OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 16, 2020

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
Branch 15
215 S. Hamilton St., Rm. 7107
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

John Blimling
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Rachel Eleanor Sattler
Assistant District Attorney
215 S. Hamilton, Rm. 3000
Madison, WI 53703

Patricia Sommer
Sommer Law Office, LLC
509 Nova Way
Madison, WI 53704

You are hereby notified that the Court has entered the following opinion and order:

2018AP1943-CR State of Wisconsin v. Hanife E. Johnson (L.C. # 2016CF2199)

Before Blanchard, Kloppenburg, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Hanife Johnson appeals a judgment of conviction and an order denying his motion for postconviction relief. Based upon our review of the briefs and record, we conclude at conference

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

After a jury trial, Johnson was convicted of one count of endangering safety by reckless use of a firearm and one count of felon in possession of a firearm. The allegation was that he fired shots into a vehicle.

At trial, the only eyewitness to testify was an occupant of the vehicle. She testified that she originally told police that Johnson was the shooter. However, as of the time of trial, she testified that she did not see Johnson with a gun, and did not remember who shot at the vehicle.

On appeal, Johnson argues that the evidence was insufficient. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. ***Id.*** at 504.

Johnson argues that the evidence was insufficient because the witness recanted. This argument fails because her original statement to police was not inherently incredible and, if believed by the factfinder, was sufficient to support both convictions. Johnson also argues that the evidence was insufficient because the witness "had a reason to lie, which was not allowed to be exposed at trial." This argument is internally inconsistent, because if the evidence was not presented at trial, it does not play a role in reviewing sufficiency of the evidence.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

We turn next to Johnson's argument that evidence of the witness's motive to lie to police in her first contacts was improperly excluded. On cross-examination, the defense attempted to ask the witness whether she had been involved in a romantic relationship with a certain person. The State objected, and argument was held outside the hearing of the jury.

The defense explained that it sought to show that the person with whom the witness had been romantically involved did not like Johnson, and that this person influenced the witness to implicate Johnson during the five hours between the shooting and the witness's first contact with police. The State responded that the questions were speculative, without foundation, and a distraction. Defense counsel replied in part: "If I can't ask her, I'll never know."

The court concluded that the defense was required to have a basis for pursuing this inquiry, such as independent evidence supporting the defense theory. The court barred inquiry into this topic under WIS. STAT. § 904.03 as being "too speculative" and lacking "tethering to the question you want to ask."

On appeal, Johnson argues that the court erred by excluding evidence of the witness's motive to lie. He argues that the probative value of this evidence outweighs the other concerns relied on by the court. The State responds that the court properly exercised its discretion.

We first clarify that the State's objection based on "speculation" was not the type of speculation objection that often occurs. The State was not objecting on the ground that the questions called for the witness to speculate about matters not within her own knowledge or perception. Instead, it was an objection based on the idea that the *defense* was speculating as to what the witness's answers might be. In other words, it was an objection based on the fact that the defense did not know in advance what her testimony would be.

We conclude that Johnson's argument must be rejected because he did not ask to make an offer of proof in the form of questions and answers by the witness. Error may not be predicated on a ruling that excludes evidence unless the substance of the evidence was made known to the judge by offer. WIS. STAT. § 901.03(1)(b). "The judge may direct the making of an offer in question and answer form." Sec. 901.03(2).

In a situation such as this, where the State's objection was based on the idea that the defense and court did not know what the witness's testimony would be, it was incumbent on the defense to ask for an offer of proof in question and answer form. If that offer had occurred, it would have clarified what evidence was available from the witness on this topic.

If the witness credibly denied any contact with or influence by the third person, there might not have been any reason for the defense to continue with that line of questions in front of the jury. On the other hand, if the witness gave testimony that supported the defense theory, the defense would have been in a position to make a specific and non-speculative argument explaining to the court the relevance and probative value of that evidence.

Without such an offer, however, we are now in the same position of speculation that the parties and circuit court were. One reason for an offer of proof is to create a meaningful record for appeal. ***State v. Brown***, 2003 WI App 34, ¶17, 260 Wis. 2d 125, 659 N.W.2d 110. If we do not know whether this line of questioning would have produced evidence, or what that evidence would have been, we are unable to conclude that evidence was improperly excluded. In essence, by not asking for an offer of proof in question and answer form, Johnson forfeited the right to claim that the circuit court erred by excluding the evidence that might have been produced by his proposed line of questioning.

In addition, even if there was error in barring this line of questioning, we conclude that the error was harmless beyond a reasonable doubt. It was harmless because Johnson was nonetheless able to pursue a line of cross-examination later that should have brought out this information from the witness, if she was willing to testify as the defense hoped.

The defense later asked the witness why she told police that Johnson was the shooter. She said it was because Johnson was "the main person that I knew and I saw," among other people she recognized at the scene. She then answered affirmatively when asked whether she told police it was Johnson because that was the person she knew best.

The defense question "why did you tell them that?" was open-ended. If the witness had been willing to say, "because my boyfriend wanted me to," that question should have elicited that answer. However, if the witness was *not* willing to testify about involvement of her boyfriend, then there is no reason to think she would have become more willing if the defense tried to elicit that information with leading questions, as it was attempting to do when the State objected.

In other words, it appears that, at most, what the defense lost in the court's earlier ruling was the ability to explore this area with leading questions. Even with the court's ruling, the defense was still able to ask the witness to explain her earlier identification of Johnson, which she was now uncertain of at trial, and she gave an answer. We are satisfied that the loss of the ability to press the witness with leading questions on this topic was harmless beyond a reasonable doubt.

IT IS ORDERED that the judgment and order appealed are summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals