COURT OF APPEALS
DECISION
DATED AND FILED

July 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1289-CR **Cir. Ct. No. 2008CF257**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM M. ZANOTTI,

DEFENDANT-APPELLANT.

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

Before Brown, C.J., Reilly, and Gundrum, JJ.

¶1 PER CURIAM. William Zanotti appeals from a judgment of conviction of attempted armed robbery and four counts of armed robbery, all as a party to the crime. He argues that he should have been granted a mistrial after the prosecutor summarized in the opening statement evidence to be elicited from a co-

defendant and then the co-defendant refused to testify. He also argues that he is entitled to a new trial because some members of the jury may have seen him in shackles as the jury returned to courtroom during deliberations. We reject both arguments and affirm the judgment.

¶2 Three masked men entered a bar; one had a gun, another held a baseball bat. The gunman pointed the gun at the bartender and emptied the register. The robbers placed bottles of liquor and beer in backpacks. The man with the baseball bat put the bat against the head of one bar patron and robbed the patron of his money sitting on the bar. Two other bar patrons were robbed of their possessions, including cell phones. Three days after the robbery, the bartender identified Zanotti from a photo array as the man with the bat. Execution of a search warrant turned up one of the missing cell phones. There was a picture of Zanotti on the phone.

¶3 Bryan Webb and Wade Hawkins were charged with Zanotti for the crimes. The prosecutor's opening statement set forth the anticipated testimony of both Webb and Hawkins. The prosecutor indicated that Webb would testify he was staying at a house where Zanotti also stayed; that during a night of drinking himself, Zanotti, and Hawkins talked about robbing a bar; that it was decided that Zanotti would take a BB gun and a baseball bat would also be used; that the three obtained a ride to the bar from another person who did not know their intended purpose; and that three of them disguised themselves and entered the bar with Zanotti carrying the gun and Hawkins carrying the bat. The prosecutor then indicated that Hawkins would testify that, when he was first interviewed, he admitted his involvement and that Zanotti was with him. Hawkins would explain how he tried to keep the driver of the car out of the mix because he had called his friend to drive them and lied about why they needed a ride. The prosecutor

explained that Hawkins' testimony would be that the three decided to commit the robbery, that he was the one with the baseball bat and he was supposed to rob the customers, that Zanotti had the BB gun, and that after the robbery proceeds were divvied up but the driver received nothing.

¶4 After the presentation of trial testimony from the bartender, the five bar patrons, the bar's owner, two other residents of the house where Webb and Zanotti stayed, and Webb, Hawkins was called as a witness. Even though Hawkins was already convicted of the crimes and serving his prison sentence, Hawkins invoked his Fifth Amendment right against self-incrimination and declined to testify. Outside of the presence of the jury, Hawkins persisted in his refusal to testify even after being granted use immunity from the prosecution. The trial court ruled that in the face of Hawkins' unavailability, his statement to police would not be admitted and that the defense could not produce a letter written by Hawkins to Zanotti which contradicted his statement to police.[1] When the jury returned, the trial court explained:

> As you might expect, the position taken by the previous witness called, Mr. Hawkins, was unanticipated to say the least. He has decided even after having been named as a witness and some reference to his testimony made during opening statement—which I remind you is not evidence. You can't consider that as evidence, the fact that anticipated testimony may have been alluded to. But given that, he's decided he does not want to testify in this case so

[1] Zanotti explained that Hawkins' letter described what was said in his presentence investigation report and claimed that the report's author had lied because "me, Bryan, and Joshua didn't destroy nothing." The letter's significance was said to be that Hawkins referenced Joshua as participating in the crimes and that was consistent with Webb's initial statement that a "Joshua," not Zanotti, was involved in the crimes. Cross-examination of Webb at trial elicited that in his first and second statements to police, he implicated Joshua and had insisted to police he was being truthful in those statements. Thus, the defense heralded Hawkins' letter to Zanotti as an independent source confirming Webb's statement that Joshua was involved.

> it's unlikely you'll be hearing anything from him. So any reference that may have been made to his testimony during opening statements I'm sure was made in good faith by the State, but it is not evidence and should not be considered by you as part of the evidence in case what you heard in that statement might come into play in your deliberations.

¶5 At the point in the trial when Hawkins refused to testify, Zanotti moved for a mistrial because he was not allowed to use Hawkins' letter as evidence. Later Zanotti renewed his motion for mistrial explaining that the jury had heard statements during the opening statement and the curative instruction was probably "not too much help" in getting jurors to forget what was said during the opening statement. The trial court denied Zanotti's request for an additional curative instruction in the closing jury instructions. After the jury returned the guilty verdicts, the court denied the pending motion for mistrial without further comment.

¶6 We review a trial court's decision on a motion for mistrial for an erroneous exercise of discretion. ***State v. Sigarroa***, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** Zanotti points out that the trial court gave no specific grounds for denying the motion for mistrial and claims the court failed to consider the prejudicial impact of the jury hearing Hawkins' account of the crimes without an opportunity for impeachment. However, we need not reverse for the trial court's failure to express the exercise of its discretion. A reviewing court is obliged to independently review the record and uphold a discretionary determination if the record provides a basis for the trial court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶7 A trial court "may, in an appropriate case, declare a mistrial on the basis of an opening statement that summarizes evidence that is not produced." ***State v. Moeck***, 2005 WI 57, ¶68, 280 Wis. 2d 277, 695 N.W.2d 783. In ***Moeck***, the court considered whether a mistrial was proper when the defendant elected not to testify but had presented the jury a summary of his intended trial testimony in the defense opening argument. ***Id.***, ¶¶46-49. The court held that the trial court erroneously exercised its discretion in granting a mistrial when it failed to consider the prosecutor's ability to make a fair response and the effectiveness of a curative instruction. ***Id.***, ¶71.

