COURT OF APPEALS
DECISION
DATED AND RELEASED

November 14, 1996

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

NOTICE

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No. 95-2880-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES CURTIS DILLARD,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

EICH, C.J. James Curtis Dillard appeals from a judgment convicting him of the first-degree intentional homicide of Fontaine Allison, recklessly endangering the safety of Roy Allison, and the attempted second-degree intentional homicide of Brian Cunnigan, and from an order denying his motion for postconviction relief.

On appeal, Dillard argues that: (1) the evidence was insufficient to support his conviction for first-degree murder; (2) the trial court erred in refusing to give his requested pattern and special jury instructions relating to various theories of his defense to the charges and to evidence he claims was "missing"; (3) the evidence did not support giving an instruction requested by the prosecution dealing with the ability of one provoking an attack to claim self-defense; and (4) justice requires a new trial. We reject his arguments and affirm the judgment and order.

The charges arose out of a confrontation between two groups of people: the "Allison group," comprised of (among others) the victims of the offenses, Fontaine Allison, Roy Allison and Brian Cunnigan, and the "Dillard group," comprised of the defendant, James Dillard, Aaron Brooks, and Melissa Kelly and her brother, Mathew Kelly.

The incidents leading up to the confrontation occurred after members of the Allison group, learning that members of the Dillard group had made gang-related threats against them, confronted the Dillards at Melissa Kelly's apartment. There is no dispute that, while in the apartment, James Dillard shot Fontaine Allison and Brian Cunnigan, and that Fontaine Allison died from his wounds. There was also evidence, which Dillard denies, that he shot Roy Allison in the hallway outside the apartment. Beyond that, the facts leading up to the shootings, and the actions of members of both groups before and during the confrontation, were the subject of highly conflicting testimony—which we discuss in more detail in succeeding portions of this opinion.

Dillard was initially charged with one count of first-degree intentional homicide and two counts of attempted first-degree intentional homicide. His defense to the charges was that he shot the victims in defense of himself and/or other members of his group. The trial court denied several of Dillard's requested instructions based on those theories with respect to the various counts, and also denied his request for a "missing evidence" instruction modeled after WIS J I-CIVIL 410, which deals with the failure of a party to a civil action to call a material witness within its control. The court also overruled Dillard's objection to the State's request for an instruction (WIS J I-CRIMINAL 815), stating, in essence, that self-defense is not available to one who provokes an attack.

The jury found Dillard guilty of the first-degree murder charge (Fontaine Allison) and of the lesser-included offenses of first-degree reckless endangerment (Roy Allison) and attempted second-degree murder (Brian Cunnigan). In his postconviction motion, Dillard claimed that the trial court erred in declining to dismiss all charges for insufficiency of the evidence at the close of the State's case and in its instructions to the jury. He renews these arguments on appeal.

I. Sufficiency of the Evidence

A. Standard of Review

Dillard argues first that the evidence was insufficient for the jury to find him guilty of first-degree intentional homicide. First-degree intentional homicide requires proof that the defendant intentionally caused the death of another person. § 940.01(1), STATS. Another subsection of the statute, entitled "Mitigating Circumstances," provides that where the defendant killed the victim unreasonably believing the act was necessary to defend himself (or herself) or another person who was "in imminent danger of death or great bodily harm," the charge of first-degree homicide is reduced or "mitigated" to second-degree homicide. Section 940.01(2)(b); *see* WIS. J I—CRIMINAL 1014; ***State v. Foster***, 191 Wis.2d 14, 23-24, 528 N.W.2d 22, 26 (Ct. App. 1995).

We wish first to settle a question concerning the scope of our review where, as here, the appeal is from the trial court's order denying the defendant's motion to dismiss at the close of the State's case. Citing ***Lofton v. State***, 83 Wis.2d 472, 266 N.W.2d 576 (1978), Dillard states, without elaboration, that the question is the same for that motion as it is for a motion made at the conclusion of all the evidence: whether, considering the State's evidence in the most favorable light, it is sufficient to prove guilt beyond a reasonable doubt. The State, ignoring the procedural context of the claimed error, simply sets forth the time-honored principles governing review of the sufficiency of the evidence to support a jury verdict of conviction. While neither party is necessarily incorrect, we think some elaboration is appropriate.

Where the motion is to dismiss—essentially to direct a verdict of acquittal—when only the State's evidence is in, and where, as here, the

defendant proceeds to put in evidence after denial of the motion, our review is of the entire record, not just the record as it existed at the time the motion was made.

