COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1371-CR **Cir. Ct. No. 01CF005461**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUIS R. DAVILA-DIAZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Luis R. Davila-Diaz appeals from a judgment entered on jury verdicts convicting him of two counts of first-degree intentional homicide, as a party to a crime, and one count of armed robbery with the use of

force. *See* WIS. STAT. §§ 940.01(1)(a), 939.05, 943.32(2) (2001–2002).[1] Davila-Diaz alleges that the trial court erroneously: (1) denied his motion for a new jury panel; (2) admitted the testimony of a witness who had not been disclosed to the defense until the morning of trial; and (3) admitted what he claims is hearsay testimony. He also claims that the evidence was insufficient to support the jury verdicts. We affirm.

I.

¶2 Luis R. Davila-Diaz was charged with robbing and killing Juan Alex DeLossantos and Carmen Hernandez. The police found DeLossantos's and Hernandez's bodies, with multiple layers of duct tape covering their faces, in the upper level of a duplex on August 1, 2001. An autopsy revealed that they had suffocated to death. Evette Nieves, Davila-Diaz's girlfriend, told the police that Davila-Diaz and several other men committed the crimes. Davila-Diaz pled not guilty and went to trial.

¶3 During *voir dire*, one of the prospective jurors, Juror W., indicated that she did not believe that she could be impartial:

> I didn't mean to look at the defendant and make a snap judgment. But I had a person that I knew who was involved in lots of criminal activity. And he had many markings on his body as affiliations that he belonged to a certain group of people. And these markings indicated that he was in certain criminal activities with this group of people.
>
> I just happened to glance at the defendant and saw similar type markings on his body. And just the thought of that person that I knew came into my mind.

[1] All references to the Wisconsin Statutes are to the 2001–2002 version unless otherwise noted.

During an in-chambers conference, the State moved to remove Juror W. for cause. The trial court granted the request and struck Juror W.

¶4 While still in chambers, Davila-Diaz's attorney moved to strike the jury panel, claiming that the entire panel was tainted by Juror W.'s comments because they were "almost to the level of expert testimony concerning the meaning of tattoos on Mr. Davila-Diaz's body and that this signified the commission of crimes in the past." The trial court denied Davila-Diaz's motion and told the parties that it would ask the remaining panel members if Davila-Diaz's markings would interfere with their ability to be impartial. The State objected on the ground that questions about Davila-Diaz's markings might emphasize them. Davila-Diaz's attorney agreed with the State, and asked the trial court to give a limiting instruction to the jury instead:

> My inclination is to simply drop it and not go any further. But I was going to ask for a limiting instruction reminding the jurors that anything that the potential -- that the panel members say in response to questions is not evidence and cannot be considered by you in reaching your verdict.

¶5 When *voir dire* continued, the trial court asked the potential jurors if they could remain impartial despite comments they may have heard from other panel members:

> During this process, everybody here is going to give us a lot of information when you're answering my questions, when you're answering the lawyers[']s questions.
>
> But I need for you all to understand, can everybody give me their assurance that nothing any other juror says in response to any questions, can you all give me your assurance that will not in any way interfere or impair or impact how you ultimately decide the case?
>
> Is how any other juror here answers a question, could it be used by you in arriving at a verdict, if so raise your hand?

No one raised his or her hand.

¶6 The State called several witnesses during the trial, including a co-conspirator, Joel Alvarado. Alvarado testified that, on July 29, 2001, he met four men, Davila-Diaz, Jose Vargas, Roberto Lopez, and Jose Dotel, outside the Baraboom Club. According to Alvarado, they planned to rob a man whom he identified as DeLossantos. Alvarado testified that he acted as a lookout while the men waited for DeLossantos to leave a bar. When DeLossantos entered the parking lot, Davila-Diaz, Vargas, and Dotel forced DeLossantos and a woman whom he was with into DeLossantos's car and forced the woman to drive to DeLossantos's house. Alvarado and Lopez followed in a truck.

¶7 Alvarado testified that, when they arrived at DeLossantos's house, Davila-Diaz, Vargas, and Dotel took DeLossantos and the woman upstairs where they threatened to kill DeLossantos if he did not tell them where his drugs were hidden. DeLossantos told the men where the drugs were, and Vargas and Alvarado retrieved them from the ceiling. Alvarado testified that he took a bag of drugs down to the truck where he and Lopez waited for the other men. When the men returned to the truck, Vargas and Davila-Diaz told Alvarado that they had killed DeLossantos and the woman by putting duct tape around their mouths and suffocating them with pillows.

¶8 The State also called as a witness a person with whom Davila-Diaz was in prison, Richard Martinez. Martinez testified that he spoke with Davila-Diaz about the crime while they walked on the track at the Racine Correctional Institution. According to Martinez, Davila-Diaz told him that he and several accomplices went to a house to rob a man and a woman of drugs and money. After they found the drugs, Davila-Diaz said that he and two other men tied the

man and the woman up with duct tape and killed them. Davila-Diaz told Martinez that when he learned that the police were looking for him in connection with the homicides, he fled to Puerto Rico.

