**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 5, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-3166-CR** **Cir. Ct. Nos. 99 CF 5822 & 99 CF 5948**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOVAN T. MULL,**

**DEFENDANT-APPELLANT.**

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APPEAL from judgments and orders of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jovan T. Mull appeals from the judgments of conviction entered after a jury found him guilty of three counts of first-degree recklessly endangering safety, contrary to WIS. STAT. § 941.30(1) (1999-2000),[1]

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

with the penalty enhancers of use of a dangerous weapon, contrary to WIS. STAT. § 939.63, and habitual criminality, contrary to WIS. STAT. § 939.62. In addition, he was convicted of intimidation of a victim, contrary to WIS. STAT. § 940.45(3), along with the habitual criminality enhancer, contrary to § 939.62. He also appeals from orders denying his postconviction motion. He raises seven issues: (1) whether his constitutional double jeopardy rights were violated when he was convicted three times for the single act of discharging a weapon into a car occupied by three people; (2) whether the trial court erroneously exercised its discretion when it admitted the preliminary hearing testimony of deceased witness Anthony Poindexter; (3) whether there was sufficient evidence to support his conviction for intimidation of a victim with threat of force or violence; (4) whether § 940.45(3), which prohibits implied threat of force or violence in attempts to dissuade victims from proceeding with prosecution of crimes, is unconstitutionally overbroad; (5) whether he was subjected to an *ex post facto* law when the trial court ordered him to submit a DNA sample and pay the associated fee; (6) whether his brother's confession is newly discovered evidence and therefore he should be granted a new trial; and (7) whether he should be granted a new trial in the interests of justice. Because we resolve each issue in favor of upholding the judgments and orders, we affirm.

## I. BACKGROUND

¶2 Anthony Poindexter reported to police that on November 11, 1999, he and his girlfriend, Jeanette Smith, and their four children, parked their car at a grocery store and Smith went inside for a short time. While Smith was in the store, Poindexter recognized Mull from the neighborhood and exited the car to say hello to him. Eventually, this greeting turned into a confrontation with Mull, Tremaine (Mull's brother), and about seven other men. When Smith returned to

the car, she saw Poindexter talking to a man she identified as Mull, and then saw Tremaine and Poindexter begin to wrestle, at which point a gun fell out of Tremaine's pants. Smith yelled for a neighbor to call the police and Tremaine threatened both her and Poindexter.

¶3 Poindexter and Smith left with their children, but seeing that the aforementioned crowd was coming around the corner, they decided to take the children to Smith's mother's house. After they dropped the minor children off, they picked up Poindexter's adult son, Derrick Poindexter, and drove back to the house to get a sweatshirt. When Poindexter returned to the car, Smith was driving and Derrick was in the back seat. Derrick told Poindexter that there was someone standing next to their house. Poindexter said that when he looked, he saw Mull step out from behind the house, point a pistol at Poindexter's car, and fire numerous shots into his car. Derrick suffered a gunshot wound as a result of the shots fired at the car.

¶4 Poindexter also reported to police that on November 13 and 14, 1999, Mull and other relatives came to Poindexter's house saying that they wanted Poindexter to "squash it," referring to the complaint. During one of these confrontations, Mull apologized for shooting at Poindexter's car, said he was "high" at the time, and offered to pay for the damages. When Poindexter refused to "squash it," Mull said he would "take it up on his own." Poindexter then ordered Mull to leave. Mull was charged and convicted of the crimes noted above. He now appeals.

## II. DISCUSSION

### *A. Double Jeopardy.*

¶5 Mull first contends that his constitutional right against double jeopardy was violated because he was convicted three times for the single act of discharging a weapon into a car. As a result, he argues he was punished multiple times for a single act. We reject his argument.

¶6 The question of whether multiple punishments are constitutionally sound when a single course of conduct results in the endangerment of three individuals is a question of law reviewed by this court *de novo*. *See* ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶7 The Wisconsin Supreme Court has employed an analysis to determine whether a defendant has been exposed to double jeopardy for a single act. *See* ***State v. Trawitzki***, 2001 WI 77, ¶21, 244 Wis. 2d 523, 628 N.W.2d 801. The reviewing court must look at the charged offenses and determine whether the offenses are identical in law and fact. ***Id.*** If they are identical, then the multiple charges violate the double jeopardy clauses of the United States and Wisconsin Constitutions. ***Id.***

¶8 Here, the parties agree that the three counts of first-degree recklessly endangering safety were the same in law, because they involved alleged violations of the same statute, leaving us to address only whether the counts were the same in fact.

