COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2003

Cornelia G. Clark
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. 02-1484-CR | **Cir. Ct. No. 00 CF 5118**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMIE JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jimmie Johnson appeals from a judgment entered on jury verdicts finding him guilty of: two counts of first-degree reckless homicide, as a party to a crime; one count of possession of a firearm by a felon; and three counts of first-degree recklessly endangering safety, as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.05, 941.29(2), and 941.30(1) (1999–

2000).[1] Johnson claims that: (1) there was insufficient evidence to support the jury verdicts; (2) the trial court erroneously exercised its discretion when it excluded testimony purporting to establish that someone else committed the crimes, denied his motion for an adjournment, and allegedly precluded him from impeaching a witness; (3) his confession was inadmissible because it was closely related to a polygraph examination; and (4) his sentence was "unduly harsh." We affirm.

I.

¶2 On September 30, 2000, around 2:00 a.m., two men were fatally shot and three men were wounded outside the Cream City Tavern in Milwaukee. At trial, Terry Farmer, a security guard at the tavern, testified that on September 30, 2000, a man wearing a grey shirt, jeans, and a tan hat tried to get into the tavern around 1:50 a.m. Farmer told the man that he could not come in because the tavern was closing. According to Farmer, the man then tried to hand a beer to a woman waiting outside. Farmer claimed that the woman startled, raised her hand, and caused the beer bottle to hit the man in the lip.

¶3 Farmer testified that the man's lip began to bleed. According to Farmer the man said "I should get something started" after people began to tease him about the incident. Farmer claimed that he turned to go back to the tavern doorway, heard gunshots, and ducked. When he looked up, he saw the man "just standing there" while everyone else was on the ground. Farmer testified that he heard the man say, "there's something started now."

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

¶4 Jemial Battle, a disc jockey at the tavern, testified that he was standing in front of a truck parked near the tavern around 2:00 a.m. when he heard shots. He then heard a man, whom he believed was the shooter, yell "Now what, now what?" Battle could not see the man's face, but testified that he had a "blackish-grey" sweatshirt on.

¶5 Shyrell Caldwell, the owner of the tavern, testified that he saw a man whom he knew as "Jimmie" in front of the tavern around closing time. According to Caldwell, Jimmie's face was bleeding and a man whom he knew as "Red" was teasing him about it. Caldwell testified that, after Jimmie began to mumble about causing trouble, he told Jimmie to "take the stuff up the road somewhere" because he did not want trouble in front of the tavern. As Caldwell turned to go back inside, he heard five or six shots. According to Caldwell, when he looked up, he saw Jimmie "just standing there." He then heard Jimmie say "Yeah, how do you like that" before he walked away. Caldwell later told the police that Jimmie was wearing a grey hooded sweatshirt, black pants, and a brown baseball hat.

¶6 Vicko Battle, Caldwell's brother-in-law and a tavern employee, testified that he was outside the tavern around 2:00 a.m. when he saw a man whom he identified at trial as Johnson. According to Battle, Johnson's face was bleeding "pretty bad[ly]" so he gave him a towel. Battle testified that about five minutes later he took the garbage out and started walking up and down the sidewalk on the side of the building to make sure the customers left. According to Battle, he was standing on the sidewalk when he heard five or six shots. As he walked toward the front of the building he saw a man in a grey sweatshirt and dark pants walking away with a gun in his hand. He testified that he thought that the gunman was Johnson because he was wearing the same grey sweatshirt he saw earlier.

¶7 On October 2, 2000, the police arrested Johnson on two city commitments. Detectives interviewed Johnson approximately five times from October 2, 2000, to October 4, 2000. During the first two interviews, Johnson denied that he was involved in the shootings. On the morning of October 3, 2000, Johnson took a polygraph examination. In an interview after the examination, Johnson confessed that he was the gunman.

¶8 Johnson filed a motion to suppress his confession. He claimed that the confession was inadmissible because it was impermissibly related to the polygraph examination. The trial court held a hearing on the motion. Detectives Clint Harrison and Timothy Heier conducted the second interview with Johnson. The interview started on October 2, 2000, at 9:47 p.m. and ended on October 3, 2000, at 2:47 a.m. Heier testified that Johnson told them he was wearing a grey hooded sweatshirt, black pants, and a brown baseball hat. Heier also testified that Johnson told them that he had nothing to do with the shootings and that he would prove it by taking a polygraph examination the next day.

