton's aunt's house. Washington testified that during his jail house conversation with Benton, about nine months later, Benton told Washington that Benton had hidden the handgun Benton used in the shooting, but that Benton's cousin, M.M., found the gun and sold it. Washington said that Benton told Washington that Benton had "beat [M.M.] up" for taking the gun.[6]

¶44 Washington's testimony on this topic was corroborated by evidence that Benton's cousin M.M. was beaten with a two-by-four in August 2013 and that M.M. told a police officer that one of the people who beat him was Benton.

¶45 The jury learned that, in August 2013, M.M. was beaten and taken to a hospital. In November 2013, a police officer interviewed M.M. after learning that there was an allegation that Benton and other men had beaten M.M. because Benton believed M.M. stole Benton's handgun. M.M., by agreeing with the

[6] Washington's testimony uses a nickname reference for Benton's cousin, M.M. There is no dispute, however, that Washington was alleging that Benton was talking about M.M.

officer and by making affirmative statements, identified Benton as one of the men who beat M.M. in August with a two-by-four because Benton believed that M.M. took the handgun.

¶46 It is true that M.M. testified at trial and denied that Benton beat him. But M.M.'s trial testimony was, to say the least, problematic from Benton's point of view.

¶47 As noted, before the jury, M.M. denied that Benton beat him. More precisely, M.M. first told the jury that he could not remember if he had been beaten with a two-by-four and could not remember talking to a police officer about it in November, about six months before the trial. But as questioning continued, M.M. inconsistently told the jury that he could remember that Benton never hit him with a two-by-four or anything else. And, there was no hint as to why M.M. would have falsely accused Benton during the interview in November. In fact, M.M.'s bias in favor of Benton would have been obvious to the jury. M.M. agreed that he was "close" to Benton. The jury also learned that M.M. did not want to testify at Benton's trial. M.M. was asked if he remembered "telling police that the judge can suck [M.M.'s] cock. That you are not coming in to testify," and M.M. responded to these questions by apologizing to the trial judge.[7]

¶48 Our point here is that the jury was presented with credible evidence that M.M. told a police officer about six months prior to the trial that Benton beat him because of Benton's belief that M.M. stole a handgun from Benton, thus

[7] Our assessment of how the jury would have viewed M.M.'s testimony is supported by the circuit court. In the context of deciding that M.M. should remain in custody "on a warrant" until the end of the trial, the circuit court opined that M.M.'s testimony denying that Benton beat him was "patently unbelievable."

corroborating Washington's testimony that Benton told Washington that Benton beat M.M. for taking the handgun Benton used during the robbery. We agree with the State that this evidence, like the erroneously admitted threat evidence against McCoy, portrayed Benton as a person willing to take drastic and violent action to protect himself.

3. The strength of the State's case and the weakness of Benton's alibi defense

¶49 This week-long trial included the testimony of 25 witnesses. We do not attempt to summarize all of the significant evidence. We acknowledge that there were arguable problems with identifications of Benton by other witnesses and some inconsistencies about events inside the residence where the shooting occurred. But it is clear from the evidence and the closing arguments of counsel that this case boiled down to two closely related topics—whether Washington and McCoy falsely identified Benton as the third intruder, and the credibility of Benton's alibi witnesses.

¶50 As to whether Washington and McCoy falsely named Benton, it is understandable that Washington and McCoy would want to lay blame for the shooting on the third participant in the robbery, but why pick Benton? For that matter, why would Washington and McCoy go so far as to falsely assert that they had gone to Benton's aunt's house before and after the robbery if that was not true? Nothing in the evidence suggested a motive for falsely identifying Benton as the third man or why Washington and McCoy might falsely assert the before-and-after stops at Benton's aunt's house.

¶51 Assuming, in Benton's favor, that the jury discounted identification evidence from two witnesses that were present in the robbed residence, for all practical purposes Benton's alibi testimony was all the jury was left with to

counteract the absence of a motive, on the part of Washington and McCoy, to falsely name Benton as the third man. And the alibi testimony was suspect to say the least.

¶52 The alibi witnesses needed to account for Benton's whereabouts during the time frame of the robbery and shooting, which was otherwise established as approximately 6:30 to 6:45 p.m. As noted, five of Benton's relatives testified. They all testified that, on the day of the crimes, there was a party at Benton's aunt's house. Although they varied in some respects, they all recalled that Benton was present at the party from at least about 6:30 to 7:00 p.m. There was no dispute that this is the same house that Washington and McCoy told the jury they were at just before and just after the robbery. Given that Washington was not identified as a suspect until August 2013, that McCoy was not arrested until November 2013, and that there is no indication in the trial evidence that any of the alibi witnesses were questioned about the shooting until almost a year after the shooting, the alibi witnesses' specific recollections about Benton's presence during a relatively short and critical time frame is suspicious by itself. But the real problem for Benton was that the alibi witnesses were often inconsistent with each other, inconsistent with statements they made to police officers before trial, and inconsistent with weather service information. We do not detail all of the inconsistencies or suspect assertions. The following will suffice to explain why the jury rejected the alibi testimony.

¶53 The birthday party that the witnesses testified about was an indoor-outdoor event, with one witness telling an officer that she spent most of her time in the backyard, and agreeing that "guys" at the party were in "muscle shirts." Four of the alibi witnesses variously described or agreed that the day of the party was a "beautiful day," "beautiful," not raining, "warm out," could have been in the

"60s," "kind of warm," a "beautiful night," and "probably [around] 70 degrees." However, records of the United States National Oceanic and Atmospheric Administration for the zip code that included Benton's aunt's house showed air temperatures for most of the relevant time frame at or under about 40 degrees, with wind chills registering an average of about 7 degrees lower. Reasonable people do not describe mid-April weather that feels like the low 30s as warm or beautiful. In contrast, one of the police officers who responded to the scene of the shooting, about six blocks from Benton's aunt's house, told the jury that it was cold and that it rained throughout the day "off and on." The officer said: "I had a jacket on with my suit coat and everything ...."

¶54 In addition, there were inconsistencies between what the alibi witnesses told investigating officers prior to testifying and what the witnesses told the jury. But the most glaring inconsistency came from the host of the party, Benton's aunt. The aunt told an officer six weeks before the trial that the party started at 8:30 p.m. and she remembered Benton arriving just before 8:00 p.m. She said she remembered the time because she had just taken lasagna out of the oven and Benton asked for a piece, but she refused to give it to him because it was too hot. But, at trial, the aunt asserted that Benton arrived in the 5:30 to 7:00 p.m. range. And, even her trial testimony was internally inconsistent. Later, she testified that Benton arrived at 3:00.

¶55 We could say more. But our point here is that our review of the full trial indicates that this was not a close case. Because properly admitted evidence showed Benton in a light similar to the erroneously admitted threat evidence and because of the weakness of the defense case, we are confident that there is no reasonable probability that the admission of the threat evidence affected the verdicts.

Conclusion

¶56 For the reasons above, we reject Benton's arguments and affirm the circuit court.

By the Court.—Judgment affirmed.

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