> "[W]here a defendant moves for a dismissal or a directed verdict at the close of the prosecution's case and when the motion is denied..., the introduction of evidence by the defendant, if the *entire* evidence is sufficient to sustain a conviction, waives the motion to direct."

State v. Simplot, 180 Wis.2d 383, 399-400, 509 N.W.2d 338, 344 (Ct. App. 1993) (emphasis in the original; quoted source omitted).[1]

Because that is the situation here, our review is of the entire record, and it is governed, as the State suggests, by the following rules:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the [jury] unless the evidence, viewed most favorably to the state and the

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[1] In ***State v. Kelley***, 107 Wis.2d 540, 545, 319 N.W.2d 869, 871-72 (1982), the supreme court explained the distinction as follows:

> [T]he denial of a motion to dismiss at the close of the prosecution's case presents the defendant with a difficult choice.... [He or she] has the option of either not presenting any evidence on his [or her] behalf and preserving the ruling for appeal or abandoning [the] motion and introducing [a] defense. Should [the choice be] the first option, the appellate court can consider only the state's evidence in determining whether it was sufficient to support the defendant's guilt beyond a reasonable doubt. If the defendant chooses the second option and subsequently appeals [the] conviction, the appellate court must review all the evidence in determining whether it is sufficient to sustain the conviction.

(Citations omitted.)

> conviction, is so lacking in probative value and force that no [jury] ... could have found guilt beyond a reasonable doubt. If any possibility exists that the [jury] could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the [jury] should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

We do not assess the credibility of witnesses or weigh the evidence on appeal: "Where there are inconsistencies ... between the witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). Stated another way:

"[An appellate] court must affirm [the verdict] if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt. The function of weighing the credibility of witnesses is exclusively in the jury's province, and *the jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.*"

State v. Alles, 106 Wis.2d 368, 376-77, 316 N.W.2d 378, 382 (1982) (emphasis in original) (quoting from ***Fells v. State***, 65 Wis.2d 525, 529, 223 N.W.2d 507, 510 (1974)).

As indicated above, while it is undisputed that the Allison group went to Melissa Kelly's apartment after learning that the Dillard group, one of whom had threatened one of the Allisons, was inside, the testimony was highly divergent with respect to what followed. It is best discussed, we think, in terms of the State's and Dillard's versions as to what occurred.

B. Facts: Dillard's Version

Consistent with his defense theory—that he was acting either in self-defense or defense of others when he fired the shots—Dillard testified he was in the apartment when the Allison group entered, and as they entered, Cunnigan, yelling something about a threat, attacked a member of the Dillard group, Aaron Brooks. According to Dillard, another member of the Allison group joined in the attack on Brooks and a general fistfight broke out. According to Dillard, when he saw one of the Allisons pick up a bottle, he feared they were going to kill Brooks and pulled a gun out of his pocket and shot Cunnigan in the chest. He said he also fired at (and missed) another member of the Allison group, Paul Clayburn, who he said was "stomping" Brooks in the face.

Dillard testified that after he shot at Cunnigan and Clayburn, Brooks got up from the floor and ran toward a bedroom, while he joined the others in the room in heading for the apartment door. He said that, as he reached the door, he saw a screwdriver, which he said he believed at the time to be an ice pick, in Fontaine Allison's hand, and when he attempted to push the door open, Allison swung the screwdriver at him, striking him in the chin. At that point, Dillard said he shot Allison, thinking that he "was going to stab me and maybe possibly he could have killed me."

Dillard denied any knowledge of shooting Roy Allison.[2]

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[2] Dillard's discussion of the facts in his brief is abbreviated and contains no citations to the record. Instead, he refers us to the appendix to the brief, where a thirty-three-page summary of the testimony appears, which his attorney apparently prepared to accompany his postconviction brief to the trial court—and which he acknowledges was not agreed to by either the trial court or the prosecution. The document purports to summarize, in counsel's words, the testimony of each witness appearing at the trial. It is not organized around the issues on appeal or the arguments in his brief; and while it does contain references to transcript pages, it does not identify to which of the seven volumes of trial transcripts the page citations refer.

