COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2008

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. 2007AP2229-CR

Cir. Ct. No. 2006CF1408

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CORY MIRIELL WRIGHT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KAREN E. CHRISTENSON and DANIEL L. KONKOL, Judges. *Affirmed*.

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

¶1 WEDEMEYER, J. Cory Miriell Wright appeals from a judgment of conviction after a jury found him guilty of two counts of armed robbery, party-to-a-crime, in violation of WIS. STAT. §§ 943.32(2) and 939.05 (2005-06)[1]. He also appeals from postconviction orders denying his motions on one of the counts of armed robbery and for a new trial.

¶2 He claims five instances of error warranting relief: (1) the State violated his constitutional and statutory rights to pretrial discovery; (2) the trial court erred in allowing the State to withdraw a peremptory challenge of a juror after both parties had accepted the jury; (3) the trial court erred in failing to grant a mistrial when, contrary to a pretrial order, his probationary status was disclosed during testimony presented by the State; (4) his double jeopardy rights were violated by the second count of armed robbery; and (5) newly discovered evidence entitled him to a new trial.

¶3 Because there were no violations of the State's discovery obligations; because Wright personally waived any objection to the State's withdrawal of a peremptory challenge; because the trial court did not erroneously exercise its discretion in denying a mistrial motion based on an alleged disclosure of the defendant's probationary status; because the prohibition against double jeopardy was not violated by the defendant's conviction of two counts of armed robbery; and finally because the trial court did not erroneously exercise its discretion in denying the motion for a new trial based upon newly discovered evidence, we affirm.

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

BACKGROUND

¶4 With few exceptions that will be noted, the facts giving rise to the two counts of armed robbery, party-to-a-crime, are uncontroverted. As summarized by the trial court, Wright was charged with complicity in the March 6, 2006 armed robbery of Glinberg's Fine Jewelry store perpetrated by his brothers Marcus Lee and Brandon Williams. Store-owner Harry Glinberg and his employee, Leslie Fares, were working on that date shortly before the conclusion of business hours when Wright entered the store and indicated his desire to sell and purchase some jewelry. Soon Glinberg became suspicious of Wright's motives because of his apparent lack of knowledge about jewelry and because he did not appear to have any intention of doing any purchasing. Within short order, Lee and Williams entered the store. Glinberg attended to them while Fares waited on Wright. Glinberg's suspicions were further heightened when he surmised that none of the three men seemed intent upon purchasing any jewelry. Sensing a robbery was to occur, Glinberg went to his office and activated a silent alarm.

¶5 Fares, for her part, noted that after Lee and Williams entered the store, Wright used his cell phone. In short sequence, Lee and Williams pulled out pistols and announced a robbery. They forced Glinberg and Wright to go to Glinberg's back office. There they ordered both to the floor. Glinberg was placed on his stomach and his hands were secured behind his back with shoelaces. Wright's hands were not tied. Lee and Williams then forced Fares at gunpoint to place numerous items of jewelry into plastic bags that they had brought with them. While Fares was collecting the items of jewelry located on Glinberg's desk, she also pressed the silent alarm system, and while doing so made eye contact with Wright, who then told Lee and Williams that "they got everything, just leave." Lee and Williams left the store, taking with them jewelry and cash from the store

and personal property from Glinberg. They were apprehended on their way out of the building.

¶6 Wright, Lee, and Williams are biological brothers but gave no indication of this fact during the course of the robbery. Wright denied having any knowledge of the robbery. He stated that he was surprised to see his brothers enter the store and that he, too, was a victim of the crime. At first, Lee and Williams refused to implicate Wright in the incident, but later Lee stated to police that the robbery was all Wright's idea. Wright was convicted of being a party to a crime in both instances of the robbery. His postconviction motions were denied and he now appeals.

ANALYSIS

A. Violation of Constitutional and Statutory Rights.

¶7 Wright first claims the State violated his constitutional and statutory rights to produce discovery in three respects by failing to: (1) fully summarize an interview between him and the district attorney; (2) disclose Fares' conversation with a police detective about her eye contact with Wright after she pressed the alarm button; and (3) disclose that Glinberg was under investigation for intentionally failing to report that he received sums of money from known drug dealers.

