COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1869-CR **Cir. Ct. No. 96CF962007**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRAN D. EVANS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Iran Evans appeals a judgment of conviction and an order denying his postconviction motion. The principal issues we address are

whether we properly extended Evans's time to pursue direct postconviction relief under WIS. STAT. RULE 809.30 (2001-02),[1] and whether the circuit court properly denied Evans's request for instruction on a lesser-included offense. We conclude the extension was properly granted, and that the trial court erred in denying the instruction. We therefore reverse Evans's conviction for attempted first-degree homicide. We do not, however, disturb the conviction for first-degree reckless injury (except to require resentencing on it) because we find no merit in Evans's remaining claims of error or in his request for discretionary reversal.

EXTENSION OF DIRECT APPEAL TIME

¶2 The State argues that we incorrectly extended Evans's time to file a postconviction motion and appeal under WIS. STAT. RULE 809.30. Evans was convicted in July 1996. In October 2000, we affirmed the denial of his pro se postconviction motion brought under WIS. STAT. § 974.06. In March 2002, represented by retained counsel, Evans moved this court for an extension under WIS. STAT. RULE 809.82(2) of his time to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30. According to the motion, postconviction counsel had been appointed for Evans in 1996, but withdrew in March 1997, without advising Evans of the dangers of proceeding pro se. The motion alleged that Evans did not make a valid waiver of his right to counsel, and therefore he must be returned to that point in the postconviction process. The motion was accompanied by an affidavit from former appointed counsel agreeing with this factual description. We granted the motion in March 2002 in a brief order.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶3 Following that order, Evans moved the circuit court for postconviction relief in May 2002. The court denied the motion later that month, and denied reconsideration in August 2002. This appeal is taken from the judgment of conviction and those orders. In August 2002, after this appeal was filed, the State filed a "motion for clarification" in this court that contested, for the first time, our granting the extension five months earlier. The State did not dispute any factual assertion in the extension motion, but raised only legal arguments. By order of September 3, 2002, we advised the State that it could raise this issue in its brief and it has done so.

¶4 The State's first argument is that this extension can be obtained only by a habeas petition under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992), and therefore we erred by granting the extension under WIS. STAT. RULE 809.82(2). However, even if we assume the State is correct that habeas is the better procedure, or even the exclusive one, the State identifies only one substantive difference in how the two procedures would apply to this case: a habeas petition would have been subject to dismissal for laches under ***State ex rel. Smalley v. Morgan***, 211 Wis. 2d 795, 565 N.W.2d 805 (Ct. App. 1997). We do not regard this difference as significant. The concept of unreasonable delay is inherent in our consideration of whether good cause has been shown for an extension. Although our order in this case did not expressly discuss those factors, we typically consider the amount of time that has passed, the reasons for the delay and any other facts that may be relevant. Therefore, because the State was free to argue the length of the delay in the context of the extension motion, we see little substantive difference between the two procedures.

¶5 The State next argues that Evans's delay was unreasonable because he failed to explain why he did not earlier raise the issue about the invalid waiver

of his right to counsel. The State argues that the delay of six years between the conviction and the extension motion was unreasonable. However, we apparently did not regard it as so. The present panel did not decide the extension motion, and we are therefore unable to relate from personal knowledge the factors that influenced the decision. We note, however, that Evans while proceeding pro se was apparently not aware he had a claim for relief based on the fact that he dismissed his attorney without first receiving certain information. Nor does there appear to be any reason to believe that a pro se defendant *should* have been aware of that claim. Finally, one might also reasonably infer that, because the extension motion was filed by retained counsel, Evans had only recently acquired funds to retain counsel. In summary, we conclude that our granting of an extension of that length was reasonable.

¶6 Finally, we note that the State was also guilty of some delay by failing to timely object to Evans's extension motion. The motion appears to have been served on the State, and our extension order was served on the State in March 2002. The State did not object until five months later, after Evans's postconviction motion had already been litigated in the circuit court.

MERITS OF APPEAL

¶7 Evans was convicted of attempted first-degree intentional homicide and first-degree reckless injury while armed. The victim, Deric Devine, testified that Evans shot him at close range on a Milwaukee street. Evans argues that the court erred by denying his request for an instruction on first-degree recklessly endangering safety, WIS. STAT. § 941.30(1) (1993-94), as a lesser-included offense to the homicide charge. We agree.

