

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP2075-CR

Cir. Ct. No. 2003CF4712

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ABDUL MUHAMMAD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Abdul Muhammad appeals from a judgment of conviction entered after a jury found him guilty of being a party to a crime, one count of first-degree intentional homicide by use of a dangerous weapon, and one count of attempted first-degree intentional homicide by use of a dangerous

weapon, in violation of WIS. STAT. §§ 940.01(1)(a), 939.32, 939.63 and 939.05 (2003-04).¹ Muhammad claims that his Sixth and Fourteenth Amendment right to present witnesses in his own defense was denied when the trial court refused to delay the trial to allow for the production of a defense witness in the State's custody. Muhammad further contends that the trial court erroneously exercised its discretion when it allowed the recalling of a witness to identify Muhammad when that witness had previously failed to do so. Because the failure to delay the trial for the production of Muhammad's defense witness was harmless error, and because the trial court did not erroneously exercise its discretion in allowing the recalled witness to testify, we affirm.

BACKGROUND

¶2 There are a substantial number of facts disputed between the appellant's and respondent's briefs. Before wading through the disputed facts, we will try to distill those facts that are undisputed. At approximately 2:15 p.m. on July 23, 2003, Jacques Williams was killed and Marlon Lewis was struck twice by bullets fired from an adjacent car. Three men were in this adjacent car: George Payne, Randy Johnson, and the defendant, Abdul Muhammad. Payne was driving the car and, at all times relevant, he was in the driver's seat. Approximately one week after the shooting Muhammad traveled to Jackson, Mississippi. He was arrested in Mississippi almost a year after the shooting on July 17, 2004.

¶3 The murder weapon was never found. The types of ammunition used in the shooting were a .40-caliber "Federal" brand, Smith & Wesson bullets.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Three intact bullets and two bullet fragments were found at the scene or removed from the bodies of the victims. Ballistics testing determined that the three bullets and two fragments were all fired from the same gun. Analysis of the seven casings found determined that they were also fired from the same gun, an Israeli Military Industries .40-caliber firearm. One model name of this type of firearm is the “Desert Eagle.”

¶4 While the ballistic evidence is mostly undisputed, there are some potentially contradictory findings. It is clear that at least seven rounds were fired at Williams and Lewis. Seven shell casings were found in Payne’s car and no shell casings were found later at the scene of the crime. However, the examination of the car driven by Lewis shows at least nine bullet strikes to the driver’s side. Shalisa Hamilton, an eyewitness to the shooting, said she heard six to eight shots fired. The police found a box of “CBC” brand .40-caliber bullets at Payne’s residence. Exactly eleven rounds were missing from the box. Ballistics determined that none of the shell casings or bullets that were used in the crime came from this box of ammunition. No other .40-caliber bullets were found at Payne’s residence.

¶5 There is much dispute as to where Johnson and Muhammad were sitting at the time of the shooting and who exactly was involved in the shooting. The State’s primary theory of the case and view of the facts are as follows: Muhammad was sitting in the front passenger seat while Johnson was sitting in the back seat. Muhammad told Payne to pull up alongside Lewis’s car. Muhammad extended his arm out the window and repeatedly shot at Lewis and Williams. After Muhammad fired between six and ten shots, both cars drove off their separate ways. After shooting Lewis and Williams, Muhammad put his gun in his waistband. Lewis, afraid for the safety of his family, did not immediately identify

Muhammad as the shooter but eventually testified at trial that Muhammad was the shooter. On top of this identification, Johnson and the defendant's own witness Shalisa Hamilton identified Muhammad as the shooter.

¶6 Muhammad's theory of the case is very different. According to Muhammad, he was in the backseat of the car the entire time and had nothing to do with the shooting. Muhammad claims that there was bad blood between Payne and Lewis because of drug-dealing competition. Muhammad asserts that Payne shot Lewis and Williams with a Desert Eagle handgun. After the shooting, Payne threatened Muhammad and Johnson in an effort to keep them silent. Muhammad witnessed Payne return to his house to reload his weapon. A year or two earlier, Muhammad was present at the sale of a .40-caliber Desert Eagle handgun from a man named "Chris" to Payne. Johnson told Muhammad's sister, Jamila Gaitlin, on multiple occasions after the shooting that he knew Muhammad did not commit the crime. Octavia Muhammad, another sister of the defendant, received a phone call from Johnson more than a year after the crime saying Muhammad did not commit the crime. Muhammad concedes that his sisters did not tell the police about these communications and that Jamila Gaitlin has eight convictions.

¶7 After many delays caused by both sides, Muhammad's trial commenced on October 31, 2005. The trial lasted for four days and on Friday, November 4, 2005, a jury found Muhammad guilty on two counts. Muhammad was sentenced on December 1, 2005, to life imprisonment with eligibility for extended supervision after twenty-five years for the homicide. Muhammad was further sentenced to ten years' initial confinement and ten years' extended supervision for the attempted homicide, consecutive to the homicide sentence. Muhammad filed three *pro se* motions for postconviction relief, which were denied. Muhammad now appeals.

