COURT OF APPEALS DECISION DATED AND FILED

August 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2399-CR | **Cir. Ct. No. 2010CF87**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PERRY CAROTHERS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Perry Carothers, Jr., appeals from a judgment, entered upon a jury verdict, convicting him of possession of a firearm by a felon, as a repeater. We hold that the trial court did not erroneously exercise its

discretion in denying Carothers's motion for a mistrial and, if it erred in admitting certain hearsay, that error was harmless. We affirm.

¶2 The first appellate issue is whether Carothers's mistrial motion was wrongly denied because the trial court told the jury during opening instructions that the felony forming the basis for the repeater allegation was possession of a firearm in a school zone.

¶3 Before the jury was impaneled, defense counsel advised the court that the defense submitted no proposed jury instructions and did not object to those the State requested. Counsel also said the parties had discussed a stipulation about the prior conviction and Carothers was willing to stipulate to it. This exchange ensued as to instructing the jury about Carothers's prior conviction:

> THE COURT: …. [M]y information would be it was a felony committed before January 19th, 2010 [the date of the instant offense], and it was possession of a firearm in a school zone.
>
> MS. RIEK [prosecutor]: That's correct, your Honor.
>
> MS. LANG MUFFITT [defense counsel]: And I believe on the jury instruction all we do is fill in the date of the—
>
> MS. RIEK: Actually I prepared the jury instruction in the alternative: Or the parties have agreed that the Defendant had—was convicted of a felony before January 19th, 2010, and you must accept this as conclusively proved.

¶4 The court then stated that during opening instructions it would give the stipulation only as something that had to be proved but that if the conviction was stipulated to during the course of the trial, it would modify the final instructions accordingly.

¶5 The Information Riek read to the jury before voir dire stated that Carothers was charged with possession of firearm by a felon "after having been convicted of a felony in Wisconsin contrary to Wisconsin statutes." Riek did not read the additional part stating, "F/A [firearm] in School Zone." In its opening instructions, however, the trial court gave the State's proposed instruction for felon in possession of a firearm, stating for the second element: "Second, the Defendant had been convicted of a [prior] felony …. Possession of a—in this case possession of a firearm in a school zone is a felony in Wisconsin."

¶6 Outside the jury's presence, defense counsel moved for a mistrial. She argued that, given the parties' stipulation, the alternative formulation of the State's submitted instruction and that this case alleged possession of a firearm, telling the jury the nature of Carothers's prior conviction was highly prejudicial. The prosecutor agreed that the instruction as given might be error but not one that amounted to "manifest necessity," as the jury would be instructed that opening instructions are not evidence.

¶7 The court responded that it had not been informed with certainty what the parties' stipulation was and had received nothing from either party as to opening instructions. The court said it would give a curative instruction but would not grant a mistrial.

¶8 The parties later provided the court with a signed stipulation. The court instructed the jury in closing instructions that the parties agreed, and it had to accept as conclusively proved, that Carothers had a prior felony conviction. It also instructed the jury that the nature and type of felony of which Carothers was convicted was immaterial and could not be considered in its deliberations.

¶9 Whether to grant a mistrial is a decision that lies within the sound discretion of the trial court. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). "A mistrial is appropriate only when a 'manifest necessity' exists for the termination of the trial." ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (quoted source omitted). We will reverse the denial of a motion for mistrial "only on a clear showing of an erroneous use of discretion." ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122.

¶10 Where a defendant is willing to stipulate to his or her status as a convicted felon, evidence of the nature of the prior felony can be excluded as irrelevant. *See* ***State v. McAllister***, 153 Wis. 2d 523, 529, 451 N.W.2d 764 (Ct. App. 1989). Here, though, the trial court knew only that a stipulation was "discuss[ed]" and that Carothers was "willing" to stipulate. It told the parties that it would present the alternatives to the jury as something that needed to be proved and, if proved, would instruct the jury accordingly. The parties did not cement the stipulation, sign it and present it to the court until later. The court had nothing certain before it when it gave opening instructions.

¶11 Significantly, defense counsel did not object at the outset to the court's explanation of how it intended to proceed. Indeed, when the court indicated that its information to the jury would be that Carothers's prior conviction was for possession of a firearm in a school zone, counsel responded only: "And I believe on the jury instruction all we do is fill in the date."

¶12 Moreover, evidence of the nature of the prior conviction was not presented at trial. The court expressly instructed the jury to consider only evidence received during the trial; defined evidence as the sworn testimony of witnesses, exhibits the court received or any fact to which the lawyers had agreed

or stipulated or which the court had directed the jury to find; and expressly instructed the jury that the nature of Carothers's prior conviction was immaterial. The jury is presumed to follow all instructions given. ***State v. Grande***, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992). Carothers has not clearly shown an erroneous use of discretion.

