COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0126-CR **Cir. Ct. No. 00CF004287**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN SWIFT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and JEAN W. DiMOTTO, Judges. *Affirmed.*

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

¶1 PER CURIAM. Brian Swift appeals from a judgment entered after a jury convicted him of first-degree reckless injury, while armed, as a party to a

crime, contrary to WIS. STAT. §§ 940.23(1)(a), 939.63 and 939.05 (1999-2000).[1] He also appeals from an order denying his postconviction motion. Swift claims: (1) he is entitled to a new trial based on newly discovered evidence; (2) he is entitled to a new trial in the interest of justice; (3) the evidence presented at trial was not sufficient to prove that the victim, Robert Owens, suffered "great bodily harm" as required by WIS. STAT. § 939.22(14); and (4) the trial court's jury instructions were improper. Because it is not reasonably probable that a different result would be reached on a new trial, because the record reflects that the real controversy was fully tried, because the record contains sufficient credible evidence to support the jury's determination that Owens suffered "great bodily harm" as required by § 939.22(14), and because any improper jury instructions were harmless beyond a reasonable doubt, we affirm.

BACKGROUND

¶2 In the early morning hours of August 18, 2000, Swift and his cousin, Andre Robinson, approached Owens while he was walking alone in the 2800 block of North Bremen Street in Milwaukee, Wisconsin. During their encounter, Swift and Robinson confronted Owens regarding alleged statements he made about Swift at a party. Subsequently, Swift and Robinson attacked Owens. During the fight, Owens was punched, kicked, and shot multiple times. Owens sustained two gunshot wounds: one to the left chest and one to the right forearm, both at close range.

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

¶3 At trial, Owens identified Swift as the shooter. Jury questions, however, reflected doubt as to the veracity of Owens's testimony. Ultimately, Swift was convicted by a jury of first-degree reckless injury, while armed, as party to a crime. Swift was sentenced to ten years' imprisonment, consisting of five years' initial confinement and five years' extended supervision.

¶4 Swift filed a postconviction motion, which was denied. He now appeals.

DISCUSSION

A. Newly Discovered Evidence.

¶5 Swift claims he is entitled to a new trial on the basis of newly discovered evidence. Specifically, he argues that Robinson's admission that Robinson shot Owens constitutes newly discovered evidence. The admission was recorded on tape during a telephone call between Swift and Robinson. Robinson admits that he shot Owens saying, "just because I did do the mother-fucking shooting, I will do this shit." From that taped conversation, Swift filed a postconviction motion for a new trial based on newly discovered evidence. On December 6, 2002, the trial court denied the motion for a new trial, finding that there was not a reasonable probability of a different result at a new trial if Robinson's statements were introduced. The trial court's decision was reasonable and must be affirmed.

¶6 To succeed on a claim of newly discovered evidence, Swift must show by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely

cumulative to the evidence which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

¶7 Swift failed to satisfy this standard and, therefore, the trial court did not err in ruling that the evidence failed to warrant a new trial. Swift argues that Robinson's admission that Robinson was the shooter satisfies the definition of newly discovered evidence because, before the conviction, Robinson claimed that Swift was the shooter.

¶8 Based on the facts of this case, we cannot conclude that Swift satisfied the first prong of the newly discovered evidence test, which requires that the proffered evidence was unknown at the time of trial. Here, Swift was with his cousin Robinson when the scuffle with Owens occurred. If Swift did not shoot Owens, then Robinson had to be the shooter. In fact, this was Swift's defense at trial—that Robinson was the shooter. Thus, the fact that Robinson was the shooter was known *before* trial. Swift argues, nevertheless, that the evidence was not discovered until after his conviction because it was then that Robinson admitted to being the shooter. This distinction does not transform the evidence into newly discovered evidence.

