COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 12, 1995

No. 94-0572-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VERNON L. WALKER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. Vernon L. Walker appeals from a judgment of conviction of first-degree intentional homicide while armed, as party to a crime, and from an order denying his motion for postconviction relief. Walker raises numerous issues on appeal. He argues that the trial court erred in failing to grant his motions in limine, in allowing the introduction of bad acts testimony, in failing to define the scope of the alleged conspiracy, in

denying his motion to sever, in failing to grant a mistrial, in restricting cross-examination of the State's witnesses, in failing to give requested jury instructions and in denying his postconviction motion for a new trial. Walker also contends that he was denied effective assistance of trial counsel. Because we conclude that the trial court did not erroneously exercise its discretion and that Walker was not denied effective assistance of counsel, we affirm.

The criminal complaint alleged that Walker, LaShonda Mayhall and LaTonia Mayhall feloniously and, in concert with others, intentionally caused the death of Leroy Brantley. Brantley was a friend of Miguel Adams. Adams was the father of LaShonda's child. LaShonda felt that Brantley was interfering in her relationship with Adams and told her sister, LaTonia, that she wanted Brantley killed. LaTonia said that Walker would take care of it.

Ronald Walker, Vernon's stepbrother, told the police that Vernon said that he had gone to Brantley's house and shot through the door. Brantley was found by the police at his house where he had suffered a gunshot wound to the abdomen. He subsequently died.

A jury trial was held, and the three defendants were tried jointly. Walker was subsequently found guilty. He filed a motion for postconviction relief which the trial court later denied. Walker appeals.

Motions in Limine

Walker argues that the trial court erred in failing to grant his motion in limine prohibiting the introduction of bullet trajectory testimony by a nonexpert witness. Admission of evidence is a matter of trial court discretion

and will be sustained on appeal if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265 (Ct. App.), *cert. denied*, 506 U.S. ___, 113 S. Ct. 608 (1992).

The court admitted testimony and physical evidence relating to the trajectory of the bullets as determined by members of the Kenosha police department. The trial court originally allowed the evidence in consideration of the fact that an expert would be produced for questioning concerning the techniques used by the officers. Later, the trial court ruled that the trajectory tape was admissible, with liberal cross-examination allowed.

We conclude that the court did not erroneously exercise its discretion when it admitted the trajectory tape. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of actions more or less probable than it would be without the evidence. Section 904.01, STATS. The tape was presented to supplement the testimony of the officers on the facts of the crime scene and the positions of the bullets and slugs that they found. Although the trajectory of the shotgun rounds could not be scientifically determined according to the expert, the tape represented only the opinions and beliefs of the officers who were on site and had personal knowledge of the position of the bullets and the position of the victim. *See* ***United States v. Allen***, 10 F.3d 405, 414 (7th Cir. 1993).

The decision to admit opinion evidence is within the discretion of the trial court. ***Pattermann v. Pattermann***, 173 Wis.2d 143, 152, 496 N.W.2d 613,

616 (Ct. App. 1992). Section 907.01, STATS., provides for the admission of lay opinion testimony if the opinions or inferences are rationally based on the perceptions of the witnesses and helpful to a clear understanding of the testimony. Here, the tape was clearly opinion evidence intended to help the fact finder more easily understand the testimony of the officers at the crime scene. Additionally, the officers' testimony was rationally based on their perceptions.

Concerns of prejudice from this opinion testimony were alleviated by the court's willingness to allow broad cross-examination so that the defense could show the opinions to be unreliable on the issue of ballistics or due to the opinion character of the testimony. In federal cases, the Seventh Circuit has determined that nonexpert opinion testimony is especially useful when there is cross-examination of the witnesses that allows the trier of fact to determine the credibility of the witnesses' opinions. *See* ***Allen***, 10 F.3d at 414. This cross-examination allowed the defense to attack the weight, credibility and reliability of the evidence of the trajectory tape and allowed the jury the information it needed to make its decision.

Walker also argues that a videotape of the route he took to the crime scene on the night of the murder should have been excluded. Demonstrative evidence is used simply to lend clarity and interest to oral testimony. ***Anderson v. State***, 66 Wis.2d 233, 248, 223 N.W.2d 879, 886-87 (1974). Illustrative exhibits may often properly and satisfactorily be used in lieu of real evidence. ***Id.*** at 248, 223 N.W.2d at 887. Where only the generic characteristics of the item are significant, no objection would appear to exist to the introduction of a substantially similar duplicate. ***Id.*** at 249, 223 N.W.2d at

887.