DISCUSSION

¶8 Muhammad claims that his Sixth and Fourteenth Amendment right to present witnesses in his own defense was denied when the trial court did not delay the trial a few days for the State to produce a defense witness who was in the State's custody. Muhammad further claims that the trial court erroneously exercised its discretion when it allowed the State to recall a defense witness to identify Muhammad as the shooter when the witness had previously failed to so identify Muhammad. We conclude that the failure to delay the trial was harmless error, and we are not convinced the trial court erroneously exercised its discretion with regards to recalling the defense witness.

¶9 Whether the actions of the State violate a constitutional right of the defendant is an issue of law, which we review *de novo*. *State v. Lo*, 228 Wis. 2d 531, 534, 599 N.W.2d 659 (Ct. App. 1999). However, the appellate court should balance the defendant's constitutional rights against "the public interest in the prompt and efficient administration of justice." *State v. Echols*, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993). "[D]enial of a continuance potentially implicates the Sixth Amendment right to counsel and the Fourteenth Amendment right to due process of law." *State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). When determining whether to delay a trial to afford the defendant the chance to present evidence, the trial court must balance "the defendant's constitutional right to adequate representation by counsel against the public interest in the prompt and efficient administration of justice. As in all reviews of alleged abuse of trial court discretion, this balancing must be done in light of all the circumstances that appear of record." *Id.*

¶10 The trial court initially denied Muhammad's request for a continuance because it believed the testimony to be requisitioned would be irrelevant. Muhammad was requesting the continuance so that a witness could be produced who would testify he sold Payne a .40-caliber Desert Eagle handgun with a ten round clip a year or two before the shooting. Muhammad points to the definition of relevant evidence as being "evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Minimal relevancy is a fairly low hurdle to clear. It logically follows that ownership of this type of firearm a year prior to a shooting does show a tendency to make the fact that the individual possessed that type of firearm at the time of the shooting more probable. The State even concedes in its brief that the testimony would satisfy the requirement of minimal relevancy. However, the State contends that the testimony was not sufficiently "material."

¶11 The State relies upon its reading of *Elam v. State*, 50 Wis. 2d 383, 184 N.W.2d 176 (1971). In *Elam*, the supreme court said: "Generally, the court may consider whether the testimony of the absent witness is material, whether the moving party has been guilty of any neglect in endeavoring to procure the attendance of the witness, and whether there is a reasonable expectation that the witness can be located." *Id.* at 390. The State argues that for evidence to be "material," it must be more than minimally relevant but probably less than the "reasonable probability of a different result" standard used for discovery. *See State v. Truman*, 187 Wis. 2d 622, 625, 523 N.W.2d 177 (Ct. App. 1994).

¶12 While it is true there is a valid distinction between relevancy and materiality, there is no clear definition of material in this legal circumstance and the hair-splitting the State does in its brief misses the point. First, the other two

Elam prongs have been met beyond any dispute. Christopher Phillips was in the custody of the State and there was clearly no neglect on Muhammad's part in his attempts to procure Phillips as a witness. *Elam*, 50 Wis. 2d at 390. In *Elam*, the court affirmed the denial of a continuance because it found both of these two other prongs absent. *Id.* at 392. If Phillips did testify, and his testimony was credible, the jury could have been influenced sufficiently as to make his testimony material. As Muhammad did everything possible to quickly identify, locate and formally request the production of his desired witness, and the witness would be available for the next day of trial, whether the witness' proffered testimony meets an undefined threshold of "material" is not the most compelling factor. The trial court erred in denying the motion for a continuance to procure Phillips. This error, however, was harmless.

¶13 An error is a harmless error if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Shomberg*, 2006 WI 9, ¶18, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted). Phillips's potential testimony would have been evidence that Payne owned or at one time owned a firearm whose type may have been used in the shooting.

¶14 Such evidence would not have been particularly helpful to Muhammad, as it would have provided the jury with confirmation that Payne and Muhammad had the type of gun used in the shooting. Whether Payne or Muhammad was the shooter would not alter Muhammad's party to the crime liability. Moreover, the State's case against Muhammad was strong and Phillips's testimony, even if admitted, would not have altered the outcome of this case. There was no dispute that Muhammad was in Payne's car when the shooting occurred, and that shots fired from Payne's car wounded Lewis and killed Williams. Lewis, who knew Muhammad, positively identified Muhammad as the

man in the front passenger seat of Payne's car, and testified that Muhammad was the one shooting at the car Lewis was in.

¶15 Moreover, there is no evidence, besides Muhammad's contradictory testimony, that Payne had any weapon with him on July 23, 2003. While Muhammad contends that the eleven missing rounds from the case of ammunition at Payne's house strongly corroborate his story, upon further analysis, the connection is not strong. The missing ammunition from Payne's house was not the ammunition used in the shooting. The only evidence that Payne came home to reload his gun with this ammunition is Muhammad's testimony. Lastly, Muhammad testified that shortly after going home to reload his gun, Payne gave the gun to a friend to dispose for him. It seems odd to make a deliberate stop to get ammunition for your weapon when you have the intention of disposing of the weapon as soon as possible. Muhammad's own account that would tie this evidence to his theory has potential credibility problems.

