

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 15, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1509-CR

Cir. Ct. No. 2015CF4712

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TERRELL DAWON ESSEX,

DEFENDANT-APPELLANT.

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

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. Terrell Dawon Essex appeals from a judgment of conviction, following a jury trial, of one count of being a felon in possession of a firearm, as a repeater, and one count of first-degree reckless homicide by use of a dangerous weapon as a party to a crime. Essex contends that the trial court erred

in admitting certain evidence which he characterizes as “other acts” evidence. We disagree that the evidence at issue was “other acts” evidence, but conclude that the evidence was admissible as direct evidence relevant to the crimes charged. Consequently, we affirm.

BACKGROUND

¶2 Essex was charged with one count of being a felon in possession of a firearm, as a repeater, and one count of first-degree reckless homicide by use of a dangerous weapon as a party to a crime, for the shooting death of Terry Dotson. According to the criminal complaint and subsequent information, Dotson was shot outside of his girlfriend’s apartment building in the City of Milwaukee. A witness told police that Essex possessed a gun earlier in the day, that Dotson and Essex engaged in a physical fight earlier in the day, and that she heard gunshots immediately before discovering Dotson lying on the ground. Another witness was also shot during the incident. None of the witnesses saw the actual shooting, nor was the gun used to kill Dotson recovered.

¶3 Prior to trial, the State filed a motion to admit “evidence regarding the defendant’s prior use of the same firearm involved in the homicide he is charged with in the instant case [involving Dotson’s death].” Specifically, the State sought to admit seven nine-millimeter bullet casings that police found in Essex’s car in May 2015 while investigating a drive-by shooting in which Essex was the victim. The motion alleged that the casings were consistent with “someone inside [Essex’s] vehicle having returned fire.” The motion stated that the Wisconsin State Crime Lab compared the casings from the May 2015 incident to the bullets fired at Dotson and concluded that the casings were fired from the

same firearm. The State argued that the evidence was direct evidence connecting Essex to the murder weapon.

¶4 The trial court granted the motion, finding that the evidence was both direct evidence and admissible other acts evidence. The court stated:

In many ways, I agree it is direct evidence. In some ways, though, it does fall under the other acts evidence in the sense that because Mr. Essex was ... a felon at the time of this shooting five months prior to this, so he shouldn't have had the gun. So even if he's shooting in self-defense, he's still afoul of the law.

....

But, most fundamentally, this is very, very [probative] evidence. Whether it's rock solid does not limit that relevancy, that [probative] value, to such a point as to take away the basic conclusion that it's highly relevant.

¶5 The matter proceeded to trial where multiple witnesses testified. L.H., Dotson's girlfriend, told the jury that Dotson and Essex were "associate[s]." She stated on the day of the shooting, she, Dotson and Essex were driving around in Essex's white Cadillac. At some point during the drive, Dotson and Essex got into a heated argument over gas money. Essex pulled out a semiautomatic gun and pointed it at Dotson. The two calmed down and Essex left. Dotson and L.H. got a ride back to L.H.'s apartment. L.H. realized that she left her phone in the back of Essex's car and asked Dotson to call Essex to drop it off. Dotson called Essex, and Essex told Dotson that he found the phone and would drop it off. L.H. stated that Dotson went outside of the building to wait for Essex. L.H. stated that she went to check on Dotson, who was standing on the front steps of the apartment building waiting for Essex. When she went to check on Dotson she noticed another woman, R.M., leaving the building. L.H. stated that she was walking back into the apartment building when she heard shots being fired. She ran outside and

found Dotson lying on the ground. She saw two men in hoodies run to Essex's Cadillac. She then saw Essex in the driver's seat hitting the steering wheel with his hands "as though he knew he had done wrong."

