COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP736-CR **Cir. Ct. No. 2005CF553**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC LAMAR JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Eric Lamar Johnson appeals from the judgment of conviction entered after he pled guilty to possession of a firearm by a felon and a jury found him guilty of second-degree intentional homicide while using a dangerous weapon. Johnson contends that the trial court erred in refusing to allow

him to introduce evidence to show that the victim had a predisposition toward recklessly using handguns, claiming that it would have supported his theory of self-defense. Because in self-defense cases, evidence of prior specific acts of violence by the victim is admissible only if the defendant is aware of the acts of violence and is introducing it to show his or her state of mind at the time of the incident, and because there is no indication here that Johnson was aware of the victim's prior use of a handgun, we conclude that the trial court did not err in refusing to allow the evidence. Therefore, we affirm.

I. BACKGROUND.

¶2 During the early morning hours of January 20, 2005, there was an after-hours party, attended by approximately fifteen people, at an apartment located at 3035 West Wisconsin Avenue. An argument over a drug deal led to an altercation between several men who were standing in a hallway. Among the men involved in the altercation were Cecilio Garcia and Johnson. At one point during the altercation, Johnson drew a gun. There are conflicting accounts as to who fired the first shot, but it is undisputed that Johnson fired several shots at Garcia. Garcia, who was also holding a gun, also fired his gun. Johnson then shot Garcia several more times, emptying his clip into Garcia's body. Johnson left immediately after the shooting.

¶3 Police were dispatched to the location and found Garcia on the floor with a gun next to him. Garcia was pronounced dead at the scene. A medical examiner later testified that Garcia had been shot ten times and died from the injuries he sustained from the gunshot wounds.

¶4 On January 21, 2005, Johnson was arrested. He told police that he was disoriented during the altercation because someone hit him over the head with

a bottle. He admitted shooting Garcia several times until he ran out of bullets, but claimed that he fired his gun because he heard a gunshot and was scared.

¶5 Johnson was charged with first-degree intentional homicide while armed, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.63 (2003-04),[1] and possession of a firearm by a felon, contrary to WIS. STAT. § 941.29(2). Johnson eventually agreed to plead guilty to the possession of a firearm by a felon charge in exchange for the State agreeing to reduce the homicide count to second-degree intentional homicide while using a dangerous weapon, under WIS. STAT. § 940.05(1)(a). The homicide charge was tried to a jury.

¶6 During the investigation, information surfaced indicating that earlier during the evening of the shooting, Garcia had been shooting the same pistol that was found next to him at the scene, out of a car window while traveling on the Milwaukee expressway system. Prior to the commencement of the trial, the State filed a motion *in limine* to, as relevant here, prohibit the defense from introducing evidence of, or making reference to, specific instances of violent conduct by Garcia. The defense argued that evidence of Garcia earlier the same day shooting the firearm that was later found by him should be admitted to show that several bullets were fired from Garcia's gun that day. The defense also asserted that the evidence should be admitted to show "a proclivity toward violence that the victim had on that evening" and a "readiness to shoot that firearm," but defense counsel admitted that "the case law does not necessarily agree with that for that singular basis alone." The State argued that the evidence was irrelevant and prejudicial

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

because there was no evidence that Johnson was aware of the earlier shooting at the time he shot Garcia. The court agreed with the State and granted the State's motion.

¶7 At trial, several witnesses testified about the shooting, some stating that Johnson fired the first shot, some stating that he did not. The defense pursued a self-defense theory. Johnson took the stand in his own defense and testified that he pulled out his gun because he was scared and shot Garcia because Garcia had a gun and was moving toward him in an aggressive manner. The jury found Johnson guilty of second-degree intentional homicide while using a dangerous weapon. Judgment was entered accordingly.

¶8 Johnson was sentenced to consecutive sentences of seventeen years' imprisonment, comprised of twelve years' initial confinement and five years' extended supervision on the second-degree intentional homicide count, and two years' imprisonment, comprised of one year's initial confinement and one year's extended supervision on the felon in possession of firearm count. This appeal follows.[2]

II. ANALYSIS.

¶9 Johnson contends that the trial court erred by precluding the defense from presenting evidence tending to show a recent and clear disposition on the part of Garcia to recklessly use his handgun.

[2] The appeal in this case was originally designated as a no-merit appeal, but appellate counsel later requested, and was granted, permission to file a WIS. STAT. § 809.30 appeal.

