COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1996

No. 95-2402-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL PRICE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Paul Price appeals from a judgment of conviction of first-degree intentional homicide. He argues that the jury panel failed to fairly represent a cross-section of the community, that the victim's toxicology report should have been admitted as evidence, that he was not timely provided discovery of a witness' statement, that a biased police investigator should have recused himself, that the evidence was insufficient, and that his 2035 parole eligibility date renders his sentence excessive. We reject his claims and affirm the judgment.

Price is African-American. At trial he objected to the jury panel because of the fifty persons drawn, there were no Hispanics and only one African- American. He argues that the trial court should have dismissed the panel and selected a new one.

The issue is inadequately developed in Price's appellate brief and we need not address it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (we will not address arguments inadequately briefed and which lack citation to proper legal authority). However, the issue was fully developed at trial with testimony from the district court administrator and jury clerk and an examination of the composition of other jury panels in the county. It is sufficient to say that we have reviewed the record and conclude that Price failed to establish a prima facie violation of the fair cross-section requirement. *See* ***Duren v. Missouri***, 439 U.S. 357, 364 (1979).[1] There was no evidence that the jury panel was unfairly or unreasonably underrepresented by African-Americans or Hispanics or that there was any means of systematic exclusion of those groups.[2]

Price's theory of defense was self-defense. He sought to admit toxicology evidence that revealed that the victim, Williams Collins, had cocaine metabolite in his blood. Price argues that evidence that Collins was "on cocaine" would explain Collins' behavior and demeanor just prior to the shooting.

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[1] In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

[2] The census showed a 7.6% African-American population in the community and the jury pool from which the jury panel was selected was made up of 6.3% African-Americans. Greater numerical disparities have withstood challenge. *See* ***State v. Pruitt***, 95 Wis.2d 69, 78, 289 N.W.2d 343, 347 (Ct. App. 1980) (a panel comprised of 12.7% of the distinct group where the general population consisted of 25% of that group was not unfair or unreasonable). "The jury pool need not be a statistical mirror of the community." ***Id.***

Collins was shot outside a liquor store. Price testified that during a verbal exchange with Collins at the liquor store, Collins lunged at him.

Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court erroneously exercised its discretion. ***Shawn B.N. v. State***, 173 Wis.2d 343, 366-67, 497 N.W.2d 141, 149 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. ***Id.*** at 367, 497 N.W.2d at 149.

The relevancy of the presence of the cocaine metabolite was explored through the voir dire examination of three medical experts. The toxicology expert pointed out that there was no active cocaine found in Collins' blood. He testified that based on the level of the metabolite found, Collins ingested cocaine a minimum of twenty hours before his death. The shooting occurred three hours and nineteen minutes before death. The expert opined that Collins did not have cocaine in his blood and was not in the "crashing phase" of coming off cocaine when he was shot.

The trial court found that based on the experts' testimony there was no basis from which it could be determined that the presence of the metabolite had an effect on the victim's behavior. Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). The metabolite level did not prove anything material to Collins' behavior. Collins' use of cocaine was remote in time to the shooting and was not sufficiently linked to the moment of the crime. We conclude that the trial court properly exercised its discretion in excluding the evidence.

On the first day of trial, Price informed the court that as part of pretrial discovery, he had not been provided with the written statement of witness Joseph Gordon. Price contends that his right to due process was violated by the discovery violation. We conclude that Price was not prejudiced by what may or may not have been late discovery.

First, Price was provided a copy of Gordon's statement on the first day of trial. Section 971.24(1), STATS., requiring the production of a witness' statement, is satisfied if the statement is provided before the witness' testimony. Second, as the trial court noted, the defense was aware of Gordon as a potential witness because he had been subpoenaed by the prosecution for the preliminary hearing. Gordon had not appeared at the preliminary hearing and on the record Gordon's name had been mentioned for the issuance of a bench warrant. Third, Price was provided an opportunity to interview Gordon before his testimony given on the third day of trial. Price was provided with Gordon's address and given approval to interview him. The trial court fashioned an appropriate remedy to allow Price to interview Gordon. Moreover, Gordon's testimony was equivocal and did not directly implicate Price. He testified that he saw a black male shoot another black male at the liquor store. He had told police he did not know what the shooter looked like. He was unable to pick out the shooter from a photo lineup. Thus, neither Gordon's testimony nor his statement was exculpatory evidence and delay in receipt did not prejudice Price.

