COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

NOTICE

No. 95-2485-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY LEE FELTON,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

WEDEMEYER, P.J. Stanley Lee Felton appeals from a judgment entered after a jury found him guilty of one count of first-degree intentional homicide, while armed, contrary to §§ 940.01(1), and 939.63, STATS. He also appeals from an order denying his postconviction motion. He raises four issues for our consideration: (1) whether the trial court erroneously exercised its discretion in excluding evidence of the victim's additional guns; (2) whether the trial court erred in excluding Felton's "expert" witness; (3) whether sympathy cards present at the jury view prevented him from receiving a fair trial and whether his trial counsel was ineffective for failing to make this argument; and

(4) whether his conviction should be reversed pursuant to § 752.35, STATS. Because the trial court did not erroneously exercise its discretion in excluding the additional gun evidence; because the trial court did not err in excluding Felton's "expert" witness; because the presence of sympathy cards at the jury view did not prejudice Felton; and because there is no reason to exercise our discretionary authority under § 752.35, we affirm.

I. BACKGROUND

On May 31, 1995, Felton entered a jewelry store located on West Mitchell Street in Milwaukee. Paul Anton operated the store. Felton came to retrieve a necklace that he had previously left at the store to be repaired. Felton, however, did not have the repair receipt or any identification. As a result, Anton refused to give him the necklace. Another customer present in the store testified that Anton told Felton in order to retrieve the necklace, Felton would have to produce either the repair receipt or identification. This customer also stated that Felton responded that he would be back in fifteen minutes. When this customer left the store, however, he saw Felton pacing back and forth in the alley along side of the store. Other witnesses testified that they heard the store's alarm going off and saw Felton leaving the store with gun in hand.

Felton's statement differed from this testimony. Felton said that when he told Anton that he did not have the receipt, Anton ignored him and went to wait on other customers. Felton stated he left the store to get money from his car to pay for the necklace and when he returned to the store, Anton got very angry and grabbed a shotgun. Felton indicated he pulled out the .38 revolver he was carrying and shot Anton in self-defense.

Anton died as a result of gunshot wounds to his left cheek, and left side. A partially uncased shotgun, belonging to Anton, was found underneath his body. Felton was charged with first-degree intentional homicide. He admits shooting Anton, but claimed he fired in self-defense. The jury found Felton guilty. The trial court denied Felton's post-conviction motion. He now appeals.

II. DISCUSSION

A. Exclusion of Additional Gun Evidence.

Felton claims the trial court erred in excluding from evidence the fact that Anton had additional guns strategically placed throughout the store. Felton asserts that this evidence was relevant to corroborate Felton's claim that Anton was the aggressor. The trial court allowed into evidence the fact that Anton had three guns within the small workshop area where Anton had been shot, but excluded from evidence as irrelevant the fact that Anton kept three other guns located in other parts of the store.

An appellate court reviews a trial court's evidentiary rulings according to the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983); ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). If a trial court applies the proper law to the established facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***

After reviewing the record, we conclude that the trial court's decision in this regard was a proper exercise of discretion. The trial court considered the facts: Felton's theory was that Anton was the aggressor because he chose to grab a cased shotgun rather than two more readily accessible handguns; that if Anton was reaching for a gun to defend himself from Felton, he would have grabbed the most readily available weapon; and that the additional guns were in remote parts of the store. The trial court applied these facts to relevancy law: evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. The fact that Anton had additional guns in other parts of the store does not make Felton's theory that Anton was the aggressor more or less probable. Accordingly, excluding this evidence as irrelevant was not an erroneous exercise of discretion.

B. Exclusion of Witness.

Felton next claims the trial court should not have excluded Wayne N. Hill from testifying regarding the stippling pattern observed near the wound

to Anton's left cheek. The trial court excluded Hill's testimony on the basis that Hill was not qualified to testify regarding this subject.

We review this evidentiary decision under the erroneous exercise of discretion standard. ***State v. Hamm***, 146 Wis.2d 130, 142-43, 430 N.W.2d 584, 590 (Ct. App. 1988). "The decision will not be upset on appeal if it has 'a reasonable basis' and was made 'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Blair***, 164 Wis.2d 64, 74-75, 473 N.W.2d 566, 571 (Ct. App. 1991) (citation omitted).

