COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2881-CR **Cir. Ct. No. 2009CF801**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAD J. LURVEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chad J. Lurvey appeals from a judgment of conviction entered after a jury found him guilty of two counts of first-degree intentional homicide. Lurvey argues that he is entitled to a new trial because: (1) the trial court erroneously permitted the State to introduce testimony

concerning a canine search despite the State's failure to provide the drug dog's training and performance records; (2) in violation of a pretrial order, the State's witnesses testified that they believed Lurvey was guilty; and (3) the trial court erroneously permitted hearsay testimony that the victim was afraid of Lurvey. We affirm.

¶2 Andrew Long and Brian Lazzaro disappeared on August 24, 2002. Both men were involved in the drug trade and Chad Lurvey stored drugs for Long on his property. Lurvey's residence was located on a large parcel of family-owned land containing in part a private pond, woods, storage buildings, and a mechanical shop. The shop was used by Lurvey and his friends to work on cars.

¶3 Police learned that Lazzaro and Long had visited Lurvey at his shop on August 24, 2002, in connection with a drug debt. Lurvey told police that he gave $5000 to Long in partial settlement and that Lazzaro and Long then drove away in Lazzaro's Dodge Durango. Lurvey admitted storing large amounts of cocaine and marijuana for Long. At the time of the disappearance, fifteen pounds of Long's marijuana was stashed in Lurvey's garage in the trunk of a car owned by Long. Lurvey initially told police he had destroyed the marijuana after Long's disappearance. Lurvey later admitted this was a lie and turned the marijuana over to police. Lurvey stated that he had also been storing four kilos of cocaine for Long in his basement. Lurvey told police that Lazzaro and Long had taken the cocaine when they drove away on August 24, 2002.

¶4 Lurvey was the last person known to have seen or heard from Long and Lazzaro. In the weeks following the disappearance, the Durango was discovered in a bowling alley parking lot, and the victims' family members would visit the Lurvey property demanding additional information. On September 5,

2002, while part of a small search party, Lazzaro's parents saw a body floating in the secluded Lurvey pond. The body was that of Brian Lazzaro, and police immediately began a more extensive search. Andrew Long's body was also discovered in the pond. Both deaths were caused by multiple gunshot wounds. Both bodies were bound with plastic cable ties, towing chains and moving blankets. Similar ties, chains and blankets were used and located in Lurvey's shop. One of Lurvey's shotguns was missing.

¶5 In June 2003, police again searched the Lurvey pond and recovered some of the victims' personal items as well as Lurvey's missing shotgun. The shotgun's barrel had been sawed off, and the sawed-off portion was also found in the pond. In the years that followed, there was a John Doe investigation. In 2009, Lurvey was formally charged with two counts of first-degree intentional homicide. After a twelve-day jury trial, Lurvey was convicted of both counts.

Lurvey is not entitled to a new trial based on the admission of evidence concerning a drug dog's search of his hunting shack.

¶6 In addition to filing a discovery demand, Lurvey sent a letter to the State noting that the police reports referred to the use of canine searches. The letter stated: "If you intend to introduce testimony relating to the searches and/or responses by dogs, then we will need information regarding the dogs" and their handlers. The State never provided the records, later explaining that because the canine searches were fruitless, it had not intended to introduce drug dog testimony.

¶7 At trial, Detective Captain Karen Ruff testified that prior to discovery of the bodies, Lurvey consented to a canine search of Long's car stored in Lurvey's garage. Both parties elicited that though the dog alerted on the car, no drugs were found. Ruff testified that she later searched a hunting shack on the

Lurvey property. The shack was secured with a padlock and contained some "garbage-type items" but nothing relevant to the investigation. She testified that in her experience, a shack like that could be used to store cocaine and marijuana and that she brought a drug dog to search the shack. The State asked: "What did the drug dog do?" Trial counsel objected and moved for a mistrial.