RULES 809.19(1)(d) and (e), STATS., require all briefs filed in this court to contain "a statement of facts relevant to the issues ... with appropriate references to the record," and "[a]n argument ... with citations to the ... record"; and we have repeatedly said that violation of these rules warrants disregarding arguments based on uncited facts. ***Lechner***

C. Facts: The State's Version

According to the State, Dillard left the building after the Allison group first entered the apartment—and before any blows were struck—returning several minutes later with his gun and shooting the two Allisons and Cunnigan. It points to evidence that Dillard's brother, Tyrone, told a police detective that Dillard had told him he had "run to get the gun from the car" when the Allison group entered the apartment. In addition, Melissa Kelly testified that she ran out of the apartment while Brooks and Fontaine Allison were engaged in a "verbal"—as opposed to a "physical"—dispute, and that as she entered the hallway she saw Dillard coming up the stairs with a gun.[3]

Roy Allison testified that when Cunnigan and Clayburn began beating Brooks, he noticed Dillard had left the apartment and went to the door to see if he could find him. Allison said that when he looked out the door and saw Dillard coming up the stairs with a gun, he attempted to run away. According to Allison, Dillard chased him past the apartment door and down the hallway, where Dillard shot him in the back. Allison stumbled down the stairs and, hearing more shots, fled.

Several of those inside the apartment—including Cunnigan, Clayburn, and Melissa's brother, Mathew Kelly—heard the shot in the hallway.

Cunnigan testified that after he heard the shot in the hallway, he stopped beating Brooks and attempted to leave, meeting Dillard as he stepped out of the apartment into the hallway, where Dillard shot him in the chest.

(..continued)
v. Scharrer, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988). We have, nonetheless, made every effort to consider and evaluate the many fact-based arguments advanced in Dillard's brief.

[3] Another member of the Dillard group, Anton Gardner, testified that he ran out of the apartment with Melissa Kelly when Brooks was first punched by Cunnigan and Clayburn. In his preliminary-hearing testimony, introduced at trial as a prior inconsistent statement, Gardner confirmed Kelly's testimony that, when they left the apartment, Dillard was coming up the stairs. This was consistent with Gardner's statement to the police—also introduced at trial—that he saw Dillard coming up the stairs.

Mathew Kelly testified that as he, too, was attempting to leave after hearing the shot in the hallway, he saw a hand with a gun extending through the partially-closed door, shooting into the apartment. He could not see the shooter—only his arm and the hand holding the gun. According to Kelly, Fontaine Allison was at the door trying to "stab" the hand with something, and he was up against the door when he was shot—falling against a nearby sofa in a sitting position. Kelly said that, after about twenty seconds passed, Allison, who no longer had any weapon that Kelly could see, was trying to get up when the person with the gun shot him again. A pathologist testified that Allison was shot twice: once in the area of his right armpit, and once through the heart.[4]

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[4] As we noted above, there is contradictory testimony, which we have referred to generally in our recitation of Dillard's version of the evidence. In arguing the sufficiency-of-the-evidence issue in his reply brief, Dillard refers to other testimony he claims is inconsistent with that relied on by the State. He points out, for example, that there was testimony that Fontaine Allison got up and walked a few steps after being shot the second time and that some of Mathew Kelly's testimony about Allison's shooting is inconsistent with the testimony of the State's forensic witness with respect to the precise location of the parties at the time of the second shot, and consistent with his own testimony. Dillard also points to discrepancies in the various witnesses' testimony as to the timing of events—not only estimates of the time between the two shots fired at Fontaine Allison (which was variously described as about "twenty seconds," "in quick succession," "just bang-bang, like that," and "very quickly"), but also the length of time Dillard was absent from the apartment prior to the shootings.

It would be a rare case indeed—even rarer in a criminal prosecution—for there *not* to be conflicts in the testimony. This is why the law, as we have noted above, wisely leaves questions of the credibility of the witnesses, and the weight to be accorded their testimony, solely to the jury. "Where there are inconsistencies within a witness's testimony or between witnesses' testimonies, the jury determines the credibility of each witness and the weight of the evidence." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). The rule is based on the jury's opportunity to observe the demeanor of the witnesses.

> The[] principles limiting [appellate] review [of jury verdicts] are grounded on the sound reasoning that the jury has the "great advantage of being present at the trial"; it can weigh and sift conflicting testimony and attribute weight to those nonverbal attributes of the witnesses which are often persuasive indicia of guilt or innocence.

State v. Alles, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982) (quoted source omitted).

D. Discussion

As noted above, Dillard's argument centers on the requirement of the homicide statute, § 940.01(2)(b), STATS., that, in addition to proving that he intentionally caused Fontaine Allison's death, the State must establish that he did so "because [he] believed he ... or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person [and that] belief was unreasonable."[5] Dillard maintains that he shot Allison to protect Brooks, who he says was "in imminent danger of great bodily harm as the result of the actions of Fontaine Allison and his friends," and he suggests, briefly, that the shooting was also justified in his own self-defense, because Allison was "attack[ing] [him] with a screwdriver" when he first shot him in the arm. At best, he says, the evidence supports a conviction for second-degree intentional homicide. We disagree.

