COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP908-CR **Cir. Ct. No. 2013CF4533**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TRAVARES DARRELL GRADY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Travares Grady appeals amended judgments[1] convicting him of first-degree intentional homicide by use of a dangerous weapon as a party to the crime and possession of a firearm by a felon as a repeat offender, as well as an order denying his postconviction motion. Grady challenges the denial of his motion for a mistrial, contends that he was entitled to a hearing on several claims of ineffective assistance of counsel, and claims that the evidence was insufficient to support the verdict on the firearm count. For the reasons discussed below, we reject each of the claims and affirm.

BACKGROUND

¶2 The charges were based upon allegations that Grady was one of several men involved in the shooting death of Reginald Williams in the street outside Williams' mother's home on the evening of September 27, 2013. The State's theory was that Grady was one of the shooters and/or the driver of the intended getaway car.

¶3 The victim's cousin-in-law, Tajeria Jones, testified that she and another person drove to Williams' house that evening to pick Williams up. While Jones was waiting in the car, she saw Williams "play fighting" in the street with Deshaun Patrick, who she knew as "D Bo." Patrick was wearing a black hooded sweatshirt and black knit cap. Shortly thereafter, Jones heard gunshots. When she looked over her shoulder out the back window of the car, she saw three armed men wearing black hoodies with the hoods up standing over Williams. She recognized

[1] Although the notice of appeal refers to a judgment in the singular, we note that the circuit court entered a separate judgment on each count.

one of the men as Terrell Newman, who she knew as "Pi." Newman was holding an "AK, a long gun" in his hands.

¶4 It was too dark for Jones to recognize the other two men, at least one of whom she saw firing at Williams with a handgun and who also fired at the car she was in. She thought one of the other men might be Patrick, because she had not seen him leave after play fighting with Williams moments before, and Patrick's car was still on the scene. She told police the other man might have been Grady, who she knew as "Ready Red," simply because Grady was often in company with Newman.

¶5 The victim's brother was just down the block when he saw a "couple" or three armed men come out of a "gangway" or driveway area between residences and start shooting at someone who fell to the ground. It was too dark for Williams' brother to recognize the shooters or even the victim, at first. One of the men had a long gun and at least one if not both of the other two men had handguns. The shooters started to leave, then one of the men returned and shot the victim several more times while he was on the ground, before all three ran off through the same gangway from which they had come. Williams' brother thought that the person who had been playing around with the victim in the street prior to the shooting ran off through a different driveway, one house over.

¶6 Several police officers from an anti-gang unit were investigating a separate incident about a block and a half away when they heard shots fired and responded immediately. Detective (then Officer) Chad Vartanian and his partner Officer Sean Mahnke were already in their squad car headed toward the scene when they heard a second round of both large and small caliber shots and could see the muzzle flashes. They exited their vehicle and were advancing toward what

they thought could be an active shooter situation when, no more than ten to fifteen seconds after the shooting stopped, they saw a man wearing a black hooded sweatshirt come out of the same gangway through which the victim's brother had seen the shooters flee. Vartanian stopped the man—who turned out to be Grady—for questioning. Mahnke frisked Grady and recovered a set of keys.

¶7 Grady told police that he had been in the area for about an hour visiting a girl named Nisha, but Grady had no last name or phone number for the girl, and no one at the house where Grady indicated that the girl lived had heard of anyone named Nisha.

¶8 Officer Daniel Keller and his partner also responded to the scene while shots were still being fired and saw Grady coming out of the gangway. Keller and another officer found a .40 caliber handgun with an extended clip wrapped in a black t-shirt and an AK-47 in a back yard adjoining the gangway. Keller described the back yard as part of a series of overgrown back yards in the interior of the block referred to in the neighborhood as "the jungle." Keller further observed that a red, four-door sedan had been backed into the gangway adjoining the yard where the weapons were found. One of the keys that Mahnke found on Grady fit the red sedan. Grady said that he was the only one with a key to the red sedan.

¶9 Officer Chad Boyack, who also observed the red sedan, noticed that its trunk was ajar and that its hood was still warm. Boyack could see a duffle bag through the trunk opening and opened the trunk further. Detective Luke O'Day searched the duffle bag and found an unused ammunition clip for an AK-47 in it. Another officer also recovered .40 caliber and assault-rifle casings in the area where the shooting had occurred.

¶10 In addition to the information above, at trial the jury learned the following.