¶9 Detective Charles Hargrove conducted the polygraph examination of Johnson on October 3, 2000. The examination began at approximately 11:15 a.m. and ended at approximately 2:58 p.m. Hargrove testified that, when the examination was finished, he detached Johnson from the polygraph machine and told him that the test was over. Johnson signed a polygraph examination agreement and release form that provided, as relevant:

> This examination was concluded at 2:58 p.m. on the above date. I completely affirm in its entirety my above agreement. In addition, I knowingly and intelligently continued to waive all my rights, including those in paragraph (2) above, and I willingly made all statements that I did make. I also understand that any questions I may be asked after this point in time, and any answers I may

> give to those questions, are not part of the polygraph examination.

Hargrove testified that he then took Johnson to a different room.

¶10 Detectives William Jessup and Heier conducted a third interview with Johnson. Jessup testified that the interview started at 6:24 p.m. on October 3, 2000, and ended at 9:08 p.m. Heier testified that, at the beginning of the interview, he told Johnson: "It's my understanding you must have failed that polygraph because you're still here." According to the detectives, they did not review the polygraph charts with Johnson and there were no polygraph machines in the room.

¶11 Johnson confessed during the interview. According to his statement, he was outside the Cream City Tavern when a woman accidentally bumped him and caused a beer bottle that he was holding to cut him near his nose. Johnson told the detectives that he became upset because people were laughing at him and his nose was bleeding. According to the statement, "K" then handed a gun to him and he fired several shots in the direction of the crowd "to make [the people] scatter." Johnson told the police that he then saw a car stop and a group of men get out. One of the men from the car and another man on the sidewalk near the car pulled out guns and started to fire at him. According to Johnson's statement, he ducked. When he looked up, the car was driving away.

¶12 The trial court concluded that Johnson's confession was admissible:

> [U]nder the analysis of this case, because of the fact that the polygraph was in the polygraph suite, the Heier interview was in [room] 419 at the extreme opposite end of the floor, there had been at least the passage of three and a half hours between the end of the polygraph and the commencement of the Heier interview, the fact that Heier's statement was made in passing, the fact that the defendant did not offer a dramatic or significant response to that, the

> fact that the statement of Heier does not specifically say you failed the test, the fact that all of those facts, under the totality of the circumstances, convince me that … the third statement to Jessup and Heier is admissible.

¶13 As noted, Johnson went to trial and a jury found him guilty on two counts of first-degree reckless homicide, one count of possession of a firearm by a felon, and three counts of first-degree recklessly endangering safety. The trial court imposed consecutive sentences of fifty years in prison, with forty years of confinement and ten years of extended supervision on the first homicide count; fifty years in prison, with forty years of confinement and ten years of extended supervision on the second homicide count; and five years in prison, with two years of confinement and three years of extended supervision on the felon-in-possession count. It also sentenced Johnson to eight years in prison on each of the recklessly-endangering-safety counts, with five years of confinement and three years of extended supervision to run concurrent to each other but consecutive to the felon-in-possession count.

II.

A. Sufficiency of the Evidence

¶14 First, Johnson claims that there was insufficient evidence to support the jury verdicts. When reviewing the sufficiency of the evidence, we will reverse a conviction only if "the evidence, viewed most favorably to the state and 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, 755 (1990). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony, ***Whitaker v. State***, 83

Wis. 2d 368, 377, 265 N.W.2d 575, 580 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983).

¶15 Johnson does not dispute that there was sufficient evidence to establish that someone shot into a crowd on September 30, 2000, "with a wanton disregard for human life." He contends, however, that the State did not present sufficient evidence to prove that he was the gunman. Johnson acknowledges that he confessed to the crimes, but claims that the confession cannot be used to establish guilt because it was not corroborated with independent evidence. We disagree.

¶16 A criminal conviction may not be grounded solely on the confession of the accused. ***State v. Hauk***, 2002 WI App 226, ¶20, 257 Wis. 2d 579, 652 N.W.2d 393. There must be corroboration of a "significant fact" to sustain the conviction. ***Id.*** We independently review whether the evidence presented meets the corroboration standard. *See* ***Barth v. State***, 26 Wis. 2d 466, 468, 132 N.W.2d 578, 580 (1965).

