COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP515-CR **Cir. Ct. No. 2010CF396**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL T. GRANT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

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

¶1 BROWN, C.J. In this case, Michael Grant was charged with two counts of repeated sexual abuse of a child involving two different victims, in incidents that were dissimilar in time, place, and manner. As the jury was deliberating the two charges, it sent a note to the court that it had reached an

agreement on one of the counts, but could not agree on the other. The trial court sua sponte suggested to counsel that the court take the verdict on the one charge, announce it in open court, and send the jury back to deliberate on the other. Neither counsel objected. That is the first issue, whether the failure to object to this partial verdict procedure was ineffective assistance that prejudiced Grant.

¶2 The second issue relates to what occurred after the court announced the verdict agreed upon by the jury, which was "not guilty" regarding the charge involving the first alleged victim, A.W. Grant claims that A.W. broke out in loud sobbing, so much so that she had to be comforted, and that her brother slammed his hand on the back of a chair and stormed out of the courtroom, uttering an expletive on the way. Grant asserts that the jury watched and heard this extraneous information and some jurors appeared stunned. Grant argues that this information had to have detrimentally affected the jury's consideration of the remaining charge.

¶3 As regards the first issue, since the law on partial verdicts is unsettled in Wisconsin and across the United States, there can be no ineffective assistance. As to the alleged outburst, the sole evidence that it occurred came from the defense investigator. The trial court, seated on the bench at the same time, had a different recollection. We will side with the judge. We affirm.

Facts

¶4 The catalyst for the two charges began when A.W. reported to police that Grant had sexually assaulted her various times between the ages of ten and twelve. At the time, A.W.'s family owned a ranch where Grant managed day-to-day operations. A.W. reported that the incidents occurred in the years 1998 to 2000, when she babysat for Grant's children at his residence on the ranch.

Specifically, A.W. stated that Grant grabbed her breasts, made her touch his penis through clothing, and on one occasion handcuffed and pinned her to the floor. A.W. testified that she told her brother about the incidents in 2003 and her mother in 2005, but asked both of them not to go to the police. She finally came forward in 2010, after becoming worried about the fact that Grant's children were approaching the age she was when the assaults started.

¶5 The second alleged victim, A.K., became involved when A.W.'s brother reached out to a mutual friend via Facebook. The brother knew A.K. could potentially provide additional information to police about Grant. He asked if A.K. had any relevant information with regard to the allegations against Grant. A.K. revealed that she had also been sexually assaulted by Grant and offered to speak to a detective about her experience. The State subsequently charged Grant with repeated sexual assault of a child with regard to both A.W. and A.K.

¶6 A.K. testified at trial that she was very close with Grant and his live-in girlfriend. A.K. stated that Grant first took advantage of her by grabbing her breasts when she was fourteen years old. Their contact progressed to vaginal and oral intercourse, which A.K. stated occurred at various times from 1997 to 1998, until she could find another ranch to board her horse. A.K. testified that she told a high school friend about these incidents shortly after they happened. The State produced this witness who corroborated that A.K. had told her about having sex with Grant. A.K. stated she left the farm shortly after Grant's twins were born.

¶7 Grant's then live-in girlfriend and the mother of his twins testified that she never saw any of these assaults take place but that she had no reason to doubt the girls. Grant also testified and denied all of the allegations against him.

¶8 On the second day of deliberations, the jury sent the court a note asking for clarification as to which verdict was for each victim. The jury also sent a second note stating that it had reached one verdict but could not agree on the other. The trial court suggested to counsel that it "[r]eceive the verdict that we do have and then send them back in and give them the supplemental instruction on agreement." Neither counsel objected. The court then brought the jury in and had this exchange with the presiding juror:

> THE COURT: Do these verdicts turn on each other? Can I receive the one and –
>
> THE FOREPERSON: I think so, yeah.
>
> THE COURT: And then we'll send you back in to deliberate on count two then.
>
> THE FOREPERSON: Okay.

What followed was the verdict of not guilty as to the charge involving A.W.

¶9 According to the defense investigator, after the court received the not guilty verdict, A.W. shrieked and began crying hysterically for thirty seconds or one minute. The investigator testified that the shriek was loud enough for everyone in the courtroom to hear. The investigator also stated that A.W.'s brother, stood up, slapped the back of the bench, stated "this is bullshit," and stormed out of the courtroom, followed by a deputy. There is no indication of these events in the transcripts and no other witnesses to corroborate the investigator. In fact, reading the transcripts, it appears that the colloquy between the court and the foreperson was uninterrupted between the time the court accepted and announced the verdict, gave the jury the supplemental instruction and sent the jury back to continue deliberations. The jury returned shortly thereafter with a guilty verdict for the charge relating to A.K.

