COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP58-CR **Cir. Ct. No. 2007CM1379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIGHT S. JAJA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Bright Jaja appeals from a judgment following a jury verdict convicting him of knowingly violating a domestic abuse injunction.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

See WIS. STAT. § 813.12(8)(a). Jaja asserts that he was denied his right to a fair trial when the complaining witness, Jolynn Steurer, made comments to jurors intended to influence their verdict during a recess at trial. He argues that the trial court erroneously exercised its discretion in denying his motion for a mistrial and that his conviction must be reversed. We disagree, and therefore affirm.

Background

¶2 Bright Jaja was charged with violating a domestic abuse injunction, and pled not guilty. A jury trial was held on August 21, 2007. Both Jaja and the complaining witness, Jolynn Steurer, testified at the trial. After the jury instruction conference, the court went into recess. During recess, two jurors reported that Steurer spoke to them outside of the courthouse. A third juror overheard those jurors report the incident to the bailiff. Jaja moved for a mistrial.[2]

¶3 The judge then questioned the three jurors. The first juror said that while she was smoking a cigarette outside, Steurer said something to her, to which the juror responded "huh" or "what." Steurer repeated what she had said, which the juror thought was something like "you were in there," or "you're on the trial, right." The juror then told Steurer not to talk to her. The juror said she believed Steurer recognized her as a juror. The court asked the juror whether the incident would affect her ability to be fair and impartial in the case. The juror responded that the incident would not affect her ability to be impartial. The court then reminded the juror that her decision must be based on what she heard in the courtroom.

[2] The State also moved for a mistrial, but later withdrew its motion after the court questioned the jurors about whether they could still be impartial.

¶4 The court then brought in the second juror who had heard Steurer's comments. That juror said that as she crossed the street outside the courthouse, she saw Steurer. The juror told the court that she believed Steurer recognized her as a juror. Steurer then said to her, "it's going to be an open-and-shut case, isn't it." The juror said she shrugged and kept walking. The court also asked the second juror whether she could be fair and impartial, and the juror responded that she could. The court also reminded the juror that she had to base her decision on what was said in the courtroom.

¶5 The court then brought in the third juror who had overheard the conversations between the jurors and the bailiff. The third juror said he had heard the first juror report that Steurer said something like "it's an open-and-shut case, right," and the second juror report that she had contact with Steurer but she did not hear what Steurer said to her. The court asked whether the juror could disregard what he had heard. The juror responded that he could. The court further reminded that juror that he had to base his decision on what was said in the courtroom. The court then denied Jaja's motion for a mistrial.

¶6 The court resumed the trial and confirmed that no other jurors had had contact with Steurer during the recess. Before closing arguments, the court reminded the jury that "[a]nything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial." After deliberations, the jury found Jaja guilty.

Standard of Review

¶7 The denial of a motion for a mistrial is within the sound discretion of the trial court. ***State v. Ford***, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. We will not overturn the denial of a motion for a mistrial unless the trial court

erroneously exercised its discretion. ***State v. Davidson***, 44 Wis. 2d 177, 194, 170 N.W.2d 755 (1969). To determine whether the trial court erroneously exercised its discretion, we examine the record to decide if the trial court "logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." ***State v. Keith***, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

Analysis

¶8 Jaja contends that his trial was structurally flawed based on Steurer's comments to the jurors and, therefore, the judgment must be reversed. The State argues that Steurer's comments did not create a structural flaw and that the trial court properly exercised its discretion in denying Jaja's motion for a mistrial. We agree with the State.

¶9 "A structural error is a defect that upsets the framework within which trial proceeds; it is not merely an error in the trial process." ***State v. Shirley E.***, 2006 WI 129, ¶62, 298 Wis. 2d 1, 724 N.W.2d 623. Structural errors in trials have a serious and fundamental impact on the court's ability to guarantee a fair trial and require reversal of a judgment. ***Id.***, ¶¶61-62. Structural errors "are so fundamental that they are considered per se prejudicial," and therefore require reversal without a showing of actual prejudice to the defendant. ***Id.*** On the other hand, a trial court must evaluate a non-structural error to determine whether, in light of the facts of the case, the defendant can still receive a fair trial. ***Ford***, 306 Wis. 2d 1, ¶29.

¶10 Jaja contends that Steurer's comments to the jurors during recess were intended to influence the outcome of the trial, and thus created a structural error.[3] Jaja contends that Steurer's attempt to influence the outcome of the trial placed the fairness and integrity of the judicial proceedings in doubt, rendering the trial fundamentally unfair. *See* ***Shirley E.***, 298 Wis. 2d 1, ¶62. Jaja also argues that Steurer's comments to the jury created a structural error by creating an appearance of impropriety, compromising the public reputation of the judicial proceedings. *See* ***id.*** We disagree.

¶11 In ***Ford***, 306 Wis. 2d 1, ¶¶1-15, 31-49, the supreme court rejected Ford's argument that his trial was structurally flawed because the original bailiff for the case had had contact with the battery victim several hours after the battery for which Ford was charged, and had advised the victim to call the police. The court distinguished ***Ford*** from a line of U.S. Supreme Court and Wisconsin cases requiring reversal following a bailiff's interactions with a jury, where the bailiff served a dual role of state's witness and bailiff. ***Id.***, ¶¶32-48 (citing ***Gonzales v. Beto***, 405 U.S. 1052 (1972); ***Turner v. Louisiana***, 379 U.S. 466 (1965); ***State v. Cotter***, 262 Wis. 168, 54 N.W.2d 43 (1952); ***Surma v. State***, 260 Wis. 2d 510, 51 N.W.2d 47 (1952); and ***La Valley v. State***, 188 Wis. 68, 205 N.W. 412 (1925)).

