COURT OF APPEALS
DECISION
DATED AND RELEASED

December 17, 1996

NOTICE

Nos. 95-3475-CR & 95-3476-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Nathaniel Whaley,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

WEDEMEYER, P.J. Nathaniel Whaley appeals from a judgment entered after a jury convicted him of multiple counts of abduction of a child, while armed, and first-degree sexual assault, as well as one count each of armed robbery, kidnapping and theft, contrary to §§ 948.30(2)(b), 939.63(2), 943.32(1)(b) & (2), 940.225(1)(b), 940.31(1)(b) and 943.20(1)(a) & (3)(d)(2), STATS. He also appeals from a trial court order denying his request for a new trial. Whaley's contention is that the trial court erred because it improperly handled the remand directions from this court and he contends that had the trial court

complied with this court's remand directions, he would have been granted a new trial. Because the trial court did not erroneously exercise its discretion, we affirm.

I. BACKGROUND

Whaley was originally charged in two informations with sexual assault-related offenses involving four different individuals. The informations were joined for trial. Immediately before trial, the prosecutor dismissed the counts relating to one of the victims, Tameka P., because PEP A serology tests seemed to exclude Whaley as Tameka's assailant.

At trial, Whaley attempted to introduce evidence of his exclusion as Tameka's assailant to show misidentification. The trial court excluded the evidence as irrelevant because the charges relating to the assault on Tameka were dismissed. Whaley was convicted and he appealed to this court, claiming the evidence should not have been excluded. We concluded that the trial court had improperly denied Whaley an opportunity to present an offer of proof and ruled:

> We conclude that an evidentiary hearing is necessary because the record is incomplete regarding the exact nature of the serological evidence and the likelihood of multiple semen sources. Therefore, we reverse the judgment and remand the matter to the trial court for further proceedings. Upon remand, the trial court shall conduct an evidentiary hearing to determine if, under the circumstances, the evidence excludes Whaley as Tameka's assailant. If the evidence does so, Whaley is entitled to a new trial and admission of the evidence. If the evidence is ambiguous, the trial court shall evaluate the evidence to determine whether to grant a new trial or to reinstate the original judgment of conviction.

On remand, the trial court ordered Whaley to submit to DNA testing. The trial court held a hearing and, based on the totality of the evidence, determined that the evidence did not absolutely exclude Whaley as Tameka's assailant. Accordingly, it denied Whaley's request for a new trial and reinstated the judgment. Whaley now appeals.

II. DISCUSSION

The issue in this case is whether the trial court erred in handling the remand. Whaley asserts the following errors: (1) the trial court exceeded the scope of the remand order when it considered evidence in addition to the PEP A serological test; (2) the trial court held a hearing simply to take an offer of proof rather than conducting the "evidentiary hearing" ordered by this court; and (3) the trial court should not have allowed DNA testing to be performed, and that allowing the DNA results to be introduced at the remand hearing was error because this evidence was inadmissible hearsay. We reject each of Whaley's arguments.

A. Exceeding Scope of Remand Order.

Whaley first contends that the trial court exceeded the scope of our remand order because it did not limit its consideration to the PEP A test. Whaley argues that the only question to be resolved on remand was whether the PEP A test excluded Whaley as Tameka's assailant and that this question was resolved in his favor because there was only one semen source. We are not persuaded.

Upon remand, a trial court must exercise its discretion to take any actions as seen "wise and proper under the circumstances" as long as these actions are not inconsistent with the remand order of the appellate court. ***Lingott v. Bihlmire***, 38 Wis.2d 114, 129, 156 N.W.2d 439, 446-47 (1968). "It is true that on remand, the trial court must not exceed the scope of the mandate. As a practical matter, however, the trial judge must be allowed some reasonable exercise of discretion in fulfilling the terms of the mandate." ***Texacally Joint Venture v. King***, 719 S.W.2d 652, 653 (Ct. App. Texas 1986) (citations omitted).

Because the trial court is vested with such discretion, our review is limited to whether the trial court erroneously exercised its discretion. ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993). Accordingly, we will not reverse if the record shows that discretion was in fact exercised and we can perceive that a reasonable basis exists for the trial court's actions. ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

We remanded Whaley's initial appeal for further proceedings and instructed the trial court to conduct a hearing to determine if the evidence excluded him as Tameka's assailant. We also instructed the trial court in the event the evidence was ambiguous: the trial court should evaluate the evidence to determine whether a new trial was warranted.

Upon reviewing the trial court's actions on remand, we conclude that it acted within its discretion. The trial court did not exceed the scope of our order, nor did it take any actions inconsistent with our order. Its actions were "wise and proper under the circumstances." Our remand order is not as exceedingly narrow as Whaley attempts to make it. In rejecting Whaley's interpretation of our mandate, we borrow a quote from another jurisdiction:

> We ... reject[] efforts to construe our remand orders so narrowly as to prohibit a trial court from considering matters relevant to the issues upon which further proceedings are ordered that may not have been envisioned at the time of the remand. So long as these matters are not extraneous to the issues and purposes of the remand, they may be brought into the remand hearing.