¶16 On top of other evidence pointing toward Muhammad's guilt unaffected by the addition of Phillips's testimony, there is the distinct possibility that Phillips would not have testified even if produced. When Muhammad first reiterated his request for the State to produce Phillips, the trial court asked if Phillips had spoken to an attorney regarding his rights because his testimony implicating Payne would be admitting to a crime. There is no indication that Phillips was prepared to waive his Fifth Amendment rights and confess to a crime. Muhammad has not addressed this issue. While this fact does not necessarily mean that Phillips would not have testified, it certainly does enter into the calculation of whether there was any harm in not delaying the trial. For these reasons we conclude the error was harmless.

¶17 Muhammad also asserts that the trial court erroneously exercised its discretion when it allowed the State to recall Shalisa Hamilton, a defense witness, who proceeded, for the first time, to identify Muhammad as the shooter. Muhammad relies on *State v. Hibl*, 2006 WI 52, 290 Wis. 2d 595, 714 N.W.2d 194. He contends that Hamilton’s identification of him occurred under suspicious circumstances, and that the trial court erroneously exercised its discretion by not excluding the testimony as violating his due process rights, or in the alternative, Hamilton’s testimony would be unfairly prejudicial when contrasted to its limited probative value.

¶18 An eyewitness identification derived from an impermissibly suggestive out-of-court procedure employed by the police is inadmissible unless the State shows that the eyewitness’s identification of the defendant is still reliable notwithstanding the suggestive circumstances. See *State v. Wolverton*, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995), *abrogated on other grounds by State v. DuBose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. The factors traditionally employed to make this determination are:

the opportunity of the witness to view the criminal at the time of the crime; the witness’s degree of attention; the accuracy of the witness’s prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation.

Hibl, 290 Wis. 2d 595, ¶39.

¶19 The spontaneous identification of Muhammad, however, was not a result of any police procedure or the State’s planned action. As such, the identification does not implicate Muhammad’s due process rights. *State v. Marshall*, 92 Wis. 2d 101, 118, 284 N.W.2d 592 (1979). “Where the confrontation is not part of a police procedure directed toward obtaining additional

evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant,” the rule requiring the above stated balancing “does not apply.” *Id.* Hamilton made her identification on her own and then began the process of revealing this fact by getting the attention of the prosecutor. While the prosecutor did ask Hamilton, who was crying, if she recognized Muhammad, this exchange was not a lineup, a standardized police procedure, or any other action done with the intent of influencing Hamilton’s memory. Hamilton made the identification on her own before flagging the prosecutor.

¶20 Even if Muhammad’s due process rights are not implicated, the trial court does have an important role in the admission of eyewitness identifications. “Although most such identifications will be for the jury to assess, the circuit court still has a limited gate-keeping function. It may exclude such evidence under § 904.03 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” *Hibl*, 290 Wis. 2d 595, ¶31. Evidence can only be excluded in this way if the evidence’s “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” WIS. STAT. § 904.03. The trial court did not erroneously exercise its discretion in determining that Hamilton’s testimony was not unfairly prejudicial, confusing or misleading.

¶21 The State and Muhammad contest in their respective briefs, the factors the court should consider in making a determination and which factors cut their way. Muhammad points out that when Hamilton made the identification in her mind, he was the defendant in the case. Muhammad also points out that Hamilton testified the shooter had braided hair and at the time of the trial Muhammad was the only person in the room with braided hair. The State points

out that: Hamilton witnessed the crime for a substantial period of time, Hamilton had a high degree of concentration on the crime, and Hamilton testified under oath that she was 100 percent sure of her identification. Muhammad retorts that the statement that the witness was “100 percent” sure should be viewed skeptically and actually cut against her credibility. The trial court must balance the probative and prejudicial weight of all the facts and determine whether the evidence should be admitted. WIS. STAT. § 904.03.

¶22 It is not the proper role of this court to determine how we would have ruled if we were in the position of the trial court at the time the motion was made.

The trial court’s decision to admit or exclude evidence is a discretionary determination that will be upheld on appeal absent a misuse of discretion. If the trial court’s decision is supportable by the record, we will not reverse even though the court may have given the wrong reason or no reason at all.

State v. Patino, 177 Wis. 2d 348, 362, 502 N.W.2d 601 (Ct. App. 1993) (citation omitted). There is evidence in the record to support a finding that Hamilton’s identification was reliable and sufficiently probative to survive a WIS. STAT § 904.03 challenge. The trial court’s ruling also follows the general policy that “most such identifications will be for the jury to assess.” *Hibl*, 290 Wis. 2d 595, ¶31. Accordingly, the trial court did not erroneously exercise its discretion by allowing the recalling of Hamilton to identify Muhammad as the shooter.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

