COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1174-CR **Cir. Ct. No. 2002CF848**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY C. TURNAGE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE and JEFFREY A. WAGNER, Judges. *Reversed and cause remanded*.

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. Johnny Turnage appeals from a judgment of conviction and an order denying postconviction relief. An important part of the record is missing, and we conclude that the record has not been adequately

reconstructed to the required standard of beyond reasonable doubt. Therefore, we reverse the judgment and order.

¶2 Turnage was convicted of first-degree intentional homicide. The allegations involved a shooting incident on a porch. Turnage claimed self-defense, and the jury was instructed on that issue. According to Turnage's postconviction motion, when his postconviction counsel began to look at the case, she found this statement in the court docket entries: "Jury question received, answered, and filed." She also was able to obtain the jury's note, which asked for a dictionary definition of "imminent." The parties agree that this request appears to have been for use in applying that word as found in the instruction for self-defense. However, the trial record is otherwise silent about this request. It does not say what the court's response to the jury was, or whether that response was developed with counsel or Turnage present or participating.

¶3 The motion asserts that Turnage's postconviction counsel then launched an investigation, and the results of that investigation are reported in affidavits attached to the motion. Very little additional information could be developed. Several years had passed since trial; the court reporter had no further notes of on-the-record proceedings; defense counsel was deceased and his files destroyed; the prosecutor had no recall; all twelve jurors were interviewed and provided mainly inconclusive responses. Postconviction counsel wrote to the original trial judge, Judge Franke. His response can be boiled down to saying that he had no specific memory about this case, and then describing that his usual practices would have been to use the Webster's dictionary in his chamber, or the pattern definition of "imminent" that is available for a different crime, or possibly to give the jury no definition, if that is what the attorneys wanted.

¶4 Based on this lack of information, Turnage's postconviction motion sought a new trial because the record cannot be reconstructed to the required degree of certainty. The applicable standard is found in ***State v. Perry***, 136 Wis. 2d 92, 95-109, 401 N.W.2d 748 (1987). That opinion lays out the process that should be followed when part of a record is missing. We will not attempt to repeat all the components of that discussion here. In short, it states that if the defendant shows a "colorable need" for the missing portion of the record, the circuit court is permitted to attempt a reconstruction of the record.

¶5 The ***Perry*** standard is a rigorous one. The reconstructed record must be "a functionally equivalent substitute that, in a criminal case, beyond a reasonable doubt, portrays in a way that is meaningful to the particular appeal exactly what happened in the course of trial." ***Id.*** at 99. The usual remedy when the transcript is deficient is reversal. ***Id.*** An inconsequential omission or slight inaccuracy that does not affect counsel's preparation of an appeal may be harmless. ***Id.*** at 100. The procedure for reconstruction "does not allow for speculation." ***Id.*** at 102. An appellate court cannot function if it has no way to determine whether error has been committed. ***Id.*** at 105. Once the defendant shows a "colorable need" for the transcript, he has no further burden, including no showing of prejudice. ***Id.*** at 108. "The court's duty is to make sure that the defendant's right to a fair and meaningful review is not frustrated by transcript errors or omissions." ***Id.*** at 108-09.

¶6 In response to Turnage's postconviction motion, the State asked for an evidentiary hearing to present one witness, the jury foreman. He testified, in short, that he was "100 percent confident" that the jury used a dictionary to get the definition, but he was not certain where the dictionary came from, what dictionary it was, or what the definition was. He thought the dictionary came from the bailiff

or was already in the room, but could not entirely rule out that it was brought in by another juror. No other postconviction record was made. Thus, the only materials before the postconviction court were the juror's brief testimony and the attachments to the postconviction motion. The circuit court denied the postconviction motion for reasons we will discuss further below.

¶7 On appeal, Turnage makes several arguments. We conclude that the dispositive issue is whether the record has been adequately reconstructed as to the court's response to the jury question. The adequacy of the reconstruction is a question of law for the appellate court. ***Perry***, 136 Wis. 2d at 97, 108. Turnage argues that some of the circuit court's findings were not made to the required degree of proof, and that the one finding that was made to the required degree does not constitute an adequate reconstruction of the record under ***Perry***. We agree.

¶8 A close reading of the circuit court's findings shows that it made only one finding to the required burden of proof, and made other findings only to a lesser burden. The court found beyond a reasonable doubt that the jury "utilized a dictionary definition," but made no finding beyond a reasonable doubt as to where the dictionary came from, what dictionary it was, or what the definition was. The court found only that it "is *probable* the dictionary definition was provided by Judge Franke," the original trial judge. (Emphasis added.) In its conclusions of law, the court held that the reconstructed record establishes that the jury was provided with "a" dictionary definition of "imminent," and that because the jury used the dictionary definition, Turnage is not denied his constitutional right to appeal.