¶8 The parties agree on the legal standard for when a lesser-included instruction must be given:

> A challenge to a trial court's refusal to submit a lesser-included offense instruction presents a question of law which we review de novo. "The submission of a lesser-included offense instruction is proper *only* when there exists reasonable grounds in the evidence both for acquittal on the greater charge and conviction on the lesser offense." In determining the propriety of a defendant's request for a lesser included offense instruction, the evidence must be viewed in the light most favorable to the defendant and the requested instruction. Further, "the lesser-included offense should be submitted only if there is a reasonable doubt as to some particular element included in the higher degree of crime." "If the court improperly fails to submit the requested lesser included offense to the jury, it is prejudicial error and a new trial must be ordered."

State v. Foster, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995) (citations omitted).

¶9 The circuit court ruled, and the State now argues, that there was no basis in the evidence for acquittal on the greater charge and also conviction on the lesser. The State argues that if the jury concluded Evans was the shooter, the manner in which Devine was shot negates any reasonable inference that the shooter did not intend to kill. In other words, the State argues that the only reasonable conclusion a jury could draw is that the shooter intended to kill Devine. Evans counters that there is ample precedent for the proposition that a shooter's failure to hit a vital body part from close range is grounds for reasonable doubt as to the shooter's intent to kill. The State does not distinguish, or even address, the precedents on which Evans relies.

¶10 Evans relies primarily on ***Hawthorne v. State***, 99 Wis. 2d 673, 299 N.W.2d 866 (1981). In ***Hawthorne***, the defendant was charged with attempted

first-degree homicide, and the trial court denied his request for a lesser-included instruction of recklessly endangering safety. ***Id***. at 678. The defendant testified that he shot the victim in the arm in attempted self-defense because he thought the victim had a gun, but did not intend to kill him. ***Id***. at 677-78, 684. In analyzing the facts, the court said the lesser-included instruction should have been given because there was evidence that negated a finding of intent to kill. In that discussion, the court noted that the victim was shot "in a non-vital area." ***Id***. at 686.

¶11 In ***Hawthorne***, the court relied in part on ***Terrell v. State***, 92 Wis. 2d 470, 285 N.W.2d 601 (1979). In ***Terrell***, the defendant objected to the State's request for a lesser-included instruction of second-degree murder, on a greater charge of first-degree murder. ***Id***. at 471-72. The difference between the two crimes was that second-degree murder did not require the intent to kill, but only conduct "evincing a depraved mind." ***Id***. at 473. The court affirmed the giving of the lesser crime instruction. ***Id***. at 476. In its analysis the court stated:

> The evidence also shows that Cobb was shot in widely separate parts of his body, a fact which could reasonably demonstrate to the jury that Terrell did not aim at vital portions of Cobbs' body with the specific intent to kill. The evidence of the police officer who investigated at the scene also indicates that some shots struck the wall and did not hit Cobbs.
>
> Under one reasonable view, this evidence demonstrates that Terrell's conduct was imminently dangerous and evinced a depraved mind regardless of human life. Under that view, it could also be reasonably said that the evidence negated the specific intent to kill.

Id. at 474-75.

¶12 In addition, our own review of the case law has found other decisions that focus on whether a victim was shot in "vital parts." In ***State v.***

Leach, 122 Wis. 2d 339, 350-51, 363 N.W.2d 234 (Ct. App. 1984), *rev'd on other grounds,* 124 Wis. 2d 648, 675-76, 370 N.W.2d 240 (1985) (reversing on other grounds, but affirming on instruction issue), the defendant made a similar argument based on ***Terrell***, but we rejected it, in part because the defendant had shot the victim in the back, and a bullet had lodged near a key blood vessel that led to the victim's heart. Rejecting a similar argument in ***State v. Moffett***, 147 Wis. 2d 343, 352, 433 N.W.2d 572 (1989), the court noted that the defendant "fired at a vital part of Tysen's body from a short distance." And, in ***State v. Cartagena***, 99 Wis. 2d 657, 665-66, 299 N.W.2d 872 (1981), the supreme court agreed with our analysis that even though the defendant shot the victim in the stomach, the jury could conclude that the defendant lacked intent to kill based on evidence of the defendant's comment at the time suggesting lack of intent and because the defendant failed to finish the victim off despite the opportunity, and in fact, attempted to take him to the hospital. In addition, there was evidence in ***Cartagena*** that could lead the jury to conclude the shooting was intended as punishment or retaliation for an earlier action by the victim. ***Id***.