¶8 Out of the jury's presence, trial counsel argued that the State should not be permitted to elicit drug dog testimony because it never provided the dog's training and performance records. The trial court overruled the objection on grounds that the canine searches were fruitless and that Lurvey opened the door by asking Ruff about the canine search of Long's car. The jury returned to the courtroom and the following transpired:

> [THE COURT]: Please be seated. Ladies and gentlemen of the jury, the objection is overruled. The state may either repeat their question, rephrase or move on to a different area.
>
> [THE STATE]: Thank you. I'm going to ask a different question.
>
> …
>
> Q: [by the State] Just one last question on this. Were there any drugs found in the hunting shack?
>
> A: [Captain Ruff] No.
>
> Q: And you searched that on - - on or about September 10 of 2002, is that correct?
>
> A: Correct.
>
> Q: Had it been searched prior to September 10 of 2002 to the best of your knowledge?
>
> A: No.

¶9 During deliberations, the jury sent a question to the court: "Did they ever check for drugs in and around the hunting shack using dogs or other methods?" With the parties' consent, the court answered: "Members of the jury, you must rely on your recollection of the evidence presented at trial." Posttrial, the defense unsuccessfully renewed its mistrial motion.

¶10 Lurvey maintains that the State's unanswered question "[w]hat did the dog do" in conjunction with its failure to provide the drug dog's training and performance records constituted violations of the State's statutory discovery obligation and Lurvey's due process right to a fair trial under ***Brady v. Maryland***, 373 U.S. 83 (1963). Lurvey argues that the State's question implied a positive alert by the drug dog which he was unable to impeach without the dog's records. He asserts that the implicit alert undermined the theory of defense by supporting Kevin Cassidy's testimony that Lurvey had cocaine on his property after August 24, 2002.[1]

¶11 Whether the State violated its discovery obligation under WIS. STAT. § 971.23(1) (2011-12)[2] presents a question of law we review independently but benefiting from the trial court's analysis. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. The admission of evidence pursuant to a discovery violation does not automatically entitle the defendant to a new trial. ***Id***., ¶41. To result in a new trial, the violation must be without good cause and prejudicial to the defendant. ***Id***., ¶15. A ***Brady*** violation occurs where the State withholds

[1] Lurvey told police that when he left the shop with Lazzaro and Long, they went to his house to retrieve the cocaine from the basement. Kevin Cassidy testified that after the disappearance, he drove Lurvey to the pond and Lurvey went into the woods, soon returning with a chunk of cocaine.

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

exculpatory, material evidence from a defendant. ***State v. Harris***, 2004 WI 64, ¶¶13, 39, 272 Wis. 2d 80, 680 N.W.2d 737.

¶12 Lurvey does not argue that the records were themselves exculpatory, but instead that they became material for impeachment purposes once the State elicited drug dog testimony. We reject Lurvey's claim for two reasons: (1) there was never actually any drug dog testimony concerning the shack; and (2) Lurvey has failed to demonstrate that the drug dog records were exculpatory or that the State's failure to provide them was prejudicial.

¶13 First, there was no drug dog testimony concerning the shack because Captain Ruff never answered the State's question "[w]hat did the dog do?" As a general rule, unanswered improper questions do not warrant reversal. ***Taylor v. State***, 52 Wis. 2d 453, 457, 190 N.W.2d 208 (1971); ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). Contrary to Lurvey's assertion, the State's unanswered question did not "elicit[] the prejudicial implication that a drug dog reacted to cocaine previously stored in the hunting shack." It was undisputed that Lurvey stored large quantities of cocaine and marijuana on his property. Ruff testified that no drugs were discovered in the shack. Any implication that she considered the shack suspicious derived from her testimony that it could have been used to store cocaine or marijuana and that though it contained only junk, it was secured with a padlock. That the jury asked whether police ever searched for drugs "in and around" the shed undermines Lurvey's assertion of an implicit alert.

¶14 Lurvey's contentions that the State implied a positive alert during closing arguments and that this was the "centerpiece" of the State's case are unpersuasive. The State never mentioned any canine search in closing or rebuttal.

