COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2236-CR **Cir. Ct. No. 2004CF379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ELTON A. KELLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Elton Kelly appeals from a judgment of conviction for kidnapping, attempted armed robbery, and the illegal possession of cocaine, marijuana, and a firearm. He also appeals from an order denying his postconviction motion for a new trial. He challenges the sufficiency of the

evidence as to venue, evidentiary rulings excluding certain testimony, and the denial of his motion for a mistrial when the prosecution commented in closing argument about his silence during the booking process. He seeks a new trial. We reject his claims of error and affirm the judgment and order.

¶2 On the night of October 23, 2004, Todd Dane traveled to Milwaukee and ended up buying crack cocaine from Yolando Harris. Dane was introduced to Kelly who sold more drugs to Dane for a ring, cell phone, and eventually some IOUs. Later, while Dane, Harris, and Kelly were in Dane's car, Kelly demanded that they go to Dane's house and get the money Dane owed for the drugs. When Dane refused, Kelly pulled out a gun and told Dane to drive. Dane drove to his home in Manitowoc County while Kelly continued to point the gun at him. Upon arriving home, Dane ran into the house and reported to his roommate, Stewart Wietholter, that someone had a gun outside. Wietholter called the police. When Harris and Kelly were removed from Dane's car a handgun and baggies of marijuana and crack cocaine were recovered from the car. Kelly also had three black leather gloves and two rubber gloves on his person and signed the booking inventory sheet listing those items as in his possession.

¶3 Kelly first argues there was insufficient evidence that the crimes of kidnapping and attempted armed robbery occurred in Manitowoc County and that the trial was not properly venued in Manitowoc County. A crime may be prosecuted in any county where an act requisite to the commission of the offense occurs. *See* WIS. STAT. § 971.19 (2005-06).[1] Although venue is not an element of

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the crime but a matter of procedure, the prosecution must prove it beyond a reasonable doubt. ***State v. Corey J.G.***, 215 Wis. 2d 395, 408, 572 N.W.2d 845 (1998). Venue may be proven by direct evidence and by "facts and circumstances from which it may be reasonably inferred." ***State v. Swinson***, 2003 WI App 45, ¶19, 261 Wis. 2d 633, 660 N.W.2d 12. We will not reverse a conviction for lack of venue unless the evidence, viewed most favorably to the prosecution and conviction, is "so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt." ***Id.***

¶4 We disagree with Kelly's basic premise that the crimes of kidnapping and attempted armed robbery were complete in Milwaukee County where Kelly first pointed the gun at Dane demanding money and ordering Dane to drive. Kelly continued to point the gun at Dane and continued to require Dane to drive against his will as the car crossed into Manitowoc County. In short, the crimes were continuous and committed in all the jurisdictions through which the car traveled. There was sufficient evidence to support venue in Manitowoc County.

¶5 Harris testified at trial about Dane buying crack cocaine supplied by Kelly, the IOUs, and how Kelly pointed the gun at Dane and demanded they drive to Dane's house to get the money that was owed. She detailed how Kelly stashed the gun and drugs when they spotted the police. She also testified that Kelly wore latex gloves when handling the crack cocaine and black gloves when he handled the gun. She acknowledged she had an agreement with the prosecution that charges against her would not be pursued in exchange for her complete and truthful testimony at Kelly's trial. On cross-examination it was established that Harris was charged with felonies of attempted kidnapping, attempted armed robbery, possession with intent to deliver cocaine, and possession with intent to

deliver marijuana, as a result of what transpired that night. Kelly wanted to introduce evidence of the maximum penalties Harris faced on those charges but that request was denied at the pretrial conference.[2] Kelly argues that the ruling denied him an opportunity to fully impeach a critical witness.

¶6 Evidentiary rulings are addressed to the trial court's discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. *See* ***id.*** at 585 n.1 and 591. We will not find an erroneous exercise of discretion if any reasonable basis exists for the decision. *See* ***id.***

¶7 The trial court concluded that because Harris faced the same charges as Kelly, informing the jury of the maximum penalties Harris faced would also inform the jury of the penalties Kelly faced. In Wisconsin juries are not informed of the penalties defendants face. *See* ***State v. Muentner***, 138 Wis. 2d 374, 391, 406 N.W.2d 415 (1987). The need to keep that information from the jury provides a reasonable basis for the trial court's ruling. Additionally, as noted by the trial court, Kelly had other ways to impeach Harris's credibility.[3] Thus, the evidence was deemed unnecessary and the probative value reduced and far outweighed by

[2] The State argues that Kelly waived his right to challenge the trial court's decision because he did not object at trial. *See* ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. Not only was the issue discussed and decided at the pretrial conference, at the start of the trial Kelly asked that his objection be noted on the record and the trial court reiterated its reasons for denying the request to ask Harris about the maximum penalties she faced. A defendant should not be required to pose a question he or she knows will draw an objection and an adverse ruling in front of the jury in order to preserve an issue already discussed and decided. There was no waiver.

[3] The jury heard that Harris had been convicted of a crime one time, that she used marijuana and crack cocaine throughout the event, that she had lied to police to try to save herself, and that she had procured immunity from any Milwaukee County charges that might arise out of the event.

the danger of prejudice from the jury learning what penalties Kelly also faced. This is also a reasonable basis for denying admission of the maximum penalties Harris faced. The trial court did not erroneously exercise its discretion.

