COURT OF APPEALS DECISION DATED AND FILED

May 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 03-2333-CR

Cir. Ct. No. 99CF003970

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FLOYD L. MARLOW,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Floyd L. Marlow appeals from a judgment entered after a jury found him guilty of first-degree reckless homicide, with the use of a dangerous weapon, as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.63,

939.05 (1999–2000).[1] Marlow claims that the evidence was insufficient to support the jury verdict. He also alleges that the trial court erred when it: (1) denied a motion to sever his trial from a codefendant's; and (2) denied his motion to strike a juror for cause. We affirm.

I.

¶2 Floyd L. Marlow, and a codefendant, Dwight D. Campbell, were charged with first-degree intentional homicide for shooting and killing Johnnie Humphrey on July 17, 1999. Marlow and Campbell pled not guilty and were joined for trial. Before the trial began, Marlow and Campbell moved to sever. The trial court denied the motion, concluding that the defenses were not antagonistic.

¶3 At trial, Marlow stipulated that on August 2, 1999, he was in possession of the same gun that discharged three of the casings found at the Humphrey murder scene. Several witnesses also testified. Arlester Jones told the court that the shooting happened while he and several others, including Humphrey, were sitting on the porch of his sister's house at 2659 North 24th Street in Milwaukee. According to Jones, while they were sitting on the porch, a man, whom he identified at trial as Campbell, came down a gangway and started to shoot at them. Jones testified that he and several others ran into the house. Jones told the court that when he went back outside after the shooting he saw Humphrey lying at the bottom of the porch. Humphrey bled to death as the result of a gunshot wound to his leg.

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

¶4 Renetta Barnette, a sixteen-year-old girl who lived upstairs from Marlow's girlfriend at 2664 North 23rd Street, testified that, shortly before the shooting, she saw a group of men, including Marlow and Campbell, run down the alley behind their house toward 24th Street. Barnette told the court that she then heard shooting and saw the men run up the alley toward the house. According to Barnette, Marlow and Campbell had guns in their hands. Barnette testified that when the men reached the house, she heard Marlow say, "'I think we killed that nigger.'"

¶5 Jeanette Anderson, Barnette's mother, testified that she was at home with Renetta when she saw a group of men including Marlow and Campbell run down the alley. Seconds later she heard shots and saw the men run up the alley with guns. Anderson testified that, when the men got to the porch of the house, she heard Marlow say, "'We killed that nigger.'"

¶6 At the close of the State's case in chief, Marlow and Campbell moved to dismiss, claiming that the evidence was insufficient to support a conviction. The trial court denied the motion as to both defendants and, regarding Marlow, specifically found that the State had presented enough evidence to meet its burden of proof:

> As to Mr. Marlow, I think that the State has presented enough evidence to meet [its] burden viewing the evidence in the light most favorable to the State. Mr. Marlow has been identified as running back from the scene of the shooting seconds after the shooting with a gun in his hand. And it has been -- It has been testified that he had made a statement regarding his involvement in the shooting of that person.
>
> Even though the statement has been impeached at least at this point, for purposes of this motion, I do find that there is enough to overcome the defense motions and I do deny both defense motions.

¶7 Neither Marlow nor Campbell testified. Marlow's attorney argued that there was reasonable doubt regarding intent because the evidence was insufficient to show the shooter or shooters' state of mind before the incident. Marlow's attorney also argued that reasonable doubt existed because the witnesses were biased and gave conflicting testimony.

¶8 Campbell presented an alibi defense through the testimony of his girlfriend, Tanishsa Bulliox. Bulliox testified that, on the day of the shooting, Campbell and several men were sitting on her back porch at 2666 North 23rd Street. Bulliox told the court that when the other men began to walk down the alley, Campbell walked to a payphone on the corner of 23rd Street. Bulliox claimed that she walked off of the porch and into the street to watch Campbell make the call. According to Bulliox, Campbell was on the telephone when she heard shots. Bulliox further testified that she and Campbell moved to Texas after the shooting.

¶9 The trial court instructed the jury on first-degree intentional homicide and the lesser-included offense of first-degree reckless homicide. *See* WIS JI—CRIMINAL 1018. A jury found Marlow guilty of first-degree reckless homicide, but not guilty of first-degree intentional homicide. The trial court sentenced Marlow to forty years in prison.

II.