¶11 The red sedan was registered to Grady's girlfriend. DNA recovered from the steering wheel, gear shift, and driver's door handle of the red sedan was matched to Grady. Security footage from a nearby grocery store showed that the red sedan had backed into the gangway with its lights turned off at 9:58 p.m., about three to five minutes before the shooting.

¶12 While police were still on the scene, an unknown woman, coming from the direction of the wooded back yard area known as "the jungle," approached the victim's mother and handed the mother a cell phone. The mother turned the cell phone over to police. Police linked the cell phone to Newman, one of the men Tajeria Jones identified as having participated in the shooting. The cell phone was linked to Newman because it contained a photo of Jones that Jones had sent to Newman. In addition, the cell phone's number was labeled as "P Plus" in Grady's phone and labeled as "Pi" in Deshaun Patrick's phone. Patrick, according to Jones, was one of the three men she saw at the scene of the shooting.

¶13 Data downloaded from the cell phones of Grady, Newman, and Patrick showed calls on the night of the homicide from Newman's phone to Patrick's phone at 8:17 p.m.; from Grady's phone to Patrick's phone at 9:31 p.m.; from Newman's phone to Patrick's phone at 9:35 p.m.; and from Patrick's phone to Newman's phone at 9:50 p.m. and 9:56 p.m.

¶14 Finally, Marques Davis, who was a former roommate of Grady and Newman, testified that Grady and Newman were as close as brothers. The victim, Williams, had also been among Grady and Newman's circle of neighborhood friends, along with Patrick and Darrin Whitmore, known as "Diesel." Whitmore is

significant because Davis told the jury that, prior to the charged shooting, Williams and Whitmore got into an altercation during which Williams shot at Whitmore. After that incident, Newman, Grady, and Patrick all took Whitmore's side in the dispute. Also, according to Davis, right after the altercation, Newman and Davis purchased an AK-47 and stored it at the house where they were living with Grady.

STANDARD OF REVIEW

¶15 The decision whether to grant a mistrial lies within the discretion of the circuit court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). Thus, we will not overturn a discretionary determination merely because we would have reached a different result. Rather, "[b]ecause the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary decisions." ***Id.*** at 591 (quoted source omitted). Even if the circuit court has relied upon the wrong rationale, we may affirm the decision if we can determine for ourselves that the facts of record provide a basis for the circuit court's decision. ***State v. Gray***, 225 Wis. 2d 39, 51, 65, 590 N.W.2d 918 (1999).

¶16 In order to obtain a hearing on a postconviction motion, a defendant must allege material facts sufficient to warrant the relief sought. ***State v. Allen***, 2004 WI 106, ¶¶9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. In the context of a claim of ineffective assistance of counsel, that means the facts alleged would, if true, establish both that counsel provided deficient performance and that the defendant was prejudiced by that performance. ***State v. Swinson***, 2003 WI App

45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. No hearing is required, though, when the defendant presents only conclusory allegations or when the record conclusively demonstrates that he or she is not entitled to relief. ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Non-conclusory allegations should present the "who, what, where, when, why, and how" with sufficient particularity for the reviewing court to meaningfully assess the claim. ***Allen***, 274 Wis. 2d 568, ¶23.

¶17 In reviewing the sufficiency of the evidence to support a criminal conviction, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence produced at trial, including evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29.

DISCUSSION

Sufficiency of the Evidence

¶18 Grady contends that the evidence was insufficient to support the verdict on the charge of possession of a firearm by a felon. The elements the State needed to prove were that: (1) Grady had possession, meaning actual physical control, of a weapon that acts by the force of gunpowder; and (2) Grady had previously been convicted of a felony. Grady stipulated that he had previously been convicted of a felony that had not been reversed or expunged. Therefore, the

only question was whether Grady exercised actual physical control over a weapon on the date in question.

¶19 Grady argues that the trial testimony establishes that only two of the three men involved in the shooting were armed—one with an AK-47, and the other with a handgun—and that there was no evidence directly identifying Grady as one of the men holding a weapon.

¶20 First, we disagree with Grady's characterization of the evidence. Although there were some contradictions in the evidence as to whether there were two or three guns, both Jones and the victim's brother testified at various points that all three of the men they saw standing over the victim were armed. Since the brother also testified that he saw the man who had previously been playing with Williams—who Jones identified as Patrick—run off through a different gangway, one inference that could reasonably be drawn from the evidence was that Grady and Newman had run down the gangway toward the red sedan while Patrick (who had his own car at the scene) had run off along a different path with his own weapon that was never recovered.