STANDARD OF REVIEW AND APPLICABLE LAW

¶8 Whether the State violated WIS. STAT. § 971.23 is a question of law, which we review independently. Before a new trial will be granted there must be a showing of: (1) a violation of the State's discovery obligations; (2) the absence of good cause for the violation; and (3) prejudice. ***State v. DeLao***, 2002 WI 49,

¶15, 252 Wis. 2d 289, 643 N.W.2d 480. In the final analysis, prejudice must be demonstrated after all of the other burdens have been met.

¶9 Under WIS. STAT. § 971.23(1)(a), (b), and (e) a district attorney must disclose to a defendant any written or recorded statement concerning the alleged crime made by a defendant; a written summary of all oral statements of the defendant which the district attorney plans to use in the course of a trial; and any relevant written or recorded statements of a named witness which the district attorney intends to offer in evidence at trial.

¶10 Wright first claims he is entitled to a new trial because the prosecutor questioned Detective Keith Werner at trial about matters not appearing in the summary of Wright's statement appearing in the complaint which was given to him at the initial appearance. More particularly, the detective was asked by the prosecutor whether Wright: (1) claimed his brothers were masked when they entered the store; (2) gave the name of the person who allegedly told him he could get a good price on jewelry; or (3) described how his brothers reacted upon seeing him in the store. We reject this claim for three reasons. First, as correctly noted by the trial court, "These questions pertained to claims or statements that the defendant did not make during the interview, and therefore, would naturally not appear in a written summary." Second, the calls of the statute require that only a summary be provided of any oral statement, not a precise and exacting version of what was orally related. Wright, in his rhetorical efforts, attempts to create a positive out of a negative, which is conceptually impossible. Third, Wright's counsel was able to cross-examine the interviewing detective concerning these subjects. Thus, if for the purposes of argument there was a disclosure violation, no prejudice has been demonstrated. The ***DeLao*** requirements have not been satisfied. This claim fails.

¶11 Next, Wright claims the State failed to disclose a second statement made by Fares to Detective Werner in which she claimed to have made eye contact with Wright at the very same time that she pressed the silent alarm button. We reject this claim for five reasons. First, WIS. STAT. § 971.23(1)(e) requires only that "written or recorded statements of a witness" be disclosed and there is no showing there was any recording of any statement made by her much less writing a statement or acknowledging a written version of the same. Second, Wright's pre-trial motion *in limine* only requested "that the prosecution be prohibited from any use or reference to any recorded statements made by the defendant, or any witnesses the prosecution intends to call, prejudicial to the defendant that has not been previously disclosed to defense counsel." Third, as revealed by the trial transcript, prior to Fares testifying, there was already ample evidence of record from Glinberg pointing to Wright's involvement in the robberies. Fourth, Wright's counsel did, in fact, cross-examine both Fares and the detective about Fares' failure to mention this factor during her first interview. Last, Wright did not object when Fares testified that she made eye contact with him when she pressed the alarm button under the desk, and that he was in a position to see her, thereby alerting the brothers to leave. Thus, waiver occurred. Again the ***DeLao*** test was not met.

¶12 Finally, Wright contends that the State failed to disclose that Glinberg was under investigation by the IRS for failing to report cash payments of over $10,000 that he had received from known drug dealers. He argues that the failure to become aware of the investigation and then disclose that fact constituted a fatal discovery violation. We are not convinced.

¶13 The record is void of any evidence showing or even suggesting that the State knew, or should have known of the IRS's investigation involving

Glinberg. It is sheer speculation that had the State become aware of this information, or it could be imputed to the State, that within the realm of reasonable probability, it would have affected the verdict. The facts of the robbery are not in dispute. Without a conviction, mere allegations have little or no probative value as to the robbery, Glinberg's credibility, or his reputation for truthfulness within the context of WIS. STAT. § 906.08.

