COURT OF APPEALS DECISION DATED AND RELEASED

September 28, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-1818-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMMY J. REICHLING,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Green County: JOHN CALLAHAN, Judge. *Reversed and cause remanded with directions*.[1]

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Timmy Reichling appeals from a judgment convicting him of three counts of second-degree sexual assault in violation of

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[1] We released an opinion in this case on July 6, 1995. We withdrew it on August 29, 1995. *See* RULE 809.24, STATS.

§ 940.225(2)(a), STATS., while possessing a dangerous weapon contrary to § 939.63(1)(a)2, STATS., and one count of false imprisonment in violation of § 940.30, STATS., while possessing a dangerous weapon contrary to § 939.63(1)(a)4; and from an order denying his postconviction motion for a new trial. Reichling contends: (1) he is entitled to a new trial because the trial court failed to properly instruct the jury on the weapons penalty enhancer under § 939.63 as required by ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994); (2) the trial court failed to find he knowingly and voluntarily waived his right to poll the jury; (3) his trial counsel was ineffective because he failed to inform Reichling of his right to poll the jury and failed to request jury polling; (4) the trial court failed to impanel fair and impartial jurors; (5) his trial counsel was ineffective in failing to ask critical questions of jurors and in failing to move to strike certain jurors for cause; and (6) his rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated by the admission of testimony about a statement he made to a police detective.

We conclude the trial court failed to properly instruct the jury that the State must prove a nexus between the predicate crimes and the dangerous weapon beyond a reasonable doubt under § 939.63, STATS. Therefore, in accordance with ***Peete***, we must reverse the judgment of conviction and remand to the trial court with directions to enter a judgment of conviction solely on the predicate crimes and to conduct a new trial on the issue of whether Reichling committed those predicate crimes while possessing a dangerous weapon. We reject Reichling's remaining contentions.[2]

[2] Our disposition of the weapons penalty enhancer issue makes it unnecessary for us to reach Reichling's challenge to his sentence. We also do not address Reichling's objection to the reinstruction the trial court provided the jury when the jury came back with a second question on the subject of hung verdicts. Reichling failed to object to this reinstruction. Failure to timely object to an error at trial generally precludes a defendant from raising the issue on appeal as a matter of right. ***State v. Marshall***, 113 Wis.2d 643, 653, 335 N.W.2d 612, 617 (1983).

BACKGROUND

Timmy Reichling was charged with three counts of second-degree sexual assault while possessing a dangerous weapon, one count of false imprisonment while possessing a dangerous weapon, and one count of intentionally causing bodily harm to a child while possessing a dangerous weapon. The charges arose out of three sexual assaults of Reichling's former girlfriend (a minor) in Reichling's car while he possessed a knife. The jury found Reichling guilty on the second-degree sexual assault and false imprisonment charges while possessing a dangerous weapon, but was unable to agree on the count charging Reichling with intentionally causing bodily harm to a child while possessing a dangerous weapon. The trial court denied Reichling's postconviction motion and this appeal followed.

NEXUS--POSSESSION OF A DANGEROUS WEAPON

Reichling claims that he is entitled to a new trial because the trial court failed to instruct the jury that the State must prove the existence of a nexus between each of the predicate crimes and the dangerous weapon beyond a reasonable doubt.[3] Section 939.63(1)(a), STATS., provides in part:

> If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased ....

