COURT OF APPEALS
DECISION
DATED AND RELEASED

August 14, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2619-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JON P. CANTWELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Jon Cantwell appeals from a judgment of conviction for two counts of robbery, contrary to § 943.32(1)(a), STATS., and an

order denying his motion for postconviction relief.[1] He argues that his conviction for two counts of robbery for the same offense violated the Double Jeopardy Clauses of the United States and Wisconsin Constitutions. He also seeks reversal of one count of robbery in the interest of justice. We reject Cantwell's arguments and affirm.

BACKGROUND

On the morning of May 18, 1995, Todd Lagerstrom rang the doorbell at the home of Howard and Marion McKnight. Marion answered the door, and Lagerstrom asked her for directions. As Marion responded, Lagerstrom forced her against the wall. She yelled for her husband, Howard, who appeared from the kitchen. Lagerstrom then went to Howard, pushed him over a chair, grabbed his arm and took his wallet, which contained approximately three hundred dollars.

During this time, Jon Cantwell entered the home. He threw Marion to the floor and tied her up with a lamp cord. While still on the floor, Marion heard the assailants take her husband toward the bedrooms. One of the assailants then demanded more money from her. She told him that she had thirty to forty dollars in her purse. The assailant responded that they had already taken that money. During the robbery, an additional five hundred dollars was taken from Howard's dresser drawer in his bedroom.

A jury found Cantwell guilty of two counts of robbery. He moved the trial court to dismiss one of the robbery counts because the conviction for two

[1] Cantwell was also found guilty of one count of burglary and two counts of false imprisonment. Those convictions are not at issue in this appeal.

counts for the same offense violated his double jeopardy protections. The trial court denied his motion. Cantwell appeals, arguing that his double jeopardy rights have been violated and that one count of robbery should be dismissed in the interests of justice.

DOUBLE JEOPARDY

Whether constitutional double jeopardy protections have been violated is a question of law that we review without deference to the trial court. *See* ***State v. Kramsvogel***, 124 Wis.2d 101, 107, 369 N.W.2d 145, 147-48 (1985). The Double Jeopardy Clause is intended to provide protection against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) infliction of multiple punishments for the same offense. *See* ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969). Cantwell asserts that his conviction for two counts of robbery, for taking money from Marion McKnight and Howard McKnight, violated the constitutional protection against multiple punishments for the same offense. Cantwell argues that robbing the married couple simply deprived them of "household money." He asserts that since the victims were married, the money taken belonged to both spouses equally, thereby resulting in only one crime.

Wisconsin uses a two-part analysis to determine whether multiple punishments have been imposed on a defendant. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492-97, 485 N.W.2d 1, 3-5 (1992). The first component of the test is whether each offense requires proof of an additional element or fact which the other offense does not. *See* ***id.*** at 493-95, 485 N.W.2d at 4-5. If the first component is met, there exists a presumption that multiple punishments are not at issue. *See* ***id.*** at 495, 485 N.W.2d at 4. This presumption is overcome if the

defendant can prove the existence of a contrary legislative intent. *See* ***id.*** at 495, 485 N.W.2d at 5.

Cantwell was convicted of two counts of robbery, contrary to § 943.32(1)(a), STATS. This section provides that "[w]hoever, with intent to steal, takes property from the person or presence of the owner … [b]y using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property" is guilty of a Class C felony. For purposes of the statute, an "owner" is "a person in possession of property whether the person's possession is lawful or unlawful." Section 943.32(3). Such possession may be actual or constructive. *See* § 971.33, STATS.; ***State v. Mosley***, 102 Wis.2d 636, 645, 307 N.W.2d 200, 206 (1981).

Under § 943.32, STATS., different facts were required to prove the robbery of Marion McKnight than were required to prove the robbery of Howard McKnight. The State needed to establish that each was in possession of property and that force was used against each to take the property. To prove the robbery of Marion, the State established that she was pushed down and tied up and that money was taken from her purse. To prove the robbery of Howard, the State established that he was pushed over a chair and that money taken from his wallet and his dresser drawer. The facts required to prove that Howard had been robbed would not, by themselves, prove that Marion had been robbed. Conversely, the facts required to prove that Marion had been robbed would not, by themselves, prove that Howard had been robbed. Therefore, the first component of the ***Sauceda*** test has been met.

