COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP282-CR **Cir. Ct. No. 2006CF2638**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RASHEE T. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Vergeront, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIUM. Rashee T. Jones appeals a judgment of conviction for attempted first-degree intentional homicide. Jones contends that he is entitled

to a new trial because: (1) the circuit court erroneously exercised its discretion in admitting evidence as to the State's attempts to subpoena Jones's sister, Ronetta,[1] to testify at trial; and (2) the circuit court acted contrary to statute and Jones's constitutional rights by excusing a juror without cause after the jury began deliberations. We reject each of these contentions, and affirm.

BACKGROUND

¶2 On August 9, 2006 at 1:15 a.m., a Madison police officer attempted to stop a vehicle because the vehicle's license plates were registered to another car. The driver stopped, exited the vehicle, and ran from the scene. The officer chased the driver, yelling "Stop, police." The driver turned and faced the officer from about twenty-five to thirty feet away. The officer saw the driver point at him, saw a flash of light and heard a gunshot.

¶3 The officer then resumed chasing the driver. The driver stopped at a distance of forty to fifty yards and faced the officer. The officer again saw a flash of light and heard a gunshot.

¶4 At the crime scene, Melissa Thomas approached the officers and said she had been a passenger in the car involved in the shooting, and that a man named Jamal had been the driver. She later told police that Jones was the driver of the car involved in the shooting. The car belonged to Jones's sister, Ronetta.

¶5 The State charged Jones with attempted first-degree intentional homicide for the August 9, 2006 shooting. At Jones's trial, the State introduced

[1] Because Jones and his sisters share a surname, we refer to Jones's sisters by their first names.

testimony by Thomas, who stated that she was in the vehicle on the night of the shooting, and Jones was driving. She testified that Jones ran from the car after it was stopped by police, and that she then heard two gunshots. The State introduced evidence that Jones's fingerprints were on items in the car, as well as on the rear license plate, which had been stolen from another vehicle. The State also introduced testimony by two jail inmates who claimed Jones had admitted the shooting to them after he was arrested.

¶6 Jones presented four alibi witnesses in his defense—his mother, his sister Julia, his sister Tamika, and his girlfriend, Gwendolyn Matthews—to establish that he was not driving Ronetta's car at 1:15 a.m. when it was stopped by police, and that he had been in the car at other times, explaining the presence of his fingerprints. Jones also presented testimony of other jail inmates to impeach the credibility of one of the State's inmate witnesses.

¶7 Jones testified in his own defense that he had not been the driver of Ronetta's car when it was pulled over prior to the shooting. Jones stated he was at a party at Ronetta's house on the evening of August 8, 2006, and that he went into her vehicle during the party, but that he spent the late evening of August 8 into the morning of August 9, 2006, at his sister Tamika's house. In its rebuttal case, the State introduced evidence of its attempts to subpoena Ronetta to testify at the trial, over defense objection.

¶8 After both sides rested and the circuit court had instructed the jury, the court excused the jury to begin deliberations. However, the court then went back on the record to address the fact that one of the jurors had stated she felt she could not continue. After engaging in a colloquy with the juror and hearing

arguments from counsel, the court excused the juror and substituted an alternate. The jury found Jones guilty, and he appeals.

DISCUSSION

¶9 Jones contends first that he is entitled to a new trial because the circuit court erroneously exercised its discretion in allowing the State to introduce evidence of its attempts to subpoena Jones's sister. Jones argues that the evidence was irrelevant and that, even if it was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. §§ 904.01 and 904.03 (2009-10).[2] The State responds that the evidence was at least marginally relevant to show why Jones's sister, who logically would have been a key witness, did not testify, and also to impeach Jones's mother's credibility. The State contends that Jones waived any argument as to undue prejudice by failing to object on those grounds. Finally, the State contends that any error in admitting the subpoena evidence was harmless. It asserts that the State presented strong evidence of Jones's guilt and did not rely on the subpoena evidence in closing arguments, and thus it is clear the subpoena evidence did not contribute to the verdict.

¶10 In reply, Jones again disputes the relevance of the subpoena evidence, and asserts that the issue of unfair prejudice was sufficiently preserved by the defense objection to the evidence at trial. He then argues that the error in admitting the evidence was not harmless, because the trial evidence was

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

conflicting, and the State cannot show that its presentation of four witnesses to show its attempts to subpoena or locate Ronetta did not contribute to the verdict.