In ***Peete***, the defendant was convicted of possession of cocaine with intent to deliver while armed. On appeal, he argued that § 939.63, STATS.,

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[3] Reichling did not object to the weapons penalty enhancer jury instruction provided by the trial court. Section 805.13(3), STATS., provides that failure to object to a jury instruction constitutes waiver of error. However, in ***State v. Peete***, 185 Wis.2d 4, 517 N.W.2d 149 (1994), a case decided after Reichling's trial, the supreme court addressed the same issue and stated that it was not a question of an erroneous jury instruction, but rather a question of statutory construction, what the jury was required to find under the instruction as given, and the sufficiency of the evidence. ***Id***. at 14, 517 N.W.2d at 152.

required the State to prove the existence of a nexus between the dangerous weapon and the commission of the predicate drug offense. Our supreme court held that the "while possessing" language in § 939.63 requires the State to prove the existence of a nexus between the predicate crime and the weapon beyond a reasonable doubt, that is, that the defendant possessed the weapon to facilitate the commission of the predicate crime. The court stated:

> A circuit court must instruct the jury on the definition of possession; on the nexus requirement, that the defendant possessed the weapon to facilitate the predicate crime; and on the definition of dangerous weapon. The enhanced penalty can only be imposed when the state proves the existence of each of these elements beyond a reasonable doubt.

Peete, 185 Wis.2d at 21, 517 N.W.2d at 155.

The ***Peete*** court reversed the judgment of conviction because the trial court had failed to instruct the jury on the nexus requirement and remanded to the trial court with directions to enter a judgment of conviction against the defendant solely on the possession of cocaine with intent to deliver charge. The court also directed the trial court to conduct a new trial on the issue of whether the defendant was guilty of committing the predicate offense while possessing a dangerous weapon. Finally, the court directed the trial court to vacate the defendant's sentence and resentence him after the new trial. ***Id.*** at 23, 517 N.W.2d at 156.

The State maintains that although the trial court failed to instruct the jury on the nexus requirement, neither a new trial nor resentencing are required because the trial court did not sentence Reichling beyond the maximum term for the predicate offenses. According to the State, the error is therefore harmless.

Our supreme court recently rejected this same argument in ***State v. Avila***, 192 Wis.2d 870, 532 N.W.2d 423 (1995). We note that the ***Avila*** court, on a motion for reconsideration, corrected a portion of its harmless error analysis as follows:

> The state correctly notes however that, contrary to the statement in the opinion, a weapons penalty enhancer is an element of the enhanced offense when that offense is charged, but not the underlying offense itself.

State v. Avila, ___ Wis.2d ___, 535 N.W.2d 440 (1995) (per curiam). However, the court nevertheless concluded that resentencing was required because, "As in ***Peete***, this court cannot ascertain from the record whether a portion of the sentence--even though the maximum wasn't reached--was nonetheless due to the invalid enhancer. Thus resentencing is necessary." ***Id.***

Based on ***Peete*** and ***Avila***, we reverse Reichling's judgment of conviction on each count and direct the trial court to enter a judgment of conviction solely on the second-degree sexual assault and false imprisonment charges. Reichling is entitled to a new trial on the issue of whether he committed the predicate offenses while possessing a dangerous weapon. We also direct the trial court to vacate Reichling's sentence on the charges of second-degree sexual assault and false imprisonment. After Reichling is retried, the trial court should resentence him on all the charges of which he is convicted.

JURY POLLING

Reichling contends the trial court failed to obtain from him a knowing and voluntary waiver of his right to poll the jury individually. When the jury returned with its verdict, Reichling was present with his counsel. The trial court announced the guilty verdicts on the three counts of second-degree sexual assault while possessing a dangerous weapon and the guilty verdict on the count of false imprisonment while possessing a dangerous weapon. The trial court then announced that the jury was unable to agree on the count of battery to a child. The court asked the jury: "Ladies and Gentlemen of the Jury, was this then, and is this now your verdict in this case?" The transcript of the trial states that the jurors responded "Yes." The trial court asked whether anyone wished the jurors polled on any or all of the counts. The court then specifically asked if the district attorney wished to, and the district attorney answered "no." The court next asked if defense counsel wished to, and he answered "no."

We recently held in ***State v. Jackson***, 188 Wis.2d 537, 525 N.W.2d 165 (Ct. App. 1994), that when a defendant is represented by counsel at the time the verdict is entered, the trial court need not find that the defendant knowingly and voluntarily consented to his trial counsel's waiver of his or her right to poll the jury. Following ***Jackson***, we conclude that because Reichling was represented by counsel at the return of the verdict, the trial court was not required to find that Reichling knowingly and voluntarily waived his right to poll the jury.