The jury also heard evidence that Dillard left the apartment before Brooks was physically attacked and that when he returned, after shooting Roy Allison in the hallway, Brooks was not even in the room with Fontaine Allison, but had gone into a bedroom. There was also testimony that, after shooting Allison in the arm in the doorway, Allison stumbled to a sitting position on the floor, making no threats and without any weapon visible, and had been sitting there for up to twenty seconds when Dillard shot him through the heart.

There was, as we indicated, considerable additional and conflicting testimony. But, viewing the evidence, as we must, in the light most favorable to the conviction, we are satisfied that it was sufficient to support the jury's verdict finding Dillard guilty of the first-degree murder of Fontaine Allison under §§ 940.01(1) and (2)(b), STATS.

II. Jury Instructions

[5] The concept is termed "Unnecessary defensive force" in § 940.01(2)(b), STATS., and it is made an affirmative defense—along with several others—to the charge of first-degree homicide, mitigating that defense, as we have said, to second-degree homicide. The statute goes on to state that when the "existence of [the] defense has been placed in issue by the trial evidence, the State must prove beyond a reasonable doubt that the facts constituting the defense did not exist in order to sustain a finding of guilt" for first-degree intentional homicide. § 940.01(3).

A. General Standard of Review

Dillard challenges the trial court's rulings on several requests for jury instructions. A trial court has wide discretion in instructing the jury, and we will not reverse its determination absent an erroneous exercise of discretion. ***State v. Morgan***, 195 Wis.2d 388, 448, 536 N.W.2d 425, 448 (Ct. App. 1995). The court's discretion encompasses the discretion to choose the language and emphasis of jury instructions—as long as they "`fully and fairly inform the jury of the rules of law applicable to the case.'" ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988) (quoted source omitted); *see* ***State v. Boshcka***, 178 Wis.2d 628, 636, 496 N.W.2d 627, 629 (Ct. App. 1992).

> 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. Whether there are sufficient facts to allow the giving of an instruction is a question of law which we review de novo.

State v. Lohmeier, 196 Wis.2d 432, 441, 538 N.W.2d 821, 824 (Ct. App. 1995) (citations omitted), *petition for review granted*, 197 Wis.2d xv, 542 N.W.2d 154 (1995).

If the instructions given adequately cover the law applied to the facts, we will not find error in refusing special instructions even though, if given, they, too, would not be erroneous. ***Id.*** at 441-42, 538 N.W.2d at 824. And even when there is an instructional error, we will not order a new trial unless the error is prejudicial—that there is a probability—not just a possibility—that the jury was misled thereby. ***Id***. "A defendant is entitled to an instruction on a valid theory of defense, but not to an instruction that merely highlights evidentiary factors. Such instructions are improper, and trial courts may properly reject them." ***Morgan***, 195 Wis.2d at 448, 536 N.W.2d at 448 (quoted source omitted).

B. Denial of Dillard's Requested Instructions

A defendant in a criminal case is entitled to an instruction on a valid theory of defense, when such an instruction is requested and supported by the evidence. ***State v. Dean***, 105 Wis.2d 390, 395-96, 314 N.W.2d 151, 155 (Ct. App. 1981). Such entitlement is not automatic, however, for the defendant has the initial burden of producing evidence to establish the defense. ***State v. Stoehr***, 134 Wis.2d 66, 87, 396 N.W.2d 177, 185 (1986). On appeal, we review that evidence "`"in the most favorable light it will reasonably admit from the standpoint of the accused."'" ***Id***. (quoted sources omitted). "Ultimate resolution of the issue of the appropriateness of giving [a] particular instruction must necessarily turn on a case-by-case review of the evidence, `with each case ... standing on its own factual ground....'" ***Id***. (quoted source omitted).

Dillard challenges the trial court's denial of several requested instructions.

