COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1848-CR **Cir. Ct. No. 2005CF190**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LOUIS DELPHIE,

DEFENDANT-APPELLANT.

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

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Louis Delphie appeals from a judgment convicting him of seven counts of hostage taking and one count each of kidnapping, burglary while armed, armed robbery, and child abuse—intentionally causing harm. He

asserts the trial court should have granted his request for a new attorney and his motion for a mistrial, and that the evidence was insufficient to support the jury's verdict of guilt. We disagree and affirm.

¶2 The charges against Delphie arose from an event in which he and five other armed men broke into the home of Nora Nieves and her fiancé, James Terrell, Sr. Six children also were in the home. The ski-masked intruders bound Terrell and two of the children, and covered the other children with a blanket. The men planned to make Nieves take them to the check-cashing business where she worked and help them rob it. The intruders fled when they heard a police radio from a patrol car that happened to pass by. Footprints in the fresh snow led police from Nieves' back door to a nearby garage where Delphie and three others hid. Police found in Delphie's jacket pocket gloves and a stocking cap cut to make a mask. DNA testing was not done on the items.

¶3 The co-defendants were severed for trial. On the morning of the second day of trial, before voir dire was finished, Delphie told the court he wanted his counsel to withdraw. Delphie explained that he did not feel informed about his case or believe his attorney was ready for trial. Reasoning that defense counsel had been on the case for several months and that Delphie's request was first raised on the second day of trial, the court denied Delphie's request as untimely.

¶4 The trial proceeded. In closing arguments, defense counsel argued that no DNA tied Delphie to the evidence because "[t]hey didn't test it." The prosecutor responded in the State's rebuttal that "either side has the ability to test."

> So if counsel was as concerned as he was during his argument, it's not his burden of proof, but he has every right to do a test to demonstrate whatever he wishes to argue in this case. It's easy to just walk in here and argue it. A little harder to put up or shut up and do the test.

¶5 Defense counsel immediately objected and, out of the jury's presence, moved for a mistrial on grounds the argument improperly imposed on Delphie an obligation to present evidence. Although the court agreed that the prosecutor's "put up or shut up" comment improperly insinuated that Delphie neglected his evidentiary burden, it concluded that a curative instruction would suffice, and denied the motion. The jury ultimately found Delphie guilty on all eleven counts. The court sentenced him to a total of forty-seven years' initial confinement and thirty-four years' extended supervision. Delphie appeals.

¶6 Delphie first argues that the trial court should have granted his request for new counsel. Whether counsel should be relieved and a new attorney appointed is a matter within the trial court's discretion. ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). A discretionary determination must be the product of a rational mental process by which the facts of record and the law relied upon are stated and considered together to achieve a reasoned and reasonable determination. ***Id.*** The trial court must be satisfied that there is good cause to permit the withdrawal, ***State v. Cummings***, 199 Wis. 2d 721, 748-49, 546 N.W.2d 406 (1996), and the defendant must present a "substantial complaint." *See* ***State v. McDowell***, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500.

¶7 The trial court asked Delphie why he wanted his appointed counsel to withdraw. Delphie responded:

> Because I don't have all my Discovery. This is all he brought me and I really don't know nothing about my case. And I asked him did he have the preliminary transcript. He say he don't have that. He only came to see me once since I have been locked up. And I asked him did he have the police records and all that. He says it's on a disk and it's at his office. So I don't feel he's ready for this case. Yesterday I asked him about the medical report. He said he didn't have it. But I looked over in the folder and

> seen it. Then he said, "Oh, here it is right here." So I don't know if he's been studying the case or not.
>
> ….
>
> I would like another attorney.

¶8 After defense counsel stated he had nothing to add, the court ruled:

> All right. We're starting the second day of trial. This case has been pending for months. [Defense counsel] has been on the case for a period of months. The court believes that the defendant's motion should be denied as, first of all, being untimely, also without significant substance in terms of the representation. I see no reason to relieve [defense counsel] of his representation and I'm going to deny the defendant's motion.

¶9 In evaluating whether the trial court properly denied a request for withdrawal and substitution of counsel, we address the adequacy of the court's inquiry into the defendant's complaint, the timeliness of the motion, and whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication, preventing an adequate defense and frustrating a fair presentation of the case. ***Lomax***, 146 Wis. 2d at 359.