Cioffoletti v. Ridgefield Planning & Zoning Comm'n, 599 A.2d 9, 13 (Conn. 1991) (citation omitted). Our remand order instructed the trial court to consider the evidence and did not limit the consideration to *only* the PEP A test or *only* the question regarding the number of semen sources. Given the resources expended in trying Whaley, it was wise for the trial court to consider *all* the evidence available to determine whether Whaley was excluded as Tameka's assailant and the DNA evidence is certainly not an extraneous matter. As we

stated in Whaley's initial appeal, if the evidence clearly excluded Whaley, then it was highly relevant and Whaley should have been able to introduce it at trial.

Therefore, it was not only reasonable, but also very prudent of the trial court to review *all* the evidence in order to make this determination not only because an absolute exclusion would require a new trial, but also because an absolute exclusion may mean that Whaley was not guilty of the crimes charged. Thus, the importance of the trial court's determination regarding this evidence is of great consequence.

Based on the foregoing, we cannot conclude that the trial court's actions were an erroneous exercise of discretion. Consideration of evidence in addition to the PEP A test was not inconsistent with our order and under the circumstances certainly was reasonable.

B. Nature of the Hearing.

Whaley next argues that the trial court erred by holding a mere "offer of proof" hearing instead of an evidentiary hearing subject to the rules of evidence. We are not persuaded.

Although our remand order did use the term "evidentiary hearing," the trial court is allowed some discretion in how such a hearing is conducted. *See generally*, ***Milenkovic v. State***, 86 Wis.2d 272, 284, 272 N.W.2d 320, 326 (1978). Under the facts presented here, we cannot conclude that the trial court erroneously exercised its discretion regarding the type of hearing it conducted on remand.

The purpose of the remand hearing was to determine a preliminary question regarding the admissibility of evidence. In Whaley's initial appeal, we concluded that the trial court had improperly denied Whaley an opportunity to present an offer of proof regarding evidence that he was excluded as Tameka's assailant. We concluded in the earlier appeal that if evidence did absolutely exclude Whaley as Tameka's assailant, then that evidence was relevant to the misidentification issue. However, because the trial

court cut short Whaley's offer of proof, a determination could not be made regarding whether this evidence absolutely excluded him. Accordingly, the subject of the remand hearing was to make this determination. In essence, it was an offer of proof to determine whether this evidence was relevant. Under such circumstances, the rules of evidence are necessarily relaxed. *See* §§ 901.04(1) and 911.01(4), STATS.; ***United States v. Matlock***, 415 U.S. 164, 172-73 (1974) (the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence).

Given the purpose of the hearing, we cannot conclude that the nature of the remand hearing held by the trial court was an erroneous exercise of discretion.

C. DNA Evidence.

Whaley also objects to the fact that DNA testing was allowed to be performed and to the fact that the DNA evidence was introduced at the hearing. He argues it should not have been introduced because it was inadmissible hearsay. We disagree.

Whaley first contends that taking the DNA sample violated his Fourth Amendment rights. He claims that the blood was drawn without justification or probable cause. We do not agree. The purpose of the remand hearing was to determine whether Whaley could be absolutely excluded as Tameka's assailant. DNA testing certainly could provide helpful information in order to resolve that issue and the intrusion to Whaley was minor. Moreover, we construe the trial court's order to draw the blood sample to be the equivalent of a search warrant. Accordingly, we conclude that probable cause did exist to draw the sample, that the intrusion was justifiable, and, therefore, Whaley's Fourth Amendment rights were not violated. ***Winston v. Lee***, 470 U.S. 753, 760 (1985) (bodily intrusions not unconstitutional as long as the facts and circumstances show that the intrusion was justifiable).

He next claims that the DNA evidence was inadmissible hearsay. Although his argument may have some merit if the report had been admitted at

trial without the proper witnesses, it does not have merit here. The DNA report was used during the remand hearing which we have already determined was not bound by the rules of evidence. Moreover, reliance on the expert's report with regard to any preliminary examination is permitted by statute. *See* § 970.03(12)(b), STATS. This hearing was a preliminary examination to determine whether the evidence would be admissible. Accordingly, we see no error in allowing the DNA evidence to be introduced at the remand hearing.

Whaley next argues that a jury rather than the judge should have determined whether the DNA or the PEP A test was more credible. Again, this would be true if this evidence was being admitted at a trial. The trial court determined, however, that the evidence was inadmissible. Hence, the credibility and weight determinations are left to the trial court to decide. Moreover, our remand order directed the trial court to make such a determination when we instructed it to decide this issue if the evidence was ambiguous. Although we agree with Whaley that the trial court apparently confused certain facts when reviewing the evidence, our review of the record leads us to conclude that the trial court reached the right result. Accordingly, we affirm. ***State v. Patricia A.M.***, 176 Wis.2d 542, 549, 500 N.W.2d 289, 292 (1993); *see also* ***State v. Holt***, 128 Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) (if a trial court reaches the proper result but for the wrong reason, it will be affirmed).