Cassidy never testified that Lurvey obtained the postdisappearance cocaine from the hunting shack. There was testimony that at various times Lurvey stored cocaine throughout his property in buried paint buckets. A positive alert on the shack was not inconsistent with Lurvey's statement that he had recently moved the cocaine into his basement and would not have "completely destroyed the credibility of Lurvey's claim of innocence."

¶15 Second, Lurvey has failed to demonstrate that the alleged discovery violation was prejudicial. The drug dog records are not part of the appellate record and though Lurvey has described the sorts of impeachment questions he might have asked, nothing suggests that the answers would have been exculpatory. *Cf.* ***Harris***, 272 Wis. 2d 80, ¶30 (State held to have violated discovery statute where postconviction, the defendant proved that the victim previously accused another person of sexual assault); ***State v. DelReal***, 225 Wis. 2d 565, 571, 573-74, 593 N.W.2d 461 (Ct. App. 1999) (defendant entitled to a new trial where postconviction testing demonstrated that swabs in the State's possession were negative for gunshot residue). Even assuming a discovery violation, on this record any prejudice to Lurvey is purely speculative. Lurvey has failed to demonstrate both that the drug dog records were materially exculpatory and that the State had a duty to provide them.

¶16 Finally, we reject Lurvey's claim that the trial court committed reversible error by failing to impose any of the authorized sanctions under WIS. STAT. § 971.23(7m)(a). Where an alleged discovery violation is not prejudicial, the trial court's failure to impose sanctions is harmless. ***Harris***, 307 Wis. 2d 555, ¶¶107-08. Given that there was no discovery violation and that even assuming a violation there was no prejudice, the trial court properly declined to order sanctions.

Lurvey's Due Process rights were not violated by testimony that Christopher Long and Kevin Cassidy believed he was responsible for the homicides.

¶17 Pursuant to Lurvey's motion and with the parties' agreement, the trial court entered an order prohibiting witnesses from offering an opinion about who committed the crimes.[3] Lurvey argues that the State violated the pretrial order during its examination of Christopher Long and Kevin Cassidy. With regard to Long, Lurvey cites the following:

> Q: [by the State] Well, Chris, I think it's been evident that you believed Chad Lurvey was responsible for your brother's death, is that right?
>
> A: Yes.
>
> Q: Is that what you believed at all times after your brother disappeared?
>
> A: No, not initially.

¶18 Lurvey never objected to this questioning nor brought it to the trial court's attention in any fashion. Rather, on cross-examination trial counsel reinforced for the jury Long's belief that Lurvey was responsible:

> Q: [by trial counsel] By the time of the meeting at Chad's place on [August] 31st, the search party, if you will, you had come to the conclusion that Chad had done something to your brother, correct?
>
> A: I didn't know for sure until their bodies were found.
>
> Q: Before finding the car at Fox Run [bowling alley], you thought that maybe it was Brian [Lazzaro], is that correct?
>
> A: I thought it was a possibility.

[3] In pertinent part, Lurvey's motion in limine cited ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988), and ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

> Q: But by the 31st you thought it was Chad, no?
>
> A: I was leaning towards it. I had no—I didn't have a definite, I didn't know.
>
> Q: Please turn to page 107 of your transcript, line 24. Question. So what's the consensus of the group that's out there. Where is Brian, where is Andy. Answer. Consensus is that they still think it's totally Chad, and then so after this happens, now I think it's Chad too. And I think that these people, the Lazzaros, know a heck of a lot more than I do about this situation.
>
> Have I read that question and answer correctly?
>
> A: Correct, yes.

¶19 A witness may not opine as to whether another witness is telling the truth. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (expert not permitted to testify that the victim was clearly an incest victim where such an opinion operated to vouch for the victim's credibility). *See also* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). The credibility of a witness is ordinarily a jury determination. ***Haseltine***, 120 Wis. 2d at 96. However, comment on a witness's credibility is not improper where "neither the purpose nor the effect of the testimony" is to attest to the witness's truthfulness. ***State v. Smith***, 170 Wis. 2d 701, 718-19, 490 N.W.2d 40 (Ct. App. 1992) (police officer permissibly testified that defendant's inculpatory statement was truthful where the officer's opinion explained the circumstances of the interrogation). The ***Smith*** Court also considered the opinion testimony harmless because the officer's belief was already apparent to the jury given the context of the case. ***Id***.

