COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1825-CR **Cir. Ct. No. 2006CF594**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY S. SHANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Terry S. Shannon appeals from a judgment convicting him of first-degree intentional homicide and discharging a firearm from a vehicle, both as a party to a crime. Shannon contends that the State violated its

discovery obligations under WIS. STAT. § 971.23(1)(e) (2005-06)[1] by failing to disclose an opinion of the medical examiner. He further contends that the circuit court erred by admitting certain evidence found at the residences of Shannon and his brother as well as a Chicago apartment in which they were arrested. We reject Shannon's claims and affirm the judgment of conviction.

¶2 On May 11, 2006, the State filed a criminal complaint charging Shannon and his brother Antonio Shannon ("Tony") with first-degree intentional homicide and discharging a firearm from a vehicle, both as a party to a crime. The charges stemmed from the brothers' roles in the shooting death of Benny Smith in Racine. The complaint accused Shannon of driving a car to the crime scene where Tony shot and killed Smith while Smith was sitting in another car with several other men. The brothers fled Wisconsin and were eventually arrested in Chicago. Their cases were joined for trial without objection.

¶3 On October 8, 2007, Shannon and Tony entered guilty pleas to a reduced charge of second-degree reckless homicide as a party to a crime. However, they later withdrew their pleas and obtained new attorneys.

¶4 On October 5, 2009, the cases proceeded to a jury trial that lasted several days. The defense was that Smith was killed by gunshots fired by the men inside the car with Smith as they shot at Shannon and Tony. The jury rejected this defense and found both Shannon and Tony guilty of the charged crimes. The circuit court subsequently sentenced Shannon to life imprisonment without the possibility of parole. This appeal follows.

[1] All references to the Wisconsin Statutes are to the 2005-06 version.

¶5 This case presents issues involving an alleged discovery violation and the admission of certain evidence. We analyze alleged discovery violations in three steps, each of which presents a question of law reviewed de novo. ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517. The first step is to establish whether the State failed to make a required disclosure. ***Id.*** The second step is to determine whether the State had "good cause" for the failure. ***Id.*** Finally, if the evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless. ***Id.*** Meanwhile, a circuit court's decision to admit or exclude evidence is discretionary and will not be upset if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the case. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

¶6 Shannon first contends that the State violated its discovery obligations under WIS. STAT. § 971.23(1)(e)[2] by failing to disclose an opinion of the medical examiner. Specifically, he complains that the State failed to inform the defense that the medical examiner was going to testify that the fatal gunshot wounds were atypical, meaning they had passed through something before hitting Smith.

¶7 In its opening statement, the State indicated that the medical examiner who performed Smith's autopsy, Dr. Lynda Biedrzycki, would testify

[2] WIS. STAT. § 971.23(1)(e) requires that "[u]pon demand, the district attorney shall" disclose "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…."

that the two likely fatal bullet wounds to Smith's head and neck were atypical. The State said Biedrzycki would testify:

> that what atypical means is that the bullet prior to striking Benny Smith struck something else like going through a windshield. It's a very important piece of information, because we know one fatal shot came from outside, from outside; an outside-in bullet, and another had a wound from the outside in, and the wound to the neck, which would most likely have been fatal was from outside the vehicle to in.

¶8 Prior to Biedrzycki's testimony, counsel for both Shannon and Tony objected to her being allowed to testify that the fatal wounds were atypical. They complained that the opinion was not in her autopsy report. In making this argument, Tony's attorney acknowledged that Tony's previous attorney had told him that Biedrzycki had concluded that "it was possible that a bullet coming through the windshield could have killed Benny Smith," and that this information was "one of the factors" that led previous counsel to decide "to do something other than go to trial." This acknowledgement was supported by the prosecutor who indicated that the information "was all common knowledge and one of the main reasons that … prior counsel in this case wanted to enter a plea … two years ago."

¶9 Ultimately, the circuit court allowed Biedrzycki to testify that the two likely fatal bullet wounds were atypical. The court found that Shannon and Tony were aware of this information long before trial. It explained in relevant part:

> The District Attorney's obligation was to provide the report of the Medical Examiner which they did. They provided her report back in before … these gentlemen initially took pleas on this case, it's in the record. One of the things that was an impetus in the change of plea was the fact that the Medical Examiner opined that a bullet coming through the windshield could have killed the victim. That is the definition of an a-typical wound. The fact that that phrase

> may not appear in her report doesn't seem to matter. You have the information regardless of what it's called, regardless of the term that a bullet which hit something before it hit the victim could have killed the victim….
>
> So the fact that we sit here now after almost four complete days of trial and this is indicated as surprise is just not flying with me. There is no surprise.

¶10 In light of this record, we are satisfied that the State did not violate its discovery obligations with respect to Biedrzycki's opinion regarding the fatal wounds. As noted, the first step in analyzing an alleged discovery violation is to establish whether the State failed to make a required disclosure. Here, Shannon's argument fails this step because the State disclosed the substance of Biedrzycki's opinion before Shannon and Tony entered their later-withdrawn guilty pleas. That was nearly two years before trial. Accordingly, we conclude that Shannon is not entitled to relief on his claim.

¶11 Shannon next contends that the circuit court erred by admitting certain evidence found at his residence and Tony's residence as well as a Chicago apartment in which they were arrested. He submits that this evidence, which included firearms, ammunition, drugs, and drug-sale related items constituted improper other-acts evidence in violation of WIS. STAT. § 904.04(2).

¶12 At trial, Racine Police Department Criminalist Michael Erdmann testified that he participated in the search of Shannon's apartment after the shooting. In the search, law enforcement found a shoulder holster with two empty nine-millimeter magazines, a container with four rounds of nine-millimeter ammunition, and .32 and .45 caliber ammunition.

¶13 Meanwhile, Racine Police Department Criminalist Randall Scheef testified that he participated in the search of Tony's apartment after the shooting.

In the search, law enforcement found a .40 caliber gun, ammunition, and a magazine. It also found two gun cases, .45 caliber ammunition, cocaine, marijuana, and scales used for weighing drugs.

¶14 Finally, Racine Police Department Investigator Mark Sorenson testified that during his investigation of Smith's homicide, he received information that law enforcement found a .40 caliber handgun with ammunition and a .44 caliber handgun with ammunition in the Chicago apartment in which the arrests were made.

¶15 We are not persuaded that the above items constitute improper other-acts evidence. Indeed, we view the firearms and ammunition found as circumstantial evidence of Shannon's guilt. That is because the majority of it (all nine-millimeter- and .40 caliber-related evidence) matched the calibers of casings found at the shooting.[3] This made it more probable that Shannon and Tony were involved with Smith's death. *See* ***Zdiarstek v. State***, 53 Wis. 2d 420, 428-29, 192 N.W.2d 833 (1972) (jacket and firearm found in defendant's possession similar in appearance to those used in robbery were admissible as circumstantial evidence despite lack of proof that the items were actually involved in crime).

¶16 As for the remaining drugs and drug-sale related items, nothing about them had anything to do with Shannon. Instead, the evidence related solely to Tony, as the items were discovered in Tony's apartment. Given this fact, as well as the procedural history of this case, Shannon cannot now complain that its admission impugned his character. *See* ***State v. Rundle***, 166 Wis. 2d 715, 731,

[3] As noted, law enforcement also found nonmatching firearms and ammunition in its searches. We are satisfied that the admission of this evidence, if it was error, was harmless.

480 N.W.2d 518 (Ct. App. 1992) (having failed to seek severance from codefendant, defendant could not assert on appeal that she was prejudiced when evidence relating solely to the codefendant was introduced during trial).

¶17 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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