¶21 Secondly, even if we were to accept the premise that there were only two weapons involved since there were only two weapons recovered, the evidence still supported the inference that Grady was the second shooter, while Patrick's role had merely been to make sure that Williams was present at the ambush site.

¶22 Third, even if we were to accept the premise that Grady had merely been waiting by the car while Newman and a fourth, unidentified man had gone to shoot Williams, the jury could reasonably infer that Grady exercised control over both the AK-47 and the handgun by transporting them, along with Newman, from

the house where the weapons were being stored to the site of the shooting. *See* WIS JI—CRIMINAL 1343.

¶23 We conclude that the evidence was sufficient to support the verdict on the count of possession of a firearm by a felon.

Motion for Mistrial

¶24 Prior to trial, the State moved to introduce statements made by the unknown woman when she handed Newman's cell phone to the victim's mother. Among those statements were that the woman had heard the phone ringing in the jungle and then found it there lying in the bushes with its face lit up. The circuit court excluded the statements on confrontation grounds, concluding that they were testimonial in nature. The prosecutor asked for clarification that "the State is then still allowed to introduce the handing of the phone from this woman to [the mother], just not the nature upon which she found it?" The circuit court agreed that the mother could testify about where and when the woman handed her the phone, but that the State would need to rely on other evidence such as GPS or cell tower data to say that the phone had been in the jungle in that time frame.

¶25 At trial, while questioning a police officer about the data recovered from Newman's cell phone, the prosecutor stated, "So this is the one in the jungle." Defense counsel immediately asked that the prosecutor's statement be stricken. Before the circuit court could rule on the motion to strike, the prosecutor stated:

> I'm sorry. This is the one from the woman I'll say — let me put it this way. It came from the jungle. Unknown.

Grady subsequently moved for a mistrial, contending that the prosecutor's comment about where Newman's cell phone came from violated the court's pretrial ruling. The circuit court denied the motion, stating that it found no manifest injustice warranting a mistrial.

¶26 The parties agree that the circuit court applied an erroneous legal standard in exercising its discretion. The test for a mistrial is not manifest injustice, but rather "whether the claimed error was sufficiently prejudicial to warrant a new trial" in light of the whole proceeding. ***Ross***, 260 Wis. 2d 291, ¶47. Therefore, we look to the record to determine whether it would have otherwise supported the circuit court's decision to deny a mistrial.

¶27 First, we conclude that the prosecutor's comment was not improper because the comment would not have been understood by a reasonable juror as an assertion about an out-of-court statement by the unknown woman. Instead, referring to the cell phone as coming from the jungle was a reasonable inference based on the victim's mother's testimony that the woman who gave her the phone was approaching from the direction of the jungle. Indeed, that is how the prosecutor later argued the matter during closing arguments.

¶28 Further, even if we assume for purposes of this decision that the prosecutor's comment communicated an out of court statement by the unknown woman, we are convinced that such error was not sufficiently prejudicial to warrant a mistrial. As we have discussed, the cell phone handed to the victim's mother belonged to Newman, not Grady. An eyewitness positively identified Newman as the shooter with the AK-47, and that identification was supported by testimony that Newman had bought an AK-47 after a dispute involving the victim. Thus, the prosecutor's comment, at worst from Grady's point of view, helped

establish Newman as one of the shooters. The comment added little if anything to the proposition that one of Newman's accomplices that day was Grady.

¶29 Moreover, there was strong evidence supporting Grady's participation in the homicide even if Newman had not been identified as one of the shooters. Grady was apprehended exiting the same gangway that the victim's brother had seen the shooters flee into merely seconds earlier; Grady was in sole possession of the key to a car in that gangway that had an AK-47 ammunition clip in its trunk and that surveillance video showed backing into the gangway with its lights turned off minutes before the homicide; and the murder weapons were also discovered in a yard along that gangway near the car.

Assistance of Counsel

¶30 Grady raised three claims of ineffective assistance of counsel in his postconviction motion. We conclude that none of them warranted a hearing.

¶31 First, Grady claimed trial counsel should have moved to suppress the AK-47 ammunition clip seized during the warrantless search of the trunk of the red sedan. The circuit court denied the motion without a hearing, reasoning that opening the trunk was justified under either the automobile exception or the protective sweep doctrine. The court further concluded that Grady had no standing to object to the search of the duffle bag because he disclaimed any knowledge or ownership of the bag. The court also reasoned that the evidence would inevitably have been discovered because the police subsequently obtained consent to search the vehicle from its owner, Grady's girlfriend.