Reichling next argues that he was denied effective assistance of counsel because his trial counsel failed to inform him of the right to poll the jury individually and failed to request an individual polling. In order to prevail on this claim, Reichling must show that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. ***Id.*** at 688. We are to indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Id.*** at 689.

The trial court's determinations of what the attorney did and did not do, and the basis for the challenged conduct, are factual and will be upheld unless clearly erroneous. ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990). Whether the attorney's representation was ineffective presents a question of law that this court reviews independently. ***Id.*** at 128, 449 N.W.2d at 848.

Reichling's contention is that the jury was confused as demonstrated by questions the jury asked during deliberations. Defense counsel was therefore deficient, he contends, in failing to ask for an individual polling, and this was prejudicial to him.

After the jury had been deliberating for about three hours, it sent the court a note asking: "What do we do if we can't agree on two counts?" The trial court advised the jury to again read the instruction provided them that stated that the verdict must be unanimous as to each count, and the court stated that each count is separate. The court also instructed the jury that they were not

going to be made to agree but it was their duty to make an honest and sincere effort to arrive at a verdict.[4] After deliberating approximately two and one-half hours more, the jury sent another note asking: "If we find the defendant guilty on three counts and are hung on two, do they only have to retry on the two hung counts?" After consulting with the district attorney and defense counsel, the court advised the jury that it was not to worry about what would happen as a result of its verdict, that its duty was to act on each of the five counts separately and to bring back a verdict on each if it could; if it could not, the jury was to advise the court on which counts it was unable to reach a verdict.

At the postconviction hearing, Reichling's trial counsel testified that he had a recollection of discussing polling the jury with Reichling at some point, but he did not recall if it was before the final verdict came back or after; in either case it would have been the same day as the jury deliberations. He did recall discussing the jury's questions with Reichling and the fact that the questions indicated the jury was unanimous on some counts and not others. He testified that he decided not to request individual polling because he thought it was clear from the jury's questions that the jury understood that each count was separate and they had to be unanimous on those counts on which they returned a verdict.

When asked whether he had concerns that the second question suggested the jury was hung on two of the five counts but the jury then returned a guilty verdict on four of the five counts, trial counsel answered:

> I didn't because they had already basically announced that they had reached a verdict on some of the counts. Had they simply come back and said that they were hung period, my view might have been different. I might have been concerned that they had reached some sort of compromise verdict, but when they had come back twice previously and basically said, "We've got decisions on some but not on the others," I took that to be a pretty clear

[4] The court gave Supplemental Instruction on Agreement, WIS J I—CRIMINAL 520.

> indication that they understood that, that whatever they came back with had to be the verdict of all 12.

He did not view the court's instructions in response to the second question to be coercive in the sense of emphasizing that the jury should return a verdict swiftly.

Reichling testified that his trial counsel had never discussed with him polling the jury individually.

The court concluded that trial counsel's assistance with regard to jury polling was not deficient and not prejudicial to Reichling. The court did not make a finding on whether trial counsel did or did not discuss individual polling with Reichling. For purposes of our discussion we will assume trial counsel did not discuss jury polling with Reichling.

As stated above, in ***Jackson*** we decided that where defense counsel is present at the return of the jury verdict, the trial court need not find that the defendant knowingly and voluntarily waived his or her right to individually poll the jury. ***Jackson***, 188 Wis.2d at 542, 525 N.W.2d at 167. We also concluded: "Jackson was represented by counsel when the verdict was entered, and the decision to assert or waive certain rights, including whether to poll the jury, was delegated to that counsel." ***Id.*** at 542-43, 525 N.W.2d at 168. We read ***Jackson*** as holding that the decision whether to request an individual polling is one delegated to counsel.[5]

Because the decision whether to request an individual polling is one delegated to counsel, we decline to hold that counsel's failure to inform a defendant of the right to an individual polling is, in itself, deficient performance. The right to an individual polling of the jury is a significant right because it is a means to test the uncoerced unanimity of the verdict. ***State v. Behnke***, 155 Wis.2d 796, 801, 456 N.W.2d 610, 612 (1990).[6] But it is not the only

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[5] In our opinion released on July 6, 1995, we held that the decision whether to poll the jury was a decision for the defendant to make personally. Upon reconsideration we conclude that our initial decision was inconsistent with ***Jackson***.