Price argues that police detective Arthel Howell should have recused himself from participation in the investigation because he was related to the victim. He seeks an opportunity to investigate further what exact prejudice may have resulted from Howell's participation and the appearance of impropriety. We summarily reject this claim. There is no basis in law for requiring an investigator's recusal. The investigator testified that he was remotely related to the victim and that his supervisor gave approval for him to continue working on the case. Price cross-examined Howell about the relationship. He had the opportunity to explore possible bias that may have affected Howell's investigation. A further fishing expedition is not warranted.

We turn to the sufficiency of the evidence. Our review of the sufficiency of the evidence is to determine whether 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. Ray***, 166 Wis.2d 855, 861, 481 N.W.2d 288, 291 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990).

Price relies on the testimony of persons unable to identify him as the shooter to demonstrate that the evidence was insufficient. Here, two witnesses identified Price as the shooter. Even though the credibility of those two witnesses was subject to doubt because of one's intoxication and the other's numerous prior convictions, credibility is a matter for the jury. It is for the jury, not this court, to resolve conflicts in testimony and determine the credibility of witnesses. *See* ***State v. Fettig***, 172 Wis.2d 428, 448, 493 N.W.2d 254, 262 (Ct. App. 1992).

Price himself admitted to shooting Collins. Intent cannot be disputed when seven shots were fired into the victim's abdomen. *See* ***State v. Kramar***, 149 Wis.2d 767, 793, 440 N.W.2d 317, 328 (1989) ("when one intentionally points a loaded gun at a vital part of the body of another and discharges it, it cannot be said that [the person] did not intend the natural, usual, and ordinary consequences."). There was sufficient evidence from which the jury could reject Price's claim of self-defense.

Price was given the mandatory life sentence and his parole eligibility date was set for 2035. He argues that because he had no prior criminal record, the selected parole eligibility date renders the sentence excessive. The issue was not raised before the trial court and is not properly before us. *See* ***State v. Barksdale***, 160 Wis.2d 284, 291, 466 N.W.2d 198, 201 (Ct. App. 1991). ***Spannuth v. State***, 70 Wis.2d 362, 365, 234 N.W.2d 79, 81 (1975), repeats the "frequently stated requirement that when sentences are challenged as excessive under the facts or as being the result of an abuse of discretion, no consideration can be given by this court unless a motion raising such error is made to the trial court; compelling circumstances being an exception to the requirement."[3]

We do conclude, however, that the record demonstrates that the sentencing court properly exercised its discretion in setting Price's parole eligibility date. A sentencing court sets the parole eligibility date using the same discretionary balancing of factors that govern the imposition of a prison sentence. ***State v. Borrell***, 167 Wis.2d 749, 764, 482 N.W.2d 883, 888 (1992).

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[3] ***State v. Lynch***, 105 Wis.2d 164, 167, 312 N.W.2d 871, 873 (Ct. App. 1981), held that the adoption of the rules of appellate procedure did not invalidate the admonition of ***Spannuth***.

Likewise, we follow the same standard of appellate review applicable to sentences, including the presumption that the sentencing court acted reasonably. ***Id.*** at 781-82, 482 N.W.2d at 895.

The primary factors to be considered are the gravity of the offense, the character of the offender and the need to protect the public. ***State v. J.E.B.***, 161 Wis.2d 655, 662, 469 N.W.2d 192, 195 (Ct. App. 1991), *cert. denied*, 503 U.S. 940 (1992). The weight to be given each factor is a determination particularly within the wide discretion of the sentencing court. ***Id.***

The sentencing court's rationale reflects consideration of these factors. We cannot conclude that the court focused too heavily on the nature of the crime to the exclusion of Price's rehabilitative needs. The court found that Price's rehabilitative needs and protection of the public required substantial confinement.

By the Court.—Judgment affirmed.

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