¶9 In ***State v. Jackson***, 188 Wis. 2d 187, 198, 525 N.W.2d 739 (Ct. App. 1994), we rejected a claim that in order for a party to have knowledge of evidence, it must not only be aware of it, but also be able to use it. ***Id.*** There is a distinction between newly *discovered* evidence that was unknown at the time of trial and newly *available* evidence that was known to the defense, but unavailable because of the co-defendant's refusal to testify. ***Id.*** at 199. Newly *available* testimony from an accomplice is not newly *discovered* evidence necessitating a

new trial for a defendant. ***Id.*** at 201. Thus, Swift had knowledge that Robinson was the shooter at the time of trial, despite the fact that this evidence was not *available* to be used because at that time Robinson was claiming that Swift was the shooter.

¶10 Moreover, even if Swift could prove by clear and convincing evidence that Robinson's taped confession satisfied the first four factors of the test, he cannot prove that there is a reasonable probability of a different result in a new trial. Whether Swift or Robinson was the shooter, the jury heard sufficient evidence from independent witnesses, which would lead to Swift's conviction as a party to the crime. Even if the case was re-tried and the jury was allowed to hear Robinson's taped confession, there is not a reasonable probability that Swift would have been acquitted. Accordingly, we reject Swift's newly discovered evidence claim.

¶11 Swift also asserts that phone records obtained after trial constitute newly discovered evidence. The phone records showed that no phone calls were made from the Swift residence to Owens's residence during the relevant time period. Those records would refute Owens's testimony that he had received threatening phone calls after Swift was charged in this case. Owens indicated that when he used "Star 69" to call back the number to see who was placing the threatening phone calls, the phone rang at the Swift residence and Owens ended up speaking with Swift's mother. Swift argues the phone records would give the jury ample reason to doubt the credibility of Owens.

¶12 The trial court rejected this contention, noting that defense counsel did an effective job cross-examining Owens on the phone call evidence, that Mrs. Swift's testimony regarding the phone conversations was more believable than

that of Owens, and that the evidence was cumulative and would not present any reasonable probability of a different outcome. We agree with the analysis of the trial court. First, the phone records could have been discovered before trial, they were cumulative to testimony directly from witnesses and, although the phone records certainly would have impeached Owens's credibility, his credibility was sufficiently challenged without the phone records. Accordingly, we conclude that Swift failed to prove that introducing the phone records during a new trial would have altered the outcome of this case.

B. Interest of Justice.

¶13 Swift next agues that the real controversy was not tried because the jury did not hear Robinson's admission that he was the shooter and the evidence proving the falsity of Owens's claim that he was receiving phone calls from the Swift home. Furthermore, Swift contends that because of these circumstances, there has been a miscarriage of justice. We disagree.

¶14 We review a trial court's denial of a motion for a new trial in the interest of justice under WIS. STAT. § 752.35. ***Vollmer v. Luety***, 156 Wis. 2d 1, 13, 456 N.W.2d 797 (1990). This court may order a new trial: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has, for any reason, miscarried. WIS. STAT. § 752.35 (2001-02). To be entitled to a discretionary reversal based on a miscarriage of justice, a defendant must establish that a "substantial probability" exists that a new trial would lead to a different result. ***Vollmer***, 156 Wis. 2d at 19. This court's discretionary power to grant a new trial is to be done infrequently and judiciously. ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Furthermore, this court will exercise its discretion to grant a new trial in the interest of justice "only in

exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶15 Swift has not presented us with any reason to conclude that the real controversy was not tried. The record reflects that defense counsel did an outstanding job undermining Owens's credibility in defending against both the accusation that Swift was the shooter and that he was an aider/abettor. Even if the jury would have heard Robinson's taped admission and the phone records, the outcome would not have changed. There was strong evidence against Swift. Adding these two items to the defense case would not have resulted in an acquittal.

C. Sufficient Evidence.

¶16 Swift argues that the trial court erroneously exercised its discretion in finding that the evidence was sufficient to prove that Owens suffered great bodily harm. We reject this claim.