[6] In ***State v. Behnke***, 155 Wis.2d 796, 456 N.W.2d 610 (1990), defense counsel was not

method for assuring a unanimous verdict. The standard jury instruction tells the jury that the verdict must be unanimous, and that all twelve jurors must agree to arrive at a verdict.[7] When jurors have questions, as they did in this case, there is further opportunity to instruct. And when the trial court reads the verdict, it may ask the jurors as a group, as it did in this case, if it is their verdict.

We conclude the better rule is that when defense counsel is present at the return of the jury verdict and does not request an individual polling, whether counsel's performance is deficient depends on all the circumstances, not simply on whether counsel explained to the defendant the right to an individual polling.

The relevant circumstances in this case are that the standard jury instruction on a unanimous verdict was read to the jury when they began their deliberations. The two questions they asked each indicated that they understood their verdict was to be unanimous on each count. The questions were directed not to this point, but to the effect of reaching verdicts on some but not all counts. The court's responses, after conferring with counsel, reinforced the concept that a verdict must be unanimous, while advising the jurors that they were not required to reach a verdict. The jurors answered affirmatively when the court read the verdict and asked if it was their verdict. Trial counsel's explanation for not requesting an individual polling took into account the jury's questions and the instructions in response. We conclude the decision not to request an individual polling was a reasonable one in these circumstances and was not deficient performance.

VOIR DIRE EXAMINATION OF JURORS

(..continued)
present when the jury returned, and the defendant said "no" when asked if he wanted to poll the jurors individually. The court held that whether the constitutional violation was viewed as a denial of counsel or ineffective assistance of counsel, automatic reversal was required because the defendant did not knowingly, voluntarily and unequivocally waive the right to counsel or the right to poll the jury. ***Id.*** at 806, 456 N.W.2d at 614. The deficient performance in ***Behnke*** was counsel's failure to be present when the jury returned.

[7] *See* WIS J I—CRIMINAL 515.

Reichling contends that he was denied his constitutional right to a fair and impartial jury because the trial court failed to conduct an adequate voir dire examination of certain jurors and failed to strike these jurors for cause. We disagree and conclude the trial court did not erroneously exercise its discretion in impaneling the jury.

A criminal defendant is guaranteed the right to a trial by an impartial jury by article I, section 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution, as well as by principles of due process. ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990), *cert. denied*, 498 U.S. 1122 (1991).

In impaneling a jury, the trial court has primary responsibility for voir dire examination of prospective jurors. ***Hammill v. State***, 89 Wis.2d 404, 408, 278 N.W.2d 821, 822 (1979). It is the trial court's duty to examine on oath each person called as a juror to determine, among other things, whether the juror has expressed or formed any opinion, or is aware of any bias or prejudice in the case. Section 805.08(1), STATS.[8] If a juror is not indifferent in the case, the juror shall be excused. ***Id.*** The trial court has broad discretion in impaneling the jury and in the form and number of questions to be asked. ***Hammill***, 89 Wis.2d at 408, 278 N.W.2d at 822.

