COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3043-CR **Cir. Ct. No. 2004CF1054**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WAYNE J. HART, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, C.J., Nettesheim and Snyder, JJ.

¶1 BROWN, C.J. Wayne J. Hart, Jr., appeals his conviction for first-degree intentional homicide. Hart asserts that his DNA sample should have been suppressed because it was obtained without consent contrary to the Fourth Amendment. Hart also claims that the trial court should have granted a mistrial at

several junctures: when, during jury selection, a local newspaper reported on Hart's prior convictions and the fact that he had pled no contest to lesser charges in the present case; when two jurors reported that their cars had been vandalized in the courthouse parking lot; when a State witness mentioned a previous theft in violation of a motion in limine order; and when the State conducted additional forensic testing on a piece of evidence during trial without notice to the court or Hart. We reject the Fourth Amendment claim because even if there were a violation, the DNA evidence only identified Hart as the assailant of the victim, a fact which was not at all in question in the trial. We also affirm the trial court's refusal to grant Hart's repeated mistrial requests. Whether to grant a mistrial is within the trial court's sound discretion, and in each case the court took appropriate steps short of mistrial to ensure that Hart was not prejudiced.

¶2 On the early morning of September 19, 2004, Heinz Krause, president of a Kenosha auto salvage yard, was awakened in his home by an automatic alarm system connected to the salvage yard. He went to investigate. According to his son's trial testimony, the usual procedure when the alarm went off was that he, his father, or both of them would walk through the salvage yard with a shotgun stored inside the office. If they found anyone, they would bring them back to the office and call the police, who would issue a citation to the intruder. On this night, only Heinz went to the yard.

¶3 The yard is equipped with a video recording system. Video from that night shows a person entering the yard and doing something to a mini van parked behind the office. Hart conceded at trial that this person was him, and that he was stealing gasoline by siphoning. Other video shows Krause walking up to the front door of the office, then walking in the yard and confronting Hart. The two speak; Krause is holding the shotgun. Krause walks Hart to the back door of

the office. Video images of the exterior of the building show the window panes and shades shaking; one of the shades falls from the window. Hart then exits the building, carrying two gas cans. Over the course of the day, Hart would visit three people and tell multiple stories about who he fought with and why. He showed a shotgun to two of them, and later threw it into the bushes of a house in Gary, Indiana, where a portion of it was later recovered by police.

¶4 Krause's body was found near the spot where the blind fell from the window. The medical examiner determined that Krause died of blunt force head trauma, and had additional blunt force trauma injuries to his neck, chest, and abdomen. His trachea was broken. Some of his many wounds were consistent with being struck with a fist, others with an object such as the butt of a shotgun. We will recite additional facts relevant to each of the issues discussed below.

¶5 Before trial, Hart moved to exclude DNA evidence from a swab of his cheek performed while he was in custody. The officers who performed the swab visited Hart in jail where he had been for the two days since his arrest. They showed him a consent form and asked him to consent to the sample for DNA testing. Hart shrugged his shoulders, and the officers told him that he had to answer "yes" or "no" before they could proceed. According to one of the officers, Hart answered "yes," and signed the consent form, after which the swab was performed. The DNA sample was later compared to tissue found under the victim's fingernails and found to be a match.

¶6 Hart claimed in the trial court and claims now that the taking of the sample violated his Fourth Amendment rights, and that the consent that he gave for it was coerced. He acknowledges that there was no overt coercion by the officers who took the sample, but argues that the fact that he had invoked his right

to counsel and that he had been in custody for two days means that the atmosphere in which he gave his consent was "inherently coercive."

¶7 The State responds with a discussion of the Fourth, Fifth and Sixth Amendments and argues that none of them were violated by the swab of Hart. We conclude that we need not make a holding on the substantive constitutional issues. Even if we were to assume that Hart is correct that the swab required a warrant or his consent, and further that his apparently voluntary consent was, in fact, coerced, we would still not reverse his conviction on this ground. The remedy for a Fourth Amendment violation is generally suppression of the evidence so obtained. *See* ***State v. Stevens***, 213 Wis. 2d 324, 333, 570 N.W.2d 593 (Ct. App. 1997), *summarily aff'd*, 217 Wis. 2d 369, 577 N.W.2d 335 (1998).

¶8 In this case, suppression would mean that the State could not have shown that the material under the victim's fingernails belonged to Hart. But Hart conceded at trial that he had gone to the salvage yard, struggled with the victim inside of the office, and left with the shotgun. The only element of first-degree intentional homicide that Hart contested at trial was whether he had the required intent; there was no question of identification. Even assuming for a moment that it was error for the trial court to allow the DNA evidence into the trial, the DNA evidence only served to identify Hart as the assailant, a fact that was both established and conceded. An error is harmless if the beneficiary of the error shows beyond a reasonable doubt that the error did not contribute to the verdict obtained. ***State v. Mayo***, 2007 WI 78, ¶47, __ Wis. 2d __, 734 N.W.2d 115. We are persuaded beyond a reasonable doubt that the inclusion of the DNA evidence merely duplicated the video identification and Hart's concession that he was the

one who had fought with the victim.[1] *See* ***id.***, ¶48. Even assuming there was error, it was harmless.