¶17 In reviewing the sufficiency of evidence to support a conviction, we must determine whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove guilt beyond a reasonable doubt. ***State v. Von Loh***, 157 Wis. 2d 91, 101, 458 N.W.2d 556 (Ct. App. 1990). Stated another way, we must determine

> "whether, when considered most favorably to the state and the conviction, the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as 'beyond a reasonable doubt.'"

Id. (citation omitted).

¶18 "Great bodily harm" is defined in WIS. STAT. § 939.22(14) as "bodily injury which creates … serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." Moreover, the Wisconsin Supreme Court held that the addition of the phrase "other serious bodily injury" to the statutory definition was an intentional broadening of the scope of the statute to include bodily injuries which were serious, although not of the same type or category as those recited in the statute. ***La Barge v. State***, 74 Wis. 2d 327, 332-34, 246 N.W.2d 794 (1976). This court has recognized that the question of the existence of great bodily harm is, ultimately, an issue of fact exclusively for the jury to decide. ***State v. Schambow***, 176 Wis. 2d 286, 297, 500 N.W.2d 362 (Ct. App. 1993).

¶19 Here, we cannot conclude that the evidence was insufficient to sustain the jury's finding that the victim suffered great bodily harm. Owens told the jury that he was shot in the chest and arm. Medical records confirmed this testimony. We agree with the trial court's assessment that it is "almost beyond argument" to contend that "a bullet in one's chest so close to the organ of the heart as was the bullet that was shot at point blank range into Mr. Owens'[s] chest," was not a serious bodily injury under the statute.

¶20 Accordingly, we reject Swift's claim that the evidence was insufficient.

D. Improper Jury Instructions.

¶21 Swift argues that the trial court erroneously exercised its discretion in charging the jury because the instructions failed to require proof of each element of first-degree reckless injury, as party to a crime, and because they

lacked the "natural and probable consequence" instruction allowing for an invalid theory of criminal liability. We reject his claims.

¶22 Whether a jury instruction violated a defendant's right to due process is a question of law we review *de novo*. ***State v. Pettit***, 171 Wis. 2d 627, 639, 492 N.W.2d 633 (Ct. App. 1992). A jury instruction is tainted and in error if a reasonable juror could misinterpret the instruction to the detriment of the defendant's due process rights. ***State v. Dodson***, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998). However, this court has recognized that a trial court has considerable discretion in issuing its jury instructions. ***State v. Turner***, 114 Wis. 2d 544, 551, 339 N.W.2d 134 (Ct. App. 1983). Furthermore, a trial court's instructions do not have to conform exactly to the standard jury instructions. ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995).

¶23 Swift contends that the jury instructions were confusing to the jury as evidenced by the questions asked by the jury during deliberations. The trial court rejected Swift's challenge to the jury instructions, noting that the appropriate pattern jury instructions were given and that the instructions were not the causative factor in triggering any jury questions. We agree.

¶24 The jury instructions given properly stated the law and were not confusing. The instructions advised the jury of the elements necessary for determining whether Swift was guilty beyond a reasonable doubt of directly committing the crime, and whether Swift was guilty beyond a reasonable doubt of aiding and abetting in the crime. When the jury submitted questions, the trial court referred the jury to the instructions for party to a crime and the substantive crimes to answer their questions.

¶25 Swift also contends that he should be granted a new trial because the party to a crime instruction permitted a conviction on an invalid theory of liability. He argues that he cannot intentionally aid and abet first-degree reckless injury because the crime does not require proof of *intent*, but rather reckless conduct. We reject his claim because Swift waived the right to raise this issue. He never requested that the specific instruction on "natural and probable consequences" be given. He never raised the "natural and probable consequences" challenge during the instruction conference. Accordingly, waiver applies.

¶26 Even if waiver did not bar this issue, any error was harmless beyond a reasonable doubt because an accidental gunshot wound is a natural and probable consequence of beating Owens with a gun. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. Had the instruction been requested and given, a reasonable jury would have still found Swift guilty.

By the Court.—Judgment and order affirmed.

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