COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1764-CR **Cir. Ct. No. 00 CF 1680**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALFONSO TAYLOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alfonso Taylor appeals from a judgment entered after a jury convicted him of first-degree reckless homicide, and two counts of first-degree recklessly endangering safety, all as party to a crime. Taylor claims that the trial court erred when it: (1) denied his motion for a mistrial; (2) denied his motion to suppress his confession; and (3) found the evidence was sufficient to

convict him of these crimes. Because the trial court did not erroneously exercise its discretion in denying Taylor's mistrial motion, because under the totality of the circumstances Taylor's statements were voluntary, and because the jury had sufficient evidence upon which to convict, we affirm.

I. BACKGROUND

¶2 On March 24, 2000, Jonathon Booth, Taylor's cousin, was involved in a fight, which led to gunfire outside a Milwaukee club. The next day, several individuals met at the home of Sylvester Townsend, another cousin of Taylor. Included among those individuals were Sylvester Townsend, Jonathon Booth, Taylor, and Levi Booth, Taylor's codefendant and stepfather. They talked about shooting some people in retaliation for the previous night's fight. Levi Booth and Taylor retrieved a bag of ammunition from the home of Levi Booth and they loaded their guns at the home of Sylvester Townsend. The men then left Sylvester's home in two groups. Taylor's group was the last to leave but, shortly thereafter, decided not to proceed. The first group, however, arrived at their destination, began shooting, and left an eleven-year-old girl dead and two adults injured.

II. DISCUSSION

A. Mistrial

¶3 Taylor's claim for a mistrial arises from an incident occurring on the third day of his trial. On that day, a few jurors encountered Taylor in the elevator of the courthouse. Deputies accompanied him and his hands were handcuffed behind him. No interaction between the jury members and Taylor occurred in the elevator. Taylor reported this incident to his attorney, and one or more court

officers reported it to the trial court. The court, after consulting with the prosecution and defense, began *voir dire* of the jury. The objective of the questioning was to determine whether the jurors saw Taylor, observed the handcuffs, and whether they drew a prejudicial conclusion as a result.

¶4 Only two jurors acknowledged seeing Taylor, and one acknowledged seeing a deputy. Upon completion of *voir dire*, the trial court denied Taylor's motion for mistrial, finding that the two jurors who saw Taylor had not seen him handcuffed and could remain fair and impartial. The trial court's decision was reasonable and must be affirmed.

¶5 We review a trial court's denial of a motion for a mistrial under the erroneous exercise of discretion standard. ***State v. Knighten***, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997). A trial court does not erroneously exercise its discretion in denying a motion for mistrial where "brief and inadvertent confrontations between a shackled accused and one or more members of the jury [occurs]," ***id.*** at 844 (citations omitted), because this is insufficient to show prejudice. A court does not err in denying a mistrial motion based on a juror's sighting of a defendant "while shackled outside the courtroom." ***Id.*** at 845.

¶6 Taylor argues that the trial court's inquiries were inadequate because the questioning was too vague to ascertain whether any jurors had witnessed Taylor in handcuffs. Taylor further argues that the court failed to ask the two jurors who had admitted seeing Taylor in handcuffs whether they had told the other jurors about seeing Taylor prior to *voir dire*. We reject his claims.

¶7 The record reflects that the trial court specifically asked the jurors, "Is there anything about seeing him in the elevator with the deputy that you feel would affect your ability to be fair and impartial in deciding this case?" The

jurors responded, "No" or "Not at all."[1] Based on this exchange, the trial court found that the prospective jurors could serve impartially to resolve the issues in this case. "A determination by the circuit court that a prospective juror can be impartial should be overturned only where bias is 'manifest.'" ***State v. Louis***, 156 Wis. 2d 470, 478-79, 457 N.W.2d 484 (1990) (*citing* ***Irvin v. Dowd***, 366 U.S. 717, 723-24 (1961); ***Hammill v. State***, 89 Wis.2d 404, 416, 278 N.W.2d 821 (1979)). Taylor has failed to produce any basis for this court to overturn the trial court's determination of impartiality. He has failed to demonstrate bias or prejudice as a result of the elevator incident. Accordingly, the trial court did not erroneously exercise its discretion when it denied his motion.