¶13 With these precedents in mind, we review the evidence in the present case, in the light most favorable to the defendant and the requested instruction. Devine testified that he passed Evans and another male on the sidewalk. Devine previously had contact with the other male a week earlier, when they had "a few words with each other" because one did not like the way the other was looking at him. Devine testified that as they passed on the sidewalk the day of the shooting, Devine and Evans had a brief exchange of greetings. Then Evans made a comment to Devine that his companion was staring at Devine, and Devine responded "So?" and continued walking.

¶14 A moment later, Evans came up behind Devine, called his name, and began shooting when Devine turned. According to Devine, Evans shot him from three or four feet away. Devine fell on his back and heard five or six shots. According to police, he was struck by four shots: one through the upper right arm, one in the left buttock, one in the front left thigh, and one through the lower left leg. A police detective testified that Evans gave a statement in which he admitted shooting Devine, and stated that he met up with Devine at the location of the shooting, that they do not get along with each other, that Devine was giving him and his friends dirty looks that day, and that they got in an argument.

¶15 In summary, there is no evidence that Evans aimed at or hit a vital part of Devine's body. The evidence suggests that one or two shots may have missed. Evans may have had an opportunity to finish Devine off, with the firearm or otherwise, but did not. There appears to be no evidence that Evans made an oral statement showing intent to kill at the time of the crime. On this evidence, and in light of existing case law, we conclude that a jury could have reasonable doubt whether Evans intended to kill Devine, or whether he instead acted recklessly, possibly to intimidate or punish Evans based on previous negative feelings between them, and with Evans's companion. Accordingly, we reverse the judgment, on the attempted homicide count.[2]

[2] Evans does not argue that the State produced insufficient evidence at trial to convict him of attempted first-degree homicide. Our review of the record satisfies us that even if the court had instructed jurors on the lesser-included offense of first-degree reckless endangerment, a reasonable jury could have found beyond a reasonable doubt that Evans attempted to kill Devine. Accordingly, we see no legal bar to the State's retrying Evans for attempted first-degree homicide on remand. *See* ***State v. Perkins***, 2001 WI 46, ¶¶47-48, 243 Wis. 2d 141, 626 N.W.2d 762.

¶16 It does not appear that the instructional error we described above would require reversal of Evans's other conviction, for first-degree reckless injury while armed. Therefore, we must address his remaining claims of error that might affect that conviction.

¶17 Evans argues that the court erred by excluding testimony from two witnesses who would have testified that Evans was with them at or near the time of the shooting. We conclude that any error here was harmless. A constitutional or other error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. The evidence against Evans in this case included Devine's own identification of Evans as the shooter, which was based on his previous familiarity with Evans from other encounters. It also included Evans's statement to police admitting the shooting, and the fact that he was found hiding from police in his mother's basement. We are satisfied that this excluded testimony would not have changed the outcome.

¶18 Evans next argues that the circuit court erred in ruling on his request before trial to exclude his statement to police. He argues that the court was obligated to make a preliminary determination of whether Evans in fact made the statement, or whether it was fabricated by the detective. His brief-in-chief cites no authority for the proposition that a court is required or permitted to exclude evidence simply because the court does not find it credible. In his reply brief, Evans cites ***State v. Samuel***, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423, *cert. denied*, 123 S. Ct. 550 (2002). Because this case was first cited in the reply brief, we decline to address it in detail. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981). However, we see no reason to believe ***Samuel*** extends beyond the situation at issue there, which was an allegedly involuntary

statement by a witness other than the defendant. In the present case, the court determined that Evans's statement, if it was genuine, was made voluntarily, and Evans does not dispute that determination on appeal.