¶9 The State responds that Judge Franke's letter provides the missing information about where the dictionary came from, what dictionary it was, and

what the definition was. According to the State, his letter tells us that it was the definition in the Webster's dictionary in the judge's chamber. However, this argument is not persuasive. To make this argument, the State simply overlooks the judge's admitted absence of actual recall about this case, and that the circuit court's found only that it was "probable" Judge Franke provided the definition. Given the judge's lack of actual recollection, even if the court had made that finding as beyond reasonable doubt, we are not certain the finding could be sustained on review, in light of the jury foreman's own uncertainty about where the dictionary came from.

¶10 As a result, the situation before us is that we have only one relevant finding that was made to the required degree of proof, namely, that the jury received "a" dictionary definition of "imminent." Thus, the issue boils down to essentially this: is it an adequate reconstruction of the record to say that the jury was given "a" dictionary definition, when we do not know what the definition was or what dictionary it came from? Turnage's position is that, under the standards we described above in ***Perry***, this is not an adequate reconstruction.

¶11 The State's response to this issue on appeal is limited. The State argues that even if the circuit court was not able to find beyond a reasonable doubt what definition the jury used, Turnage's ability to have a meaningful appeal is not affected. The State argues that the jury "obviously didn't act on its own in finding a definition; otherwise, the question would not have been asked" to the court. This is not persuasive. If the circuit court declined to give a specific definition, as Judge Franke said he may have done, the possibility cannot be excluded that the jury acted on its own after that time to obtain a definition. More importantly, whether the jury acted on its own is not the central issue; the issue is what definition was given and whether it was adequate.

¶12 The State's brief appears to address that point in only one sentence: "And there is not one scintilla of evidence to suggest that any dictionary definition of 'imminent' would have been misleading or erroneous." The State's argument, more precisely phrased, appears to be that *any* dictionary would have had an adequate definition of "imminent," and therefore it does not matter, for purposes of Turnage's appeal, what the specific definition was or where it came from.

¶13 From a common-sense perspective, the State's argument has some appeal. "Imminent" is not a new word, or a difficult one to define, or one whose meaning is changing. It may well be true that any standard dictionary issued by a professional, mainstream publisher would have an adequate definition. Case law recognizes that courts may use dictionaries. While many of those cases appear to be in the context of statutory interpretation, we have found some involving jury instructions. *See, e.g.*, ***State v. Brunette***, 220 Wis. 2d 431, 453, 583 N.W.2d 174 (Ct. App. 1998) ("[s]ince neither the statute nor the jury instruction defines these terms, we give them their ordinary meaning, and that may be determined from a recognized dictionary"); ***Ervin v. City of Kenosha***, 159 Wis. 2d 464, 484, 464 N.W.2d 654 (1991).

¶14 However, many opinions also qualify the dictionaries that may be used, by referring to "recognized" dictionaries. Not every opinion we found includes that qualifier, but many do. Our limited research did not find a description of what makes a dictionary "recognized." And, in some cases, even a standard dictionary may not be adequate. *See* ***State v. Harvey***, 2006 WI App 26, ¶16, 289 Wis. 2d 222, 710 N.W.2d 482 ("[w]hile the law commonly looks to a standard dictionary for guidance in defining a word in easily understood terms, such a source cannot always be relied upon … to supply or explain legal nuances;"

the court's focus "must remain on ascertaining the *legal* definition consistent with the legislative intent").

¶15 The State argues that there is no evidence that any dictionary definition would be inadequate but, to the extent this is an evidentiary question, the State misplaces the burden. As we described above, under ***Perry*** Turnage does not have the burden to show prejudice or to make an evidentiary record showing that the court's attempt to reconstruct the record is inadequate. The burden is on the State, and the problem in this case is that there are no findings and no evidence to support the State's argument that "any" dictionary would be adequate. There is no finding or evidence beyond a reasonable doubt that Turnage's jury used a "recognized" dictionary. Possibly this record could have been made through additional testimony by the jury foreman describing the dictionary in greater detail, but no such record is currently before us. As a result, for us to reach that conclusion would require us to essentially make a finding of fact ourselves, which we cannot do. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

¶16 In summary, we are not satisfied that in this case we are able to say that "any" dictionary definition was adequate. The record simply does not provide sufficient support for us to conclude that the court's attempt to reconstruct the record has preserved Turnage's right to a meaningful appeal. To know simply that "a" dictionary definition was provided, without knowing what dictionary or definition was used, or that it was a "recognized" dictionary, is not sufficient to comply with the standard articulated in ***Perry***. Therefore, as stated in ***Perry***, the usual remedy is reversal for a new trial.

¶17 In addition to the homicide charge we have discussed above, Turnage was also convicted of felon in possession of a firearm. As far as we can see, his argument about the court's response to the jury's request for a definition of "imminent" does not provide a basis to reverse the conviction on the firearms charge. Turnage's brief also includes other arguments, including an ineffective assistance of counsel argument that the jury improperly learned of Turnage's earlier adjudication for arson. However, none of these arguments appear to provide a basis to reverse the firearm conviction. Accordingly, we reverse only the homicide conviction for a new trial, and we vacate the sentence on the firearms charge so that resentencing on that charge can occur in light of future developments on the homicide charge. If Turnage or the State disagrees with this disposition, they should move for reconsideration within the time provided in WIS. STAT. RULE 809.24 (2007-08).

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).