¶11 We will assume for purposes of this opinion that the subpoena evidence was erroneously admitted. We conclude, however, that even if the evidence was erroneously admitted, the error was harmless.

¶12 An "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted). The supreme court has also held that an error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶43 (citation omitted). We review de novo whether a claimed error is harmless, and the State bears the burden of proof. ***State v. Carnemolla***, 229 Wis. 2d 648, 653, 600 N.W.2d 236 (Ct. App. 1999).

¶13 We consider the following factors in analyzing whether an error was harmless:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Harris, 307 Wis. 2d 555, ¶45.

¶14 Here, as to frequency of the error, the State introduced testimony by three witnesses who had tried unsuccessfully to serve Ronetta with a subpoena and one who had tried to locate her, but the State did not raise the issue in its closing arguments. The importance of the erroneously admitted evidence was low; it

established only that the State was unsuccessful in its attempts to subpoena Ronetta, not the substance of what Ronetta would have stated had she testified.

¶15 Jones argues that the evidence was significant because the only reasonable inference the jury could draw is that Ronetta would have testified favorably to the State. While we agree that this is the inference the jury was likely to draw from the evidence, we do not agree that it renders the evidence significant. The State already introduced testimony by Thomas, who stated she was a close family friend, identifying Jones as the driver of Ronetta's car at the time it was stopped prior to the shooting. Even if the subpoena evidence allowed the jury to draw an inference that Ronetta would have testified that Jones had borrowed her car during the time of the shooting, this would only duplicate testimony already provided by the State. Additionally, there was no evidence or argument that this is, in fact, what Ronetta would have testified, or that she would have provided any other specific testimony. We therefore have no basis to conclude that the subpoena evidence was particularly important to the State's case.

¶16 As to the nature of the case and the overall strength of the State's case, this case clearly came down to credibility of the State and defense witnesses. Thomas testified for the State that she was a close family friend of Jones; that she was with Jones in Ronetta's car on the night of the shooting; that Jones was driving; and that when police attempted to pull the car over, Jones stated he was going to run, and after Jones ran from the car, Thomas heard two gunshots. The State presented evidence that Jones's fingerprints were located on Ronetta's car, as well as on the stolen license plates. The State also presented testimony by Jones's fellow inmates that Jones had admitted to the shooting.

¶17 Jones presented three alibi witnesses contradicting Thomas's testimony, placing Jones at his sister Tomika's apartment around the time of the shooting. Jones also testified in his own defense, denying any involvement in the shooting. The defense testimony provided an explanation for why Jones's fingerprints were in Ronetta's car and on the stolen license plate, explaining that Jones had driven the car earlier in the evening and had filled the gas tank, which was behind the license plate. Jones also presented testimony that one of the State's inmate witnesses was untruthful.

¶18 Thus, the question for the jury was whether Thomas or the defense witnesses provided the credible version of the events on the night of the shooting. Because the central issue was credibility, and that issue was not significantly affected by the subpoena evidence, we conclude that the State has proven beyond a reasonable doubt that the erroneously admitted subpoena evidence did not contribute to the jury's verdict, and that it is clear beyond a reasonable doubt that a rational jury would have found Jones guilty absent that error. We conclude that the erroneously admitted subpoena evidence was harmless.

¶19 Next, Jones contends that he is entitled to a new trial because the circuit court removed a juror without cause during deliberations. He argues that excusing the juror without cause during deliberations violated Jones's constitutional rights, and that the court lacked statutory authority to substitute an alternate juror after the jury began deliberations. The State responds that Jones's arguments fail because the record establishes that the jury had not begun deliberations when the court excused one of the jurors and substituted an alternate. We agree with the State.

¶20 All of Jones's arguments as to the jury are based on the underlying premise that the jury had already begun deliberations when the circuit court excused one of the selected jurors and substituted an alternate juror. However, the record reveals the following: The transcript of the jury trial states, "Jury excused for deliberations at 3:11 p.m." The court asked if there was anything else for the record, and the parties indicated there was not. The court then went into recess. The following then occurred:

> THE COURT: Okay. We're back on the record. The appearances are the same.
>
> Before I got back to my office, the bailiff intercepted me and indicated—and we had a private conversation in my office—indicated that one of the jurors … didn't feel like she could continue. The alternates have been kept here so that we can proceed if we have to….
>
> I would propose we bring in [the juror], … and find out what's going on, and then if we have to, select one of the alternates to serve to fill out the jury. But if somebody has a different idea, let me know.
>
> [PROSECUTOR]: No. That would be fine.
>
> THE COURT: [Defense counsel], is that okay with you?
>
> [DEFENSE COUNSEL]: Yes.

