

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP2454-CR

Cir. Ct. No. 2008CF6324

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CORTEZ RAMON BROOKS, I,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Cortez Ramon Brooks, I, appeals from a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide and armed robbery, with use of force, as a habitual criminal, as party to a crime. Brooks argues that the trial court erroneously exercised its discretion when

it denied his motion for a mistrial after Kevin Burks, his cellmate, testified that Brooks confessed to committing multiple homicides, in addition to the one with which he was charged. Because we conclude that the trial court's decision to deny the motion was rational and based on the law and facts of the case, we affirm.

BACKGROUND

¶2 In November 2009, the State tried Brooks based upon an amended information, which charged him with: (1) first-degree intentional homicide, while armed, as a habitual criminal; (2) armed robbery, with use of force, as a habitual criminal, as party to a crime; and (3) possession of a firearm by a felon, as a habitual criminal. The criminal complaint alleged that Brooks and Jimmie Dean met in an alley to trade guns, but that, following the trade, Brooks shot Dean once in the back of the head, killing him; Brooks then proceeded to rob Dean.

¶3 Trial commenced and numerous witnesses testified. Only Burks's and Derrick McGregory's testimonies are relevant to Brooks's appeal.

¶4 Burks, a State witness and Brooks's cellmate, testified on direct examination that he had engaged in various conversations with Brooks during which Brooks confessed to killing Dean. Burks testified that he reported these conversations to the authorities, and, because of his cooperation, the State asked the court to reduce Burks's sentence by 100 days.

¶5 Brooks's trial counsel aggressively cross-examined Burks, engaging in the following exchange:

Q Okay. And according to you, all of this was told to you by Mr. Brooks in a day room while you and he were mopping?

A No, not just in the day room. Day room and our room.

Q So he told you this more than one time?

A Yes, I think I told you that.

Q How many times did he tell you this?

A I don't recall how many times, sir.

Q Well, was it two times or ten times?

A I don't want to perjure myself. I know it was more than once.

Q Okay. And the first time he told it to you you were where?

A The first time I guess was -- I strongly believe it was in the day room. I'm 99 percent sure it was in the day room.

Q So the first time Mr. Brooks told that to you, you strongly believe you were in the day room mopping?

A I don't think we was mopping. I think we was watching TV.

Q Just watching TV. So when was the next time he talked to you about it?

A I don't recall every event, sir, every -- every time because it's been over two and a half years.

Q So it would be fair to say your recollection's a little dim of what to talk about, right?

A No.

Q All right. So then tell me how many times you talked.

A We talked all the time so, you know, telling me -- telling you how many times we talked about the same situation *because he told me about multiple*

homicides that he committed that -- that I don't know how many times we talked about this same one, but I know we talked about different shootings that occurred that he said he committed.

(Emphasis added.)

¶6 Brooks's counsel immediately moved to strike, as unresponsive and irrelevant, Burks's testimony that Brooks "told me about multiple homicides that he committed" and that Burks talked with Brooks "about different shootings that occurred that [Brooks] said he committed." The State did not object and the trial court ordered the answer stricken. Burks's testimony continued without incident, and the State's case continued with the testimony of its other witnesses.

¶7 During a lunch break, outside the presence of the jury, Brooks's counsel moved for a mistrial based on Burks's stricken testimony. Counsel explained he did not immediately move for a mistrial because he did not want to draw additional attention to Burks's improper testimony.

¶8 The State objected to a mistrial on the grounds that the testimony was elicited by the defense and the defense's theory was that Burks was lying about everything; therefore, under the defense's theory, Burks's testimony that Brooks confessed to multiple other homicides was not credible and therefore not prejudicial. The State suggested that the jury be given a special instruction telling it to disregard Burks's stricken testimony.

¶9 The trial court denied Brooks's motion for a mistrial, concluding that there was insufficient prejudice to warrant such a remedy. The trial court noted that Burks's response to counsel's question underscored the fact that Burks frequently tried to give more information than necessary, consistent with the

defense's theory that Burks's willingness to be overly cooperative cast doubt on his credibility.

¶10 The trial court also concluded that it would be inappropriate to give the jury a special instruction regarding Burks's testimony, finding that such an instruction would draw unnecessary attention to the testimony, the very thing that defense counsel had said he wished to avoid. Brooks never requested a special jury instruction.

¶11 Later that day, in addition to several other witnesses, the State called McGregor, Brooks's childhood acquaintance. McGregor testified that sometime around the night of Dean's death, Brooks told him that he was scared and that a gun had gone off during a gun trade. On cross-examination, Brooks's counsel engaged in the following exchange with McGregor:

- Q. Okay. When was the first time you talked to [the police] in terms of the date?
- A. In terms of the date? I can actually say I don't remember what day it was. I know the police came to the house. They came to the house that I was living with me and my child's mother and they came looking for her for a robbery. *They came looking for her for a robbery that involved Mr. Brooks and her brother and Duran.* I don't know his last name, but they came, looked for her and everything, and then after they grabbed her they snatched me, too. I had a warrant for an arrest for an old ticket. They snatched me.

