COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP1014-CR
2007AP1015-CR
2007AP1016-CR
2007AP1017-CR

Cir. Ct. Nos. 2005CM744
2005CF308
2005CF316
2005CF337

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVERETT J. DAVIS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Everett Davis appeals judgments of conviction and an order denying postconviction relief. Davis was convicted of two misdemeanor

counts of violating a restraining order, two counts of stalking, two counts of felony bail jumping, and one count of disorderly conduct. Davis argues he is entitled to a new trial because: (1) a deputy was permitted to render an irrelevant personal opinion, (2) when a witness read the conditions of Davis's bond to the jury, she mistakenly included conditions that had not been ordered, and (3) the jury heard prejudicial testimony regarding two charges that were dismissed on day two of the trial. We reject Davis's arguments and affirm the judgments and order.

BACKGROUND

¶2 Linda Davis separated from her husband, Everett Davis, and obtained a restraining order against him in May 2005. Linda contacted police regarding alleged violations of the restraining order on August 29 and September 4. Davis was arrested and released on bond for both incidents. Police subsequently charged Davis with multiple offenses related to contacting Linda in violation of the restraining order or the conditions of his bond.

¶3 A jury trial initially proceeded on eleven charges. Two charges were dismissed by the court on the second day of trial. The jury returned not guilty verdicts on two other charges. Davis was ultimately found guilty of two misdemeanor counts of violating a restraining order, two counts of stalking, two counts of felony bail jumping, and one count of disorderly conduct. The court denied his postconviction motion for a new trial.

DISCUSSION

¶4 Davis challenges the admission of certain evidence at his jury trial. "We review a [trial] court's decision to admit or exclude evidence under an

erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶5 In order to appeal an evidentiary ruling, a party must first object to the admission or exclusion at the trial court level. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. If a party fails to object at the trial court level, the party waives any objections to the admissibility of the evidence. ***Id.*** The contemporaneous objection rule gives parties and the trial judge notice of the issue and a fair opportunity to address the objection thus eliminating the need for appeal. ***State v. Huebner***, 2000 WI 59, ¶12, 235 Wis. 2d 486, 611 N.W.2d 727. Therefore, a party must not simply object, but must object on the proper ground. *See* ***State v. Nelis***, 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619; ***State v. Mayer***, 220 Wis. 2d 419, 429-30, 583 N.W.2d 430 (Ct. App. 1998).

¶6 Even if evidence is erroneously admitted, the error may be harmless. Where there is a reasonable possibility the error contributed to the outcome of the trial, the error is not harmless. *See* ***State v. Moore***, 2002 WI App 245, ¶16, 257 Wis. 2d 670, 653 N.W.2d 276. A reasonable possibility is a possibility which is sufficient to undermine our confidence in the outcome. *See* ***id.***

¶7 Davis first argues deputy Al Diede improperly rendered an irrelevant personal opinion at trial. The prosecutor asked Diede, "[W]ere you in your professional judgment rating this as a minor … incident…?" Davis objected stating the question called for a legal conclusion. The prosecutor did not repeat the question. Instead, the prosecutor asked Diede if the case was "a run-of-the-mill case[.]" Diede responded that the case concerned him and he believed the situation was escalating. Davis did not object to that question or to Diede's answers to any questions on that subject.

¶8 Davis's objection to the earlier question does not extend to different questions and, even if it did, the objection was not on the proper ground. *See* ***Mayer***, 220 Wis. 2d at 429-30. He did not object on the ground that the question asked for an irrelevant personal opinion. Rather, he objected solely on the ground that the question asked for a legal conclusion. Therefore, Davis waived his objection to the admission of this evidence. ***Edwards***, 251 Wis. 2d 651, ¶9.

¶9 Davis next argues that he is entitled to a new trial because Linda testified Davis's bond conditions included that he not possess any dangerous weapons or consume alcoholic beverages or illegal drugs. These bond conditions were not actually imposed on Davis. However, when Linda was asked to read Davis's bail bond conditions for the jury, she mistakenly included them. Davis contends the misreading of the bond conditions prejudiced him because the jury might have believed that this meant a judge thought Davis was a dangerous person who should not have weapons and that he had a problem with alcohol and drugs.

¶10 We reject this argument for two reasons. First, Davis failed to object at trial and therefore waived any objection. ***Id.*** Second, even if this evidence was improperly admitted, any potential error was harmless. The jury had already heard that Davis was prohibited from possessing firearms. Linda's son testified that he had Davis's firearms because Davis was not allowed to possess them. Additionally, Linda's testimony regarding the bond conditions was minor in light of the total evidence. The jury heard a variety of testimony from multiple people regarding Davis's conduct in threatening and stalking his wife. In light of all the other evidence, there is not a reasonable possibility that this error contributed to the outcome of the trial.