The determination of whether a prospective juror should be dismissed from the jury panel is a matter within the trial court's discretion. ***State v. Gesch***, 167 Wis.2d 660, 666, 482 N.W.2d 99, 102 (1992). Absent an abuse of discretion, a trial court's decision concerning voir dire should not be disturbed on appeal. ***State v. Koch***, 144 Wis.2d 838, 847, 426 N.W.2d 586, 590 (1988). This broad discretion, however, is subject to the essential elements of fairness. ***Id.***

Only two of the prospective jurors discussed by Reichling, jurors Ferguson and Moon, actually sat on Reichling's case. Any claim that a jury is not impartial must focus on the jury that actually sat in the case. ***State v. Traylor***, 170 Wis.2d 393, 400, 489 N.W.2d 626, 629 (Ct. App. 1992). After examination of Ferguson and Moon, the trial court concluded that neither would be excused for cause.

[8] Section 805.08(1), STATS., applies to criminal trials. *See* § 972.01, STATS.

A. Juror Ferguson

In response to the trial court's question about whether anyone on the jury panel was acquainted with another member of the jury panel, Ferguson stated that another jury panel member was a personal friend. The juror referred to had been acquitted of a sexual assault charge. The trial court asked Ferguson whether her relationship with that juror would affect her ability to make a fair and impartial decision. Ferguson responded, "I would hope not."

In response to the trial court's question about whether anyone on the panel would not care to listen to sexually explicit testimony, Ferguson replied "yes" and indicated that she did not know whether she could listen to the testimony and make a fair and impartial decision. In addition, when asked whether any member of the jury panel had an immediate family member who had been involved in a sexual assault, Ferguson replied that her sister had been assaulted by several boys over fifty years ago when her sister was approximately six years old. The assault "wasn't really sexual," and was resolved when her father spoke with the assailants. In response to the trial court's question about whether she could accord the defendant the presumption of innocence, Ferguson replied:

MS. FERGUSON: Well, I sure would try.

THE COURT: I think you would.

MS. FERGUSON: Yeah.

We conclude the trial court extracted a sufficient guarantee from Ferguson that she would be a fair and impartial juror. While Ferguson did express some doubt about her ability to listen to sexually explicit testimony, she agreed that she would accord the defendant the presumption of innocence. A juror can qualify as an impartial trier of fact if the juror can lay aside his or her impressions or opinions and can render a verdict on evidence presented. ***Hammill***, 89 Wis.2d at 414, 278 N.W.2d at 825.

B. Juror Moon

We also conclude the trial court extracted a sufficient guarantee of impartiality from Moon. In response to the trial court's question about whether any prospective juror had been the victim of a sexual assault, Moon stated that she had been sexually assaulted by several acquaintances in high school about twenty-three years ago. However, Moon stated that she could be impartial according to the facts in the case and would "just go by the facts."

INEFFECTIVE ASSISTANCE OF COUNSEL ON VOIR DIRE

Reichling contends that he was denied effective assistance of counsel when his trial counsel failed to ask follow-up questions of several jurors to test their impartiality, and failed to move to strike these jurors for cause. Again, we address only those jurors that actually served on the jury--Ferguson and Moon. *See* ***Traylor***, 170 Wis.2d at 400, 489 N.W.2d at 629. We conclude, as did the trial court, that trial counsel's performance was not deficient for failing to pose follow-up questions and to move to strike these jurors.

Trial counsel testified that he did not feel that he could have been successful in striking any of these jurors for cause. He stated that he was impressed with Moon's forthrightness; that it appeared Moon's experiences differed substantially from the facts of the defendant's case; and that Moon indicated that her prior experience would not play a role in her ability to evaluate the evidence. Trial counsel also testified that he had noted the difference between Ferguson's experience with sexual assault and the defendant's case, and took into account the manner in which Ferguson answered his questions. He felt she would be a favorable juror due to her friendship with the prospective juror who had been acquitted of the sexual assault charge. After inquiry by both the trial court and trial counsel, both Moon and Ferguson indicated that they felt they could be fair and impartial.[9]

[9] Reichling's reliance on ***State v. Traylor***, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), is misplaced. In ***Traylor***, one juror stated during voir dire that she did not think she could be fair and impartial because she considered a defendant guilty "right away." Several other jurors indicated they might consider a defendant's failure to testify during their deliberations. Nevertheless, trial counsel in ***Traylor*** failed to ask follow-up questions and/or to move to strike these jurors for cause.