Upon reviewing the record, we conclude that excluding Hill's testimony was not an erroneous exercise of discretion. Although Hill is certainly qualified to testify as an expert in certain fields, there is no evidence that he has "'specialized knowledge' as the result of 'knowledge, skill, experience, training or education,'" ***State v. Whitaker***, 167 Wis.2d 247, 257, 481 N.W.2d 649, 653 (Ct. App. 1992), regarding stippling patterns. Accordingly, the trial court had a reasonable basis to exclude Hill's testimony.

Felton also claims that excluding Hill's testimony deprived him of his right to present a defense. We do not agree. A defendant does not have an absolute right to present all relevant evidence. ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973). Rather, the trial court is within its discretion to restrict the admissibility of scientific evidence (even if that evidence is relevant) through its gatekeeping functions. *See* ***State v. Peters***, 192 Wis.2d 674, 689-90, 534 N.W.2d 867, 873 (Ct. App. 1995). Because Hill was not qualified to offer the testimony proffered, the trial court did not err in prohibiting Hill's testimony. This testimony was properly excluded because Hill did not satisfy the requirements set forth pursuant to § 907.02, STATS. Hill's right to present a defense does not require that the trial court admit testimony from a witness who is not qualified to give an expert opinion.

C. Extraneous Information.

Felton claims the jury was exposed to extraneous information during the jury view. Specifically, he contends that the numerous sympathy cards hanging in the jewelry store when the jury went to observe the scene

unfairly influenced the jurors by evoking sympathy for the victim. He also claims that his trial counsel was ineffective for failing to move for a mistrial on the basis that the jury was exposed to this extraneous information. The trial court rejected Felton's claims, ruling that the cards were innocuous; that they were so high up that they could not be read by the jury; that the jurors were at the scene for a short period of time; and that the jurors' attention was focussed as the court directed during the jury view. Accordingly, the trial court concluded that Felton was not prejudiced by the sympathy cards.

There is nothing in the record that contradicts the trial court's findings of fact. Therefore, we conclude that the findings are not clearly erroneous. Based on these findings, we conclude that the trial court's conclusion that Felton was not prejudiced by this information was correct. Accordingly, we reject both of his claims.

We reject his general claim that the cards constituted extraneous information and therefore deprived him of a fair trial. Extraneous information is information that is not of record *and* beyond the jurors' general knowledge and accumulated life experiences. ***State v. Poh***, 116 Wis.2d 510, 521, 343 N.W.2d 108, 115 (1984). The trial court determined that based on the location of the cards, the jurors could not see them. Accordingly, even if the cards can be considered extraneous information, the jurors were not exposed to it. Moreover, we cannot conclude that the cards satisfy the definition of extraneous information because jurors can be expected to know that friends and family of a homicide victim would express their sympathy. This fact is not beyond the jurors' general knowledge.

We also reject Felton's ineffective assistance claim because counsel's failure to object to the cards did not prejudice Felton. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (to prevail on ineffective assistance claim, defendant must show that counsel's performance was both deficient and prejudicial). Based on the trial court's findings, any mistrial motion raised by his trial counsel would not have succeeded. The trial court found that the cards were innocuous, and could not have influenced the jurors because they were high up on the walls where the jurors could not read them. Accordingly, there is no reasonable probability that, but for trial counsel's failure to object to the cards, the result of the proceeding would have been different. ***Id.***

D. Section 752.35, STATS.

Felton requests that we exercise our discretionary reversal authority under § 752.35, STATS., because the real controversy was not tried. His argument is based on the three assertions of error discussed above. As indicated by the foregoing opinion, we reject each of Felton's three assertions. Accordingly, we see no reason to exercise our discretionary reversal authority under § 752.35. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero").

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring in part; dissenting in part*). I agree with the majority's conclusions regarding the additional guns evidence and the sympathy cards at the jury view. I disagree, however, with the majority's analysis of the trial court's exclusion of Felton's expert witness.

"The question of an expert witness' qualifications is a matter resting in the sound discretion of the circuit court, and unless it is shown that the court misused its discretion, its ruling will stand." ***State v. Donner***, 192 Wis.2d 305, 317, 531 N.W.2d 369, 374 (Ct. App. 1995). In this case, the record establishes that the trial court misused its discretion.