¶20 We conclude that Long's testimony was not a violation of the pretrial order prohibiting ***Haseltine*** evidence. The testimony served not to prove Lurvey's untruthfulness, but to explain Long's actions in confronting Lurvey and withholding information from the police after his brother's disappearance.

Further, Long's belief in Lurvey's potential guilt was already apparent from his testimony that Lurvey provided inconsistent stories about the events of August 24, 2002, Long eventually confronted Lurvey and "told him that I wanted him to walk me through from the minute my brother got to his house to the minute that my brother left his house because it doesn't make sense and why can't he give me any clear explanation or details," he threatened to "bury" Lurvey with evidence of his drug involvement if he did not provide a more complete story, and he searched the Lurvey property with the Lazzaros. As in ***Smith***, there was no "risk that the jury used [Long's] testimony to assess [Lurvey's] truthfulness, particularly when the jury was instructed that it was the sole judge of the witnesses' credibility at the trial." ***Id.***, 170 Wis. 2d at 719.

¶21 That this testimony was not improper is also supported by Lurvey's lack of any objection or mistrial motion. Though Lurvey argues that no objection was required to preserve the viability of the pretrial order, he fails to explain why he never complained to the trial court out of the jury's presence.[4] In fact, the testimony is consistent with and was made part of Lurvey's defense. Lurvey drew attention to Long's opinion during cross-examination and argued during closing that Long's statements to law enforcement lacked credibility because they were colored by this opinion. Trial counsel also elicited from other State's witnesses that early on in the investigation they believed Lurvey was involved.

[4] We note that the alleged opinion testimony was not part of Lurvey's postverdict mistrial motion. Additionally, during Detective Wepfer's testimony on the eighth day of trial, Lurvey swiftly objected and moved for a mistrial when Wepfer testified that he never tested Cassidy's DNA because he "had reasons to believe that Chad Lurvey …." During the State's proffer, Wepfer confirmed he had been ready to testify that police believed Lurvey was involved in the murders. The trial court sustained Lurvey's objection but denied his mistrial motion. Lurvey requested and the trial court provided a curative instruction. This is the precise objection Lurvey raises for the first time on appeal in connection with Long and Cassidy.

¶22 Similarly, we conclude that Cassidy's testimony did not violate the court's pretrial order. During cross, Lurvey alerted the State and the court of his intent to question Cassidy about a failed polygraph examination. The State objected, explaining that the jury would be left with an inference that "somehow Mr. Cassidy is responsible for something because he didn't pass a polygraph." The State suggested that this would open the door on rebuttal for questions concerning whether at the time of the exam Cassidy thought Lurvey was involved. The trial court determined that Lurvey could ask about the failed polygraph, but warned that this might open the door on rebuttal. Lurvey questioned Cassidy about the polygraph, elicting that the police had asked whether he was involved in or had information about the homicides, that Cassidy told them no, and that police told Cassidy he had not done well on the examination. On rebuttal, the State offered an explanation for the failed polygraph:

> Q: [by the State] When you were asked back on September 9th of 2002 at that polygraph examination whether or not – do you know for sure who murdered Andy and Brian, you answered that question no?
>
> A: [Kevin Cassidy] Correct.
>
> Q: At that point in time you had information, a substantial amount of information based in part on what occurred on August 24 of 2002 of the relationship between the defendant and Andy Long and Brian Lazzaro, correct?
>
> A: Yes.
>
> Q: And you were asked: Do you know for sure who murdered Andy and Brian. Correct?
>
> A: Yes.
>
> Q: You answered that question no?
>
> A: Correct.
>
> Q: Did you have a belief at that time as to who murdered Andy and Brian?

A: I had a pretty strong belief that Chad was involved.