A. Sufficiency of the Evidence

¶10 Marlow claims that the trial court erred when it denied his motion to dismiss at the end of the State's case in chief. By not resting the defense case for Marlow after the State's case in chief, however, Marlow waived the right to

review of the trial court's refusal to grant his motion for a directed verdict at the end of the State's case in chief. *See* ***State v. Gebarski***, 90 Wis. 2d 754, 773–774, 280 N.W.2d 672, 680–681 (1979). Therefore, in considering Marlow's challenge to the sufficiency of the evidence, we review all of the evidence presented at the trial. *See* ***id.***

¶11 When reviewing the sufficiency of the evidence, we will 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). The jury, not a reviewing court, determines the credibility of witnesses and the weight of their testimony, ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575, 580 (1978), and resolves any conflicts in the evidence, ***State v. Daniels***, 117 Wis. 2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983).

¶12 Marlow argues that while "the evidence was arguably sufficient to place [him] in the vicinity of the shooting," the evidence was not sufficient to show his "state-of-mind at the time he was there." Marlow was, however, convicted of first-degree reckless homicide. A person is guilty of first-degree reckless homicide if: (1) the person caused the death of the victim; (2) by criminally reckless conduct; (3) that showed an utter disregard for human life. WIS JI—CRIMINAL 1020. We examine Marlow's sufficiency-of-the-evidence claim against these elements.

¶13 The element of utter disregard for human life is measured under an objective standard. ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521,

613 N.W.2d 170. It "'does not require the existence of a[ny] particular state of mind in the actor at the time of the crime but only requires that there be conduct imminently dangerous to human life.'" ***State v. Blanco***, 125 Wis. 2d 276, 281, 371 N.W.2d 406, 409 (Ct. App. 1985) (quoted source omitted). Accordingly, Marlow's "state-of-mind" is not relevant to our analysis. Instead, we examine Marlow's conduct.

¶14 Here, there is ample evidence to support a finding that Marlow's conduct was imminently dangerous to human life. Arlester Jones testified that Campbell shot at him and a porch full of people. Renetta Barnette and Jeanette Anderson testified that they saw Marlow and Campbell run down an alley toward the scene of the shooting and run back moments later with guns in their hands. They also testified that they heard Marlow say that they killed a man. Moreover, Marlow stipulated that three casings found at the murder scene were from his gun. A reasonable jury could infer from this evidence that Marlow or a coactor associated with Marlow recklessly caused Humphrey's death, and that these actions showed utter disregard for Humphrey's life.

B. Motion to Sever

¶15 Marlow alleges that the trial court erred when it denied his motion to sever the trials. Joinder and severance of defendants in a criminal case is governed by WIS. STAT. § 971.12.[2] A trial court has the power to try defendants

---

[2] WISCONSIN STAT. § 971.12 provides, as relevant:

Joinder of crimes and of defendants.

....

(continued)

together when they are charged with the same offenses, arising out of the same transaction, and provable by the same evidence. ***Haldane v. State***, 85 Wis. 2d 182, 189, 270 N.W.2d 75, 78 (1978). Whether to sever is within the trial court's discretion and we will not reverse absent an erroneous exercise of discretion. ***Id.***

¶16 "[A] defendant wishing to successfully challenge a [trial] court's denial of her motion to sever must show 'actual prejudice' – that is, the defendant must show that she could not possibly have a fair trial without a severance." ***United States v. Caliendo***, 910 F.2d 429, 437 (7th Cir. 1990). Cases have generally held that a defendant is prejudiced to such a significant degree that severance is required when: (1) codefendants present defenses that are so antagonistic that they are mutually exclusive, ***Haldane***, 85 Wis. 2d at 189, 270 N.W.2d at 79; (2) the conduct of one defendant's defense harms the other defendant, ***United States v. Ziperstein***, 601 F.2d 281, 286 (7th Cir. 1979); or (3) there is a significant disparity in the amount of evidence introduced against

---

> **(2)** JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

each of the two defendants, ***United States v. Clark***, 989 F.2d 1490, 1499 (7th Cir. 1993).

¶17 In this case, the trial court denied the motion to sever because it concluded that the defenses were not antagonistic:

> Now, as to severance, and my ruling, I think, makes it … clear[] … that these are not antagonistic defenses and I don't see any reasons to sever the defendants. I looked at that issue afresh. I see that Mr. Campbell has filed an alibi, Mr. Marlow has not. If the stipulation comes in as I anticipate it may, lead the jury to believe that Mr. Marlow was there but they still could believe Mr. Campbell's alibi. They are not antagonistic defenses. So that isn't a reason to sever them.
>
> I don't think that the joinder of the two defendants compromises the right of either one of the defendants. The fact that Mr. Campbell's alibi might be successful does not inculpate Mr. Marlow, the reverse situation. So I think that the joinder in this case doesn't prevent the jury from making a reliable judgment on the guilt or innocence of each defendant.