¶6 R.M. told the jury that on the day of the shooting, she was staying at her brother's apartment and waiting for her nephew to come over. She went to the building's entrance and saw Dotson sitting on the front steps talking on the phone. She heard Dotson say "[y]eah, I see your car, but where you at?" R.M. then saw a white Cadillac coming up the street without its headlights on. R.M. stated that she went back inside the apartment building for a few minutes and came back out to check if her nephew had arrived. She stated that two men approached Dotson, one was "quiet but aggressive," while the other, whom she heard being referred to as "Bee Bee," was talking. R.M. walked through or around the three men to get to the street when she heard one of the men tell another to "shut the F up and pass him ... [his] shit." R.M. thought the man was referring to a gun and was correct, as she then felt a rush of wind from a bullet pass her. She turned around to see the individual she later identified as Essex pointing a gun at her. Essex continued to shoot and a bullet struck R.M.'s elbow. She ran to a nearby bus stop and asked someone to call for help. When the police arrived, R.M. pointed to the white Cadillac and told officers that the occupants of the Cadillac shot her and Dotson. At that point the Cadillac was travelling eastbound on a nearby street. R.M. later identified Essex in a photo array.

¶7 Detective Vanessa Harms had previously searched the vehicle Essex was in when he was shot at in May 2015. Harms testified that she found mail with Essex's name in the vehicle, along with multiple fired bullet casings. Harms said that the location of the casings were consistent with "an individual who is in the rear compartment of this vehicle firing back[.]"

¶8 Xai Xiong, a firearms and tool mark examiner for the Wisconsin State Crime Lab, testified that he examined the casings found in Essex's car in May 2015 and compared them to the casings retrieved from the Dotson shooting. Xiong determined that the casings found in Essex's car and the casings from the bullets fired at Dotson were all fired from the same firearm.

¶9 Essex also testified. He denied shooting Dotson and denied "fir[ing] back" in the May 2015 incident.

¶10 The jury found Essex guilty as charged. This appeal follows.

DISCUSSION

¶11 On appeal, Essex argues "the other acts evidence in the form of evidence of another shooting and matching ballistics should not have been admitted." (Capitalization omitted.)

¶12 The admissibility of evidence is a matter within the trial court's discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). Consequently, a trial court's evidentiary ruling will not be upset on appeal if the court had "a reasonable basis" and it was made "in accordance with accepted legal standards and in accordance with the facts of record." *Id.* (citation omitted).

¶13 We disagree with Essex's characterization of the evidence at issue as "other acts," and instead agree with the trial court that the evidence at issue was direct evidence linking Essex to the firearm used to kill Dotson. The State did not allege that Essex committed an "other act" in May 2015. The jury was told that Essex was the victim in the May 2015 drive-by shooting.

¶14 Rather, the evidence—casings found in Essex’s car in May 2015 and expert testimony that the casings matched those found at the scene of Dotson’s shooting—was relevant and probative as to both of the charges against Essex. Essex was charged with first-degree reckless homicide by use of a dangerous weapon, as a party to a crime, and felon in possession of a firearm, as a repeater. Evidence that the gun used to kill Dotson had been in Essex’s possession months prior to the shooting was relevant to whether Essex either directly caused Dotson’s death by shooting him, or aided and abetted in the death by providing the weapon used to kill Dotson. The evidence was also relevant to whether Essex was in possession of the firearm used to kill Dotson.

¶15 Two witnesses saw Essex with a firearm on the day Dotson was shot. L.H. witnessed Essex pull a gun out on the day of the shooting and threaten Dotson. R.M. identified Essex as the man who shot her and Dotson. Evidence of the May 2015 bullet casings ultimately corroborated the witnesses’ testimony and served as tangible evidence connecting Essex to the crimes charged.

¶16 The trial court’s admission of this evidence had a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *See id.* Accordingly, the trial court did not erroneously exercise its discretion when it admitted the evidence of the May 2015 bullet casings from Essex’s car.¹

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¹ Because we affirm the trial court’s decision to admit the evidence as direct, relevant evidence of the crime, we do not consider further whether the evidence was admissible other acts evidence, or whether the trial court’s findings constitute harmless error. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“cases should be decided on the narrowest possible ground”).

