COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2109-CR **Cir. Ct. No. 2006CF1243**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. DANIEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. John W. Daniel appeals from the judgment of conviction entered against him. Daniel argues that the circuit court erred: (1) when it allowed the State to play tape recordings without providing the defense with transcribed copies of the same recordings, (2) when it limited evidence of a

witness's prior convictions, and (3) when it played the tape recordings a second time for the jury during deliberations. Because we conclude that the circuit court did not err, we affirm.

¶2 Daniel was convicted after a jury trial of one count of delivery of cocaine as a party to a crime and habitual offender, second or subsequent offense. Prior to trial, the State said that it wanted to introduce tape recordings made during the drug transaction. Daniel's counsel objected, stating that under the terms of the pretrial order, the State was required to provide a transcription of the recordings. The State had given the defense a copy of the actual recordings many months before trial. The court concluded that giving defense counsel a copy of the recordings was as good as getting a transcription and that the defense had not been prejudiced by the lack of a transcription.

¶3 One of the State's witnesses was a confidential informant. The informant had a number of criminal convictions. Before trial, the parties discussed how many convictions the witness would admit to having. The court determined that the witness should admit to one conviction because the other convictions were all more than ten years old.

¶4 During jury deliberations, the jury asked the court if it could hear the taped recorded conversations again. The court brought the jury back into the courtroom with the defendant present and played the recording for them a second time. The defense objected and moved for a mistrial. The court ultimately denied the motion. The jury then returned to its deliberations, and found Daniel guilty.

¶5 Daniel argues first that the circuit court erred because it allowed the State to play the recordings at trial. Specifically, Daniel says that he was not aware that the State was going to use the recordings in its case-in-chief, and the

State had not provided him with a transcription of the recordings. Daniel bases his argument on WIS. STAT. § 971.23(1)(a) and (b) (2007-08),[1] which state:

> Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph all of the following materials and information, if it is within the possession, custody or control of the state:
>
> (a) Any written or recorded statement concerning the alleged crime made by the defendant, including the testimony of the defendant in a secret proceeding under s. 968.26 or before a grand jury, and the names of witnesses to the defendant's written statements.
>
> (b) A written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial and the names of witnesses to the defendant's oral statements.

¶6 Daniel argues that the State violated the court's pretrial order and WIS. STAT. § 971.23(1) by not providing him with a transcription of the recordings. Daniel notes that the prosecutor said during the argument on the issue that the State may have violated the pretrial order by not providing the defense with a transcription of the recordings. Daniel further argues that it is clear beyond a reasonable doubt that the jury would not have found Daniel guilty without the tapes, and therefore the decision to admit them was not harmless error.

¶7 We conclude that the circuit court did not err when it allowed the State to use the tape recordings at trial. The issue presented is one of statutory interpretation. The legislature's intent is expressed in the statutory language.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

> Thus ... statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.
>
> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.

Id., ¶¶45-46 (citations omitted). When the legislature uses a word or words in one subsection but not in another, "we must conclude that the legislature specifically intended a different meaning." ***Responsible Use of Rural and Agric. Land v. PSC***, 2000 WI 129, ¶39, 239 Wis. 2d 660, 619 N.W.2d 888 (citation omitted).[2]

¶8 We agree with the State that Daniel has misconstrued subsections (a) and (b) of the statute. Subsection (a) requires the State to provide the defense with any recorded statements. This the State clearly did, many months before trial. Subsection (b) requires the State to provide the defense with a written summary of all oral statements. By using two different phrases to refer to "recorded statements" and "oral statements," and by separating them into two subsections, the legislature clearly intended to refer to two different things. In other words,

[2] Daniel argues in his reply brief that this case is not applicable because it does not address WIS. STAT. § 971.23(1). We do not cite it to support any statement about that statute, but rather as a rule of general statutory interpretation.

under subsection (a), the State must provide recorded statements to the defense. Under subsection (b), if the statement was a spoken or "oral" statement, in other words it was not recorded, then the State must provide the defense with a written summary of that statement. The statute does not use the word transcription. There is nothing in either subsection that requires the State to provide a transcription of the recorded statements as well as a copy of the recording. Further, although Daniel argues that the tapes were hard to hear, he never explains what difference that made in his trial. We conclude that the circuit court did not err when it allowed the State to use the recordings at trial without having provided the defense with a transcription of those statements.

¶9 The second issue is whether the circuit court erred when it allowed the informant witness to testify that he had only been convicted of one crime. Specifically, Daniel argues the court erred by using a ten-year cutoff point for allowing the evidence of the other crimes and that the court should have allowed evidence of three prior crimes. Whether to allow evidence of prior convictions for the purpose of impeachment is within the circuit court's discretion. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). The circuit court here said that it generally followed the federal rule and did not allow evidence of crimes older than ten years unless the crimes were nearly identical to the crime charged.

¶10 Daniel argues that the circuit court erred by applying the federal rule. He asserts that Wisconsin does not follow this rule and the court misapplied the law. Wisconsin law, however, allows the circuit court to consider the lapse of time since the conviction when determining whether to admit this type of evidence for impeachment purposes. *See* ***id.*** at 525. The record shows that the circuit court appropriately balanced the various interests, and reached a reasoned determination

to allow evidence of one conviction. The circuit court did not err by generally following the federal rule. We conclude that the circuit court properly exercised its discretion.

¶11 The last issue is whether the circuit court erred when it allowed the jury to listen to the recorded statements during deliberations. The decision to send an exhibit to the jury room during deliberations is within the circuit court's discretion. ***State v. Anderson***, 2006 WI 77, ¶27, 291 Wis. 2d 673, 717 N.W.2d 74. The circuit court should consider whether the exhibit "will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submission of the exhibit, and whether the exhibit could be subjected to improper use by the jury." ***Id.*** When the court exercises its discretion to replay a recording to a jury during deliberations, the jury should return to the courtroom to hear the recording in open court. ***Id.***, ¶30. This is because when the recording is played in open court, the circuit court can guarantee that the recording is not played multiple times and "may instruct the jury as necessary to minimize the risk of overemphasis." ***Id.***, ¶31.

¶12 Daniel argues that the court erred when it played the recording for the jury during its deliberations because it had the effect of over emphasizing the recording, and the court failed to instruct the jury not to unduly emphasize the recording over other evidence. The record establishes that the court played the statement to the jury in an open courtroom. Further, Daniel's argument that the court played the tape more than once is mere speculation. The record suggests the tape was played once during the trial and once during deliberations. Although the court did not specifically tell the jury not to over emphasize the tape, ***Anderson*** does not require such an instruction, but suggests it as an option. Further, Daniel has not explained how he was harmed by the recordings. He used the tapes as part

of his theory of the defense, arguing that the portions of the tape that were intelligible undermined the State's case. We conclude that the circuit court properly exercised its discretion when it allowed the jury to hear the tapes during deliberations, and followed the appropriate procedures for doing so. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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