COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP25-CR **Cir. Ct. No. 2006CF1848**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT-PETITIONER,

V.

OLU A. RHODES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Olu A. Rhodes appeals a judgment entered after a jury found him guilty of first-degree intentional homicide as party to a crime, *see* WIS. STAT. §§ 940.01(1)(a) & 939.05, and first-degree recklessly endangering safety as party to a crime, *see* WIS. STAT. §§ 941.30(1) & 939.05. This case was here

before, and we reversed and remanded for a new trial because we concluded that the trial court had improperly truncated Rhodes's right of cross-examination. ***State v. Rhodes***, 2009AP25, unpublished slip op., 2010 WL 2671289 (WI App July 7, 2010). The supreme court disagreed and reversed. ***State v. Rhodes***, 2011 WI 73, ¶¶3–4, ___ Wis. 2d ___, ___, 799 N.W.2d 850, 853. It has directed us to consider Rhodes's remaining contentions, which we now do. He contends that the trial court: (1) erroneously allowed a State witness to give expert testimony for which, he argues, she was not qualified; (2) erroneously did not grant a mistrial motion when the State, in its closing argument, told the jury that cellular telephone records showed that Rhodes was at the scene of the shootings; and (3) erroneously excluded evidence that the victim who survived had once been convicted of driving without a license. We affirm.

I.

¶2 As we recounted in our earlier opinion,

> Olu A. Rhodes and his brother, Jelani Saleem, were tried together for the shooting death of Robert Davis and the shooting injury of Jonte Watt. The State's theory was that the brothers killed Davis because they thought he was responsible for the beating of their sister, Nari Rhodes, and that Watt was an unlucky bystander. Watt and his girlfriend, Dominique Walker, were with Davis at the time of the shooting. Both Walker and Watt identified the brothers as the shooters. The jury acquitted Saleem.

Rhodes, unpublished slip op., ¶2. Part of the State's evidence was that Rhodes used Saleem's cell phone the day of the shooting, and that cell-phone records placed him at the scene of the shootings. To support that theory, the State called an employee of the company providing Saleem's cell-phone service, and an employee of the Wisconsin Department of Justice. It is the testimony of the latter

witness, Melissa Marchant, that Rhodes contends was improper because, he claims, it was beyond the scope of her expertise.

¶3 The telephone company representative produced, pursuant to subpoena, a log of the calls made and received by Saleem's cell phone, and the cell-phone towers to which those calls were connected, together with the towers' longitude and latitude coordinates. She testified that a cell-phone call will connect to the tower with the strongest signal, which may be, but not necessarily is, the tower closest to the cell phone. She also agreed with Rhodes's lawyer that the documents she produced could not indicate where a person making a cell-phone call was standing when the call connected to the tower, but, rather, the best that could be shown was that the call came from within a particular tower's sector.

¶4 Marchant, who described herself as a "criminal intelligence analyst" working for the Department of Justice, testified that, using a computer program, she mapped the coordinates supplied by the cell-phone company for their various towers, and translated those coordinates into street intersections. She testified that she was a high-school graduate and had undergone training to learn how to map the coordinates. She also told the jury that she "received telephone analysis training, paneling training which involves cell phone, cell towers and understanding that information." As with the cell-phone company employee, she acknowledged that a cell phone will "grab the closest tower with the strongest reception." The State gave the requisite notice to Rhodes and Saleem that either Marchant or another Department of Justice employee would "testify to the ability of cellular phone records and cellular towers to be used for the purpose of triangulating the position of a cell phone at the time that cellular activities (i.e. text messaging, voice calls) occur. They will further testify to the ability to map such activities in relation to a crime scene." *See* WIS. STAT. § 971.23(1)(e) (State must

disclose to a defendant "any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony."). The notice also told the defendants that they could get copies of the potential witnesses' "curricula vitae or resume" from the Milwaukee County district attorney.

¶5 We address Rhodes's contention in turn.

II.

A. *Expert Testimony*.

¶6 Admission of evidence is in the trial court's reasoned discretion. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998). "An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***Id.***, 216 Wis. 2d at 780–781, 576 N.W.2d at 36. This is true of expert testimony as well. ***State v. Donner***, 192 Wis. 2d 305, 317, 531 N.W.2d 369, 374 (Ct. App. 1995) ("The question of an expert witness' qualifications is a matter resting in the sound discretion of the circuit court, and unless it is shown that the court misused its discretion, its ruling will stand."). Moreover, "[a] witness called to give expert testimony may, like any other witness, establish a proper testimonial foundation by his or her own testimony. *Cf.* RULE 906.02, Stats. (A witness' requisite personal knowledge may be proven by his or her own testimony.)." ***James v. Heintz***, 165 Wis. 2d 572, 579, 478 N.W.2d 31, 34 (Ct. App. 1991). Further, WIS. STAT. RULE 907.02 requires a question-by-question analysis; an expert in one area may not have sufficient expertise to answer all questions asked at trial. *See* ***Green***

v. Smith & Nephew AHP, Inc., 2000 WI App 192, ¶23, 238 Wis. 2d 477, 499–500, 617 N.W.2d 881, 891, *aff'd*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727.