1. Defense-of-Others: The First-Degree Murder Charge

Dillard argues first that the trial court erred in denying his request for a defense-of-others instruction with respect to the charge that he had murdered Fontaine Allison. Unfortunately, we are unable to find the requested instruction in the record; we assume it was the pattern defense-of-others instruction.[6]

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[6] The record contains only a document entitled "Defendant's First Request For Jury Instructions," which consists of a list of requested instructions by number and includes the following entry:

> 1016 First Degree Intentional Homicide (Completed and Attempted): Self Defense: Defense of Others: Second Degree Intentional Homicide (Completed and Attempted): First Degree Reckless Homicide: First Degree Reckless Endangering (**as modified herein**)

WIS J I-CRIMINAL 1016, while it contains language relating to self-defense, contains no reference to defense of others. In any appeal, our review is limited to those portions of the record available to us, ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977), and it is the appellant's responsibility to ensure that evidence and other materials pertinent to the appeal are in the record. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). We assume the requested defense-of-others instruction was WIS. J I-CRIMINAL 830

We must thus decide whether a reasonable construction of the evidence, considered in the light most favorable to Dillard, supports his theory—that he reasonably believed Brooks was in danger of imminent death or great bodily harm at the time he shot and killed Fontaine Allison. ***State v. Coleman***, 199 Wis.2d 174, 183, 544 N.W.2d 912, 915-16 (Ct. App. 1996).

Dillard argues first that the trial court improperly relied on his own testimony that (1) after he fired the first two shots at Cunnigan and Clayburn, Brooks got up and fled from the room and all the others ran out the apartment door, and (2) when he attempted to enter the apartment, he feared for his own safety, not anyone else's.[7]

He acknowledges that that was, in fact his testimony; he contends, however, that the trial court should have considered the possibility that a reasonable jury could have disbelieved his version of the facts. Dillard correctly points out that the supreme court said in ***State v. Sarabia***, 118 Wis.2d 655, 663, 348 N.W.2d 527, 532 (1984), that "in viewing the evidence in the most favorable light it will reasonably admit from the standpoint of the accused, we must take into account that the jury could reasonably disbelieve the defendant's version of the facts." (Citations omitted.) The ***Sarabia*** court went on to note, however, that there still must be "some evidence" supporting the requested instruction in order for an appellate court "to determine whether submission of the defendant's requested ... instruction was warranted." ***Id***. at 663-64, 348 N.W.2d at 532-33.[8]

(..continued)
(1994), or some modification thereof. The instruction states, in pertinent part, that a defendant may use force to defend another person if he or she reasonably believed at the time that such force "was necessary to prevent imminent death or great bodily harm" to the other person. And it places the burden on the state to satisfy the jury beyond a reasonable doubt "that the defendant was not acting lawfully in defense of others."

[7] Dillard testified: "I thought he was going to stab me and maybe ... kill[] me.... at that time, I ... feared for my life more than I did anybody's." He also stated that after he fired the initial two shots at Cunnigan and Clayburn, Brooks got up from the floor and ran to an adjoining bedroom and "everybody else ... [ran] out the [apartment] door."

[8] As the State points out, the trial court's ruling on the defense-of-others instruction was not explicitly limited to Dillard's testimony. In denying the instruction, the court also relied on medical testimony showing the defendant was in closer proximity to Fontaine Allison when the first shot was fired than the second and looked to the break in time

It is indeed difficult to see how one could reasonably attribute to Dillard a state of mind which would provide a defense to his conviction when he never claimed he possessed such a state of mind. In any event, we agree with the State that even if we accept the possibility that the jury may have disbelieved Dillard's testimony, unless he can point to other evidence in the record supporting giving the instruction, it is properly denied as based only on speculation, not on any "reasonable belief." ***State v. Foster***, 191 Wis.2d 14, 25-26, 528 N.W.2d 22, 26 (Ct. App. 1995).

The only facts Dillard argues to us on the point are uncited to the record, apparently selected from his "summary" of the evidence which, as we indicated above, *supra* note 2, was never accepted by the trial court.

Even so, the facts he asserts suggest only that sometime prior to Dillard's attempted entry into the apartment and the shooting, Fontaine Allison and other members of the Allison group were battering Brooks.[9] The trial court believed, and we agree, that the conduct of Brooks's assailants that could reasonably be viewed as placing Brooks in danger of imminent danger of death or great harm was "separate and distinct" from the later confrontation between Fontaine and Dillard at the apartment door. And we reject Dillard's suggestion that because Brooks may have been in such danger at an earlier time, the jury could reasonably determine that that danger continued to the time of Dillard's attempted entry and his shooting of Fontaine because the events "happened so fast." Even the case he cites in support of the argument, ***State v. Jones***, 147 Wis.2d 806, 815, 434 N.W.2d 380, 383 (1989), states that the issue in defense-of-others cases is what the defendant reasonably believed *at the time of the act* he or she attempts to justify as being undertaken in another's defense—here, Dillard's shooting of Fontaine.[10] *See* ***Thomas v. State***, 53 Wis.2d 483, 488, 192 N.W.2d

(..continued)

between the shooting of Roy Allison and Cunnigan in the hallway and the shooting of Fontaine.