¶9 Hart's other claim is that the circuit court erred in failing to grant the mistrial that he requested four times during the proceeding. Whether to grant or deny a request for mistrial is within the circuit court's sound discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). We will not reverse absent a clear showing of an erroneous exercise of discretion. ***Id.*** We address each request in turn.

¶10 Hart first requested a mistrial on the morning of the second day of juror voir dire. Hart had pleaded no contest to charges of bail jumping and being a felon in possession of a firearm the day before so that the jury would not find out that he was a felon and on bail for a different charge. However, on the morning of the second day of voir dire, the local newspaper reported on the pleas and his earlier convictions, and also that jury selection had been slow because of questioning regarding media coverage of the case. Hart argued that the jury was "tainted" by this media report. In response to Hart's complaint, the court conducted individual voir dire of each juror, asking whether each juror had read or heard about the article in the paper. The court then denied the mistrial, saying "I am satisfied at this point that we have a panel of 27 jurors who now have had no contact with the [paper] this morning, and have had no discussion of the facts of this case, and have no knowledge of any of the potential issues that might have been raised … and at this point I see no reason to grant the motion for mistrial."

[1] In reply to the State's harmless error argument, Hart replies only that "any error would not be harmless as the [State] asserts" and does not explain why. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987) (undeveloped arguments deemed waived).

¶11 "[U]nless a newspaper article is so prejudicial as to influence the verdict of the jury, it is solely within the judge's discretion as to whether a mistrial is in order." ***Oseman v. State***, 32 Wis. 2d 523, 530, 145 N.W.2d 766 (1966). Hart argues that the newspaper article was "extremely prejudicial," because it discussed his prior criminal record and his pleas, and because on the day before the article was published, the court had not reminded the jury not to read any articles about the case. He also notes that first-degree intentional homicide, for which he was on trial, is the most serious crime in this state. But regardless of seriousness of the crime, the court's omission of the day before, and the content of the article, Hart nowhere disputes the court's finding that *no members of the jury read or heard about the article*. Hart does not explain how a jury could be tainted by a news account with which it has had no contact. The circuit court was well within its discretion in denying a mistrial.

¶12 Hart's next mistrial motion came the following day, when two jurors notified the court that their cars had been vandalized the day before while parked near the courthouse. Both cars displayed a parking permit identifying them as jurors' vehicles at the time when they were vandalized. The court voir dired each one. The first juror stated that there had been a "gouge" in one of her tires and that she thought a person had done it, though she did not think it was targeted at her, but rather was "a random thing."

¶13 The second juror had discovered a three-inch scratch under his door handle, and though he initially stated that he had no idea why his car would have been targeted, in response to a question from Hart's counsel he conceded that it was "a possibility" that he was targeted because he was a juror. He stated that he was "slightly uncomfortable" about continuing to sit on the case, though he said that having a guard in the lot would make him more comfortable. He further

stated that he had no idea whether someone from one side or the other side of the case might have vandalized his car. Both jurors denied that the incidents would have any effect on their ability to serve as jurors. Both jurors said that they had mentioned the vandalism to other jurors, and one said that the other jurors had had no reaction to the news. Hart asked for mistrial, but the court refused, and instead asked the sheriff to provide increased security in the parking lot.

¶14 Hart argues that the vandalism of the two jurors' cars was prejudicial. He cites the general standard for mistrial: "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. He again notes that the trial was for a "very violent" homicide, and argues that the jurors "were made victims themselves and the other jury members knew about it."

¶15 We acknowledge that the vandalism could have been construed by the jurors as a threat, and could have led them to develop a prejudice, possibly against Hart. The key phrase here, though, is "could have." When the court became aware of the incident, it addressed it promptly, questioning the jurors and allowing the attorneys to question them to determine whether such bias actually materialized. Both jurors gave plausible assurances that the incidents would not keep them from fulfilling their roles as jurors, and the court apparently believed them. The trial court was in a far better position to assess the jurors for possible bias than we are, and whether an incident like this one calls for mistrial is within

the trial court's discretion. *See* ***Bunch***, 191 Wis. 2d at 506. We certainly cannot call the court's decision an abuse of discretion.[2]

¶16 Hart again asked for a mistrial on the next day of the trial, after the State's direct examination of a friend of Hart's. The friend testified as follows regarding her encounter with Hart after he left the salvage yard:

> Q So he was indicating he didn't have gas?
>
> A Correct. And he asked me if I could—He says, I haven't gotten any sleep, can I take a couple hours and sleep in the van in your parking lot?[3]
>
> Q He did mention how he was trying to get gas? Did he say his method of trying to get gas?
>
> A No, he said it just didn't work out. He said he was—oh, oh, but he did tell me that he had siphoned gas a couple weeks before that from a school yard ….