¶17 There was ample evidence from which the jury could have found that Johnson had the opportunity to commit the shootings. Several eyewitnesses corroborated Johnson's presence at the scene of the crime and one witness testified that he saw a man matching Johnson's description walk away from the tavern after the shootings with a gun in his hand. Eyewitness testimony and physical evidence also matched the clothing that Johnson claimed he was wearing on the night of the shootings. The police found a grey hooded sweatshirt and black jeans at Johnson's girlfriend's house and a detective testified that he discovered a "light green to tan" baseball hat among Johnson's property on inventory at the jail.

¶18 There was also evidence from which the jury could find that Johnson's motive—he was upset because people were teasing him about the beer-bottle incident—was corroborated. Several witnesses testified that Johnson's face was bleeding and that people were teasing him. One witness testified that the gunman said "I should get something started" before the shootings and "there's something started now" after the shootings. The evidence corroborates many "significant facts" in Johnson's confession. A jury could reasonably conclude from this evidence that Johnson was the gunman.

B. Third-Party Defense

¶19 In his defense, Johnson argued the theory that Donnell Carter, a/k/a, "Easy," was the gunman. Before trial, Johnson made an offer of proof pursuant to ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), to admit the testimony of Lorenzo Parker. Johnson's attorney represented to the trial court that Parker's testimony would show that "Easy" was the gunman, under the theory that there was a violent confrontation between two groups of people at the Cream City Tavern. The trial court admitted the testimony based on the attorney's representations.

¶20 Parker could not be found. At the close of the evidence, Johnson asked the trial court to admit Parker's statement to the police under WIS. STAT. RULE 908.045(2) and (6) on the ground that Parker was "unavailable," *see* WIS. STAT. RULE 908.04(1)(e). The trial court denied the request. Johnson then asked the court to adjourn the trial so that he could locate Parker. The trial court declined to grant an adjournment and reversed its earlier ruling on Parker's testimony, noting that Johnson had not sufficiently linked "Easy" to the shooting:

> I've reviewed the police report of the statement of Lorenzo Parker…. You did misstate your offer of proof…. There's nothing in here that Lorenzo Parker describes the man with the gun as Easy. There is no reference to the name Easy anywhere in this report.
>
> Also, you misrepresented time frame. There is nothing in this report that indicates at what point Mr. Parker saw women arguing.

¶21 Johnson claims that his due-process rights were violated because Parker's statement supported his theory that someone else was the gunman.[2] The decision to admit or exclude evidence is within the sound discretion of the trial court. ***State v. Evans***, 187 Wis. 2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). Before a defendant may introduce evidence that someone else may have committed a crime, the defendant must satisfy the "legitimate tendency" test. ***Denny***, 120 Wis. 2d at 622–625, 357 N.W.2d at 16–17. The legitimate tendency test is satisfied if the defendant shows that the other person had a motive and the opportunity to commit the crime, and provides evidence to "directly connect the third person to the crime charged which is not remote in time, place or circumstances." ***Id.***, 120 Wis. 2d at 624, 357 N.W.2d at 17.

¶22 Johnson's offer of proof was deficient. According to the police report, Parker saw several women arguing from the back porch of his apartment building. He told the police that as one of the women walked back toward the tavern, a man approached her and attempted to give her a hug. The woman pushed the man away and, according to Parker's statement, the man pulled out a gun and began to wave it around. Several friends pulled the woman away into a

[2] Johnson does not challenge on appeal the trial court's ruling that Parker's statement was not admissible under WIS. STAT. RULE 908.045(2) and (6). Thus, the issue is waived. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

small red car. Parker went back into his apartment. According to the report, Parker heard several gunshots fifteen minutes later. Parker told the police that when he looked out a window facing the tavern, he saw a grey Chevrolet Caprice accelerate away from the scene. He then heard a man cry: "They came to get me. I'm the one supposed to be dead, and my brother's gone."

¶23 Parker's statement did not establish motive or opportunity much less a direct connection between "Easy" and the shootings. Parker could only testify that an unknown man had an argument with a woman fifteen minutes before the shootings. There was no showing that the man had any motive to shoot into the crowd fifteen minutes later. Indeed, according to Parker's statement, the woman the man was arguing with was presumably not even present when the shootings happened because her friends pulled her into a car. Additionally, nothing in Parker's statement connected "Easy" with the shootings. Parker did not identify the man allegedly waving the gun around, he did not see the shootings, and his statement did not place the man with the gun at the tavern at the actual time of the shootings.

