COURT OF APPEALS DECISION DATED AND RELEASED

May 6, 1997

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

NOTICE

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No. 96-0683-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY M. REYNOLDS, A/K/A ANTHONI M. REYNOLDS,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Anthony M. Reynolds appeals from a judgment entered after a jury found him guilty of five counts of armed robbery, two counts of robbery, and one count each of first-degree recklessly endangering safety, false imprisonment, and first-degree reckless injury, contrary to §§ 943.32(1)(a)&(2), 943.32(1)(a), 941.30(1), 940.30 and 949.23(1), STATS. He also appeals from an

order denying his postconviction motions seeking a new trial and sentence modification. He claims that the trial court erred when it: (1) denied his motion to suppress evidence seized during the search of the residence where he was arrested; (2) denied his motion to suppress a statement made to the police; (3) denied his motion to suppress the lineup identifications; (4) refused to order the State to disclose the identity of the confidential informant; (5) denied his motion to sever one charge from the others; (6) admitted identifications from two victims despite comments made in their presence at the preliminary hearing; (7) refused to allow Reynolds to call expert witnesses for the purposes of voice identification and eyewitness identification; (8) denied his request for an adjournment for the purpose of obtaining a blood expert; and (9) declined to issue a bench warrant for witness Juanita Hamilton. He also claims that he received ineffective assistance of trial counsel, that the trial court violated his right to be present at the trial and imposed an unduly harsh sentence. Because we resolve each contention in favor of upholding the judgment and order, we affirm.

I. BACKGROUND

On May 5, 1993, at about 10 a.m., Dwight Oberleitner was at a Walgreens store on North Hopkins Street in Milwaukee. An individual, later identified as Reynolds, approached Oberleitner and asked him for a ride. Oberleitner agreed and, after driving a distance, Reynolds told Oberleitner to drive into an alley. Reynolds pointed a gun at Oberleitner's head and threatened to kill him. Reynolds took his money and keys and ran off. Reynolds was charged with armed robbery arising out of this incident.

On May 15, 1993, at about 5:30 or 6 p.m., Michael Reed, while at a liquor store on West Hampton Avenue in Milwaukee, was approached by an

individual later identified as Reynolds. Reynolds told Reed he needed a jump-start and a ride. Reed agreed to help and they drove some distance until Reynolds directed him to pull into an alley. Reynolds struck Reed with an object, threatened to kill him and demanded money. A struggle ensued. Reynolds grabbed Reed's wallet and fled. Reynolds was charged with armed robbery arising out of this incident.

On May 16, 1993, Ron Collison was walking along the 2400 block of West Wisconsin Avenue towards his parked car. He was approached by an individual later identified as Reynolds indicating that he needed a jump-start for his car which was parked several blocks away. Collison agreed to help. As they were driving, Reynolds directed Collison to pull into an alley. A struggle ensued and Reynolds threatened to beat Collison if he refused to give him money. Collison turned his money over. Reynolds was charged with robbery arising out of this incident.

On May 26, 1993, at about 8 a.m., Thomas Kaczmarek, while at a gas station on North 35th Street in Milwaukee, was approached by an individual later identified as Reynolds. Reynolds offered him $5 for a jump-start. Kaczmarek accepted and both got into Kaczmarek's car to drive to Reynolds's car. As they were driving, Reynolds directed Kaczmarek into an alley and they stopped near a parked car. A struggle ensued, Reynolds cut Kaczmarek's cheek, arm and wrist, grabbed his wallet and took off. Reynolds was charged with armed robbery and first-degree recklessly endangering safety arising out of this incident.

On May 26, 1993, between 8:30 and 9 a.m., Everett Fox, while sitting in his car at 25th and Vine Streets in Milwaukee, was approached by an individual later identified as Reynolds. Reynolds opened Fox's car door and said

he wanted money. Reynolds took Fox's wallet and keys and ran. Reynolds was charged with robbery arising out of this incident.

On May 26, 1993, at about 9:15 p.m., Paul Meier was in his car at 7th Street and Wisconsin Avenue in Milwaukee. He was approached by an individual, later identified as Reynolds, who said he was having car trouble and asked for a ride. Meier agreed and they began driving. Reynolds directed Meier to pull into an alley where he pulled a knife and demanded that Meier give him money. Meier gave him his wallet. When Reynolds saw a TYME card in the wallet, he directed Meier to drive to Capitol Court shopping center several miles away. He told Meier to withdraw $300 from the cash machine. Reynolds took the money, took Meier's car keys and fled. Reynolds was charged with armed robbery and false imprisonment arising out of this incident.