¶8 Further, Taylor's counsel was present and involved in the formulation of the questions asked during *voir dire*. Yet, Taylor's counsel did not object to the failure of the court to ask additional questions pertaining to the jurors' conversations among themselves. Because issues not presented in the trial court will not be considered for the first time on appeal, Taylor's objection has been waived. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

¶9 For the reasons outlined above, we hold that the trial court did not erroneously exercise its discretion in denying Taylor's mistrial motion.

B. Voluntary Statements

¶10 Taylor argues that his statements made to the police regarding the shooting in question were involuntary. Taylor did not initially object to the

[1] Taylor further argues that it is uncertain whether a juror would admit prejudice to the court if he or she were prejudiced as a result of the incident. This objection was never raised to the trial court and, therefore, has been waived.

voluntariness of those statements prior to trial or move to suppress the confession. In fact, defense counsel made the court aware that he did not intend to raise a ***Miranda-Goodchild*** challenge.[2] However, when defense counsel's opening statement focused on the circumstances of these statements, the prosecutor requested a ***Miranda-Goodchild*** hearing. Defense counsel specified that he was not asserting that Taylor had not been given his ***Miranda*** rights, and was not asserting that Taylor was forced to give a statement. Instead, defense counsel stated, "I am raising the issue of the discrepancy in the statements that were given to the police and in the testimony that Mr. Taylor may give." A ***Miranda-Goodchild*** hearing was held and the statements were allowed into evidence.

¶11 We review the voluntariness of statements using a "totality of the circumstances" analysis, which "weigh[s] the [suspect's] personal characteristics … against the [alleged] coercive police conduct." ***State v. Franklin***, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999) (citation omitted). We will find a defendant's statement "involuntary" only if it "was compelled by coercive means or improper police practices." ***Id.*** at 413. When evidence of coercion is present, a balancing test is applied. ***State v. Williams***, 220 Wis. 2d 458, 464, 583 N.W.2d 845 (Ct. App. 1998). When balancing the totality of the circumstances, this court has held that some of the factors to be considered are "the confessor's age, education and intelligence, physical and emotional condition and prior experience with the police." ***State v. Tobias***, 196 Wis. 2d 537, 546, 538 N.W.2d 843 (Ct. App. 1995) (citation omitted). While the State must show voluntariness by a preponderance of the evidence, findings of underlying historical fact will not be

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

set aside unless they are clearly erroneous. *See* ***Lego v. Twomey***, 404 U.S. 477, 489 (1972); ***State v. Agnello***, 226 Wis. 2d 164, 182, 593 N.W.2d 427 (1999); ***Franklin***, 228 Wis. 2d at 413.

¶12 Specifically, Taylor alleges two types of coercive interrogation methods used by the police during questioning. The first is physical intimidation, involving the pulling of his "trigger finger" and the detective getting "into his face" during questioning. The second is the use of psychological intimidation when the detectives said they could make Taylor the "trigger man" and get him put away for life.

¶13 We agree with the trial court that the alleged intimidation was not sufficient to undermine the voluntariness of Taylor's statements. This court has held that "the fact that the investigator raised his voice and invaded [a suspect's] space by getting close to him does not establish actual coercion." ***State v. Owen***, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). Moreover, the pulling of Taylor's "trigger finger" accompanied by the alleged threats—that the detectives could make Taylor the "trigger man" and put him away for life—do not amount to police coercion in this instance. Taylor argues that the police knew that he was not the trigger man at the time they interrogated him because other parties had already confessed. However, these two confessors were Taylor's stepfather and brother, and it would have been irresponsible for the detectives to conclude that Taylor could not have been the shooter simply because his stepfather and brother did not identify him as such. Furthermore, these tactics are well within the range of permissible interrogation techniques used by interrogators. *See* ***Frazier v. Cupp***, 394 U.S. 731 (1969) (holding that a clear and deliberate falsehood on the part of the police did not render an otherwise voluntary confession involuntary). Thus, we conclude that the trial court's findings were not clearly erroneous and,

under the totality of the circumstances, hold that the interrogation methods used by the police were not unlawfully coercive.

¶14 Taylor further argues that his statements to police were involuntary due to the length of the detention, the length of the interrogation, and the fact that he suffers from a learning disability.