¶9 As noted, a jury found Davila-Diaz guilty of two counts of first-degree intentional homicide and one count of armed robbery. The trial court sentenced him to two consecutive terms of life in prison without extended supervision on the homicide counts and sixty years in prison on the armed-robbery count, with forty years of confinement and twenty years of extended supervision, consecutive to the homicide sentences.

II.

A. Right to an Impartial Jury

¶10 Davila-Diaz argues that the trial court erroneously exercised its discretion when it denied his request to dismiss the jury panel. He contends that Juror W.'s comments about his markings violated his Sixth Amendment right to an impartial jury because they gave the prospective jurors the impression that he was a "major gang related criminal." We disagree.

¶11 *Voir dire* is conducted under the supervision of the trial court, which has broad discretion in the exercise of the process. ***State v. Migliorino***, 150 Wis. 2d 513, 537, 442 N.W.2d 36, 46 (1989). The trial court instructed the prospective jurors that they could not consider another juror's comments in reaching their decision. We presume that a jury follows the instructions given to it. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). Thus, any prejudice that may have been created by Juror W.'s remarks about Davila-Diaz's markings was cured by the trial court's instruction, and, when

asked, none of the potential jurors indicated any inability to remain impartial. The trial court acted within its discretion in determining that the jury was not prejudiced by Juror W.'s comments.

B. Evidentiary Rulings

¶12 Davila-Diaz also challenges the trial court's evidentiary rulings that permitted the jury to hear what Vargas had said after he and Davila-Diaz returned to the truck, and that permitted Martinez to testify about what Davila-Diaz told him when they were in prison together. 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). A trial court properly exercises its discretion when it applies the appropriate legal standard to the relevant facts of the case. *See* ***id.***

1. Vargas's Statements

¶13 Davila-Diaz first alleges that the trial court erroneously exercised its discretion when it permitted Alvarado to testify about what Vargas said after Vargas and Davila-Diaz returned to the truck. The trial court received the evidence as Davila-Diaz's adoptive admissions. An "adoptive admission" is an out-of-court statement that is not hearsay when it is offered against a party who has manifested his or her adoption or belief in its truth. WIS. STAT. RULE 908.01(4)(b)2.[2] A statement falls under this rule if it is made in a party's presence

[2] WISCONSIN STAT. RULE 908.01 provides, as relevant:

> **(4)** STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> ….

(continued)

and the party does not deny it even though it is the type of statement that would ordinarily be denied. ***State v. Marshall***, 113 Wis. 2d 643, 652, 335 N.W.2d 612, 616 (1983). "Adoption can be manifested by any appropriate means, such as language, conduct, or silence." ***United States v. Jinadu***, 98 F.3d 239, 244 (6th Cir. 1996). In a criminal case, "the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement." ***Id.*** (applying FED. R. EVID. 801(d)(2)(B), the federal counterpart to RULE 908.01(4)(b)2).

¶14 As noted, Alvarado testified that, after he left DeLossantos's house with the drugs, he waited for the other men by a truck. When the men came outside, they told Alvarado that they had killed DeLossantos and Hernandez:

> Q. The three men came back down and they got into the truck; is that correct?
>
> A. Yes.
>
> ….
>
> Q. And did someone tell you what happened?
>
> A. Yeah.
>
> Q. Who told you what happened?

> (b) *Admission by party opponent*. The statement is offered against a party and is:
>
> ….
>
> 2. A statement of which the party has manifested the party's adoption or belief in its truth.

A. *Capone [Vargas] was actually doing more of the talking, and Cuco [Davila-Diaz], and then Joselito [Dotel] was just like agreeing with everything.*

Q. And what was [Davila-Diaz] doing?

A. Talking about it.

Q. So all three men were talking about it together?

A. Um-hum.

Q. Is that a yes?

A. Yes.

Q. And what -- what were they saying? What was each man saying?

….

A. They say they had to tie them up and kill -- they told me how they killed them. They say they had to kill them, and they tied them up with duct tape.

Q. And who said that?

A. [Vargas] and [Davila-Diaz]. [Dotel] was agreeing with it.

Q. [Davila-Davis] was agreeing?

A. No, no. [Dotel].

Q. What was [Davila-Diaz] saying?

A. He was saying that yeah, they either had to kill them, because [Vargas] said that they had to kill them. So he was saying yeah, we had to kill them.

Q. And did you hear either [Vargas] or [Davila-Diaz] tell you why they had to kill Carmen Hernandez and Juan De[L]ossantos?

A. They were saying some story about someone in Puerto Rico, he knew his family or some story like that.

Q. That he knew whose family?

> A. That Alex knew their family, somebody's family. Either [Dotel]'s or [Davila-Diaz]'s.
>
> Q. How did they tell you? Did someone tell you how they killed them?
>
> A. Yeah, they say they --
>
> Q. Who said that; do you remember?
>
> A. [Vargas] and [Davila-Diaz] say that they had to tape them. They taped them all around in their mouth and just suffocate them like that. And I guess they put pillows on their back too on their head.
>
> Q. Who said they put pillows on their head?
>
> A. [Vargas].

(Emphasis added.)