¶10 We see no erroneous exercise of discretion in denying the motion for new counsel. First, the court inquired as to Delphie's reasons, allowed him to fully explain, and found no significant substance to his complaint. Delphie suggested that he felt incompletely informed about his case and noted a miscommunication about a medical report, but did not clarify the report's substance or relevance or explain how either complaint translated to his attorney's unpreparedness for trial.

¶11 Second, Delphie brought the motion months into the trial's pendency, on the second day of trial when voir dire was nearly complete. He offered the trial court no explanation for not bringing the motion sooner. Third,

Delphie said defense counsel had met with him only once and he did not know "if [counsel has] been studying the case or not." These assertions do not establish a request supported by good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict. *See* ***State v. Wanta***, 224 Wis. 2d 679, 703, 592 N.W.2d 645 (Ct. App. 1999).

¶12 Delphie next contends that the court should have granted his motion for a mistrial when the prosecutor improperly suggested that the defense had some obligation of proof. Whether or not to grant a motion for a mistrial lies within the trial court's sound discretion. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The test to be applied is whether the prosecutor's improper remarks made in argument to the jury, viewed in the context of the entire trial, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Where State overreaching is alleged, a mistrial is appropriate only when a "manifest necessity" exists for the termination of the trial. ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995).

¶13 The parties discussed the prosecutor's comment outside the presence of the jury. The trial court denied Delphie's motion for a mistrial and, immediately upon calling the jurors back into the courtroom, instructed them:

> [T]here was an objection that was made by [defense counsel] concerning the statements that were being made by [the prosecutor] … concerning the fact that either side could conduct experimentation or could ask for testing to be done. And then there was a comment that there was no testing done and that the defendant—or the statement was it was time to put up or shut up. And I'm sustaining [defense counsel's] objection to that because I believe that the statement was improper by the State and [the prosecutor].

> I believe it was improper for this reason: The defendant has an absolute right not to testify. Not only that, the defendant has an absolute right not to offer any evidence in the case. The defendant rested without offering any evidence and … any suggestion or inference that might be drawn by … [the prosecutor's] comments … that would suggest that somehow you should take into consideration the fact that the defendant offered no evidence, or did no testing, or was in some [way] obligated to put up or not be permitted to comment concerning the lack of evidence presented by the State was improper, and I'm going to order you to disregard it completely in your deliberations.

¶14 Denying the mistrial motion represented a proper exercise of the trial court's discretion. Besides the challenged comment, the prosecutor also stated that Delphie did not have the burden of proof. Also, the court immediately gave a strong curative instruction, which we presume erased any possible prejudice. *See* ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. Not all errors warrant a mistrial, and the law prefers less drastic alternatives, if available and practical. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). In any event, the presence or lack of DNA on the hat and gloves in Delphie's jacket was not a major issue at trial. We see no error.

¶15 Finally, Delphie contends that the evidence, all of it circumstantial, was insufficient to support the verdict and that no jury acting reasonably could have found him guilty beyond a reasonable doubt.

¶16 We may not reverse a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. ***State v. Johannes***, 229 Wis. 2d 215, 221, 598 N.W.2d 299 (Ct. App. 1999) (citation omitted). It is for the jury—not this court—to determine witness credibility and the weight of the evidence. ***State v. Sharp***, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993).

Our review is the same regardless of whether the evidence is direct or circumstantial. ***State v. Poellinger***, 153 Wis.2d 493, 503, 451 N.W.2d 752 (1990).

¶17 We conclude the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. *See* ***id.*** at 507. Police followed footprints in the fresh snow from Nieves' house to a garage where they found Delphie hiding. His dark clothing and the items found in his jacket pocket—gloves and a hat with eyeholes cut to make it a mask—matched the victims' descriptions of what the intruders wore. Delphie made various incriminating statements to police and gave a name they determined was false from the driver's license in a wallet found in the garage where he hid. Police also found the cell phone of one of the victims in the garage, and DNA from gloves and ski masks found near the scene matched that of two men hiding with Delphie in the garage. Finally, police found keys near Delphie's wallet in the garage which fit a car loaned to Delphie and found parked near the victims' home.

¶18 Circumstantial evidence, often more probative than direct, alone may be sufficient to convict. ***State v. Pankow***, 144 Wis. 2d 23, 30, 422 N.W.2d 913 (Ct. App. 1988). None of Delphie's appellate challenges persuade us. We affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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