B. Withdrawal of Peremptory Jury Challenge.

¶14 Here, Wright claims that it was an error for the trial court to allow the State to withdraw a peremptory challenge after a prospective juror disclosed that her mother worked for the Milwaukee County District Attorney's Office. This revelation occurred after the jury had been accepted by the parties, but before the jury was empanelled or sworn in. The State offered to withdraw its last peremptory challenge so that the jury selection would not have to be repeated. Wright raised no objection to this juror who would replace the juror removed for cause.

STANDARD OF REVIEW AND APPLICABLE LAW

¶15 Absent an erroneous exercise of discretion, a trial court's decision concerning *voir dire* should not be disturbed upon appeal. ***State v. Koch***, 144 Wis. 2d 838, 847, 426 N.W.2d 586 (1988). "This broad discretion however, is subject to the essential demands of fairness." ***Id.***

¶16 The record reveals that one of the chosen jurors disclosed that her mother worked for the District Attorney's office after the parties had exercised their peremptory challenges and had accepted the jury. To assist in solving the problem, the State stipulated to remove the juror for cause and offered to withdraw

one of its own peremptory challenges; thus replacing the excused juror with one of the jurors it had stricken from the panel. This involved juror No. 5. Wright's counsel stated that she had not intended on striking juror No. 5 from the panel. After conferring with Wright and gaining his approval, it was agreed to substitute juror No. 5 for the excused juror. The following day Wright, through counsel, affirmed the stipulation.

¶17 In his postconviction motion and on appeal, Wright argues that ***State v. Nantelle***, 2000 WI App 110, 235 Wis. 2d 91, 612 N.W.2d 356, and WIS. STAT. § 972.04 require a new trial. The trial court dismissed this argument ruling that here, unlike in ***Nantelle***, no mistake was made during jury selection and that the issue presented arose out of circumstances created after the proper exercise of all the peremptory challenges. The trial court's ruling was correct. No strike took place after the acceptance of the jury. Both parties agreed to the withdrawal of a State's strike against a juror acceptable to the defense. This procedure did not have the slightest effect on the outcome of the verdict. The demands of fairness were more than adequately served.

C. Disclosure of Probationary Status.

¶18 Next Wright claims error in the failure to grant a mistrial after a police officer testified that a Milwaukee Police Department card and a probation and parole card were found on Wright's person after he was arrested. The trial court had previously ordered that no evidence about Wright's probationary status could be elicited.

STANDARD OF REVIEW AND APPLICABLE LAW

¶19 "The decision whether to grant a motion for mistrial lies within the sound discretion of the trial court." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). "The trial court must determine, in light of the whole proceeding, whether the [basis for the mistrial request is] sufficiently prejudicial to warrant a new trial." ***Id.*** We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. ***Id.*** A trial court properly exercises its discretion when it "has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994).

> ¶20 The deference which we accord the trial court's mistrial ruling depends on the reason for the request. When the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights. In such a situation, a mistrial is allowed only if there is a 'manifest necessity' for termination of the trial.

State v. Bunch, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citations omitted). A high degree of necessity must be found before concluding that a mistrial is appropriate. ***Arizona v. Washington***, 434 U.S. 497, 506 (1978).

¶21 In support of his claim, Wright asserts that there was a credibility claim between himself and Glinberg/Fares. He argues he was unaware that his brothers intended to rob the jewelry store and did not assist in any way. On the other hand, the State through Glinberg and Fares sought to demonstrate that Wright did in fact participate in the robbery through planning, initiating the action through a cell phone call, and telling his brothers to leave the store once he

became aware that a silent alarm had been activated. He thus reasons that when the police officer testified that he had a probation card in his possession, his credibility was harmed—for what other reason would he carry a probation card, unless he was on probation for the commission of some crime? It was Wright's strategy not to testify so that his criminal record would not be disclosed.