¶15 Davila-Diaz contends that the trial court erroneously exercised its discretion because Alvarado's testimony about what Vargas told him was "out and out" hearsay. We disagree. Vargas's recitation about what happened in the house and Davila-Diaz's role in the murders is something that an ordinary person would deny if it were not true. According to Alvarado, Davila-Diaz not only did not deny what Vargas was saying, but, indeed, joined in telling the story. Davila-Diaz's interjections during Vargas's recitation are admissible against Davila-Diaz under WIS. STAT. RULE 908.01(4)(b)1, which makes out-of-court statements made by a party-opponent non-hearsay. The trial court did not erroneously exercise its discretion in admitting Alvarado's testimony.

2. Martinez's Testimony

¶16 Davila-Diaz also argues that the trial court erroneously exercised its discretion when it admitted Richard Martinez's testimony. The State first told Davila-Diaz on the morning of the trial, May 7, 2002, that it intended to call

Martinez. Davila-Diaz's attorney moved to exclude Martinez's testimony "on the ground that he ha[d not] been identified a reasonable time before trial." The State told the court that it did not learn about Martinez until the Friday evening before the trial when the Racine Correctional Institution informed it that Martinez had reported something related to the case. The trial court denied Davila-Diaz's motion to exclude, determining that the State notified Davila-Diaz within a reasonable time because court was not in session from Saturday through Monday.

¶17 Two days later, Davila-Diaz's attorney renewed his motion to exclude Martinez's testimony and moved for an adjournment so that he could investigate whether Davila-Diaz and Martinez were together when Martinez claimed that he talked to Davila-Diaz. The trial court denied both motions. After Martinez testified, the trial court supplemented the record on its denial of Davila-Diaz's motions:

> [H]aving heard where the conversations took place on the track, my decision to not exclude and my decision not to adjourn I think was proper, because granting an adjournment would really accomplish nothing because the circumstances, as testified by the witness, happen to all inmates on a daily basis, unless someone is in segregation the entire period of time. And obviously that's something that [Davila-Diaz's attorney] could explore to see if Mr. Davila-Diaz or Mr. Martinez was in segregation and never ever in the yard during the time frame we're talking about.

¶18 Davila-Diaz claims that Martinez's testimony should have been excluded because the State did not disclose Martinez to the defense "within a reasonable time before trial" as is required by WIS. STAT. § 971.23(1).[3] But

[3] WISCONSIN STAT. § 971.23(1) provides, as relevant:

(continued)

Davila-Diaz has now had well over a year to look into what he claims he was prevented from investigating by the trial court's refusal to grant an adjournment, and he does not tell us what he claims he would have discovered if the trial court had given him more time. *Cf.* ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant alleging ineffective assistance of counsel must allege with specificity what an investigation would have revealed and how it would have affected the outcome of the trial); ***State v. Williams***, 198 Wis. 2d 516, 538, 544 N.W.2d 406, 415 (1996) (we will not consider whether an evidentiary error occurred absent a proper offer of proof); WIS. STAT. RULE 901.03(1)(b) (offer of proof). In light of that, any error made by the trial court was harmless beyond a reasonable doubt. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 231–232 (1985) (test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction).

C. Sufficiency of the Evidence

¶19 Finally, Davila-Diaz claims that the evidence was insufficient to support the jury verdicts. When reviewing the sufficiency of the evidence, we will

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> WHAT A DISTRICT ATTORNEY MUST DISCLOSE TO A DEFENDANT. Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> ….
>
> (d) A list of all witnesses and their addresses whom the district attorney intends to call at the trial. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

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).

¶20 Davila-Diaz contends that the evidence was insufficient to uphold his convictions because the State's witnesses were inherently incredible. Specifically, he challenges the testimony of Evette Nieves, Maidemy Rivera, and Alvarado, all of whom implicated him in the crime. Davila-Diaz claims that Nieves was not a credible witness because she gave inconsistent statements to the police and received consideration from the State in exchange for her testimony. Davila-Diaz also argues that Rivera and Alvarado were not credible because they received consideration from the State in exchange for their testimony. We disagree.

¶21 An examination of the record as a whole shows that there is adequate evidence to support the jury's verdicts. Several witnesses testified that Davila-Diaz participated in the robbery and murder of DeLossantos and Hernandez. Davila-Diaz does not argue that this testimony failed to support the elements of the offenses charged. Rather, Davila-Diaz's arguments are based on his contention that the witnesses were not credible. The determination of witness credibility, however, is an exclusive function of the jury. ***State v. Pankow***, 144 Wis. 2d 23, 30–31, 422 N.W.2d 913, 914–915 (Ct. App. 1988). When there are inconsistencies within a witness's testimony, it is the jury's duty to determine the weight and credibility of the testimony. ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). We will not substitute our judgment for the jury's unless the jury relied on evidence that is inherently or patently

incredible. ***Id.***, 117 Wis. 2d at 17, 343 N.W.2d at 415–416. In this case, the jury presumably weighed and considered the credibility of all the evidence and returned a finding of guilt. There is no indication that the jury relied on inherently incredible evidence in reaching its verdicts.

By the Court.—Judgment affirmed.

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