The juror was then brought back into the courtroom, and stated, "I just don't feel, um, I guess mentally mature enough or that I can hold the stigma of either, A, sending somebody to jail that wasn't deserving or, B, letting somebody go that could have possibly hurt somebody, and I just feel torn inside between them." The court questioned the juror further on her feeling that she was unable to proceed, and established that she was twenty years old and was employed.

¶21 The court then told the juror to go with the bailiff, who was instructed to keep the juror separate from the other jurors. The court engaged in the following discussion with counsel:

> THE COURT: Any suggestions as to what to do, [prosecutor]?
>
> [PROSECUTOR]: She's indicated, as she could have answered during my questioning—my first question was is there anyone who for whatever reason, philosophical, theological, personal reason can't sit in judgment of another person. That's what she's now saying she can't do. So I think based on that, she should be excused.
>
> THE COURT: [Defense counsel]?
>
> [DEFENSE COUNSEL]: Well, I'd object to it.
>
> THE COURT: And your basis for your objection is?
>
> [DEFENSE COUNSEL]: I think that what's going on here is, um, that, you know, at the time she was asked a question, she felt she could. It was only after hearing the evidence that she became feeling torn. I think that that's based on how the case went, and I think that, you know, she works; she—you know, she's 20 years old. I think she's quite qualified to be able to make a decision. She may feel apprehensive. Understandable. But I think she can do it.
>
> THE COURT: And what makes you think she can do it from what she said?
>
> [DEFENSE COUNSEL]: Because she works at a job, and she's 20 years old. It's young, but, I mean, you only have to be 18. So she didn't just turn 18 or anything like that.
>
> Um, you know, I see that she's upset. Um, but at the same time, … I don't want to feel like we're just … taking out some jurors. You know, Mr. Jones has the right to have the jury as it was selected, and I don't think people should self-select themselves out of it because they feel torn. I mean, feeling torn is one of the …. things that they have to … deal with. Every one of those jurors …, if they all feel torn, they can't all just get out and then we got no

> jury. You know, I don't know if that's a good enough reason.
>
> ….
>
> THE COURT: I'm going to excuse her for cause. It's unfortunate she also may be a minority. I'm not a hundred percent sure on that, but it's possible. If this had come about during the middle of the … deliberations or a ways into it, it would be a very different situation. But she has indicated before the jury has begun that she doesn't feel that she can emotionally go through this process….
>
> ….
>
> I think maybe we should bring the entire jury back in, … excuse [the juror] and draw one more…. But if somebody wants a different procedure, let me know.
>
> [PROSECUTOR]: No. I agree with that suggestion, your Honor.
>
> THE COURT: [Defense counsel]?
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: Let's do that….
>
> I guess one other thing I'll put on the record. If she had answered the question that I ask, is there anyone who feels they cannot continue for any reason, we would have dealt with this before we excused the jury. But we actually caught it before the jury started deliberating. So we're kind of in the same place.

¶22 Jones cites the statement in the transcript that the jury was excused for deliberations at 3:11 p.m., and contends that the court's statement that deliberations had not begun is therefore unsupported by the record. We disagree. While the record reveals that the jury was excused for deliberations and the court went into recess, it also reveals that the judge was intercepted by the bailiff before he even reached his office. The court also specifically stated that jury deliberations had not begun, and neither counsel stated otherwise. In fact, as the above discussion illustrates, defense counsel argued only that the reason provided

by the juror was insufficient to excuse her from the jury, not that removal would be improper based on the jury having begun deliberations. We conclude, on this record, we have no basis to disturb the circuit court's factual finding that jury deliberations had not begun. Accordingly, we reject Jones's argument that he is entitled to a new trial based on the court's decision to excuse one juror and substitute an alternate juror. We affirm.

By the Court.—Judgment affirmed.

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