Hart objected to the testimony at this point, and the court sustained the objection and ordered the jury to disregard the last answer. However, after the end of direct examination, Hart asked for a mistrial. He noted that he had filed a motion in limine, which the court had granted, to exclude other acts evidence under WIS. STAT. § 904.04(2) (2005-06). He argued that the friend's testimony about Hart's previous siphoning of gas was prejudicial.

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[2] *Cf.* ***Smith v. Phillips***, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable…. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.")

[3] The transcript shows the second part of this response as the next question, but we assume that it was, in fact, the witness's answer. Whether this is so does not affect our analysis of the issue.

¶17 The trial court denied the mistrial request, stating that the friend's answer had been nonresponsive to the prosecutor's question. The court also noted that Hart had conceded in his opening statement that he was in the salvage yard siphoning gas on the night in question. Thus, it reasoned, "[t]he issue is not … whether the defendant was capable of … or would siphon gas…. It is a non-issue in terms of the homicide because it is a conceded point."

¶18 We are not so sure that the witness' answer was nonresponsive to the prosecutor's question because it was a two-part question which did ask about Hart's "method." A more careful approach was warranted, given the sensitive area of questioning. Nevertheless, we agree with the circuit court's conclusion. Hart argues that the friend's answer was especially problematic because "it was the [State's] theory of the case that Mr. Hart was at [the salvage yard] to siphon gas when he was confronted by Heinz Krause." But that "theory" of the case was not merely the State's, it was also Hart's, as he made clear in both his opening and closing statements. There was no dispute that Hart had siphoned gas at the salvage yard, and so we cannot see how the friend's answer made his homicide conviction any more likely. In any case, the jury was instructed to ignore the answer, and juries are presumed to follow such instructions. *See* ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). The trial court was within its discretion in denying a mistrial.

¶19 Hart's last mistrial request came after two more days of trial. The State had, on the Friday before, adduced the testimony of a state crime lab worker regarding bloodstains on the side of a desk that had been in the office where Krause was killed. In contrast to the prosecutor's opening statement, in which he had claimed that there were more than 20 blood spots on the desk, the crime lab worker testified that only one of the spots she had tested was blood. This came as

a surprise both to the prosecution and the defense. On the following Monday when trial resumed, the prosecution informed the defense and the court that it had taken the desk panel out and had it re-tested over the weekend, and had discovered four additional blood spots. Hart moved for a mistrial, which the court considered, but ultimately denied. The court noted that Hart had declined the opportunity to test the desk before trial, and also that the four new blood spots did not constitute an unfair surprise because up until the crime lab expert's testimony, all parties had assumed that there were many blood spots on the desk. The court further reasoned that the surprising testimony and the State's response was helpful to Hart, and concluded that the proper course was to allow Hart to cross-examine the officer responsible for the retesting.

¶20 Hart argues that the mistrial should have been granted because the new testing rescued the State's case from the surprise testimony of the crime lab worker. We doubt that an increase in the number of blood spots from one to four, when the State had previously claimed more than twenty, aided the State. If anything, as the circuit court noted, the episode aided Hart. But even if it can be said that the State aided its cause with the new testing, evidence is not prejudicial simply because it aids the prosecution. Certainly, if the prosecution had had this evidence all along and had hidden it from Hart, that could have been a discovery violation. But that was not what happened here; the State looked for and found the new spatters in response to an unexpected twist in the case, and promptly notified the defense of its finding.

¶21 Hart insists that "there is something inherently prejudicial about the State removing evidence without the court's permission and having it tested during trial." The State notes in response that the desk had not been accepted into evidence at the time the retesting occurred. Though this may be so, it certainly

would have been a better procedure for the State to ask the court's permission, and notify the defense, before it retested the evidence. We are not condoning the State's action. In fact, we disapprove of it. In another set of circumstances it could jeopardize the State's case. Nevertheless, the trial court's response to the situation at hand was reasonable, and it was well within its discretion to deny a mistrial at this point.

¶22 Hart finally argues that all of the above-discussed incidents, taken together, warrant a new trial, even if individually they do not. As our discussion shows, we do not agree that any of the trial's events created "substantial prejudice" such that the circuit court was required to grant a new trial. Viewing all of Hart's complaints together, we reach the same conclusion. The few minor irregularities were promptly corrected, and we are satisfied that Hart received a fair trial.

By the Court.—Judgment affirmed.

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