¶10 At the postconviction motion hearing, the defense investigator testified that he noted how several jurors were watching the gallery with shocked and concerned expressions after the outburst. For his part, when asked about these events, the defense attorney stated he heard a shriek or a cry or an outburst but kept his head down so as not to distract the jury because he was happy with the not guilty verdict and did not want the jury to see his reaction. He also testified that he did not think to object to the partial verdict being read aloud, and that as he watched the faces of the jurors as they stood up to return to deliberate, nothing in their faces or behavior stood out to him. We quote, in part, what the trial court had to say about the brief event:

> During that period of time apparently there was an outburst or—from the complaining witness and her brother, but actually I was pretty busy looking at the jury and giving the instruction 520 and other matters that diverted my attention …. I don't believe that the—that that outburst indeed could be characterized as an outburst affected the jury at all…. Those jurors are grown-up people. They know … that … it's a solemn moment ….

The trial court denied the motion for a new trial and we now have Grant's appeal.

There Is No Ineffective Assistance of Counsel Where the Law Is Not Clear

¶11 Although Grant failed to object to the reading of the partial verdict at trial, our supreme court allows forfeited objections in criminal cases to be analyzed on appeal through the rubric of ineffective assistance of counsel. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). To succeed on an ineffective assistance of counsel claim, a party must show both deficient performance by trial counsel and that the deficiency prejudiced the defendant. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A court may choose to address either the "deficient performance" component or the "prejudice"

component first. ***Id.*** at 697. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. ***Id.*** "Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done." ***State v. Kimbrough***, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752.

¶12 In analyzing whether trial counsel's performance was deficient, the reviewing court assesses whether counsel's performance was objectively reasonable according to professional norms. ***Strickland***, 466 U.S. at 688. Reasonable counsel cannot be expected to object and argue an area of law that is unsettled. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). In Wisconsin, there is no authority or precedent prohibiting the taking of partial verdicts.

¶13 Nor is the law any more clear in other jurisdictions such that counsel should have taken notice and objected. In fact, a number of jurisdictions expressly permit partial verdicts. For example, the Federal Rules of Criminal Procedure allow partial verdicts for multiple defendants and multiple counts: "If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed." FED. R. CRIM. P. 31(b)(2). Additionally, the Second Circuit has ruled that partial verdicts are permissible even in cases in which interlocking facts may be material to multiple counts. *See* ***United States v. DiLapi***, 651 F.2d 140, 147 (2d Cir. 1981) (failure to inform jury that partial verdict was final did not constitute reversible error).

¶14 The D.C. Circuit has also upheld partial verdicts in cases with interlocking facts even when the verdicts appear inconsistent. In ***United States v. Dakins***, 872 F.2d 1061 (D.C. Cir. 1989), the defendant Dakins and two

codefendants were charged with conspiracy to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and use of a telephone to facilitate those offenses. ***Id.*** at 1062-63. The jury announced in open court that it had found Dakins guilty of all three counts, but after resuming deliberations determined it could not agree as to the two codefendants, and the counts were dismissed. ***Id.*** at 1064. One juror wrote a note to the court indicating that she had misgivings about the already-announced conspiracy verdict as to Dakins after deliberations were resumed. ***Id.*** On review, the court upheld all three guilty verdicts against Dakins, holding that reading the verdict in open court made it final and relying on ***United States v. Powell***, 469 U.S. 57 (1984), where the Court refused to vacate a verdict convicting a defendant of facilitating a conspiracy even though the defendant had been acquitted of the underlying conspiracy charge by the same jury. ***Dakins***, 872 F.2d at 1065-66.

¶15 On the other hand, the Eighth Circuit remanded a case because of a partial verdict where, due to interlocking facts, the court found it "difficult to imagine that the jury could continue to deliberate on the conspiracy charge without reweighing" the evidence on the other charge. ***United States v. Benedict***, 95 F.3d 17, 20 (8th Cir. 1996). Benedict, the sole defendant, had been charged with conspiracy to burglarize a post office, conspiracy to steal post office property, aiding and abetting post office burglary, and aiding and abetting theft of post office property. ***Id.*** at 18. During deliberations, the jury sent a note to the court asking for clarification between the conspiracy to steal and theft charges. ***Id.*** The jury later announced a guilty verdict as to three of the counts but it could not decide on the conspiracy to commit post office theft. ***Id.*** at 20. The court told the jury to resume deliberations of the final count, but the government agreed to

dismiss the count after further deadlock. ***Id.*** at 19. Reversing Benedict's conviction, the court held:

> It is difficult to imagine that the jury could continue to deliberate on the conspiracy charge without reweighing the evidence with respect to the substantive offense where, as here, the government's evidence on both counts was virtually the same. The jury expressed as much when it asked for clarification between the two charges.

Id. at 20.