¶23 As with Long, trial counsel never objected or mentioned the alleged error to the court. More importantly, Lurvey himself opened the door to the State's questioning by eliciting that Cassidy's denial of involvement resulted in a failed polygraph. The State was entitled to respond by putting before the jury that Cassidy may have failed the exam because he believed Lurvey was responsible.

The trial court did not erroneously exercise its discretion when it permitted testimony concerning Andrew Long's fear of Lurvey.

¶24 Over Lurvey's objection, the court ruled that the State could present hearsay testimony from two witnesses that prior to Andrew Long's disappearance, he suggested he was afraid of Lurvey. Pursuant to this ruling, Juan Robles testified that on August 22, 2002, Long told him a man named Chad was storing his marijuana and cocaine. According to Robles, Long stated that he had grown leery of and no longer trusted Chad and asked Robles if he would accompany him to confront Chad.

¶25 The State also sought the admission of statements Andrew Long made to his brother Christopher the night before his disappearance. The trial court rejected most of the State's proffer, ruling that it could ask only whether Andrew had a "concern" about Chad Lurvey:

> The court will allow the DA to ask whether or not the deceased, Andrew, had a concern about Chad Lurvey. And the answer to that can be yes. And it can be - - the comment as to what Chris Long said, if the state wishes to bring it in, that I told my brother to get out, that may come in. However, statements that - - where it indicates here that he told me that Jodi had been stealing drugs and that Chad owed him a lot of money although he didn't say a dollar amount, those statements cannot come in. The fact that he stated he didn't trust Chad and Chad knew some kind of leg breaker with the mob, that cannot come in. The statement

> that he said Chad was up to something and Chad might be trying to do something, possibly kill him, that cannot come in.

¶26 The court explained that this limited testimony was relevant to explain why Christopher Long turned to Lurvey for answers. The court limited the scope of the testimony due to Lurvey's inability to cross-examine Andrew Long and because initially, Christopher Long was not completely forthright with the police. At trial, Christopher Long testified on August 23, 2002, he had a brief conversation with his brother wherein Andrew expressed "concern" regarding Lurvey. Christopher Long testified that he told his brother to "get out of whatever he's in" and that this conversation led him to go out to Lurvey's property on August 25, 2002.

¶27 Lurvey argues that the trial court erroneously exercised its discretion by permitting Robles and Christopher Long to testify about Andrew's fear. Whether to admit or exclude evidence lies within the sound discretion of the trial court. ***State v. Sveum***, 220 Wis. 2d 396, 405, 584 N.W.2d 137 (Ct. App. 1998). This court will uphold a discretionary determination if the trial court examined the relevant facts and applied a proper legal standard. ***Id***.

¶28 We conclude that the trial court properly determined the admissibility of the testimony.[5] WISCONSIN STAT. § 908.03(3) permits hearsay statements of the declarant's then existing state of mind. After considering the facts and circumstances, the trial court reasonably determined that Andrew's statements to Robles described his then existing state of mind. The trial court's well-considered decision concerning the admissibility and permissible scope of

[5] Because we conclude that the testimony was admissible for the reasons stated by the trial court, we need not address the State's argument concerning forfeiture by wrongdoing.

Christopher Long's testimony was also proper. Andrew Long's statement that he had "concerns" was offered to "explain[] why Chris Long went to Chad Lurvey's residence and was asking questions."

¶29 Lurvey argues that even if it constituted a hearsay exception under WIS. STAT. § 908.03(3), Andrew Long's state of mind was irrelevant. We conclude that a reasonable judge could have properly determined that Long's fear was relevant given the facts of this case. It is relevant to explain why Long wanted to collect his stash from his longtime business partner and why he brought Lazzaro along to confront Lurvey on August 24, 2002. It also illustrates the growing animosity and tension between Lurvey and Long, partners in a drug enterprise and former friends. In this circumstantial case, Long's unease is relevant to the picture the State was trying to paint, one of a volatile drug-related confrontation gone horribly wrong.

By the Court.—Judgment affirmed.

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