¶7 At the time of trial, WIS. STAT. RULE 907.02 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[1] Rhodes does not contend that the cell-phone company employee was not qualified or that her testimony was not admissible; rather, he claims that the trial court should have sustained the following objections to questions the State asked Marchant. We set out concurrently with our analysis each of the questions that Rhodes specifically identifies in his brief. He admits however that Marchant was qualified to identify "points on the map that corresponded to cell tower hits."

(1) "Q Now what is the significance of the towers? What is a cell phone tower?" Rhodes's lawyer objected, and the trial court overruled the objection. This was well within the trial court's discretion because based on what Marchant said was her training, she would know what a cell-phone tower was.

(2) Rhodes also objected when Marchant told the jury: "If you have one cell tower and you're at home all day and you make 20 calls, it's just going to give you that one tower." The trial court overruled the

[1] WISCONSIN STAT. RULE 907.02 was amended and substantially changed by 2011 Wis. Act 2 §§ 34(m) & 37. The parties do not argue that the new rule applies here.

objection. This also was well within its discretion because given Marchant's recounting of her training, the answer was within her ken, and Rhodes did not seek a *voir dire* of Marchant to show that it was not. *See* WIS. STAT. RULE 901.03(3) (hearing on "offers of proof or asking questions" should, "to the extent practicable," be out of jury's presence). He also does not contend that her testimony was wrong.

(3) Marchant then said: "So it wouldn't show another registration. You could have multiple calls on that one tower which is – which is what happened here." Rhodes asked that the trial court strike the "last answer" because there was, according to him, "no foundation." The trial court denied the motion, telling Rhodes's lawyer that he would "be able to cross." Rhodes does not develop an argument why this ruling was an erroneous exercise of discretion. Indeed, ***State v. Walstad***, 119 Wis. 2d 483, 519, 351 N.W.2d 469, 487 (1984), tells us that cross-examination was the preferred way of dealing with expert evidence that was helpful to a jury and "'reliable enough to be probative.'" (One set of quotation marks and citation omitted.) Significantly, as before, Rhodes does not even suggest that the answer was wrong.

(4) Rhodes also objected when Marchant said that a cell phone "will grab the closest tower to the phone." The trial court overruled the objection. As we have seen, however, Marchant also testified that a cell phone would "grab the closest tower with the strongest reception," and this was consistent with what the cell-phone company employee also told the jury, so, at the most, the effect of

Marchant's initial comment was *de minimis*. Moreover, whether a cell phone "will grab" this or that tower appears on our Record to be arguably within the scope of Marchant's expertise as she described it. The trial court did not erroneously exercise its discretion in overruling the objection.

B. *Alleged Prosecutorial Misstatement During Closing Argument and Rhodes's Mistrial Motion.*

¶8 A prosecutor during his or her summation is permitted to comment fairly on the evidence. *See* ***State v. Amundson***, 69 Wis. 2d 554, 572, 230 N.W.2d 775, 785 (1975). Further, "[w]hether to grant a mistrial is a decision that lies within the sound discretion of the circuit court." ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 606, 754 N.W.2d 150, 168.

¶9 Further, Rhodes complains that the prosecutor misused the cell-phone evidence to tell the jury during his closing argument: "So you can look at all these records look at the phone and they put Olu Rhodes at the scene of the shooting at the time of the shooting." Rhodes's trial lawyer immediately objected: "That is a misstatement of the evidence, and you know it." The trial court overruled the objection and, later, denied Rhodes's motion for a mistral, ruling that the prosecutor's comment was "fair."

¶10 Rhodes admits that the cell-phone evidence placed him "in the neighborhood" of the shootings, where Rhodes also lived. As we have seen, the jury heard testimony that the cell-phone records could only show that a particular call connected within a cell tower's sector, and could not pinpoint an exact location. Thus, the trial court correctly recognized that the jury could assess whether the towers' sectors were close enough to the scene of the shootings so, as

the prosecutor argued, the records connecting Rhodes's calls to those towers put him "at the scene of the shooting at the time of the shooting."

C. *Surviving Victim's Prior Convictions.*

¶11 Rhodes argues that the trial court erred when it permitted the jury to know about two of the surviving victim's prior felony convictions, possession of cocaine with intent to deliver, and carrying a concealed weapon, but not that he also had a third conviction, which was for driving without a license.

¶12 As material, WIS. STAT. RULE 906.09 provides:

> **(1)** GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.
>
> **(2)** EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

"Whether to allow prior-conviction evidence for impeachment purposes under § 906.09, Stats., is within the discretion of the trial court." ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995). Wisconsin does not let the jury know the nature of the crimes. ***State v. Rutchik***, 116 Wis. 2d 61, 76, 341 N.W.2d 639, 646 (1984).

¶13 In denying Rhodes's request that the jury be told that the surviving victim had three rather than two convictions, the trial court opined: "I think that an operating without a license is not such a crime that should be, even under the Wisconsin rules, considered." Significantly, Saleem's lawyer agreed with the trial court. Telling the jury that the surviving victim had three rather than two prior

convictions without also telling them that one of the convictions was for a relatively minor offense, would have been misleading. The trial court did not erroneously exercise its discretion in denying Rhodes's request.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.