The homicide scene reconstruction and the stippling pattern on the victim's face were critical to the State's theory. They were needed to prove the close range at which the fatal bullet was fired, and to disprove Felton's version that he fired from a greater distance in self-defense. To support his theory of self-defense, Felton needed an expert to substantiate his scenario: that the stippling pattern was caused by a second shot fired from a greater distance that traveled through glass before striking Anton. Specifically, as Felton explains in his brief to this court:

> At trial, the government presented testimony from a pathologist, Dr. Teggatz, and a State Crime Lab ballistics expert, Monty Lutz, describing the stippling pattern surrounding the wound to Mr. Anton's cheek. In light of this stippling pattern, these two witnesses concluded that the wound in question was produced by a gunshot fired at a range of inches to a foot from muzzle to target. Dr. Teggatz, the pathologist, acknowledged that a similar type of stippling pattern can be produced by a bullet passing through glass. However, Dr. Teggatz rejected that possibility in light of Lutz's conclusion that only one bullet had passed through the only known intermediate target in the case, the glass partition at the front of the workshop area. Teggatz and Lutz believed that this single bullet hole accounted for the bullet fragments that caused the lacerations to Mr. Anton's left forearm and right hand.

....

> In this case Mr. Hill would testify that a second bullet passed through the glass partition adjacent to the first hole. Mr. Hill based this conclusion, in part, on the fact that the oblong shaped hole in the glass is extremely large given the caliber of bullet. Mr. Hill would also testify that the stippling pattern on the deceased's face was inconsistent with gunpowder stippling.

Thus Felton offered Wayne N. Hill as an expert in homicide scene reconstruction and related disciplines to testify in areas corresponding to those addressed by Dr. Teggatz and Mr. Lutz. As summarized in the defense memorandum to the trial court in support of the expert testimony:

[Hill] not only has years of law enforcement experience, but is also
> board certified by the American Board of Forensic Examiners. We note that the American Board of Forensic Examiners is nationally accredited by the American Federation for Medical Accreditation. Among the Boards accredited by the A.F.M.A. is the American Board of Forensic Pathology. Mr. Hill is the author of numerous articles, the majority of which involve the forensic examination of ballistic-related matters. We ask the Court to review his curriculum vitae in detail. Numerous courts all over the country have certified Mr. Hill as an expert in his field and have accepted his testimony as such.

> The foundation for Mr. Hill's testimony will be the following: State's photographs of the crime scene, Mr. Hill's own photographs of the crime scene, Mr. Hill's own personal observations, examination of all relevant physical evidence in the possession of the State, blood splatter analysis, and review of all of his own tests on selected pieces of physical evidence and, potentially, experiments conducted.[1] Mr. Hill will be testifying as to the following: inferences that can be drawn as to the location of Stanley Felton at the time shots were fired, the location of Paul Anton at the time shots were fired, the number of shots fired, sequence of shots, location of blood splatter patterns, analysis of physical evidence, including but not limited to, stippling to the face, trajectory and location of gunshot wounds, analysis of whole and

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[1] At the offer of proof, Hill testified:

> I reviewed the police reports, the crime scene diagram, the crime scene photography, the medical examiner's reports, and what I believe is the medical examiner's photographs of the wounds rather than police department. I've been to the scene. I've examined the scene itself. I've seen the plate glass section that still retains a partial bullet hole in it that remains. I've observed the clothing personally. I've got a brief non-microscopic examination of the clothing, the bullets, the firearms.

Later during the offer, Hill also testified that he had read the autopsy protocol and, through defense counsel, had presented the medical examiner with information raising the possibility that "[t]he autopsy protocol was mistaken a[s] to the evidence of gunpowder stipplings on the face."

> fragmented bullets found, presence or absence of soot, and the presence or absence of gunpowder.[2]

In a decision that offered minimal and marginally-accurate references to the evidentiary record, the trial court concluded:

> There is nothing in this record—anything that I've read contained in the briefs, the testimony, that I've heard would even entertain the thought quite frankly of this gentleman as being an expert in that field [of homicide events reconstruction] based upon his experiences in the field, which there are none. It appears that he knows a lot about some things but that doesn't qualify one as an expert in a particular field.
>
> I can tell you the Court's very concerned based upon the lack of experience that he offers.

The trial court then incorrectly commented that "it appears that most of the educational portion of his vitae is by correspondence, expert through correspondence—."[3]

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[2] Under cross-examination by the prosecutor at the offer of proof, Hill testified, "I intend ... in front of this jury ... to explain where I believe the participants were when several of the shots were fired based on supporting physical evidence." Challenged further by the prosecutor, Hill also explained that he would be able to testify about the sequence and trajectory of shots specifically with reference to whether they had passed through glass.