¶24 Moreover, the testimony that Johnson offered to corroborate Parker's supposed testimony did not link "Easy" to the shootings. Michelle Watkins testified that she saw "Easy" argue with a woman named "Shalonda" around 1:30 a.m. or 1:40 a.m. According to Watkins, "Easy" did not have a gun. Another witness, Rhonda Smith, told the police that the shooter was not a man whom she knew as "Easy." The trial court did not erroneously exercise its discretion when it excluded Parker's testimony. *See **Denny***, 120 Wis. 2d at 622, 357 N.W.2d at 16 (The defense cannot rest on the creation of "a bare possibility that a third party might be the culprit.").

C. Adjournment

¶25 Next, Johnson alleges that the trial court erroneously exercised its discretion when it denied his request for an adjournment. As noted, Johnson asked for an adjournment of the trial because Parker could not be located. Johnson claims that the trial court should have granted an adjournment given the "relevance and importance" of Parker's testimony. We disagree.

¶26 The decision to grant or deny an adjournment is within the sound discretion of the trial court. ***State v. Fink***, 195 Wis. 2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). When a party has been denied a continuance after claiming surprise, three factors must be met:

> (1) there must have been actual surprise which could not have been foreseen; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance must have made some showing that contradictory or impeaching evidence could probably be obtained within a reasonable time; and (3) the denial of the continuance must have been, in fact, prejudicial to the party who sought it.

Id., 195 Wis. 2d at 339–340, 536 N.W.2d at 404.

¶27 Johnson's claim fails on the second and third prongs of the ***Fink*** test. The trial court denied Johnson's motion for an adjournment on a Friday afternoon. Nonetheless, the court kept the body attachment for Parker in effect until Monday morning. Johnson does not allege that Parker was ever found. Thus, Johnson does not show that, had the trial court granted an adjournment, Parker would have been produced. Moreover, as noted, Johnson does not provide any evidence that Parker's statement would have connected "Easy" with the shootings. Accordingly, Johnson did not suffer any prejudice as a result of Parker's failure to testify.

¶28 Johnson also contends that his due-process rights were violated when the trial did not "exercise its inherent power to secure properly subpoenaed witnesses," such as Parker. He cites no legal authority to support this proposition. Indeed, "the primary responsibility for having witnesses present in court rests with the parties and not the court … the rule is that a motion for a continuance to obtain the attendance of witnesses is addressed to the discretion of the trial court." ***Elam v. State***, 50 Wis. 2d 383, 389, 184 N.W.2d 176, 180 (1971). As noted, the trial court did not erroneously exercise its discretion when it denied Johnson's motion for an adjournment.

D. Opportunity to Impeach

¶29 Johnson also alleges that the trial court erroneously exercised its discretion when it precluded him from impeaching Vicko Battle with an alleged prior inconsistent statement about whether the gunman was in the parking lot or on the sidewalk during the shootings. This claim lacks merit. Johnson does not provide any reference to the record to show where this alleged erroneous exercise of discretion occurred. Moreover, Johnson was able to contradict Battle's testimony through the testimony of other witnesses. Derrick Nelson, a bartender, testified that he saw Johnson in the middle of the parking lot after the shootings and Rhonda Smith testified that she saw the gunman run east through the parking lot.

E. Polygraph Examination

¶30 Next, Johnson alleges that his confession is inadmissible because it was closely related to the polygraph examination. Polygraph test results and anything that a defendant says during what is considered to be part of a polygraph examination are not admissible in criminal proceedings. ***State v. Greer***, 2003 WI

App 112, ¶9, ___ Wis. 2d ___, 666 N.W.2d 518. Statements made during post-polygraph interviews may be admissible, however, if the post-polygraph interview is distinct from the mechanical polygraph test "both as to time and content." ***State v. Johnson***, 193 Wis. 2d 382, 388, 535 N.W.2d 441, 443 (Ct. App. 1995). Conversely, post-polygraph statements are inadmissible if the post-polygraph interview "is so closely related to the mechanical portion of the polygraph examination that it is considered one event." ***Id.***

> The … "one event" touchstone is a mosaic of many fragments, and among other factors to be considered are: the time between the end of the polygraph examination and the interview during which the defendant said something that he or she seeks to suppress; whether the defendant was still attached to the polygraph machine when he or she made the incriminating statements; whether the post-polygraph interview was in the examination room or some other place; whether the defendant was told that the polygraph examination is over; and whether … the polygraph examiner interrogates the defendant making "frequent use of and references to the charts and tracing he had just obtained."