[9] While he asserts in his brief that he shot Allison when he "observ[ed] Aaron Brook[s's] plight," he provides no citation to either the record or his own "summary" to support the assertion.

[10] In ***Jones***, the court considered whether, when he stabbed the victim, the defendant reasonably believed that his sister "faced imminent death or great bodily harm" at the hands of the victim, or "whether, instead, the threat of ... death or ... harm to the defendant's sister had passed." ***Id***. at 815, 434 N.W.2d at 383. Recognizing that "what the totality of the evidence reveals" is for the jury, not the trial court, the ***Jones*** court stated

864, 866 (1972) (where assault against third person has ended or subsided to the point where she was not under any threat of imminent death or great bodily harm, defendant could not reasonably believe he was then defending her and thus claim entitlement to the defense-of-others instruction).

Viewing the testimony most favorably to Dillard, as we are required to do, we are not persuaded that the evidence may be reasonably construed to support his defense and the giving of the requested instruction.[11]

(..continued)
that the question before it was whether a reasonable construction of the evidence, viewed most favorably to the defendant, "support[ed] [his] theory that he reasonably believed that his sister faced great ... harm." ***Id***. at 816, 434 N.W.2d at 383.

Noting that the defendant had said at one point that "about two minutes" had elapsed between the time his sister had broken away from the victim and the time of the stabbing and, at another point, that it all happened "so fast"—and that the testimony of other witnesses corroborated the "so fast" statement—the ***Jones*** court surmised that the defendant may have had "a poor concept of how long a minute is," and concluded that the jury could have decided that the defendant reasonably believed his action was necessary in the defense of his sister. ***Id.*** at 818, 434 N.W.2d at 384.

In this case, as we have noted, Dillard testified that the assault on Brooks had ended—and Brooks had left the room—before his encounter with Fontaine Allison at the apartment door. And that testimony was corroborated by other witnesses. We do not believe ***Jones*** compels the conclusions advanced by Dillard on this appeal.

[11] Finally, we note that despite the fact that the trial court instructed the jury on self-defense with respect to Fontaine Allison's shooting, the jury convicted him. The State puts forth an alternative "harmless-error" argument, stating that it is inconceivable that the jury would have rejected Dillard's self-defense claim, which was directly supported by his testimony, at the same time accepting a claim of defense of others, which had only very tenuous, if not nonexistent, support in the record. The State reasons:

> [A]ll of the evidence presented by [Dillard] regarding his shooting of Fontaine focused on self-defense. It focused on Fontaine's use of the screwdriver against the defendant ... which led [him] to conclude that Fontaine was trying to kill him. There is no way the jury could have found that the defendant *was not* in imminent danger from Fontaine, who was directly attacking [him] at the time [Dillard] began shooting at him, but at the same time found that Brooks *was* in imminent danger from Fontaine. If the jury did not get to

2. Self-Defense: The Attempted Murder Charges

The trial court rejected Dillard's proffered self-defense instructions on the charges involving the shooting of Cunnigan and Roy Allison, and he claims this was error as well. He repeats the argument advanced on the defense-of-others instruction: in denying his request, the trial court improperly relied on his own testimony that he shot Cunnigan and Roy Allison because he believed they were presenting a danger to Aaron Brooks.[12] He claims that "the whole thing happened so fast that it was not possible to separate [his] fear for his own safety from his fear for his friends' safety," and that a reasonable jury could find that the entire incident "formed one continuous event" and reasonably conclude that he feared for his own safety.

He does not elaborate. He has not pointed to any evidence in the record that would support a determination that he himself was confronted with a threat of imminent death or great bodily harm when, while in the hallway, he shot a fleeing Roy Allison in the back and, as he entered the apartment, shot an apparently unarmed Brian Cunnigan in the chest. Again, he simply refers us to his own summary of the evidence, *see supra* note 2, and states that the record "shows that a reasonable jury could find that he feared for his own safety" when he shot the two men.

We have rejected essentially the same argument with respect to another of Dillard's instruction requests, and he has not persuaded us that the trial court erred in rejecting this one.[13]

(..continued)

> an acquittal via the self-defense route, it is certain that it would not have gotten there via the defense-of-others route.

(Emphasis in original.) Where there is no reasonable probability that an error contributed to the defendant's conviction, it is harmless. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). The State contends that is the case here, and we agree.

[12] Here, as before, the record establishes that the trial court relied not only on his own testimony but also on the absence of any other testimony "that would support the giving of [a] self-defense [instruction] for counts two and three."

