

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2007AP928-CR

Cir. Ct. No. 2002CF5970

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANGELO STOKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and KAREN E. CHRISTENSON, Judges. *Affirmed.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Deangelo Stokes appeals a judgment convicting him of first-degree intentional homicide. He also appeals an order denying postconviction relief. Stokes was convicted after a jury trial. The issue is whether

the trial court properly admitted into evidence the statement of an unavailable witness. We affirm.

¶2 The complaint against Stokes alleged that Michael Bridges drove Stokes, Willie McNeice, and Kinley Patterson to Kenneth Henley's residence to buy drugs. There, according to the complaint, Stokes shot Henley to death. The State based the allegations in the complaint on a statement McNeice gave police. At the time the complaint was filed, police also had a statement from Terrence Jackson in which Jackson asserted that he, Shawn Simmons, and McNeice accompanied Stokes to Henley's residence. Jackson stated that he saw Stokes shoot Henley, and his description of the shooting was roughly comparable to McNeice's as presented in the complaint, except for who witnessed it.

¶3 At Stokes' first trial, Jackson appeared as a witness for the State. Jackson testified, however, that the statement he gave police was false, and that he was not present when Henley was shot. Jackson added that most of the information he received about the shooting came from another jail inmate. Counsel for Stokes did not cross-examine Jackson. The trial concluded with a mistrial, as the jury was unable to reach a verdict.

¶4 At Stokes' second trial, Jackson testified that he did not know Stokes, and denied making the statement that police attributed to him. When questioned further, he refused to answer, invoking his Fifth Amendment right. The trial court declared a mistrial, concluding that Jackson's refusal to testify unfairly denied Stokes the right to cross-examine Jackson.

¶5 Before the third trial, the court ruled that the State could not use Jackson's testimony from the first trial, but could introduce Jackson's statement. At the beginning of the third trial, the State attempted to present Jackson as a

witness, but Jackson invoked his Fifth Amendment privilege. The State subsequently called a police officer who conveyed to the jury Jackson's statement about the shooting. The State later introduced testimony from McNeice that Jackson was not present at the shooting, and introduced a taped phone call Stokes made from jail stating that Jackson was not at Henley's. In closing argument, the prosecutor acknowledged that Jackson lied about witnessing the shooting, but contended that Jackson clearly had accurate information about the shooting from someone who witnessed it and, in the prosecutor's view, that someone must have been Stokes. Defense counsel argued that Jackson denied talking to Stokes about the shooting, and must have received his information from McNeice. The jury found Stokes guilty, and the trial court entered a judgment of conviction.

¶6 In his postconviction motion, Stokes alleged that the trial court erred by admitting Jackson's statement into evidence when Jackson was unavailable to testify. The circuit court denied the motion, concluding that even if it were error to admit Jackson's statement, the error was harmless given the other evidence against Stokes.

¶7 A defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at the trial, if those statements are "testimonial" and the defendant has not had a prior opportunity to cross-examine the out-of-court declarant. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Testimonial statements include statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. *Id.* at 51-52. Here, the State concedes that Jackson's statement was testimonial. Whether its admission violated Stokes' constitutional right to confrontation is a question of law that we review independently. *State v. Weed*, 2003 WI 85, ¶10,

263 Wis. 2d 434, 666 N.W.2d 485. We also independently review whether admitting the statement was harmless. *See State v. Harris*, 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996). The test for harmless error is whether the beneficiary of the error proves beyond a reasonable doubt that it did not contribute to the verdict. *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. An alternative test for harmless error is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.*, ¶43.

¶8 We need not decide if admitting Jackson's statement violated Stokes' right to confront witnesses, because admitting that statement was harmless. McNeice and Patterson testified that they saw Stokes shoot Henley, and offered substantially similar accounts of the shooting. Bridges did not see the shooting, but corroborated McNeice's and Patterson's accounts of the events leading up to and after the shooting. The prosecutor told the jury that it had to determine whether McNeice, Patterson, and Bridges testified truthfully, and advised the jury to acquit if it did not believe their accounts. Clearly, the jury found the three witnesses credible.

¶9 Stokes agrees that the case depended on the credibility of the State's three main witnesses, and contends that Jackson's statement was important, not as evidence of Stokes' guilt in its own right, but because it significantly bolstered the credibility of the main witnesses by verifying their identification of Stokes. But that is true only if the jury believed that the source of Jackson's information was someone besides McNeice or Patterson, because only then would it have provided independent verification of their accounts. The defense argued in closing that

McNeice was Jackson's source, and the prosecutor offered his theory that Stokes was the source.¹ There was, however, virtually no evidence to resolve the question. Because it was inconclusive as to whether the statement independently verified the eyewitnesses' identifications of Stokes, we cannot conclude that the Jackson statement significantly bolstered the eyewitnesses' credibility in the jury's eyes. We therefore conclude that it is clear beyond a reasonable doubt that the verdict would have been the same even had Jackson's statement not been admitted in evidence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).

¹ In Stokes' first trial, Jackson testified that most of the information he received about the shooting came from another jail inmate, Joseph Jordan. Jackson did not explain how Jordan knew of the shooting. The jury in the third trial did not learn of Jackson's testimony in the first trial.