¶22 A review of the trial transcript reveals the following. The actual testimony of the police officer upon which Wright based his motion for a mistrial reads in pertinent part:

> [Mr. Potter]: As part of taking him to the police station, do you have to search Cory Wright to see if he has any property on him?
>
> ….
>
> [Police officer]: I conducted a pat-down and then a little more thorough search.
>
> [Mr. Potter]: What, if anything, did you find on Cory Wright that afternoon?
>
> [Police Officer]: I recovered a bundle of U.S. currency from his left pocket, a Verizon cell phone from his jacket pocket, and there was also a key fob with a key on it.
>
> ….
>
> [Mr. Potter]: Could you identify for the jury Exhibit No. 7 … and then Exhibit No. 8.
>
> [Police Officer]: Exhibit No. 7 is the cell phone that I removed from Cory Wright's jacket, a Verizon cell phone.
>
> And Exhibit No. 8 is the Chrysler key on the key fob as well as the Chevy Impala tag that was recovered on Cory Wright, and, I believe, the other pieces of paper in here which are a Milwaukee Police Department card and a probation and parole card.
>
> [Mr. Potter]: I'm only asking about the key.
>
> [Police Officer]: Okay.

¶23 After the officer was excused, Wright's counsel moved for a mistrial. The trial court denied the matter and in so ruling found as a matter of fact "there was no testimony that this card was taken from Mr. Wright, there was no connection made between that and Mr. Wright, so while it is regrettable, it was inadvertent and certainly was not in response to a question." The motion was denied. Upon postconviction review, the motion court affirmed the trial court stating:

> The court rejects this contention for the same reasons set forth by the trial court on the record. There was no evidence of any bad faith on the part of the prosecutor.
>
> The officer's statement was inadvertent and no direct connection was made between the defendant and the probation card. The jury was never told that the defendant was on probation, and any inference that may have been drawn by the presence of the probation card on his person was not prejudicial—i.e. there is not a reasonable probability that it affected the verdict.

¶24 The importance that Wright places on his view of the credibility issue is further diminished in importance for several other reasons. First, there was essentially no dispute as to the details of the robbery; the only issue being whether the circumstances of the incident reasonably could support the jury's determination that Wright participated in the criminal activity as a party to the crimes. Second, Wright decided for reasons best known to himself not to testify, presumably because of a criminal record. Thus, the precise aspect of credibility upon which he focuses his argument was never presented. Third, and more central to the broad issue of credibility is the contradictory testimony and statements of Lee, one of the armed robbers and brother of Wright. At trial, Lee denied Wright's involvement in the robberies, but on cross-examination admitted making a statement to an investigating detective that: (1) the robbery was Wright's idea, including the targeted store and methodology to be followed; (2) the three brothers

went to the store together; (3) Wright was to signal if the robbery was to proceed after the brothers entered the store and he had time to evaluate the situation; and (4) the brothers left the store after being directed by Wright.

¶25 On rebuttal, the detective affirmed what Lee had told him. From this review we conclude the record supports the proper exercise of discretion by the trial court in denying the motion for a mistrial. As demonstrated by the oral ruling of the trial court there was no showing of a high degree of necessity warranting a mistrial. This claim of error fails. We are, however, troubled by the apparent proclivity of police officers to violate court orders *in limine*. Although, we have determined herein that the violation was inadvertent and not prejudicial, we direct the trial courts to utilize the contempt power to enforce pre-trial orders, which are not followed.

D. Double Jeopardy.

¶26 Next, Wright claims that his protection against double jeopardy was violated when he was charged and convicted of two counts of armed robbery; one involving the store owner Glinberg and the other involving an employee Fares. He asserts that Fares could not have been an "owner" within the meaning of WIS. STAT. § 943.32(3) because Glinberg, the actual owner of the store, was also on the premises. Because Glinberg was present at the time of the robbery, he claims Fares did not have an active or constructive possession of any of the property that was forcibly taken. Consequently, the legal requirements for armed robbery were not met. We reject this contention.