¶19 Evans argues that the court erred by denying his subpoena duces tecum for the detective who took Evans's alleged statement. Evans's position was that his statement was partially fabricated by the detective after Evans signed it, and that this occurred by having him sign at the bottom of the first page, and on a second page that was blank, and that the detective later filled in additional material above his signature. The detective's testimony suggested that it was his usual procedure to have the signature at the bottom of the page, rather than at the conclusion of the statement text. Evans's subpoena sought copies of statements the detective had taken from defendants in other cases, so Evans could see whether the detective indeed followed the same signature practice in other statements. The circuit court acknowledged that it was "unusual" to have a suspect sign at the bottom of a page, but concluded that the other statements would not be relevant, "and that it's going to be spending a lot of time on something that's not necessary for the -- the jury to consider in arriving at a verdict."

¶20 We understand the second part of the court's ruling to have been saying that regardless of what evidence might have been produced by the subpoena, the court was not going to admit it at trial because its probative value would be substantially outweighed by a consideration of waste of time under WIS. STAT. § 904.03. We conclude this was a reasonable exercise of discretion. Even if other statements taken by the detective were signed in a different manner, the issue for the jury was not whether the officer followed or deviated from his regular procedure in this case, but whether he fabricated parts of Evans's written statement. We agree with the State that having the jury examine statements the

detective had taken from defendants in other cases would be of limited probative value in the absence of evidence that the officer had added fabricated material to those statements, and that pursuing the "customary procedure" issue would have been both a waste of time and potentially confusing to the jury. Accordingly, we conclude the trial court did not erroneously exercise its discretion in quashing the subpoena duces tecum.

¶21 Evans also argues for reversal in the interest of justice under WIS. STAT. § 752.35, based on the claimed errors we have discussed above. We conclude that reversal of the reckless injury conviction on this ground is not warranted.

¶22 Evans argues that the court erred in denying his request for postconviction discovery. A defendant is entitled to postconviction discovery when the sought-after evidence probably would have changed the outcome of the trial. ***State v. O'Brien***, 223 Wis. 2d 303, 321, 588 N.W.2d 8 (1999).

¶23 Evans sought Devine's medical records or any other information that Devine possessed or used illegal drugs or alcohol in the time leading up to the shooting. The motion asserted that "[i]ndependent investigation has disclosed that Mr. Devine admitted to possession of rock cocaine at the time of the shooting. His consumption of drugs easily could have interfered with his ability accurately to perceive and identify who shot him and create a reasonable doubt that did not otherwise exist in the minds of the jurors." However, the motion did not describe any specific facts from the "investigation," and therefore it provided no basis to believe there was evidence that potentially would have changed the outcome of the trial.

¶24 Evans also sought, as postconviction discovery, the same material that he sought with his subpoena duces tecum that we discussed above. We concluded above that the court properly quashed the subpoena, and our reasoning there demonstrates that this evidence would not have potentially changed the outcome of the trial. Finally, Evans sought an *in camera* review of the personnel file of the detective who took his statement, for evidence of perjury or other like dishonesty. Later, in a reconsideration motion, Evans presented information, obtained through an open-records request, that the detective had previously been given a twenty-five-day suspension without pay for "untruthfulness." Evans asserted that he was unable to obtain the facts of that incident except by inspection of the detective's file. We conclude that this request was properly denied. Whatever the facts of that incident may have been, it was eleven years before trial, and we are satisfied that this evidence of this one incident would not have changed the outcome at trial.

¶25 In summary, we reverse Evans's conviction for attempted first-degree homicide but not his conviction for first-degree reckless injury while armed with a dangerous weapon.[3] We do, however, vacate the sentence on the latter conviction to allow for resentencing. *See* ***State v. Church,*** 2003 WI 74, ¶¶21-26, No. 01-3100-CR.[4] The circuit court may wish to delay resentencing on the

[3] Evans also presented alternative arguments couched in terms of ineffective assistance of counsel in the event we would conclude that any of his substantive claims of error were deemed waived by failure to make timely or proper objections in the trial court. We find no waiver and have addressed all claims of error directly. Accordingly, we do not consider the alternative ineffective assistance arguments.

[4] The court sentenced Evans on July 29, 1996, to a thirty-five-year term of imprisonment for attempted homicide and to ten years concurrent on the reckless injury count. Reversal of the conviction underlying the controlling thirty-five-year sentence thus significantly impacts the original sentence structure.

reckless injury count until the post-appeal disposition of the attempted homicide charge is determined (see footnote 2).

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

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