[3] In support, Jaja points out that attempting to influence a juror through improper communications is a felony under WIS. STAT. § 946.64. Section 946.64 provides that

> [w]hoever, with intent to influence any person, summoned or serving as a juror, in relation to any matter which is before that person or which may be brought before that person, communicates with him or her otherwise than in the regular course of proceedings in the trial or hearing of that matter is guilty of a Class I felony.

However, it does not follow that action that violates § 946.64 requires a mistrial or necessitates reversal of a conviction.

The ***Ford*** court explained that Ford's case was distinguishable because it did not involve a bailiff-witness; the bailiff's involvement in the case had been limited to seeing the victim sometime after the battery and advising him to call police, rather than investigating the crime; and the bailiff's contacts with the jurors had been limited and did not include any inappropriate comments. ***Id.***, ¶¶44-48.

¶12 Jaja argues that ***Ford*** implies that if the bailiff had been a witness and had made inappropriate comments to the jury, there would have been a structural error. We do not read that implication in ***Ford***. Rather, ***Ford*** distinguished itself from a line of bailiff-witness cases that had found a mistrial was required.[4] ***Id.***, ¶37 (recognizing "the great prejudice inherent in the dual role of jury bailiff and key prosecution witness" (citation omitted)). Moreover, ***Ford*** did not imply that a variance on its facts would support a finding of structural error; to the contrary, the ***Ford*** court reiterated that "[t]he United States Supreme Court has found structural error in only a very limited class of cases." ***Id.***, ¶43 & n.4 (citation omitted) (stating United States Supreme Court has recognized

[4] In ***State v. Ford***, 2007 WI 138, ¶¶31-49 & n.4, 306 Wis. 2d 1, 742 N.W.2d 61, the supreme court did not specify whether the Wisconsin bailiff-witness cases involved structural error, although it discussed those cases as requiring "automatic reversal" based on bailiff-witness contact with jurors. It noted that the Wisconsin bailiff-witness cases are in line with the United States Supreme Court bailiff-witness cases. ***Id.***, ¶¶32-38 (citing ***Gonzales v. Beto***, 405 U.S. 1052 (1972) (holding that there is not a per se rule requiring reversal for a prosecution witness' contact with a juror, but the close contacts between sheriff-witness and jurors required reversal in that case) and ***Turner v. Louisiana***, 379 U.S. 466 (1965) (holding that defendant's right to a jury trial was violated when bailiff-witness was continuously in presence of sequestered jury, and ate with, conversed with, and ran errands for jurors)). The ***Ford*** court also noted that while "[a]t least one federal court has described the Supreme Court's decision in ***Turner*** as structural error," another jurisdiction had "specifically declined to reach the question of whether ***Turner*** involved structural error." ***Id.***, ¶43 n.4. However, the Wisconsin bailiff-witness cases were long ago abrogated by ***Shelton v. State***, 50 Wis. 2d 43, 50-51 & n.2, 183 N.W.2d 87 (1971), which held that while the Wisconsin courts previously followed the rule that "a trial must not only be free from prejudice but free from the appearance of prejudice …., the rule has been relaxed to the extent that there must be some showing of probable prejudice."

structural errors for, *inter alia*, complete denial of counsel, denial of public trial, and denial of self-representation).

¶13 We conclude, as in ***Ford***, that Jaja "has not set forth any case that supports the conclusion that a structural error requiring automatic reversal exists here." *See* ***id.***, ¶44. This is not a bailiff-witness case, and Steurer never engaged any jurors in actual conversation, much less engaged in significant social contact with them. In sum, this case "does not contain a defect that infects the entire trial process and necessarily renders the trial fundamentally unfair." ***Id.***, ¶49 (citation omitted). Thus, the error was not structural.[5] Jaja does not argue that the error prejudiced him, and we see no basis in the record for concluding that Steurer's comments to the jurors caused actual prejudice to Jaja.[6]

¶14 We conclude that the court reached a reasonable conclusion based on the facts of the case and the appropriate legal standard. *See* ***Keith***, 216 Wis. 2d at 69. Accordingly, we affirm.

[5] In his reply brief, Jaja contends that the communication between Steurer and the jurors was constitutional error, and thus the State had the burden to show that the error was harmless. *See* ***State v. Burton***, 112 Wis. 2d 560, 334 N.W.2d 263 (1983). Without addressing whether this is the correct standard, we also conclude that the court's questioning of the three jurors, and its factual finding that each was able to remain impartial despite Steurer's brief comments, meets the burden of proving harmless error beyond a reasonable doubt. *See* ***id.*** at 570-73.

[6] In ***Ford***, 300 Wis. 2d 1, ¶60, the supreme court placed significance on the fact that the trial court "inquired as to whether the jurors could decide the case fairly and impartially" following their contact with the bailiff who was a potential witness. The trial court followed the same procedure here, and we have no basis to disturb its finding that "in light of the entire facts and circumstances that the claimed error was not sufficiently prejudicial to warrant a mistrial." *See* ***id.***, ¶62 (citation omitted).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.