STANDARD OF REVIEW AND APPLICABLE LAW

¶27 The prohibition against double jeopardy includes three protections: a prohibition against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and a prohibition against multiple punishment for the same offense. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). The third protection prohibits multiplicity or dividing a single offense into multiple charges. ***Id.*** at 413. Although "offenses may be identical and contained within the same statutory section, the factual circumstances may be separated in time or sufficiently different in nature to justify multiple punishments." ***Id.*** at 414 (citing ***State v. Rabe***, 96 Wis. 2d 48, 65-66, 291 N.W.2d 809 (1980)).

¶28 WISCONSIN STAT. § 939.71 sets forth the test for multiple convictions from a continuing course of conduct. The question is whether the conviction of one "requires proof of a fact for conviction which the other does not require." ***Id.*** WISCONSIN STAT. § 943.32(3) defines "owner" to mean "a person in possession of the property whether the person's possession is lawful or unlawful."

¶29 From a review of the record, it is factually undisputed that there were two separate victims with separate identities: Fares and Glinberg. Each was threatened with imminent violence: Fares was "marched at gunpoint" throughout the jewelry store and ordered to collect the jewelry from the display cases and give it to one of the robbers. She had physical possession of the property she was instructed to hand over. Glinberg, on the other hand, was ordered to the back of the store and robbed of his personal property. Thus, separate criminal acts were inflicted upon separate victims relating to property of a different nature. Neither

case law nor statutory law provides support for Wright's double jeopardy violation. For these reasons, there was no error.

E. Newly Discovered Evidence.

¶30 Last, Wright claims the trial court erroneously exercised its discretion by ruling he did not present newly discovered evidence thereby warranting a new trial.

STANDARD OF REVIEW AND APPLICABLE LAW

¶31 The test to determine whether newly discovered evidence warrants a new trial has five factors: (1) the evidence must have been discovered after the trial; (2) the moving party must have not been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the evidence must not be merely cumulative to the evidence which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached at a new trial. ***State v. Coogan***, 154 Wis. 2d 387, 394-95, 453 N.W.2d 186 (Ct. App. 1990). If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989). "A motion for a new trial is addressed to the sound discretion of the trial court and we will not reverse the trial court's decision unless it erroneously exercised its discretion." ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). The appellant must prove the first four factors requirements by clear and convincing evidence. ***State v. Edmunds***, 2008 WI App 33, ¶13, ___Wis. 2d ___, 746 N.W.2d 590.

¶32 With respect to the fifth factor—the reasonable probability of a different result on retrial—the appellant must prove that there is a reasonable probability a retrial with the new evidence would have resulted in acquittal. ***Id.***

¶33 Finally if the new evidence serves only to impeach the credibility of witnesses who testified at trial, it is insufficient to warrant a new trial as a matter of due process because it does not create a reasonable probability of a different result. ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989).

¶34 As noted earlier in this opinion, Wright claims that the State failed to disclose that Glinberg was under federal investigation for failure to report cash payments of over $10,000 to the IRS. He argues that this information ought to be imputed to the State and if so, it clearly establishes the existence of newly discovered evidence. We are not convinced.

¶35 The jury convicted Wright on July 12, 2006. The federal criminal complaint attached to Wright's motion is dated August 29, 2006. The postconviction motion court denied the motion. Wright asserts that the trial court failed to conduct the appropriate analysis required for a newly discovered evidence motion. In doing so, Wright faults the trial court for arriving at the following conclusion. "Information about a federal investigation involving one of the victims in this case has nothing to do with the sentence imposed for the defendant's acts. Moreover, the federal investigation and the federal charges do not satisfy the criteria newly-discovered evidence."

¶36 For whatever reason, Wright failed to include in the cited language the balance of the trial court's decision, which reads as follows. "There is not a reasonable probability of a different result at a new trial with the admission of this

evidence given the implausibility of the defendant's version of the events and the strong evidence of his complicity in these crimes."

¶37 We have carefully reviewed the trial transcript and having done so conclude there is a reasonable basis in the record to support such a ruling. Because Wright failed to fulfill the fifth requirement for a newly discovered evidence motion, the trial court did not erroneously exercise its discretion in denying the motion for a new trial.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.