¶9 Charges are sufficiently different in nature to survive multiplicity challenges if each charge requires proof of a fact that is not necessary for conviction of another count, or if each requires a new exercise of volition in a

continuing course of conduct. *See* ***id.*** at ¶28. In the instant case, to convict Mull of three offenses, the State had to prove that Mull endangered the lives of each of the three individuals, that he did so by engaging in reckless conduct, and that the circumstances of the acts associated with each victim established he acted with utter disregard for life. *See* WIS JI—CRIMINAL 1347. If the State had not proved that Derrick Poindexter was in the vehicle when the shots were fired, the State might not have been able to prove that Derrick's life was endangered. Similarly if the facts established that Mull walked up to the vehicle and ordered one of the victims outside before shooting the victim point-blank, the State probably would not have been able to prove that Mull endangered the lives of the other two, nor could the State have demonstrated that he showed utter disregard for the lives of the two remaining passengers. Thus, the State had to prove a different fact for each of the three charges—that each of the three individuals was in the car when Mull fired at it. Accordingly, the three counts are different in fact. Because Mull's conduct endangered three victims, three charges and multiple punishments were constitutionally sound.

*B. Admission of Testimony.*

¶10 Mull next contends that the circuit court erroneously exercised its discretion when it allowed the victim's preliminary hearing testimony to be introduced at Mull's trial in violation of the hearsay prohibition and in violation of Mull's confrontation rights and thus, Mull is entitled to a new trial. We disagree.

¶11 Generally, "[t]he admissibility of former testimony is discretionary with the trial court," subject to review for an erroneous exercise of discretion. ***State v. Drusch***, 139 Wis. 2d 312, 317-18, 407 N.W.2d 328 (Ct. App. 1987). However, if the focus of the trial court's ruling is on the constitutional right of the

defendant to confront the unavailable witness, the issue is more properly characterized as one of constitutional fact, subject to independent review. *Cf.* ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

¶12 The Wisconsin Supreme Court has summarized the standard to be applied for determining the admissibility of hearsay evidence against a criminal defendant in accord with the constitutional right of confrontation. ***State v. Bauer***, 109 Wis. 2d 204, 215, 325 N.W. 2d 857 (1982). In order to satisfy the confrontation right, the witness must be unavailable and the evidence must bear some indicia of reliability. ***Id.*** However, the trial court must still determine whether there were unusual circumstances, which may justify excluding the evidence. ***Id.*** It is clear that the evidence was reliable and Mull concedes that Poindexter was not available; therefore, the only question left is whether there were unusual circumstances warranting exclusion of the testimony. This court will concern itself only with the question of whether Mull had "the opportunity for effective cross-examination." *See* ***State v. Tomlinson***, 2001 WI App 212, ¶31, 247 Wis. 2d 682, 635 N.W.2d 201 (citation omitted). As this court stated in ***Tomlinson***, "Except in extraordinary cases, no inquiry into the *effectiveness* of the cross-examination is required." ***Id.*** (citation omitted).

¶13 At the preliminary hearings, Mull was able to fully cross-examine Poindexter with the exception of one objection from the State that was sustained on grounds of relevance. Poindexter had already made an identification of Mull in the courtroom and therefore an inquiry into what clothes the shooter was wearing on the night of the shooting was irrelevant. Mull argues that the magistrate's ruling on relevancy was in error and implies that the error created an unusual circumstance, which transformed this case into an "extraordinary case" in which inquiry into effectiveness of cross-examination is warranted. ***Id.***

¶14 Based on the foregoing, we reject Mull's claim. The trial court did not erroneously exercise its discretion in excluding the evidence. All the criteria for admission were present. The testimony was reliable, the witness was unavailable and Mull had the opportunity to cross-examine the witness. Therefore, the testimony was properly admitted.