¶10 The question of admissibility of evidence generally lies within the trial court's discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational and legally sound conclusion. ***Burkes v. Hales***, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶11 Johnson contends that ***State v. Pence***, 150 Wis. 2d 759, 442 N.W.2d 540 (Ct. App. 1989), "is on point." He cites ***Pence***'s discussion about evidence showing a predisposition, and notes that in ***Pence***, the court determined that both WIS. STAT. § 904.04(1)(a) and WIS. STAT. § 904.04(2) could be used to admit other acts evidence. ***Pence***, 150 Wis. 2d at 767. Johnson asserts that, under ***Pence***, a defendant may use other acts evidence to show that the victim had a predisposition toward recklessness. He therefore submits that he should have been allowed to introduce evidence that only a short time prior to the incident Garcia had been shooting the same handgun out the window of a car on the Milwaukee expressway system, to show that Garcia had a predisposition toward reckless use of his handgun. He claims that the evidence of Garcia shooting his handgun on the freeway would have supported his claim that Garcia was acting recklessly in the hallway of the apartment, and thus also supported his claim of self-defense—that he fired only because Garcia fired first and was coming toward him about to fire again. We reject Johnson's contention that ***Pence*** applies here.

¶12 ***Pence*** is inapplicable to this case. ***Pence*** does not address the issue before us, namely the admissibility of other acts evidence about a *victim* to support a *self-defense* theory; rather, ***Pence*** deals with other acts evidence of a *defendant* to support a claim of *entrapment*. ***Id.***, 150 Wis. 2d at 765.

¶13 The rules applicable to this case are set forth in ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973), ***Werner v. State***, 66 Wis. 2d 736, 226 N.W.2d 402 (1975), and their progeny. In ***McMorris***, our supreme court addressed the admissibility of evidence of prior specific acts of violent behavior of the victim of an assault or homicide where self-defense is an issue. The court held:

> When the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident.

Id. at 152.

¶14 In ***Werner***, the supreme court clarified that under ***McMorris*** a defendant who claims self-defense may testify about prior specific acts of violence by the victim only when this specific conduct was "*within his knowledge to show his state of mind*" at the time of the alleged offense. ***Werner***, 66 Wis. 2d at 744 (emphasis added). Thus, "[e]vidence of prior specific conduct may *not* be used to prove that the victim acted in conformity with that conduct." ***Id.*** (emphasis added). In other words:

> The purpose in allowing such testimony is not to support an inference about the victim's actual conduct during the incident; rather, the testimony relates to the defendant's state of mind, showing what his beliefs were concerning the victim's character. Such evidence helps the jury determine whether the defendant 'acted as a reasonably prudent person would under similar beliefs and circumstances' in the exercise of a privilege of self defense.

Id. at 743 (footnote omitted).

¶15 In ***McAllister v. State***, 74 Wis. 2d 246, 246 N.W.2d 511 (1976), the supreme court further explained ***Werner*** and ***McMorris***. The case hold that although a defendant claiming self-defense may testify about specific instances of violence by the victim, testimony by other witnesses is inadmissible to prove that the victim acted in conformity with that conduct, but a defendant may "produce supporting evidence to prove the reality of the particular acts of which he claims knowledge, thereby proving reasonableness of his knowledge and apprehension and the credibility of his assertion." ***McAllister***, 74 Wis. 2d at 250-51.

¶16 This case fits squarely within the rule proscribing the introduction of evidence of prior specific acts of violent behavior of the victim to show that the victim acted in conformity therewith, set forth in ***McMorris*** and ***Werner***.

¶17 Johnson does not allege that he had knowledge of Garcia firing a handgun out a car window at a different location earlier during the day on January 19, 2005, much less that any knowledge of Garcia shooting his handgun on the Milwaukee expressway system would have explained Johnson's state of mind at the time he shot Garcia to show that his beliefs about Garcia's character were reasonable. *See* ***Werner***, 66 Wis. 2d at 743-44. Indeed, there is no indication that Johnson had any knowledge of anything Garcia did on January 19, and thus, no indication that his state of mind at the time of the shooting was in any way influenced by his knowledge of previous acts of violence by Garcia. *See* ***id.***

¶18 In fact, Johnson's only claim for why the evidence of Garcia allegedly shooting out of a car window should have been admitted is that it would have shown that Garcia had a predisposition for reckless use of his firearm, and would thereby support his claim of self-defense. He is, in other words, arguing that he should have been allowed to introduce evidence of prior specific conduct

by Garcia to prove that Garcia acted in conformity with that conduct. This, however, is precisely what ***McMorris*** and ***Werner*** held that evidence of specific acts of violence by a victim in self-defense cases may not be used for—"[e]vidence of prior specific conduct may *not* be used to prove that the victim acted in conformity with that conduct." ***Werner***, 66 Wis. 2d at 744 (emphasis added).

¶19 Because evidence of a victim's acts of violence may be introduced *only* if the defendant had knowledge of such violent acts, and then only if the evidence is used to prove that the defendant's actions—acting in self-defense—based on this belief, were reasonable, and as Johnson has shown nothing of the sort, his argument fails.[3] Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] Indeed, in objecting to the State's motion *in limine* to prevent the introduction of evidence of violent conduct by Garcia, even Johnson's own trial counsel conceded that the "case law does not necessarily agree" with his position.