COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP533-CR **Cir. Ct. No. 2007CF1714**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUDOLPH D. POWELLS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Rudolph D. Powells appeals from a judgment convicting him of first-degree reckless homicide, armed robbery, and possession of a firearm by a felon, and from an order denying his postconviction motions for relief. He contends that: (1) the circuit court should have excluded 911 caller

identification evidence and a shell casing from a separate domestic violence incident; (2) the circuit court should have allowed him to argue that two other individuals had access to the murder weapon; (3) defense counsel should have moved to suppress a mask and gun; (4) the circuit court should have granted him a new trial based upon newly discovered evidence showing that the apartment where the 911 call originated was leased to a third party; and (5) the circuit court should have ordered postconviction DNA testing on a beer can found near the crime scene and additional discovery relating to phone records. We reject each of these contentions and affirm.

¶2 The charges were based upon an incident in which two masked intruders kicked in the door to an apartment and demanded money and marijuana from the residents. During the course of the robbery, one of the intruders shot and killed one of the residents. Police recovered a shell casing from the apartment and a mask from the parking lot with Powells' DNA on it immediately after the incident. They subsequently obtained the murder weapon from the residence of a third party. Thus, the trial focused largely on the State's attempts to link the mask found in the parking lot to the robbery/homicide, and the gun to Powells. More specific facts relevant to each issue will be set forth in the discussion below.

The 911 CAD and Shell Casing

¶3 Eleven days after the homicide, a computer-aided dispatch screen (CAD) showed that a 911 call was made from a phone registered in Powells' name. Police responding to that call recovered a shell casing about a block from the apartment where the call originated. Ballistic tests determined that the shell casing recovered during the response to the 911 call was fired from the same gun as the shell casing recovered from the robbery/homicide scene. However, because

a subpoenaed witness failed to appear, the jury was never informed that the 911 call related to a domestic violence incident, or that the domestic violence victim told police that Powells had fired the gun.

¶4 Powells contends that the CAD printout and the shell casing from the 911 incident should have been excluded from evidence under the test for other acts evidence set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). *See also* WIS. STAT. § 904.04(2) (2007-08).[1] We agree with the State, however, that neither the CAD printout nor the shell casing in and of themselves constituted other acts evidence. The other act which was the subject of the initial pretrial motion was Powells' firing of the gun during the domestic violence incident. Since the evidence that Powells had fired the gun did not come in, the ***Sullivan*** test did not apply. Instead, the circuit court properly evaluated the admissibility of the CAD printout and shell casing under the standard requirements that they be relevant and that their probative value not be substantially outweighed by the danger of unfair prejudice. WIS. STAT. §§ 904.01, 904.02, and 904.03.

¶5 The relevance of the 911 shell casing was that it had been fired from the murder weapon. The relevance of the CAD was that it showed Powells was in some way associated with the location near where the murder weapon was discharged after the homicide, at the time the gun was discharged. Both items therefore constituted links in a circumstantial chain of evidence connecting Powells to the robbery/homicide by means of the murder weapon. While it is true

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that the probative value of the items was limited by the lack of direct evidence that Powells had actually fired the gun at the secondary location, any prejudicial effect of the items was limited to the same degree. In other words, the jury may or may not have made the inference that the recovery of a bullet casing a block away from a residence where a 911 call was made on a phone registered to Powells meant that Powells had possessed or had access to the weapon that discharged that casing. If it did make that inference, then the items had sufficient probative value to outweigh any prejudicial effect. If it did not make that inference, there was no prejudicial effect. In either event, the admission of the items was within the circuit court's discretion, and the weight to be given to them was for the jury to decide.

Other Potential Suspects

¶6 Powells contends that he was improperly prevented from presenting a defense that either Marlon Bates or Karl Taylor could have committed the robbery/homicide. Bates, who was facing charges in a separate drug case, testified that Powells had sold a gun with "a homi on it" to a third party. There were some unsent letters indicating that the victim in this case was upset that Taylor had been spreading rumors that the victim was a snitch.

¶7 In order to present evidence and make argument suggesting that a third party may have committed the charged crime, however, a defendant must show that the third party had: (1) motive; (2) opportunity; and (3) a direct connection to the crime that is not remote in time, place or circumstances. *See* ***State v. Denny***, 120 Wis. 2d 614, 622-23, 357 N.W.2d 12 (Ct. App. 1984).