Greer, ___ Wis. 2d ___, ¶11 (quoted source omitted). The "core factors" are "whether when the defendant made the statements he or she seeks to suppress 'the test was over' and whether the defendant was so told." ***Id.***, ¶12 (quoted source omitted).

¶31 We will uphold the trial court's findings of historical and evidentiary fact unless they are clearly erroneous. ***Johnson***, 193 Wis. 2d at 387, 535 N.W.2d at 442. The application of the facts to the constitutional principles, however, is a question of law that we review *de novo*. ***Id.***

¶32 The polygraph examination and the post-polygraph confession were sufficiently discrete. Hargrove testified that, after the polygraph examination was

complete, he told Johnson that it was over. Johnson also signed a release form which provided "that any questions I may be asked after this point in time, and any answers I may give to those questions, are not part of the polygraph examination." Thus, Johnson was told and acknowledged that the test was over.

¶33 Moreover, the trial court found that Johnson was taken to a different room and interviewed approximately three and one-half hours after the polygraph examination. Johnson does not challenge these findings. Thus, the post-polygraph interview was distinct both as to time and location from the polygraph examination. Heier's comment to Johnson that "you must have failed that polygraph because you're still here" does not alter our analysis. "[A] truthful comment to a suspect, either volunteered by the officer or in response to the suspect's question, does not override the other factors that we have used consistently to determine whether a defendant's post-examination statements should be suppressed." ***Greer***, ___ Wis. 2d ___, ¶17. Moreover, the statement was a truism; Johnson *was* still there and that reasonably meant that he had not passed the polygraph examination.

F. Sentence

¶34 Finally, Johnson alleges that his sentence was unduly harsh because "it did not represent the minimum custody consistent with the sentencing factors in this case." (Uppercasing omitted.) Sentencing is largely within the trial court's discretion and we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). A strong public policy

exists against interfering with the trial court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183, 191 (Ct. App. 1984). To obtain relief on appeal, a defendant "must show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883, 895 (1992).

¶35 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public.[3] ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527, 537 (1984). An examination of the record shows that the trial court considered the appropriate factors. It considered the gravity of the offense, noting that the shootings were "incredibly tragic" because Johnson "shot into the crowd and hit innocent bystanders." It also considered Johnson's character and the need to protect the community, commenting: "I … hope to send a message … to the community…. I wish I could do something to get everybody to quit running around with guns and shooting them at every stupid insult or slight that takes place." The court also noted there were "tragic and horrible consequences" for the victims' families and that Johnson failed to take responsibility for his actions during his allocution. Given these factors, we cannot say that Johnson's sentence was unduly harsh or unconscionable.

[3] The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495–496, 444 N.W.2d 760, 763–764 (Ct. App. 1989).

¶36 Johnson claims that the trial court erred when it rejected the State's sentencing recommendation because the "prosecutor's recommendation was especially important for the Court to strongly consider because there was no [pre-sentence investigation report] and the Court, unlike the prosecution, was not privy to the full panoply of out of court perspectives generated by the police investigation and prosecutor's analysis." (Footnote omitted.) We disagree. The same judge presided over the trial and the sentencing proceedings. It heard all of the testimony and had an adequate opportunity to gain a "panoply … of perspectives." Moreover, the only reason there was no presentence investigation report is because Johnson refused to cooperate with the presentence report writer. Thus, he cannot now claim error based on the trial court's failure to consider a report.

¶37 Johnson also contends that the trial court relied on an improper factor when it allegedly believed that Johnson owned the gun he used in the shootings. The record belies this claim. At sentencing, the court commented: "All of this happened … because of your gun being present *or being handed a gun in this case*, you shot into the crowd and hit innocent bystanders." (Emphasis added.) Johnson fails to show an unreasonable or unjustified basis in the record for the sentence imposed.

By the Court.—Judgment affirmed.

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