Walker complains that the change of the conditions at the crime scene at the time of the trial distorted the usefulness of the tape as an illustration of the facts of the witness's testimony and therefore it was useless as evidence. However, when the court allowed the admission of the route tape it also suggested that the defense had the opportunity to question witnesses regarding any changes in the conditions that existed at the time of the crime from that shown in the tape.

The trial court did not err in allowing a videotape that illustrated the testimony of a witness and that was clarified through cross-examination. Regardless, there is nothing to show that the evidence presented in the tape prejudiced the decision against Walker.

Shotgun Evidence

Walker argues that the "trial court erred in failing to grant [his] motion in limine prohibiting the introduction of the shotgun as evidence without an adequate foundation indicating that the weapon was actually used in the crime." A witness testified that he and several others had disposed of the shotgun in "the Pike River." The police later retrieved the gun and had it admitted into evidence as the murder weapon.

In order for the trial court to admit physical evidence of the murder weapon, without the availability of ballistic or forensic tests or experts, the State had to show that there was a connection between the defendant, the article and the charged offense. *See* ***Wold v. State***, 57 Wis.2d 344, 352, 204

N.W.2d 482, 488 (1973). If there is a connection, the court may admit the evidence and the jury can decide the weight to be given to the evidence. ***Id.***

The State showed the connection and laid a foundation for the admission of the shotgun evidence. Testimony from the store clerk identified the shotgun as the one that Walker had purchased at a sporting goods store in Kenosha. Testimony from another witness showed that the shotgun that was thrown into the river was the same gun recovered by the police in November 1990. We conclude that the facts presented were sufficient to allow the jury to determine the validity of the connection.

Bad Acts Testimony

Walker argues that the "court erred in allowing the introduction of bad acts testimony against the co-defendant which prejudiced the defendant-appellant and erred in denying the motion for mistrial made by the defendant-appellant on May 11, 1992." He states that the court erred in allowing the introduction of evidence against LaShonda relating to allegations of a previous stabbing and a drive-by shooting.

The decision whether to admit evidence is within the trial court's discretion. ***Jenkins***, 168 Wis.2d at 186, 483 N.W.2d at 265. Section 904.04(2), STATS., provides:

> OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the

> character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under the circumstances of the present case, LaShonda's previous acts were necessary for a full presentation of the State's case. The jury needed to understand the circumstances leading up to and surrounding the State's theory of conspiracy. Therefore, the evidence was admissible. *See* ***State v. Shillcutt***, 116 Wis.2d 227, 236-37, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984).

We further conclude that the introduction of evidence regarding LaShonda's previous conduct did not prejudice Walker. The trial court gave the following instruction to the jury:

> Evidence has been received regarding other conduct of the defendant, La[S]honda Mayhall for which he is not on trial. Specifically evidence has been received that the defendant stabbed a Mike or Miguel Adams. If you find that this conduct did occur, you should consider it only as--to present it in the context of the case. You may not consider such evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with this trait or character with respect to the offense charged in this case. You may consider this evidence only for the purpose I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

Prior to Adams's testimony concerning the stabbing, the court stated: "The Court would like to remind the jury once again, as we have done in the past, that these are three separate trials and that you should adduce evidence as--or consider the evidence as it is brought out in the trial as to each person individually." These instructions prevented the introduction of LaShonda's prior conduct from prejudicing Walker.

Scope of Conspiracy

Walker argues that the trial court never properly defined the scope of the alleged conspiracy and, thus, denied Walker due process of law. Walker, however, cites no authority for this argument in his principal brief. Because Walker has failed to adequately brief this issue, we do not consider it. *See* ***Vesely v. Security First Nat'l Bank***, 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).