¶8 Powells argues that Bates had a motive to rob the victim based upon general involvement in the drug culture. Powells has not, however, presented any basis to believe that Bates even knew the victim, or was aware that he might have

drugs or money in his apartment, much less that he had any actual connection to the crime. While the letters could arguably establish that there was bad blood between Taylor and the victim, it was undisputed that Taylor was in jail at the time of the robbery/homicide, and therefore had no opportunity to commit the offenses. We therefore conclude the circuit court was within its discretion to refuse to allow Powells to present a defense that either Bates or Taylor could have committed the robbery/homicide.

The Mask and Gun

¶9 Powells contends that trial counsel should have moved to suppress the black cloth found in the parking lot because the manner in which the police presented photos of it to the surviving victim for identification was unduly suggestive. However, Powells does not present any legal authority to support the proposition that the same lineup procedures and standards that apply to identifying suspects also apply to identifying physical evidence. Here, the police recovered the black cloth outside the apartment building where a robbery/homicide had been committed by masked intruders, and the crime lab independently determined that the mask contained Powells' DNA. We are satisfied such crime scene evidence was admissible without regard to whether the victim was or was not able to identify the cloth as the same mask worn by one of the intruders. Rather, the witness's identification, and any discrepancies between her description of the mask and its actual properties were properly the subject of cross-examination and impeachment.

¶10 Powells also claims counsel should have moved to suppress "a gun found in a search not linked to this case." Specifically, he complains that there was no evidence presented about who lived at the house where the gun was

recovered. The gun was plainly "linked" to the case, however, by the ballistics report showing that it was the murder weapon. Again, the strength of the State's circumstantial case linking the gun to Powells goes to the weight of the evidence, not the gun's admissibility. In short, counsel did not provide ineffective assistance by failing to file a suppression motion that lacked merit.

The Lease

¶11 Powells next argues that he is entitled to a new trial based upon newly discovered evidence in the form of a lease showing that someone other than Powells was on the lease for the apartment where the 911 call originated. The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not merely be cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. *See* ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990).

¶12 Assuming for the sake of argument that Powells could meet the first four factors, we conclude that he has failed to satisfy the fifth factor. As the trial court noted, it is not uncommon for a person to reside someplace without being listed on a lease. The fact that Powells was not listed on the lease does not negate the fact that the phone was registered in his name and that a witness testified to having seen Powells living at that address with his girlfriend. We therefore see no reasonable probability that information about who was actually listed on the lease would have led to a different result at trial.

Postconviction Discovery

¶13 Finally, Powells seeks postconviction discovery of phone records to determine who subscribed to the line at the apartment where the 911 call originated, and DNA testing on a beer can found in the parking lot of the apartment where the robbery/homicide occurred. In order to obtain postconviction discovery, a defendant must generally show that the evidence sought is "relevant to an issue of consequence," meaning that there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. ***State v. O'Brien***, 223 Wis. 2d 303, 320-21, 588 N.W.2d 8 (1999). Postconviction DNA testing is more specifically governed by WIS. STAT. § 974.07(2) and (7). Under those sections, a defendant must allege actual innocence and show that the evidence is relevant and that it is reasonably probable that the defendant would not have been convicted if the result of the testing was exculpatory; that the evidence is in the possession of a government agency with a demonstrable chain of custody or integrity established by the testing itself; and that the evidence has not been subject to previous testing.

¶14 Here, it is not reasonably probable that Powells would have been acquitted if phone records showed that someone else had registered the 911 apartment phone in his name, or if his DNA were not found on the beer can in the robbery/homicide parking lot. In addition to the testimony that a witness had seen Powells living at the 911 address with his girlfriend, the State points out that the phone book for that year listed the 911 apartment as Powells' address, and that Powells also gave the apartment as his address when he was arrested on unrelated

charges earlier that year.[2] There was no testimony or evidence that the suspects involved in the robbery/homicide had been drinking in the parking lot, or any other reason to connect the beer can to the crimes charged.

By the Court.—Judgment and order affirmed.

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

[2] It is not clear from the parties' briefs whether the information about the phone book and Powells' given address on a prior charge was in the record at the time of the trial, but the court was entitled to consider it when evaluating whether additional information would have changed the outcome of the trial, since it would also be admissible at a new trial.