[3] Here again, it is apparent that the trial court failed to understand or apply accurate legal

After being corrected by defense counsel, the trial court continued:

> Well I'll—it's not—it's not just that. I'm talking about the different—the different seminars that the—that

(..continued)
standards. As we have explained:

> Under Rule 907.02, STATS., a person may give an opinion within his or her area of expertise as long as the witness is "qualified as an expert by knowledge, skill, experience, training, or education." Rule 907.02. The rule's unambiguous language does not condition an expert's competence on formal education. "Experience is a proper basis for giving an expert opinion as well as technical and academic training." As has been pointed out elsewhere, Rule 907.02 "permits witnesses with any form of specialized knowledge, *however obtained*, to assist the trier of fact".
>
> A person may be an "expert" under this rule based on experience alone and need not have any special education or training. The question is whether he or she knows something beyond that which is generally known in the community. If yes, the witness is an expert under this rule.

State v. Hollingsworth, 160 Wis.2d 883, 895-896, 467 N.W.2d 555, 560 (Ct. App. 1991) (emphasis in original; footnote and citations omitted) (quoting R.A. FINE, FINE'S WISCONSIN EVIDENCE 209-210 (1988)).

In this case, it is undisputed that Hill's expertise derived from professional training, professional experience, academic training, and technical training. It is undisputed that he had taught and published on subjects related to his areas of intended testimony. It is undisputed that he had been qualified as an expert in numerous other states. The trial court's concern about a correspondence course suggests a failure to focus on the more salient portions of the record.

> these—that he's attended. That's like me or yourself going to a seminar or somebody else going to a seminar for five days taking by sub-subject and utilizing that to build up ones [sic] resume as an expert in the field. That's ludicrous. It's absolutely ludicrous to one—for one to do that.
>
> ....
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> Now even if the Court were to qualify him as an expert in ballistics and—which he has very little experience of, not having the general experience of attending an autopsy or going to homicide investigation scenes or investigating as a police officer, I think the Court would be very remiss by even entertaining the thought based upon his testimony and based upon the entire record in this case and based upon the case law in this state. If he doesn't have any firsthand knowledge of that experience, I find it very difficult to believe to let him go into a scene and recognize what needs to be recognized without any prior experience. Court won't qualify him as an expert.[4]

[4] Because the trial court cited no legal standards, it is difficult to discern the basis for the trial court's conclusion. It is possible, however, that the trial court's error derived, in part, from the argument in the State's Memorandum to Exclude Defendant's Expert Witness, and argument in the trial court following the offer of proof, that the defense must satisfy the standards stated in ***Daubert***

Felton argues:

> [T]he alleged deficiencies in Mr. Hill's resume have no bearing on the narrow scope of testimony the defense was seeking to introduce.
>
> ... The defense merely sought to have Mr. Hill explain the inferences that could be drawn from the physical evidence, such as the holes in the glass partition, the stippling pattern on Mr. Anton's cheek, and the fragmenting and angles of the bullets."

Felton is correct. Although the prosecutor's cross-examination at the offer of proof exposed areas of legitimate concern for any jury considering Hill's trial testimony, the offer of proof, in combination with the credentials submitted to the trial court (and included as an appendix to this opinion), clearly establish Hill's qualifications to offer the intended expert testimony. The trial court's reservations relate to the weight of Hill's testimony, not its admissibility.

"[T]he rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability." ***State v. Peters***, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872, (Ct. App. 1995). Although we allow a trial court substantial discretion in determining whether a witness is qualified to present

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v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Although to some extent "Wisconsin law and ***Daubert*** coincide," ***State v. Donner***, 192 Wis.2d 305, 316, 531 N.W.2d 369, 374 (Ct. App. 1995), Wisconsin's "standard for the admission of scientific evidence was unaffected by ***Daubert***." ***State v. Peters***, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995).

expert testimony, we will affirm the trial court's decision only "if it has 'a reasonable basis' and was made '"in accordance with accepted legal standards and in accordance with the facts of record."'" ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991) (citation omitted). In this case, the trial court's decision did not have a reasonable basis and was not in accordance with the facts of record.

Trial court discretion is not unlimited. As we have explained:

> To sustain a discretionary ruling we need only find that the trial court examined the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. If the court relied on an erroneous understanding of an evidentiary rule, then it abused its discretion because it made an error of law.

Pophal v. Siverhus, 168 Wis.2d 533, 546-547, 484 N.W.2d 555, 560 (Ct. App 1992) (citations omitted). In this case, the trial court failed to apply a proper legal standard, failed to use a rational process, and failed to reach a reasonable conclusion.

The trial court erred in denying Felton's request to introduce expert testimony critical to his theory of defense and, therefore, Felton is entitled to a new trial. Accordingly, on this issue, I respectfully dissent.