¶8 Kelly also challenges the trial court's refusal to admit evidence that Dane and his roommate, Wietholter, shared an intimate and sexual relationship. Kelly wanted to show bias and motive for Wietholter corroborating Dane's testimony about Dane's state of mind when he returned from Milwaukee. He contends: "It is the common human experience that the emotional ties that accompany a physical human relationship are much stronger and more likely to lead to biased perceptions and testimony than mere friendship." The trial court ruled that Kelly could only inquire if the two are friends and how long they had been friends and roommates. It did not allow Kelly to establish that they were romantically involved because it did not add significantly to proof of bias and it was potentially prejudicial.

¶9 As Kelly acknowledges, the constitutional right to present evidence is limited to the presentation of "relevant evidence not substantially outweighed by its prejudicial effect." *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 646, 456 N.W.2d 325 (1990). Whether evidence should be excluded on the basis of its prejudicial potential "goes to the trial court's discretion to weigh the probative value of the evidence against the possibility of prejudice or other factors which might impede the orderly and expeditious disposition of the issues at trial." *See* ***State v. Hinz***, 121 Wis. 2d 282, 285, 360 N.W.2d 56 (Ct. App. 1984) (citations omitted). The trial court found that "[t]here is a substantial portion of the populace which still strongly disapproves of homosexual relationships." With that finding in place and

not challenged by Kelly, the trial court's determination that the danger of unfair prejudice outweighed the minimal probative value was reasonable.[4]

¶10 The final issue is whether Kelly's motion for a mistrial should have been granted when during closing argument the prosecution made reference to Kelly having signed the booking inventory without any comment. The prosecution argued:

> In regard to any of the other materials, when you ask yourself, why aren't there prints on that, well, when the defendant was booked, in his personal property, in addition to the black gloves, were two latex gloves.
>
> Now, there's no information that latex gloves were found on anybody else. And what's interesting is in the property, it's interesting that in the personal property inventory, in the booking process, the item was listed and the corrections officer told you that that stuff would be out on the counter when it's being inventoried. And Mr. Kelly, after the inventory, signed off on it. He didn't jump up and say those aren't mine, there's no special notation. And the correction officer had no recollection of there being a problem with any of the materials.

Kelly's objection interrupted at that point. A sidebar discussion was had but not recorded. When the prosecutor continued the closing argument the jury was urged to consider in whose possession the gloves were found. The prosecutor's argument then moved on to another area.

¶11 After all closing arguments were concluded, the trial court allowed Kelly to make a record of his objection. Kelly asked for a mistrial and for a

[4] Even if the evidentiary ruling was an erroneous exercise of discretion, it was harmless error. Harris testified after Wietholter and after the trial court sustained an objection to the question regarding the nature of Wietholter's and Dane's relationship. Harris referred to Wietholter as Dane's "boyfriend." The jury learned the nature of the relationship in any event.

cautionary instruction that post-arrest silence could not be used against Kelly. The trial court denied the motion for a mistrial because there had been no objection during the booking officer's testimony that Kelly had signed the booking inventory without comment and there was no pretrial motion to suppress the inventory exhibit. The court deemed the prosecution's comment, if a violation of the right to remain silent, was at most a technical violation because there were no questions being asked and unanswered as to criminal culpability and the signed inventory itself acknowledged Kelly's agreement that those items were found in his possession. The court concluded there was no possibility that the prosecutor's comment carried any weight independent of the signed inventory. The request for a cautionary instruction was denied because not made during the sidebar and it came after the jury had been sent out for deliberations.

¶12 Before we discuss the merits of the claim that an improper comment was made on a defendant's post-arrest silence, we express disapproval of the practice of first discussing the issue in an unrecorded sidebar. We appreciate the inconvenience and interruption in possibly having to remove the jury so that the objection could be discussed on the record. However, where an objection is substantive, and possibly of constitutional dimension, the initial sidebar needs to be recorded.

¶13 "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988) (citations omitted). It is improper for the prosecution to comment upon a defendant's choice to remain silent at or before trial and it may not argue that the defendant's silence is inconsistent with a claim of innocence. ***State v.***

Nielsen, 2001 WI App 192, ¶¶30-31, 247 Wis. 2d 466, 634 N.W.2d 325. "The test for determining if there has been an impermissible comment on a defendant's right to remain silent is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." ***Id.***, ¶32. In conducting our de novo review, we consider the comment in the context in which it was made. ***Id.***

¶14 At the point that the prosecution referenced Kelly's non-objection to the booking inventory, it was attempting to explain why there were no fingerprints on the weapon and other evidence. The gloves provided that explanation and the gloves were linked to Kelly by the booking inventory. The prosecution was merely explaining the booking process and how Kelly's execution of the booking inventory was an admission that the gloves were found in his possession. There was no manifest intent to comment on Kelly's right to remain silent. As the trial court noted, the comment was not linked to culpability for the crimes, simply possession of the gloves. Moreover, the prosecution's argument was an accurate summary of the un-objected to evidence that Kelly signed the booking inventory. The jury already had the information that Kelly made no assertion that the gloves were not in his possession. Even if the comment was improper, it was harmless. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998) ("The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury.").

¶15 Kelly concludes with a request for a new trial claiming the errors complained of, either alone or in combination, were prejudicial and undermined the outcome of the trial. *See* WIS. STAT. § 752.35 (this court may reverse a

judgment or order when it appears from the record that it is probable that justice has miscarried). We have rejected his claims of error. A final catch-all plea for discretionary reversal based on the cumulative effect of non-errors cannot succeed. *See* ***State v. Marshal***, 172 Wis. 2d 491, 507, 493 N.W.2d 758 (Ct. App. 1992).

By the Court.—Judgment and order affirmed.

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