Motion to Sever

Walker contends that the trial court erred in denying his motion to sever his trial from the trial of the codefendants. Questions of severance are within the trial court's discretion. ***State v. Brown***, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983). Although a single trial may be desirable from the standpoint of economical or efficient criminal procedure, the right of a defendant to a fair trial must be the overriding consideration. ***Id.*** Under certain circumstances, a joint trial might be unduly prejudicial to the interest of one or more of the defendants. ***Id.*** In such a situation, the interests of administrative efficiency must yield to the mandates of due process. ***Id.***

The defense made its motion to sever in the middle of the trial when LaShonda decided to testify on her own behalf. Walker contends that LaShonda's testimony was overwhelmingly prejudicial. However, the testimony she gave basically repeated the testimony of other witnesses; therefore, it is not a grounds for severance. *See* ***Cranmore v. State***, 85 Wis.2d 722, 756, 271 N.W.2d 402, 419 (Ct. App. 1978).

The mere fact that LaShonda was a codefendant testifying in a joint trial does not automatically require that the trial be severed. *See, e.g.*, ***United States v. Hutul***, 416 F.2d 607, 620-21 (7th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970). It is only when the exercise of common sense and sound judicial judgment leads to the conclusion that a defendant cannot have a fair trial, as that term is understood in law, that a severance should be granted. ***Id.*** We conclude that LaShonda's testimony had minimal effect on Walker's case and was not prejudicial to him.

Mistrial

Walker contends that the trial court erred by refusing to grant a mistrial after an outburst by one of the members of the jury panel during jury selection. During jury selection, one of the jurors accused the trial judge of being too lenient in a sentence that had been imposed in an earlier murder case. He was excused from service immediately, but the whole panel heard the outburst. The defense counsel moved to discharge the jury panel, but the prosecution suggested that an instruction to disregard the outburst and further questioning of the prospective panel of the effect of the outburst might allow them to still find an impartial jury. The judge denied the defense's motion, but

was open to a new motion at the close of the jury selection. The defense did not renew its motion.

By not objecting once the complete jury was selected, Walker waived his right to raise this issue on appeal. *See* ***Wright v. State***, 46 Wis.2d 75, 90, 175 N.W.2d 646, 654 (1970). His counsel actively took part in the questioning of prospective jurors and then did not object to their tainting once jury selection was completed. Now, after a lengthy trial, Walker claims that the results of the trial were prejudiced by this initial outburst. Once a jury has been impaneled, it is reasonable to conclude that challenges to the array from which it has been picked are waived. ***Brown v. State***, 58 Wis.2d 158, 171, 205 N.W.2d 566, 573 (1973). In this situation, the trial court invited objection from the defense counsel at the end of jury selection if they still felt the jury could not be impartial. The defense did not object. This is an issue that should have been raised in the trial court, and not for the first time on appeal. *See* ***Brooks v. Hayes***, 133 Wis.2d 228, 241, 395 N.W.2d 167, 172 (1986).

Restriction of Cross-Examination

Walker argues that the court erred in failing to grant a mistrial because of the restrictions on the cross-examination of Stacie Neal and other State's witnesses. The scope of cross-examination is within the trial court's discretion. ***State v. Olson***, 179 Wis.2d 715, 722, 508 N.W.2d 616, 619 (Ct. App. 1993). We will not overturn such a decision unless there was an erroneous exercise of discretion. *See* ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 656, 511 N.W.2d 879, 883 (1994).

At trial, Neal was permitted to testify concerning key witness Jerry Yarbrough's drug use on the night in question. The court, however, refused to allow the codefendants to cross-examine her regarding Yarbrough's drug use on other occasions:

> MR. WARD: Your Honor, it's relevant for impeachment purposes because Jerry Yarbrough testified under oath that he was not under the influence of any drugs even though he took drugs all day, and therefore we should be allowed to go in and test that through other witnesses who have seen him under the influence on other occasions and see what this drug--what the drugs do to him and his ability to get around, to know what he's doing, to function.
>
> THE COURT: And I said as far as that day Mr. Breitenbach can ask questions, and he--
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> MR. SFASCIOTTI: In order to do that, Your Honor, is what we're getting at is someone familiar with the previous declarant, we should be permitted to ask questions as to their ability to observe the declarant's demeanor during such times as he might have taken such substances.
>
> MR. WARD: That's the foundation that you have to lay down to give a lay opinion witness--or give a lay opinion.
>
> THE COURT: It's not relevant.