*C. Insufficient Evidence.*

¶15 Next, Mull contends that his conviction for intimidation of a victim of a crime by implied threat of force must be overturned as there was not sufficient evidence by which a jury acting reasonably could have found him guilty. We disagree.

¶16 The standard for reviewing claims of insufficient evidence has been set out by the Wisconsin Supreme Court as affirming a decision unless the conviction is "so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Great deference is given to the judgment of the finder of fact such that if a possibility exists that the trier of fact could have drawn the appropriate inferences to find guilt, we will not overturn even if we believe the trier should not have found the defendant guilty. ***Id.*** at 507.

¶17 Based on the testimony of Poindexter and the standard above, a jury, acting reasonably, could have found Mull's threat to "take it up on his own" to infer that Mull was intimidating Poindexter with a threat of force and therefore the evidence was sufficient to support a conviction for intimidation of a victim with threat of force or violence.

*D. WIS. STAT. § 940.45(3).*

¶18 Mull also contends that WIS. STAT. § 940.45(3), which prohibits implied threat of force or violence in attempts to dissuade victims from proceeding with prosecution of crimes, is unconstitutionally overbroad as it prohibits conduct which the state is not allowed to regulate. We disagree.

¶19 The constitutionality of a statute presents a question of law that is reviewed independently of the trial court's decision. ***State v. Janssen***, 219 Wis. 2d 362, 370, 580 N.W.2d 260 (1998). Generally, statutes are presumed to be constitutional and the challenger must refute this presumption. ***State v. Stevenson***, 2000 WI 71, ¶10, 236 Wis. 2d 86, 613 N.W.2d 90. However, when the statute involves the First Amendment, the State bears the burden of proving beyond a reasonable doubt the constitutionality of the statute. ***Id.***

¶20 A statute is constitutionally overbroad "when its language, given its normal meaning, is so sweeping that its sanctions may be applied to conduct which the state is not permitted to regulate." ***State v. Konrath***, 218 Wis. 2d 290, 304-05, 577 N.W.2d 601 (1998) (citation omitted). It is well established that threats to harm another person are unprotected by the First Amendment. *See* ***Watts v. United States***, 394 U.S. 705, 707 (1969). Although threats are often conveyed by words and are undeniably expressive in their content, they nevertheless do not merit constitutional protection.

¶21 Mull argues that "threat of force" is unfairly broad; however, he uses a definition from a dictionary with a copyright of 1947. When looking at the definition of force in Black's Law Dictionary and the way the phrase is used in other Wisconsin statutes, it is clear that the definition can be narrowly construed. *See* BLACK'S LAW DICTIONARY 656 (7th ed. 1999); *see* WIS. STAT.

§§ 940.225(1)(c), 943.23(1g), 943.32(1)(b), and 940.31(1). We have previously stated that we will not find a statute unconstitutionally overbroad when the statute can be narrowly construed in a way that is constitutionally sound. *See* ***State v. Brulport***, 202 Wis. 2d 505, 522, 551 N.W.2d 824 (Ct. App. 1996).

¶22 Several aspects of the statute demonstrate that it does not punish protected speech. First, the statute requires that the offender act "knowingly and maliciously." *See* WIS. STAT. §§ 940.44 and 940.45. Second, the statute, on its face, addresses only "true threats" and not "political argument, idle talk, or jest." *See* ***United States v. Viefhaus,*** 168 F.3d 392, 395 (10th Cir. 1999); ***United States v. Spruill***, 118 F.3d 221, 228 (4th Cir. 1997); ***United States v. Miller***, 115 F.3d 361, 363 (6th Cir. 1997). The plain language of the statute requires that the suspect use some threat of force against another to accomplish his malicious objective.

¶23 The First Amendment simply does not protect speech or acts which threaten harm to a victim of crime and which are done with the purpose of thwarting prosecution of a crime. Therefore, the statute does not chill protected speech, and it is not constitutionally overbroad.

*E. Ex Post Facto Law.*

¶24 Mull also contends that he was subjected to an *ex post facto* law when the court ordered him to submit a DNA sample and pay the associated fee, because the law did not become effective until after the date of the offense. We disagree.