(Emphasis added.)

¶12 Defense counsel did not move to strike McGregor's statement about Brooks's "involve[ment]" in a prior robbery, did not request a cautionary instruction, and did not move for a mistrial.

¶13 The jury found Brooks guilty of the lesser-included offense of first-degree reckless homicide, with use of a dangerous weapon, and of armed robbery as party to a crime, but not guilty of being a felon in possession of a firearm. The trial court sentenced Brooks to forty years of confinement and ten years of extended supervision on the first-degree reckless homicide count, and to twenty-five years of confinement and ten years of extended supervision on the armed robbery count, to be served concurrently. Brooks appeals.

DISCUSSION

¶14 Brooks argues that the trial court erroneously exercised its discretion when it denied his motion for a mistrial because Burks's testimony that Brooks confessed to committing multiple homicides was impermissible character evidence prohibited by WIS. STAT. § 904.04(2) (2009-10)¹ and was highly prejudicial. Brooks contends that Burks's testimony "unfairly portrayed Brooks to the jury as

¹ WISCONSIN STAT. § 904.04(2) (2009-10) states:

OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State does not challenge the trial court's decision to strike, as impermissible character evidence pursuant to § 904.04(2), Burks's testimony that Brooks confessed to multiple homicides. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a[] habitual killer, who brags about his many deeds to others” and that the testimony could not have been ignored by the jury. He further submits that the prejudicial effect of Burks’s testimony was compounded by McGregory’s later testimony that Brooks was “involved” in a robbery. We disagree.

¶15 A trial court has discretion to deny a motion for a mistrial unless the alleged error is so prejudicial that it influences the jury’s verdict. *Oseman v. State*, 32 Wis. 2d 523, 530, 145 N.W.2d 766 (1966). Steps taken by the trial court to mitigate prejudice may be balanced against any possible prejudice. *See Johnson v. State*, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977).

¶16 Because the trial court’s decision to grant or deny a motion for a mistrial is discretionary, we reverse the trial court’s decision only if it made an error of law or failed to base its decision on the facts in the record. *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. When a trial court does not explain the reasons for a discretionary decision, we may search the record to determine whether it supports the court’s decision. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶17 We conclude that the trial court acted within the scope of its discretion when it determined that Brooks was not unfairly prejudiced by Burks’s stricken testimony and consequently denied Brooks’s motion for a mistrial.

¶18 First, any prejudice from Burks’s answer was cured by the trial court immediately striking the answer upon Brooks’s motion. *See Haskins v. State*, 97 Wis. 2d 408, 420, 294 N.W.2d 25 (1980) (“Any prejudicial effect which might have flowed from the statement was cured by the court’s immediate instruction to the jury to disregard the statement.”) (citation omitted). And later, the trial court

instructed the jury to “[d]isregard all stricken testimony.” We presume that jurors follow the trial court’s instructions. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780.

¶19 Second, the trial court rationally concluded that Burks’s unresponsive, over-the-top testimony had not been prejudicial to Brooks, but had rather supported the defense’s theory—that Burks was an overly cooperative witness whose testimony was incredible because his primary goal was to curry favor with the State and reduce his sentence. As such, Burks’s testimony that Brooks confessed to multiple homicides simply reinforced the defense’s theory that Burks’s testimony as a whole was unreliable.

¶20 Third, we reject Brooks’s contention that McGregory’s testimony that Brooks was “involved” in a prior robbery inappropriately heightened and compounded the unfair prejudice from Burks’s stricken testimony. McGregory’s testimony that Brooks was “involved” in a prior robbery did not automatically lead to the conclusion that Brooks was “a suspect” in a prior robbery, as Brooks contends. The jury could just have easily have inferred that Brooks was the victim of a robbery or a witness to a robbery. Moreover, Brooks’s counsel did not object to or move to strike McGregory’s testimony that Brooks may have been “involved” in a prior robbery. Nor did he move for a mistrial based on the testimony, further suggesting that, even from the defense perspective, the implication was that Brooks’s alleged involvement in the prior robbery was benign.

¶21 In sum, we conclude that the trial court did not erroneously exercise its discretion when it denied Brooks’s motion for a mistrial based on Burks’s stricken testimony.²

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

² Because we conclude that the trial court did not erroneously exercise its discretion when it denied Brooks’s motion for a mistrial, we need not address the parties’ arguments regarding whether any such error was harmless or whether harmless error review is appropriate under the facts of this case. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Appellate courts should try cases on the narrowest possible grounds.).