[13] Our harmless-error comments with respect to Dillard's preceding argument, *supra* note 11, apply equally here. Dillard's testimony—which, as we discussed above, other

3. Dillard's "Theory of Defense" Instruction

Dillard also argues the trial court improperly denied his theory of defense instruction, which would have allowed the jury to consider whether he had an affirmative duty under § 940.34, STATS., to come to Brooks's aid.[14] The statute, entitled "Duty to aid victim or report crime," provides in part: "Any person who knows that a crime is being committed and that a victim is exposed to bodily harm shall summon law enforcement officers or other assistance or shall provide assistance to the victim."

Dillard's proposed instruction, after quoting § 940.34(2)(a), STATS., informs the jury that the theory of his defense is that, at the time he shot all three victims, he was "acting to prevent a crime" because all three—Roy Allison, Brian Cunnigan and Fontaine Allison—were engaged in a conspiracy to commit the crime of aggravated battery on Brooks. The bulk of the instruction is devoted to defining and discussing the term "conspiracy." The instruction tells the jury that if it believed Dillard was "acting to help the victim, Aaron Brooks, pursuant to Wisconsin's statute which requires a person to render assistance," they must acquit him.

Section 940.34, STATS., does not create a privilege, or a defense to a crime; it creates a crime. It simply penalizes those who, in certain situations, fail to contact the police or assist the victim when a crime is occurring and the victim is exposed to harm, and it makes that failure a criminal offense. It does not, as the State points out, "purport to create a privilege for those who attempt to comply with that duty by engaging in criminal conduct, e.g., the murder of

(..continued)

witnesses contradicted—was that he shot Cunnigan and Roy Allison while they were assaulting Brooks. Viewed most favorably to Dillard, that testimony would, as the State suggests, tend to support a finding that he was acting in defense of others at the time. Indeed, the jury was instructed on that defense with respect to the Roy Allison and Cunnigan charges—and rejected it in both instances. As before, we fail to see how a reasonable jury, considering that testimony, could refuse to find defense of others—as this jury did—and go on to validate a claim of self-defense on evidence with scant support in the record.

[14] In the heading to this argument in Dillard's brief, he states that his request for "a modified form of `self-defense: retreat'" instruction was also improperly denied. However, because he makes no separate argument on the point, we do not consider it. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

the person committing the crime that exposes the victim to bodily harm." Nor does it in any way address when a physical assault on the person committing the crime—particularly one involving the use of deadly force—may lawfully be utilized to fulfill the duty of rendering assistance imposed by its terms. Indeed, it states that one need not render assistance when to do so "would place him or her in danger." § 940.34(2)(d)(1).

We agree with the State that Dillard's requested instruction would decimate the defense-of-others statute, § 939.48(4), STATS., which sets forth the specific circumstances under which a person has a privilege to resort to deadly force to aid a third party who is threatened with bodily harm—including the important provision that the force be limited to that which is "necessary for the protection of the third person." The trial court effectively—and properly—disposed of Dillard's argument when it stated:

> I cannot believe that in enacting the Duty to Aid [statute], the legislature intended to, in essence, raise a super defense which would accord to someone even greater protection than self-defense or defense of others, and ... not only give them the duty, but give them no appreciable limits within which they must act.

4. Dillard's "Missing Evidence" Instruction

Dillard, complaining that the State failed to (1) collect and save pieces of a broken bottleneck (purportedly related to the assault on Aaron Brooks) and (2) preserve a pager and pieces of Roy Allison's clothing, requested that the jury be instructed as follows:

> If you find that the state in this case failed to preserve evidence within its control and [it] would have assisted the defense ... and the state fails to give a satisfactory explanation for failing to preserve and control that evidence, then you may presume that the evidence would have been ... favorable ... to the defense.

The instruction is based on the "absent witness" instruction used in civil cases.[15]

Dillard states that if Roy Allison's fingerprints were to be found on the bottle fragments, he would gain support for his theory that Allison hit Brooks with a bottle. He also claims that had Allison's clothing been tested for blood stains, a blood-typing analysis would aid in determining whether he battered Brooks.

Dillard acknowledges the absence of any legal authority supporting the proposed instruction. An instruction must "`fully and fairly inform the jury of the rules of law applicable to the case,'" ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988) (quoted source omitted), and in the absence of any showing that a legal foundation exists for the proposed instruction, we will not find error in the trial court's refusal to give it.[16]

We reach a similar conclusion with respect to the suggestion in Dillard's brief that the trial court was constitutionally required—as a matter of

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[15] WIS J I-CIVIL 410 (1989) provides:

> If a party fails to call a material witness within its control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, then you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.
>
> There is no counterpart in the criminal instructions.