¶13 Carothers next complains that the trial court erred when it allowed to be played before the jury an audio recording of the conversation between City of Racine Police Department Officer Scott Keland and Woody Farris, the driver of the vehicle in which Carothers was a passenger. The recording was made shortly after the gun was found near the passenger's seat in Farris's car. Carothers argues that the recorded statement was inadmissible hearsay.

¶14 During the State's questioning, Farris testified that he, Farris, did not have a gun in his car, that Carothers "[g]ot a little fidgety" when the squad car activated its emergency lights and that he told police the truth the night of the incident. Farris also acknowledged that he spoke to police after the gun was discovered in the vehicle and stated that he was "quite sure" the police officer was recording the conversation. The prosecutor and Farris then engaged in the following colloquy:

> Q: Do you remember what you told them?
>
> A: Well, what they asked me I just—
>
> Q: You just answered their questions.
>
> A: Right, I answered their questions.

¶15 At that point the prosecutor asked to play a compact disc. Defense counsel objected that it was hearsay. The prosecutor explained that the audio

recording's purpose was "to reflect what the witness said that night to the police." This exchange followed:

> THE COURT: And that's based upon his non[-] recollection as just stated?
>
> MS. RIEK: Correct.
>
> MS. LANG MUFFITT: I'm sorry[.] I didn't hear him say he didn't—he didn't remember what he said on that day. She didn't ask him a specific question he didn't remember.
>
> THE COURT: Well, my recollection was he said "I answered their questions," to that effect, and then Ms. Riek wanted to play the interview.

The court decided it would allow the audio to be played during Farris's testimony subject to Keland, who recorded the interview, laying the foundation.

¶16 In the recording, Farris said that after the police car activated its lights, Carothers bent over and was fidgeting around with his right hand, prompting him to ask Carothers, "[Y]ou ain't got nothing in this car and put it [u]nder my seat?" He said Carothers denied it. When Farris told Keland it was "his [Carothers's] gun," Keland asked him how he knew; Farris responded, "Cuz it's not mine." Immediately after the recording was played, Farris confirmed that it fairly and accurately reflected his conversation with Keland.

¶17 During his testimony, Keland confirmed that he spoke to Farris and recorded their conversation. The audio recording and the transcript made of it both were marked as exhibits. Keland followed along on the transcript as the recording was played and acknowledged that the transcript fairly and accurately reflected his conversation with Farris.

¶18 The State agrees the statement was hearsay but was admissible as a present sense impression or excited utterance, *see* WIS. STAT. § 908.03(1), (2), or—at the very worst—harmless error. Assuming without deciding that admitting the hearsay was error, we conclude it was harmless.

¶19 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." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (citations omitted). To make this determination, we consider the entire record. ***State v. Patricia A.M.***, 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993).

¶20 Farris did not testify that the gun was Carothers.' Therefore, Carothers argues, there is at least a reasonable possibility that allowing the jury to hear Farris tell Keland the gun was Carothers' contributed to his conviction and undermines confidence in the outcome of the proceeding. We see it differently.

¶21 While Farris did not testify that the gun was Carothers', Farris did testify that: the gun was not his; he had not loaned his car to anyone; to his knowledge there was no gun in his car when he got in it that day; he did not see the gun in his car; he would have known if there was a gun in the car because the seat has no space to "really … get up under it"; Carothers grew "fidgety" when the police made their presence known; and he saw Carothers's hand moving near the floorboards of the car.

¶22 In addition, Keland testified that he could see the front passenger "making movements to where he would lean forward" and "drop his shoulder down towards like the floor area"; the passenger's motions were consistent with

one trying to conceal something; and, besides Farris, the driver, Carothers was the only other person in the car at the time of the stop.

¶23 Keland's partner, Officer Peter Boeck, who rode in the passenger seat of the squad car, similarly testified or confirmed that once the emergency lights were activated, he could see the passenger in the car ahead "looking at us and then moving back to the right in his seat and dropping his right shoulder towards the floor of the car"; that as he approached the passenger side of the stopped vehicle, Carothers moved his right arm from where it rested on door and reached down, canting his right shoulder toward the floor; that Carothers did not raise his right hand until being ordered a second time to show his hands; that Carothers was visibly trembling and shaking while being handcuffed; and that a handgun was located between the passenger seat frame and a plastic cowling in a location Farris could not have reached from the driver's seat.

¶24 Farris's comment in the recorded statement that the gun was Carothers' "[c]uz it's not mine" is a process-of-elimination deduction a trier of fact reasonably could make based solely on trial testimony. There is no reasonable possibility that it contributed to Carothers's conviction, as the evidence to convict him was sufficient without it. We conclude that any error in failing to suppress the statement was harmless.

By the Court.—Judgment affirmed.

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