¶32 Grady asserts that a warrantless search is *per se* unreasonable, unless the State can demonstrate that an exception applies. However, in the context of an

ineffective assistance of counsel claim, the burden remains on the defendant to show prejudice, including that a motion or challenge that was not made would have been successful. *See* ***State v. Roberson***, 2006 WI 80, ¶35, 292 Wis. 2d 280, 717 N.W.2d 111 (defendant needed to show in-court identification was tainted to prove prejudice on ineffective assistance claim, even though it would have been State's burden had objection been raised at trial).

¶33 In his initial brief, Grady asserts that the State would not have been able to establish any exception to the warrant requirement. Grady then discusses why two potential exceptions—the plain view doctrine and the incident-to-arrest doctrine—would not apply, without addressing any of the theories of admission actually cited by the circuit court. In reply to the State's reiteration of the circuit court's rationale that the evidence would have been admissible under the vehicle exception, Grady asserts that he satisfied all he needed to do to obtain a hearing by alleging that counsel should have objected to the seizure of evidence without a warrant, and that it is unfair to make him anticipate and address all possible exceptions to the warrant requirement that the State might have raised to satisfy the State's burden if a suppression motion had been filed.

¶34 Grady's argument might be more persuasive in a different procedural posture. Here, however, Grady was not alleging any facts beyond those that were produced at trial. That is, there was no factual dispute about how the evidence was seized; there is merely a question of law as to whether the seizure was constitutional, thereby providing a basis for us to conclude that the absence of a motion to suppress constituted ineffective assistance of counsel. In that context, we are not persuaded that it would have been difficult for Grady to anticipate obvious theories of admissibility, such as the vehicle exception. More to the point, on appeal Grady has still failed to persuasively explain why the

automobile exception, and others noted by the circuit court in the postconviction proceedings, do not apply.

¶35 Although we conclude that multiple exceptions to the warrant requirement apply, we choose to simply explain why Grady's argument against the automobile exception does not persuade us.

¶36 Grady argues that the officer's testimony about why he opened the trunk did not satisfy the test for the automobile exception. We disagree. Boyack testified at trial that "just based off the sheer incident that we were there for, the shooting and the items we had just located, I then proceeded to open the trunk, make sure there were no bodies in there." Under the automobile exception, the police may search a vehicle without a warrant if the vehicle is readily mobile and probable cause exists to believe that it contains contraband. ***Maryland v. Dyson***, 527 U.S. 465, 467 (1999). Grady points to evidence of the subjective thinking of the officer, but ignores the fact that the test for probable cause is objective, not subjective. That is, the test is whether the available facts would lead *a person of reasonable caution* to believe it likely that contraband would be found in the vehicle. ***State v. Tompkins***, 144 Wis. 2d 116, 123-25, 423 N.W.2d 823 (1988).

¶37 Here, the presence of a vehicle backed into an gangway very near the scene of a shooting at the time of the shooting, with its trunk ajar and adjacent to a yard where two weapons had just been found, would lead a person of reasonable caution to believe that the vehicle was likely the intended getaway car and that it might have additional weapons or ammunition in it. Since Grady did not allege in his postconviction motion any factual disputes with the trial testimony related to the search, there is no reason to suppose that the absence of a

suppression motion resulted in prejudice. The trial record contains undisputed testimony satisfying the automobile exception to the warrant requirement.

¶38 We now turn our attention to Grady's second ineffective assistance claim. Grady claimed trial counsel should have objected to repeated references at trial to "gang activity." Grady argues that these references suggest that Grady and the other alleged co-actors were affiliated with a street gang. However, the references to which Grady points all related to the fact that the officers who responded to the shooting were members of an anti-gang unit. The testimony was clear that the anti-gang unit officers were in the area for a separate incident when they heard the shooting. Therefore, we are confident that the failure to object to these references had no effect on the verdicts.

¶39 Third, Grady claimed trial counsel should have raised a foundational objection when one of the police officers testified about data from Patrick's phone that had actually been retrieved by another officer. Assuming for the sake of argument that a foundational objection would have been sustained, we conclude that Grady was not prejudiced by counsel's failure because essentially the same information gleaned from the analysis of Patrick's phone was properly entered into evidence through the officer's testimony about the data on Grady's and Newman's phones, which the testifying officer did examine himself.

¶40 For that matter, Grady did not demonstrate that an objection would have blocked admission of cell phone data evidence. As Grady's own argument implicitly acknowledges, another officer could have provided this information. If Grady's trial counsel had objected, Grady now gives us no reason to suppose that the prosecutor could not have called a different witness with sufficient personal knowledge.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).