Marlow claims that this analysis, "though correct, did not go far enough." He concedes that Campbell's alibi defense "does not necessarily preclude acquittal of Marlow," but argues that severance was nonetheless required because he was prejudiced by Campbell's "patently absurd" alibi defense. We disagree.

¶18 Even though the nature of the defenses presented by codefendants may not be antagonistic, severance may be required if a defendant is prejudiced by the actual conduct of the codefendant's defense. ***Ziperstein***, 601 F.2d at 286. "This ground for severance, however, depends on a careful evaluation of facts elicited, prejudicial tendencies, and the entire course of the trial prior to the challenged conduct." ***Id.***

¶19 Campbell's alibi defense did not prejudice Marlow. As we have seen, Campbell's defense did not implicate Marlow. Bulliox's testimony that she saw Campbell use a pay phone at the time of the shooting had no connection to Marlow's defense that the State failed to meet its burden of proof. It is clear from the record that Bulliox's testimony applied solely to Campbell and any inference of guilt that may have flowed from Bulliox's testimony that she and Campbell moved to Texas clearly did not apply to Marlow.

¶20 Marlow also argues that severance was warranted because the evidence against Campbell was grossly disparate from the evidence introduced against him. He claims that "the State may not have possessed a gross disparity of evidence as between Marlow and Campbell at the outset; however, the manner in which Campbell conducted his defense … destroyed Marlow's otherwise persuasive argument that, though he may have been present in the vicinity of the shooting, he had no reason to believe that Campbell was about to commit a murder." This argument is insufficiently developed.

> The fact that the government has greater evidence against one codefendant does not automatically give the other codefendant grounds for severance. In such situations, the relevant inquiry is whether it is within the jury's capacity to follow the trial court's limiting instructions requiring separate consideration for each defendant and the evidence admitted against [him].

Clark, 989 F.2d at 1500 (citation and internal quotation marks omitted).

¶21 Here, the trial court read to the jury separate party-to-a-crime instructions for Marlow and Campbell. It also gave the jury separate instructions for Marlow and Campbell for the first-degree-intentional-homicide charge and the first-degree-recklessly-endangering-safety charge, and submitted separate verdict forms to the jury. Marlow's trial counsel did not object to the trial court's failure

to read a more specific limiting instruction to the jury and Marlow does not address his lawyer's failure to do so on appeal. Accordingly, any such claim is waived. *See* WIS. STAT. RULE 805.13(3) ("Failure to object … constitutes a waiver of any error in the proposed [jury] instructions.").

¶22 Moreover, witness testimony and physical evidence placed both Marlow and Campbell at the scene of the crime. After reviewing the record, we conclude that the evidence in this case was not so complicated that the jury would be unable to follow the trial court's instructions and consider the evidence against Marlow and Campbell separately. *See* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury presumed to follow instructions). Accordingly, the trial court did not erroneously exercise its discretion when it denied Marlow's motion to sever.

C. Motion to Strike Juror

¶23 Marlow claims that the trial court erred when it denied his motion to strike a potential juror for cause. He alleges that "it is easy to conclude that as a matter of law that [the potential juror] was objectively biased" because the juror: (1) expressed disgust over the number of shootings in Milwaukee and indicated that the shooting occurred in his neighborhood; (2) was training to be a police officer; thus, he was exposed to homicides on a daily basis; and (3) expressed the belief that Marlow was there because he must have done something. This argument fails under ***State v. Lindell***, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 233 (overruling ***State v. Ramos***, 211 Wis. 2d 12, 564 N.W.2d 328 (1997)).

¶24 ***Lindell*** held that "[t]he substantial rights of a party are not affected or impaired when a defendant chooses to exercise a single peremptory strike to correct a [trial] court error." ***Id.***, ¶113. While the law was different at the time of

Marlow's trial, our analysis is controlled by ***Lindell***. ***State v. Brown***, 2002 WI App 260, ¶16, 258 Wis. 2d 237, 655 N.W.2d 157.

¶25 In this case, the allegedly biased juror did not serve, but, rather, was removed by one of the party's exercise of a peremptory strike.[3] Marlow does not argue on appeal that any biased jurors actually served on the jury in his case. Thus, under ***Lindell***, Marlow "received that which he was entitled to under state law." ***Id.***, 245 Wis. 2d 689, ¶131. Marlow was tried by a fair and impartial jury and is not entitled to a new trial. *See* ***Brown***, 258 Wis. 2d 237, ¶17.

By the Court.—Judgment affirmed.

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

[3] Marlow admits in his brief on appeal: "[the allegedly biased juror] was struck by one of the parties using a peremptory strike because he was not included in the jury which was seated."