DETECTIVE PEPPER

Reichling argues that the State violated his due process right to a fair trial and his Fifth Amendment right against self-incrimination when it allowed Detective John Pepper to testify as to Reichling's post-***Miranda*** silence and request for counsel. We disagree.

At trial, Pepper testified about his interview with Reichling at the sheriff's department. Pepper testified that although Reichling was not under arrest, he was informed of his ***Miranda*** rights and he stated that he wanted to make a statement without consulting with his attorney. Pepper then related what Reichling had told him about the incident:

Q Now, after you obtained this information from Mr. Reichling, what did you advise him of?

A Then I advised him it's my procedure and my practice is that after we've obtained pretty much everything we can from the statement is I turn around, and I have the use of a computer where I actually type up the statement off of my notes, and I told Tim that's what I would be doing, at which time then I would read the statement to him. He would read the statement. We'd both sign it, and that would be part of the investigation. Tim then made the comment that, "Well, it looks like I'll probably be serving time, so I think maybe this is something my lawyer should look at," and as soon as he said the word lawyer --

[Defense Counsel]: Judge, I'm going to object to this. I think this is wholly improper.

....

THE COURT: Well, I'm going to leave what's been said. Mr. Luhman, proceed.

Q After Mr. Reichling mentioned something about an attorney, did you question him any further?

A No.

Q Did you type up a written statement for him?

A No. I told him at that time I would stop the questioning since he had made mention of a lawyer, and I told him that he could use my phone to call a lawyer of his choice, or I gave him the name and telephone number of Roger Sturdevant, who is the Public Defender of Green County, that he could call.

Q And after that did you have any further contacts with Mr. Reichling?

A Yes.

Q I mean on January 4th did you have any further contacts with Mr. Reichling?

A No.

In ***Doyle v. Ohio***, 426 U.S. 610 (1976), the United States Supreme Court held that a defendant is denied his or her due process rights if, after ***Miranda*** warnings, the state uses the defendant's refusal to talk or the defendant's request for an attorney in evidence against the defendant, even if just to impeach his or her testimony. However, ***Doyle*** does not impose a *per se* bar against any mention whatsoever of a defendant's right to request counsel. ***Lindgren v. Lane***, 925 F.2d 198, 202 (7th Cir.), *cert. denied*, 502 U.S. 831 (1991). Rather, it guards against the exploitation of that constitutional right by the prosecutor. ***Id.*** In ***Wainwright v. Greenfield***, 474 U.S. 284 (1986), the Court stated:

What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights [to consult counsel] after the State's assurance that the invocation of those rights will not be penalized.

Id. at 295. In order to determine whether there has been a violation, a court must look to the circumstances in which the exchange took place. ***Lindgren***, 925 F.2d at 203.

In his testimony, Pepper did not refer to Reichling's silence. He simply testified that Reichling decided to speak with an attorney before he signed the statement Pepper was preparing, and that he (Pepper) ended the interview at this point. Regarding Pepper's reference to Reichling's request for counsel, the point of the district attorney's inquiry was to explain how the interview with Reichling ended and why a written statement was not prepared and signed. Reichling's request for an attorney was not argued to the jury or used for impeachment. The purpose was not to suggest "a tacit admission of guilt on the part of the defendant." *See* ***State v. Fencl***, 109 Wis.2d 224, 235, 325 N.W.2d 703, 710 (1982).

Although Reichling contends that repeated references were made to his post-***Miranda*** silence and request for counsel in closing argument, those references were to Reichling's statements to Detective Pepper *before* Reichling said that "maybe this is something my lawyer should look at." When the jury requested the testimony of Detective Pepper during deliberations, the portion read to the jury did not include the part about which Reichling complains.

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

Not recommended for publication in the official reports.