[16] Dillard repeatedly asserts that the State "destroyed" the evidence, but he has not referred us to any evidence in the record to support such assertions. His argument is limited to the State's failure to gather evidence, which is an entirely different thing. As the State points out, Dillard's instruction states as its underlying premise that "[t]he state has the duty of investigating, collecting, and preserving for trial, relevant and material pieces of material evidence," and we said in ***State v. Smith***, 125 Wis.2d 111, 130, 370 N.W.2d 827, 836 (Ct. App. 1985), *rev'd on other grounds*, 131 Wis.2d 220, 388 N.W.2d 601 (1986), that there is no requirement in criminal cases that the State "collect all evidence which might possibly turn out to be exculpatory."

due process—to give the instruction.[17] First, it does not appear that he raised any such claim in the trial court, thereby preserving the issue for appeal. *See* ***State v. Skamfer***, 176 Wis.2d 304, 311, 500 N.W.2d 369, 372 (Ct. App. 1993). Even so, to prevail on a claim that the State violated a defendant's due process rights by losing, destroying or failing to preserve evidence, the defendant must show not only that the State was aware of the exculpatory nature of the evidence but also that its actions were undertaken with a bad-faith motive to suppress the evidence. ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1988); ***State v. Greenwold***, 189 Wis.2d 59, 67, 525 N.W.2d 294, 297 (Ct. App. 1994).

While Dillard refers to the testimony of a fingerprint expert and a serologist, given at the hearing on his postconviction motions, that (1) had prints been on the bottleneck shards, they would have been found, and (2) if there was any blood on Roy Allison's clothing, it could have been typed, he has not pointed to anything showing that such evidence would have been exculpatory,[18] much less that the State, knowing of its exculpatory nature, intentionally and in bad faith destroyed it.

C. Dillard's Challenge to the "Provocation" Instruction

At the State's request, the trial court instructed the jury—with respect to Dillard's claim of self-defense in the killing of Fontaine Allison—that

> [y]ou should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack.

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[17] We review a due-process challenge to jury instructions de novo. ***State v. Foster***, 191 Wis.2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995).

[18] Indeed, he acknowledges that neither expert could testify that any such prints, or any such blood samples, "would have supported [his] hypothesis that Roy Allison had hit Aaron Brooks over the head with a bottle."

> However, if the attack which follows causes the person reasonably to believe that he is in imminent danger of death or great bodily harm, he may lawfully act in self-defense. But the person may not use or threaten force intended or likely to cause death or great bodily harm unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm.

WIS J I—CRIMINAL 815 (1994).

Where the defendant is complaining not of the denial of a requested instruction but of the granting of the State's request, we consider the evidence supporting the instruction's use in the light most favorable to the State: whether the evidence, so viewed, would allow a reasonable jury to find the fact suggested by the instruction. ***State v. Herriges***, 155 Wis.2d 297, 300, 455 N.W.2d 635, 637 (Ct. App. 1990).

We have discussed at some length the testimony of several of the State's witnesses that Dillard left the apartment to retrieve his gun before any altercation involving Brooks or anyone else occurred. Thus, when he ran back into the building with the weapon he had no reason to believe that anyone—Brooks or anyone else—was in danger. There was testimony that, while still in the hallway, Dillard shot Roy Allison in the back as Allison was attempting to flee, and then ran to the apartment door, where he shot Cunnigan, who was attempting to leave the apartment. The jury could certainly reasonably believe that such unlawful conduct was likely to provoke a response from members of the Allison group—including an attempt by Fontaine Allison to keep him from entering the apartment by jabbing at him with a screwdriver. We see no error in the giving of the provocation instruction.[19]

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[19] Dillard also asks us to exercise our discretionary authority under § 752.35, STATS., to order a new trial in the interest of justice because the real controversy was not tried with respect to the Fontaine Allison murder charge. He repeats his arguments that the trial court erred in instructing the jury and states simply that "a properly instructed jury might very well have convicted [him] of a lesser offense [on the murder count], if not acquitting him completely." Because we have found no error in the trial court's instructions, we need

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

(..continued)
not consider the argument further.

Finally, we have commented at several points in this opinion on Dillard's failure to follow the rules of appellate procedure with respect to providing citations to the record for argued facts. Despite that failure, we have, as indicated, attempted to give full consideration to each of Dillard's arguments in order to ensure that his appeal received full and fair consideration.