We conclude that Walker's trial counsel failed to preserve this issue for appeal. Robert Sfasciotti, Walker's trial attorney, did not request an offer of proof and none was given. The substance of Neal's testimony is not apparent from the context in which the questions were asked; therefore, we cannot conclude that the trial court erroneously exercised its discretion in

limiting cross-examination on the basis of relevancy. *See* ***State v. Echols***, 175 Wis.2d 653, 679, 499 N.W.2d 631, 639, *cert. denied*, 510 U.S. ___, 114 S. Ct. 246 (1993).

We do not address Walker's general accusations that the court erroneously restricted the cross-examination of numerous other witnesses for the State because of his failure to adequately brief these issues. See ***Vesely***, 128 Wis.2d at 255 n.5, 381 N.W.2d at 598.

Jury Instructions

Walker asserts that the trial court erred in failing to give WIS J I—CRIMINAL 221 in order to "at least minimally repair the damage that was done by the overzealous introduction of the stabbing and drive by shooting evidence against LaShonda Mayhall." WIS J I—CRIMINAL 221 provides:

> Evidence has been received of a statement made by defendant (name). It may be used only in considering whether defendant (name) is guilty or not guilty. It must not be used or considered in any way against defendant (name other defendant).

The comment after WIS J I—CRIMINAL 221 indicates that this instruction applies in situations where a statement is made by a nontestifying codefendant.

As long as jury instructions fully and fairly inform the jury of the law applicable to the particular case, the trial court has discretion in deciding which instructions will be given. ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 60, 443 N.W.2d 50, 54 (Ct. App. 1989). Whether there are sufficient facts to allow the giving of an instruction is a question of law which we review de novo. ***Id.***

Additionally, a court errs when it fails to give an instruction on an issue raised by the evidence. ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis.2d 743, 750, 235 N.W.2d 426, 431 (1975).

We reject Walker's argument. LaShonda testified at trial; therefore, WIS J I—CRIMINAL 221, which is used in situations involving a *nontestifying codefendant*, is inapplicable.

Although Walker's subheading to this issue in his brief asserts that the trial court erred in failing to give "Wisconsin Jury Instruction 1017 Or 1018 And The Trial Court Erred In Giving Wisconsin Jury Instruction 245 Over [Walker's] Objection," no argument regarding these instructions appears within this section in his principal brief. We therefore do not consider these potential arguments. *See* ***Vesely***, 128 Wis.2d at 255 n.5, 381 N.W.2d at 598.

Ineffective Assistance of Counsel

Walker argues that he was denied effective assistance of counsel because his trial counsel failed to subpoena and obtain the presence of an expert on ballistic trajectory and weapons to challenge the State's evidence. By failing to counter the evidence presented in the videotape of the trajectory of the slugs according to the police officer's opinion, Walker contends that the demonstrative evidence was not neutralized and the jury's verdict was "probably inevitable." Whether trial counsel provides effective assistance is a mixed question of law and fact. ***State v. Pitsch***, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714-15 (1985). We will not reverse the trial court's underlying findings of what happened, unless they are clearly erroneous. ***Id.*** at 634, 369

N.W.2d at 714. Whether the counsel's performance was deficient and prejudicial to Walker is a question of law which we review de novo. ***Id.*** at 634, 369 N.W.2d at 715.

The Supreme Court set forth a two-pronged test in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), in order to determine whether there was ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The Wisconsin Supreme Court has also developed a line of cases which addresses the issue of whether trial counsel was ineffective. Trial counsel must act prudently and choose tactics based upon a knowledge of all of the facts and available law. However, the supreme court has stated that it "disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." ***State v. Felton***, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983).

Walker's argument is unpersuasive. The fact that Walker's trial

counsel did not secure an independent ballistics expert to testify was not deficient. The court required that in order for the trajectory tape to be admissible, the State had to produce an expert. Walker's counsel was able to get in the evidence about the opinion and unscientific nature of the evidence through cross-examination of this expert. Because we conclude that trial counsel's performance was not deficient, we do not need to address the prejudice prong of ***Strickland***.

Denial of Postconviction Motion

Lastly, Walker argues that his postconviction motion for a new trial should have been granted because "the combined effect of all the trial errors clearly denied [him] a fair trial." Again, Walker's brief is inadequate. He argues this issue in a single sentence and cites no authority. We therefore will not consider his argument. *See* ***Vesely***, 128 Wis.2d at 255 n.5, 381 N.W.2d at 598.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.