¶25 At the time of the offense, the trial court had discretionary authority to order a DNA sample and surcharge. Even if the law had not existed when Mull

committed the crime, the provision of a DNA sample and paying costs associated with its analysis are not punishment.

¶26 In both Mull's postconviction motion and appeal, he erroneously claimed that prior to 1999 WIS. ACT 9, the trial court had authority to order a DNA sample and surcharge only if the offender had been convicted of particular crimes. In fact, WIS. STAT. § 973.047 originated in 1993, and was enacted through 1993 WIS. ACT 16, §§ 3854, 3855. That early version of WIS. STAT. § 973.047 required courts to order DNA samples in certain cases, but granted discretion to order DNA samples in other felonies. ***Id.*** The plain language of the statute clearly grants trial courts the discretionary authority to order defendants to produce a biological sample for DNA analysis. *See, e.g.*, WIS. STAT. § 973.047(1)(b) (1997-98).

¶27 Consequently, Mull was not subjected to an *ex post facto* law, because there was a law in place at the time that the crime was committed and, even if there was not, the DNA analysis and surcharge are not punishments.

*F. Newly Discovered Evidence.*

¶28 Mull contends that he should be granted a new trial because his brother's recorded rap song, which the State should see as a confession, is newly discovered information. We disagree.

¶29 To justify a new trial on the basis of newly discovered evidence, a defendant must show by clear and convincing evidence that: (1) he was unaware of the evidence until after the trial; (2) he was not negligent in failing to discover the evidence; (3) the evidence is material to an issue in the case; (4) the evidence would not be merely cumulative to evidence already produced at trial; and (5) the evidence would create a reasonable probability that the outcome would be

different on retrial. *See* ***State v. Brunton***, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996).

¶30 The standard of review for a motion based on newly discovered evidence should be addressed to the trial court's discretion. ***Id.*** at 201-02. Mull's contention that his brother's statements entitle him to a new trial is based entirely on his interpretation of the statements as "confessions." Mull has failed to prove by clear and convincing evidence that the statements were, in fact, confessions or even "statements against interest."

¶31 A statement against interest requires that the statement, at the time of its making, tends to subject the declarant to criminal liability. *See* WIS. STAT. § 908.045(4); ***State v. Denny***, 163 Wis. 2d 352, 358, 471 N.W.2d 606 (Ct. App. 1991). Tremaine's statements to a friend, Lawrence Allen, and his rap song assert absolutely no fact that is probative of a relevant or material issue. Nothing about the statement or song would subject Tremaine to criminal liability. In the affidavit to support the "confession," only one relevant fact is provided: Tremaine stated, "I have no reason to be out on the streets if Jovan doesn't beat his case." Allen offered that he believed that Tremaine was the shooter and felt guilty about his brother's incarceration, but statements from Tremaine supported neither of Allen's opinions that Tremaine committed the crimes. The statement and song could have been made because Tremaine felt responsible for what happened because he started the argument with Poindexter. In any case, they are not corroborated, and are neither confessions nor statements against interest.

¶32 Because Mull has failed to establish that Tremaine confessed to the offenses for which Mull was convicted, he is not entitled to a new trial.

*G. New Trial in the Interest of Justice.*

¶33 Finally, Mull contends that he should be granted a new trial in the interest of justice because the jury did not hear Tremaine's "confessions." We disagree.

¶34 The standard of review for a trial court's decision on a motion for a new trial in the interest of justice is whether the court erroneously exercised its discretion. ***Markey v. Hauck***, 73 Wis. 2d 165, 171-72, 242 N.W.2d 914 (1976).

¶35 "[A] new trial in the interest of justice will be granted only if there has been an apparent miscarriage of justice and it appears that a retrial under optimum circumstances will produce a different result." ***Garcia v. State***, 73 Wis. 2d 651, 654, 245 N.W.2d 654 (1976). Mull failed to establish that the statements constitute a confession. Consequently, he has failed to establish that there is "an apparent miscarriage of justice" because the jury did not hear Tremaine's statements. A new trial in the interest of justice in not warranted.

*By the Court.*—Judgments and orders affirmed.

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