¶15 The record reflects that the length of Taylor's detention during which he gave his statements was approximately twenty-seven hours. The trial court found that the length of Taylor's detention had no effect upon the voluntariness of his statements. That finding is not clearly erroneous. Taylor was given his ***Miranda*** warnings, his needs and comforts were accommodated, and Taylor has shown no evidence that his questioning was delayed as a method to induce his confession.

¶16 The length of Taylor's interrogation was less than six hours, broken up into four separate interviews. During the interviews, Taylor gave four separate and different statements. Due to Taylor's different stories and willingness to participate, we conclude that the length of interrogation was not coercive in nature and did not render his statements involuntary.

¶17 Finally, Taylor claims he has a learning disability, which rendered his statements involuntary. Evidence of a learning disability should not be relied upon to prove involuntariness unless there is some evidence showing that the defendant's intellectual level in some way affected or impaired his ability to waive his ***Miranda*** rights or to make a voluntary statement. *See* ***Norwood v. State***, 74 Wis. 2d 343, 366, 246 N.W.2d 801 (1976). Here, whether Taylor had a learning disability is unimportant. The evidence has shown he clearly understood the

questions and gave intelligent answers in response. We conclude that Taylor's alleged learning disability did not render his statements involuntary.

¶18 For the reasons outlined above, we hold that Taylor's statements were voluntarily made.

C. Insufficient Evidence

¶19 Taylor contends there was insufficient evidence to support his conviction. Taylor contends that he may not have known what was occurring during the time of the crime, that the evidence established that he was not at the scene of the shooting, that three witnesses at the scene who made statements to the police were not credible, and that there was evidence that he withdrew prior to the shooting. We cannot agree with Taylor.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted). Where there are inconsistencies within a witness' or witnesses' testimony, it is the trier of fact's duty to determine the weight and credibility of the testimony. ***Thomas v. State***, 92 Wis. 2d 372, 382, 284 N.W.2d 917 (1979). We will substitute our judgment for that of the trier of fact only when the fact finder relied on evidence that was "inherently or patently incredible"—that kind of

evidence which conflicts with nature or with fully established or conceded facts. ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

¶20 Taylor argues that the statements three witnesses made to the police were involuntary and/or later recanted. This does not render the evidence insufficient. "The jury is the sole judge of witness credibility." ***State v. Givens***, 217 Wis. 2d 180, 197, 580 N.W.2d 340 (Ct. App. 1998); *accord* ***State v. Hahn***, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998). "[W]here there are inconsistencies in the testimony of a witness … the jury may choose to disbelieve either version or make a choice of one version rather than another. Only when the evidence is inherently or patently incredible will we substitute our judgment for that of the factfinder." ***State v. Saunders***, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995) (citations omitted); *accord* ***Hahn***, 221 Wis. 2d at 683. Despite all three witnesses' denials that they had made the statements to the police, there was evidence in the record to the contrary on which a jury could rely in its credibility determination. We therefore refuse to reverse on this basis.

¶21 Taylor asserts that there is insufficient evidence of his knowledge of the conspiracy. We disagree. "Where one defendant knows another is committing a criminal act, he should be considered a party thereto 'when he acted in furtherance of the other's conduct … and acquiesced or participated in its perpetration.'" ***Frankovis v. State***, 94 Wis. 2d 141, 149, 287 N.W.2d 791 (1980). Here, Taylor's statements, along with the statements of three witnesses, provide sufficient proof of Taylor's knowledge of the conspiracy. We therefore cannot reverse on this basis.

¶22 Next, Taylor complains that there was ample evidence that he withdrew from the conspiracy prior to the shooting. However, Taylor has

provided no authority to support his withdrawal defense on appeal. We therefore reject his argument on this basis.

¶23 Finally, Taylor argues that there was no evidence at trial to show either that he was at the scene of the shooting, or that shotguns or rifles were used by any of the shooters. While Taylor is correct in asserting that there was no evidence connecting Taylor to the actual shooting scene, that is immaterial. The absence of bullets, shells, and casings directly connected to Taylor at the scene of the shooting only goes to prove that Taylor was not present; it does not establish that he was not a party to the crimes. Accordingly, we are not persuaded by his claim.

¶24 For the reasons outlined above, we agree with the trial court that there was sufficient evidence to support Taylor's conviction.

By the Court.—Judgment affirmed.

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