Our review shows that at best, the evidence as to whether Whaley was excluded was ambiguous. The PEP A test seemingly excluded him and the DNA test included him as Tameka's assailant. Given these apparently conflicting tests, it was necessary to review all the evidence to determine whether Whaley should be granted a new trial. Because the trial court's analysis in this regard is somewhat muddled, we search the record in order to determine whether the trial court's determination should be affirmed. ***Prahl***, 142 Wis.2d at 667, 420 N.W.2d at 376.

Our review demonstrates that the DNA evidence includes Whaley to a great statistical probability. The PEP A test, on the other hand, only *absolutely* excludes him if one assumes that no other bodily fluids contaminated Tameka's underwear. Given these facts, together with the other strong evidence introduced at trial to show Whaley's guilt regarding the other crimes for which he was convicted, we agree that the proper result was to deny his request for a

new trial and reinstate the verdict.

Whaley's last contention is that allowing the DNA evidence to be introduced at the hearing without the proper witnesses denied him his constitutional rights to confront his accusers and of due process. We reject this argument. This evidence was not introduced at a trial to prove Whaley's guilt. It was presented at a preliminary hearing to determine whether certain evidence was admissible. Under these circumstances, we see no reason to conclude that Whaley's constitutional rights were violated. *See* ***Matlock***, 415 U.S. at 172-73 (defendant does not have a right to confront his accusers at a preliminary admissibility hearing). He did have the opportunity to cross-examine the expert witness who rendered opinions based on the DNA report. Given the nature of the proceeding, this was sufficient to satisfy his rights.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). This appeal presents two separate issues: (1) whether Whaley is entitled to a new trial because the serological evidence from the state crime laboratory excludes him as the assailant of a victim whose assaults originally were alleged to have been committed by the perpetrator of the assaults for which Whaley was convicted; and (2) whether additional serological evidence, produced as the result of DNA testing of a blood sample drawn by order of the trial court following this court's remand, also would be admissible at Whaley's re-trial.

We addressed and resolved the first issue in our decision on Whaley's first appeal. We held, "If the evidence [excludes Whaley as Tameka's assailant], Whaley is entitled to a new trial and admission of the evidence." ***State v. Whaley***, Nos. 93-2700-CR & 93-2701-CR, unpublished summary op. at 5 (Wis. Ct. App. Aug. 3, 1994). At the evidentiary hearing following remand, Raymond E. Menard, the former Wisconsin State Crime Laboratory biologist who had conducted the tests at issue, testified unequivocally that the serological evidence excluded Whaley as Tameka's assailant.[1] Thus, consistent with our earlier decision, Whaley is entitled to a new trial with admission of this serological evidence.

The fact that the trial court, on remand, ordered additional blood testing of Whaley does not alter the analysis. As correctly quoted by the majority, the concluding paragraph of our previous decision referred to "*the* serological evidence" once and "*the* evidence" five times. Majority slip op. at 3 (emphasis added). Without question, we were concerned with the only serological evidence then in existence or at issue in the case—*the* evidence from the state crime laboratory.

Whether the trial court had authority to order additional testing, and whether those test results are admissible at Whaley's retrial, present separate issues on which the State has offered the stronger arguments. Thus, in

[1] The State argues that Menard's testimony was not unequivocal. The record refutes the State's argument.

a second trial, a jury should have the opportunity to search for the truth, evaluating what now emerge as two contradictory lines of serological evidence.[2]

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[2] As was true when we first evaluated Whaley's appeal and reversed, the trial court's confusion complicates the analysis of this case. As the State concedes:

> Defendant correctly points out that the trial court failed to enter detailed findings or conclusions either with regard to the admissibility of the forensic evidence, including the serology evidence, or with regard to whether defendant should be granted a new trial.
>
> Moreover, the trial court appears to have confused the possibility of *contamination* of the PEP A enzyme test of the panties (from foreign or unknown bodily fluids), which cannot be excluded, and the possible "degradation" of the material on the vaginal swab for purposes of serology testing. As defendant correctly states, Menard explicitly denied that "degradation" of the sample could account for the presence of foreign bands on the PEP A test of the panties.
>
> Nor, assuming that the evidence of defendant's exclusion as a whole was ambiguous, did the trial court explain in detail its reasoning for denying a new trial. Instead, the trial court apparently let Menard's testimony and the documentary forensic report stand as the basis for its decision, without substantial commentary.

(Citations omitted; emphasis in State's brief.)

The majority acknowledges the deficiences in the trial court's analysis of this case on remand, stating that it "agree[s] with Whaley that the trial court apparently confused certain facts when reviewing the evidence," *see* majority slip op. at 10, and that "the trial court's analysis in this

(..continued)
regard is somewhat muddled."