¶11 Next, Davis argues that he is entitled to a new trial because the jury heard evidence on two charges that were ultimately dismissed. Davis was tried on eleven counts. On the second day of trial, the trial court dismissed a charge of stalking based on a prior domestic abuse conviction and a related charge of bail jumping. The trial court did so because Davis had not been convicted of domestic abuse before, but, rather, he had been convicted of disorderly conduct. The trial court did not believe this would support a charge of stalking with a prior domestic abuse conviction. Davis argues he is entitled to a new trial because evidence relating to the dismissed charges had been introduced prior to the dismissal.

¶12 Davis did not ask the court to strike the evidence related to the two dismissed charges, he did not ask for a cautionary instruction, and he did not move for a mistrial. Therefore, he has waived any objection to the introduction of this evidence. ***Id.***

¶13 Nonetheless, Davis argues this court may vacate the guilty verdict because "the case was prejudicially joined for trial with another invalid charge." In support of his argument, Davis cites ***State v. McGuire***, 204 Wis. 2d 372, 556 N.W.2d 111 (Ct. App. 1996). However, without elaborating, the factual situation in ***McGuire*** is different than his case, and Davis does not explain how ***McGuire*** can be applied to his case. Further, Davis never cites the test from ***McGuire*** and does not apply the test to the facts of his case.

¶14 Even if we were to apply ***McGuire***, Davis would have to demonstrate "compelling prejudice" from the evidence related to the two dismissed counts. ***Id.*** at 381. We consider the following factors to determine whether a defendant has shown "compelling prejudice":

> (1) whether the evidence introduced to support the dismissed count is of such an inflammatory nature that it would have tended to incite the jury to convict on the remaining count; (2) the degree of overlap and similarity between the evidence pertaining to the dismissed count and that pertaining to the remaining count; and (3) the strength of the case on the remaining count.

Id. at 379-80.

¶15 In this case, the evidence related to the dismissed counts was not inflammatory. Linda simply testified that Davis had been convicted of a domestic disorderly conduct in 2002 and the incident involved physical conduct. She did not describe the incident any further.

¶16 The second ***McGuire*** factor examines the degree of "overlap and similarity of evidence on the two counts." ***Id.*** at 382. In cases where the counts emanate from similar facts, it is difficult for a defendant to show prejudicial spillover. ***Id.*** In this case, while the information admitted in Davis's case was only relevant to the dismissed charges, it paled by comparison to the other evidence of Davis's conduct.

¶17 Finally, the strength of the case against Davis on the remaining charges was overwhelming. The jury heard a wide range of testimony regarding Davis's conduct in threatening and stalking his wife. Linda testified she moved out of her marital home to her son's home in the city because Bloomer police officers suggested she was safer in the city. She also testified that she moved around because Davis was continuously following her, she felt very scared, and felt safer in Bloomer because if she called police they could get to her quicker.

¶18 The couple's daughter, Krystalyn Lotts, testified that Davis came to her house to pick up her brothers but got mad when she asked him to leave after he

began searching for Linda. She also testified that he called multiple times despite being told he was not supposed to call. Additionally, she testified that he came to the house multiple times and got mad and yelled at her if she would not allow him to talk to Linda.

¶19 The couple's daughter-in-law, Sarah Davis, testified that Davis often came to her house looking for Linda. Davis would get mad and yell at her if she would not let him see Linda. She also testified that on one occasion her husband had to prevent Davis from attempting to find Linda. Sarah also testified that she was a passenger in Linda's car on September 2, when Davis appeared on the road behind them and followed them to their destination. Sarah stated that when Linda parked, Davis parked behind her blocking her vehicle and said "Linda, come here."

¶20 Linda also testified that Davis approached her at a friend's house and told her if they did not talk about the divorce papers neither of them would make it to court. According to Linda, he grabbed her by the shirt and tried to pull her down the steps of the friend's home and told her she needed a bullet in the head. Davis's stepson testified that Davis called him to attempt to get his firearms.

¶21 Finally, Davis asks us to grant a new trial in the interests of justice because the real controversy was not fully tried. We only exercise our power of discretionary reversal in exceptional cases. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 13, 15, 456 N.W.2d 797 (1990). As stated above, the evidence overwhelmingly supports the jury's findings. This is not the type of exceptional case to warrant a reversal.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.