¶16 Some states have promulgated rules that specifically allow partial verdicts. For instance, New York's Rules of Criminal Procedure allow for a court to accept a partial verdict in cases where it believes there is a "reasonable possibility of ultimate agreement upon any of the unresolved offenses with respect to any defendant." N.Y. CRIM. PROC. LAW § 310.70. The court then has the discretion to either receive the partial verdict and tell the jury to resume deliberations on the remaining counts or send the jury back to deliberate on the case as a whole. ***Id.***

¶17 The Supreme Court of New Jersey has held that partial verdicts are permissible, but with a strong disclaimer against their use:

> Because of the potential compromise to either a defendant's or the government's interests, and the risk of interfering with jury deliberations, we strongly discourage routine use of partial verdicts. Nevertheless, trial courts possess the discretion to accept such verdicts absent a showing of prejudice to the defendant. Interim partial verdicts may be warranted, for example, when the jury has deliberated at length, when the charges against a defendant are rooted in unrelated facts, when the court has reason to be concerned that a juror may become ill before deliberations conclude, when there is risk of taint to the jury's decision-making process, or when the State has indicated its intention to dismiss the unresolved counts.

State v. Shomo, 609 A.2d 394, 398-99 (N.J. 1992).

¶18 In summary, the law concerning the permissibility of partial verdicts is far from settled and, therefore, we cannot say that counsel was ineffective for failing to object to the trial court's sua sponte suggestion to take a partial verdict in the case at hand.

¶19 Also, we tend to agree with the New Jersey Supreme Court that partial verdicts present an inherent risk of implying to the jury that the facts found in one count are correct, which it then may apply in its consideration of other counts *where the facts are interlocking.* When the underlying facts of the charges are interlocking, *e.g.*, ***Benedict***, 95 F.3d at 20, then the partial verdict is dangerous because the court is essentially involving itself in the jury's deliberation process by accepting still-to-be deliberative facts as the foundation of a verdict in another charge.

¶20 However, in cases like the one at hand, where the facts do not interlock, we simply do not see the prejudice. The facts as to one series of events have been determined and announced, and the jury has been instructed to return and deliberate on a completely different set of facts. We recognize that if there is law to be made here, our supreme court must make it. But, in our view, the permissibility of partial verdicts should depend on whether the facts are interlocking. At the same time, we recognize that whether the facts are interlocking might prove to be problematic and, since there is really very little value in announcing a partial verdict, it might be wise for trial courts to heed the suggestion of the New Jersey Supreme Court and avoid partial verdicts altogether.

¶21 The above discussion informs us regarding the remaining question. Assuming for the sake of argument that counsel should have objected, we see no prejudice precisely because the facts did not interlock.

¶22 Grant also argues that the jurors were not aware they were going to be asked to read a partial verdict and continue deliberations on the other count, but the record directly contradicts this argument. The judge told the jurors it would receive the first verdict "[a]nd then we'll send you back in to deliberate on count two then," to which the foreperson replied, "Okay." This clearly demonstrates the jury knew it would be continuing deliberations on the remaining count.

The Alleged "Outburst" Does Not Constitute Extraneous Information

¶23 We also reject Grant's argument that he was prejudiced by the outburst that occurred after the first verdict was taken. On this issue, the first question is whether extraneous information was actually brought to the attention of the jury. "Extraneous information, in contrast with the commonly known facts and experiences we expect jurors to rely on in reaching their verdict, comes 'from the outside.'" ***State v. Eison***, 194 Wis. 2d 160, 174, 533 N.W.2d 738 (1995) (citation omitted).

¶24 Here, three people are on record with regard to what Grant refers to as an "outburst." First, we have the defense investigator who provided the most detailed description of the outburst, which he claims several jurors also noticed. Second, we have the testimony of Grant's trial counsel at the postconviction hearing that he heard a shriek or an outcry or an outburst, but kept his head down so as not to distract the jury by showing his pleasure with the not guilty verdict and saw nothing remarkable on the jurors' faces as he watched them leave the

courtroom to resume deliberations. Finally, we have the trial court's statement that, in effect, it did not see anything out of the ordinary.

¶25 The trial court never really said whether it accepted the credibility of the defense investigator's account of what occurred. However, the court was reluctant to label whatever occurred as "an outburst." The court was busy putting together the instruction and other matters so that the jury could continue its deliberations. Whatever occurred certainly was not loud or demonstrative enough to divert the court's attention from the task it was doing. If it was not enough to get the court's attention, was it enough to get the jury's attention? All we know is that the trial court was "looking at the jury" during this time. Yet, the trial court opined that the outburst, if it could be called an outburst, did not affect the jury at all. And we do know that Grant's trial attorney did not say he heard someone cry hysterically for thirty seconds to one minute and did not say he heard the brother slam his hand on a chair, utter an expletive, and walk out.

¶26 It is evident that the trial court did not give the investigator full credibility, and the record transcript does not help Grant either. We need not reach whether the outburst prejudiced Grant because the "outburst" itself has not been established.

By the Court.—Judgment and order affirmed.

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