¶8 Here, not only was the jury told before opening statements that the opening and closing arguments of counsel were not defined as evidence, a curative instruction was given immediately following Hawkins' brief appearance before the jury. The jury was told that what they heard about Hawkins' testimony in the opening statement was not evidence and was not to be considered in deliberations. The jury was also told at the conclusion of the trial that the attorneys' remarks were not evidence. "Where the trial court gives the jury a curative instruction, this court may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." ***Sigarroa***, 269 Wis. 2d 234, ¶24. The trial court could rely on the curative instruction as a remedy for inclusion in the opening statement of testimony not presented. Indeed it is the preferred practice to adopt a less drastic alternative to mistrial when available and practical. ***State v. Bunch***, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995).

¶9 Additionally, the summary of Hawkins' testimony in the opening statement was not the only thing the jury heard about Zanotti's involvement in the crime. The summary of Hawkins' testimony matched closely the summary of

Webb's testimony, and Webb gave the represented testimony implicating Zanotti in the crime. The bartender identified Zanotti at trial as the robber with the gun.[2] The driver of the car confirmed that he drove Zanotti, Hawkins, and another man to a residential area on the night of the robbery and that they came running back to the car after five minutes and asked him to drive off. Others living in the house where Zanotti stayed saw him with a box matching one stolen from the bar and heard him brag about having committed the robbery. This was not a case where the jury heard a summary of evidence about Zanotti's involvement that was not actually produced. Ample evidence of Zanotti's involvement was produced rendering any mention of Hawkins' testimony inconsequential and harmless.[3] *See* ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (the test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction; a reasonable possibility is a possibility sufficient to undermine our confidence in the conviction). We conclude that the ample evidence of Zanotti's involvement in the crimes, coupled with the curative instruction, supports the trial court's denial of the motion for mistrial.

¶10 The second issue raised on appeal is whether Zanotti is entitled to a new trial because some members of the jury may have seen him in shackles during

[2] By cross-examination, Zanotti made the jury aware that the bartender had first identified Zanotti as the man with the bat. Impeachment of the bartender on this point does not detract from other evidence confirming Zanotti's involvement as a party to the crimes.

[3] Zanotti makes passing reference to the prosecutor's opening statement as violating his right to confront and cross-examine his accuser as recognized in ***Crawford v. Washington***, 541 U.S. 36 (2004). ***Crawford*** held a defendant's confrontation rights are violated if the trial court received evidence of out-of-court statements by someone who does not testify at trial if those statements are "testimonial" and the defendant had no prior opportunity to cross-examine the witness. ***Id.*** at 68. We summarily reject any suggestion that a ***Crawford*** violation occurred. The jury was told that the opening statement was not evidence. No evidence was admitted making ***Crawford*** applicable.

deliberations. As the jury returned from lunch on the last day of trial, it walked past a conference room in which Zanotti was seated. The blinds and the door of the room were open. Zanotti was seated at the table in leg shackles but not handcuffs. Some members of the jury may have seen Zanotti before the deputy closed the blinds and door. After the jury was excused from the courtroom to resume deliberations, Zanotti let the trial court know what had happened and asserted that at least a few jurors saw him seated in the room with shackles. The trial court observed that during his closing argument, Zanotti had suggested he had been in custody so that it had been disclosed to the jury that he was in custody. The court also noted that Zanotti was only in leg shackles under the table. The court expressed that it was not a huge concern and that a record had been made.

¶11 Zanotti claims his constitutional right to a fair trial was violated by the possible observation of his leg shackles outside of the courtroom. At no point did Zanotti object to the jurors having seen him; he did not request fact-finding as to the number of jurors that may have observed him or what was seen; he did not assert a constitutional right to a fair trial; he did not request a mistrial. Zanotti forfeited his right to raise his constitutional claim. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("a mere failure to object constitutes a forfeiture of the right on appellate review"); ***State v. Huebner,*** 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."); ***State v. Gilles***, 173 Wis. 2d 101, 115, 496 N.W.2d 133 (Ct. App. 1992) (we properly decline to review an issue where an appellant has failed to give the trial court fair notice that he or she is raising a particular issue). Here, there is good reason to enforce the forfeiture, because if Zanotti had made an objection or sought other relief, the trial court could have engaged in necessary fact-finding

and fashioned a corrective measure. *See* ***State v. Lewis***, 2010 WI App 52, ¶26, 324 Wis. 2d 536, 781 N.W.2d 730. Not only is Zanotti's assertion that some jurors saw his leg shackles speculative, but the suggestion of prejudice in light of the jury's knowledge that he was in custody is "so speculative and implausible that it would be a waste of judicial resources to discuss it." ***Id.*** The trial court implicitly recognized that the suggestion of prejudice was a nonstarter. Zanotti's right to a fair trial was not violated.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2009-10).