Cantwell argues that only "household money" was taken and, therefore, money was only taken from one owner. He contends that under ***State v. Mosley***, 102 Wis.2d 636, 307 N.W.2d 200 (1981), the theft of household money should be considered to be only one crime. In ***Mosley***, the defendant was convicted of two counts of robbery after taking money from a restaurant and the personal possessions of one of its employees. *See* ***id.*** at 638-39, 307 N.W.2d at 203-04. The Wisconsin Supreme Court rejected the defendant's assertion that his two convictions violated the Double Jeopardy Clause. However, in a footnote the court stated:

> We emphasize … that the counts in this case are not parsed according to the fact that the taking of the *restaurant's* money from two *loci* (the cash register and the office) separated only by a brief time interval; nor are the counts parsed on the basis that the restaurant's money was taken from more than one employee. These matters, if so charged, would be materially different and might pose a different question as to double jeopardy.

Id. at 644 n.6, 307 N.W.2d at 206. Cantwell argues that the taking of household money from more than one person is analogous to taking restaurant money from more than one employee, and therefore his double jeopardy rights have been violated.

We reject Cantwell's argument. First, the supreme court did not conclude that the taking of restaurant money from more than one employee would not support multiple robbery convictions. The court stated only that the taking of restaurant money from separate employees "might pose a different question as to double jeopardy." Second, Cantwell's argument ignores the fact that the robbery statute does not define ownership in terms of one's legal right to property, but in terms of one's possession of property. In fact, the statute explicitly rejects the relevance of the legality of one's possession. *See* § 943.32(3), STATS. Therefore,

whether Howard and Marion jointly owned the property as "household property" is irrelevant. What is relevant is that each separately possessed money—Howard in his wallet and Marion in her purse—at the time of the theft.

Because the first element of the ***Sauceda*** test has been satisfied, a presumption arises that multiple crimes have been committed to which separate punishments apply. Cantwell can overcome this presumption if he proves the existence of legislative intent contrary to allowing multiple punishments for these multiple offenses. *See* ***Sauceda***, 168 Wis.2d at 495, 485 N.W.2d at 5. The language and history of the statute, the nature of the proscribed conduct and the appropriateness of multiple punishments for the offenses should all be considered when analyzing whether there was a contrary legislative intent under that statute. *See* ***id.*** at 497, 485 N.W.2d at 5.

We see nothing in the language of the statute to indicate that the legislature did not intend multiple punishments for the robberies of two individuals. Therefore, we conclude that Cantwell's multiple convictions and their resulting punishments do not violate the Double Jeopardy Clause.

INTERESTS OF JUSTICE

Cantwell also argues that one of the robbery convictions should be reversed in the interests of justice because the real controversy has not been fully tried and because there has been a miscarriage of justice. *See* § 752.35, STATS. When we conclude that the real controversy has not been fully tried, we may reverse without concluding that a different result would probably occur at a new trial. *See* ***State v. Wyss***, 124 Wis.2d 681, 735, 370 N.W.2d 745, 770 (1985). In cases where the controversy was fully tried, but justice nevertheless miscarried in

some way, we must also conclude that the outcome would probably be different upon retrial. *See* ***id.*** at 736, 370 N.W.2d at 771.

Situations in which the controversy has not been fully tried have arisen in two factually distinct ways: (1) when the jury was not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *See* ***id.*** at 735, 370 N.W.2d at 770-71. Cantwell has not set forth specific facts that satisfy either prong of ***Wyss***. Therefore, we are given no reason to conclude that the jury was denied the opportunity to hear important testimony or that a crucial issue was clouded by improperly admitted evidence.

Under the second part of § 752.35, STATS., we may reverse when a miscarriage of justice has occurred and it is probable that a different outcome would result at a new trial. *See* ***Wyss***, 124 Wis.2d at 736, 370 N.W.2d 771. To reverse for a miscarriage of justice, we must be convinced that the defendant should not have been found guilty and that justice demands that the defendant be given a new trial. *See* ***id.*** Again, Cantwell offers no facts or law to convince us that such a situation exists here. He simply adds the claim that a miscarriage of justice has occurred to his double jeopardy arguments. If this court concluded that Cantwell's constitutional protections from double jeopardy had been violated, that, by itself, would be grounds for reversal of one of the counts of robbery.

We have concluded that this is not the case, and we are not given any alternative reason for reversing in the interests of justice. We therefore affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.