On May 27, 1993, sometime after 2 p.m., Francis Odya was at a credit union in the 3500 block of North 26th Street in Milwaukee. Odya was approached by an individual, later identified as Reynolds, who told Odya he needed a jump-start. Odya agreed to help and drove his car to where Reynolds directed. A struggle ensued. Reynolds pulled a knife on Odya and caused numerous cuts which later required surgery. Reynolds took Odya's wallet and left. Reynolds was charged with armed robbery and first-degree reckless injury arising out of this incident.

The case was tried to a jury which convicted Reynolds on all counts. Judgment was entered. Reynolds filed postconviction motions, which were denied without a hearing. He now appeals.

II. DISCUSSION

A. Search

Reynolds claims the trial court erred in denying his motion to suppress evidence discovered during the search of the apartment where he was arrested. Reynolds was arrested on May 27, 1993, at 3205 North 20th Street in Milwaukee, at the residence of Sally Hamilton. The police arrived at the apartment, knocked, and announced their presence. When no one answered the door, they forced the door open. They discovered Reynolds hiding in a closet under some laundry. They asked Hamilton whether they could search the apartment and she consented. The trial court determined that the search was consensual and, therefore, the evidence need not be suppressed. Reynolds claims that the consent to search was not given freely and voluntarily.

Our review of a denial of a suppression motion is as follows. We will uphold the trial court's findings of fact unless they are clearly erroneous, but whether those facts satisfy the constitutional requirement of reasonableness is a question of law that we review independently. ***State v. Jackson***, 147 Wis.2d 824, 829, 434 N.W.2d 386, 388 (1989). Moreover, whether consent to search was given and whether it was given voluntarily are questions of fact. ***State v. Garcia***, 195 Wis.2d 68, 73, 535 N.W.2d 124, 127 (Ct. App. 1995); ***State v. Rodgers***, 119 Wis.2d 102, 111, 349 N.W.2d 453, 457 (1984).

In reviewing the record, we conclude that the trial court's findings that Hamilton voluntarily consented to the search are not clearly erroneous. Hamilton testified at the suppression hearing that although she was under the influence of cocaine at the time, that did not influence her ability to consent to a search of her apartment. She indicated that she was not afraid of being arrested if she did not cooperate and that the police advised her that she had a right not to

consent to the search. She testified that she gave the police permission to search and that the police did not threaten her to obtain permission. She also said that she helped the police by pointing out certain items that she knew were Reynolds's, including his keys, glasses, a black bag, pants and the bloody T-shirt. This testimony supports the trial court's findings that consent was given voluntarily.

We further conclude that, based on these facts, the search was not unconstitutional and, therefore, the trial court did not err in denying Reynolds's suppression motion.

B. Statement

Reynolds next argues that the trial court erred in denying his motion to suppress the statement he made to the police. The trial court denied the motion, ruling that the statement was "an unsolicited statement," that it was not the subject of ***Miranda*** and, therefore, there was no reason to suppress the statement. Reynolds does not contend that the statement was not volunteered. Rather, he claims the police officer should have re-read Reynolds his rights a second time to make sure he still understood that any statement could be used against him. We are not persuaded.

Because this issue also involves the review of a trial court's denial of a suppression motion, our review is the same as referenced above. The record demonstrates that Reynolds was questioned by the police at about 10:25 a.m. on May 28, 1993. Prior to questioning, Reynolds was advised of his ***Miranda*** rights. Reynolds said he understood those rights and answered questions until he said he was tired and wanted to sleep. At this point the police officer terminated the interview and walked Reynolds to the elevator. While they were waiting for the elevator, Reynolds said: "You know it's over for me. I did a couple of those

robberies but I can't tell you which ones." The police officer testified that the statement did not come in response to a question, but "was a completely voluntary, unsolicited statement." The trial court found that the statement was volunteered, and that there was no evidence of any police questioning after the interview had terminated. These findings are not clearly erroneous as they are supported by the police officer's testimony. Based on these findings, we conclude that the trial court did not err in denying Reynolds's suppression motion.

There is no merit to Reynolds's contention that his volunteered statement under these circumstances required additional ***Miranda*** warnings. It is not necessary to repeatedly recite ***Miranda*** warnings during an investigation of the same person for the same crime. ***State v. Jones***, 192 Wis.2d 78, 99, 532 N.W.2d 79, 87 (1995). Reynolds was properly advised of his rights. He chose to volunteer this statement. It was properly admitted.

C. Lineup

Next, Reynolds claims that the trial court erred in denying his motion to suppress evidence from the lineup. Reynolds argues that the lineup was unduly suggestive because his physical characteristics were not similar to those of the other participants and that his uncooperative conduct made him stand out. The trial court found that the physical characteristics of the lineup participants were so similar they could have passed as brothers.

Again, because this issue involves the review of a denial of a suppression motion, we apply the same standard of review enunciated above. After reviewing the lineup photos, we agree with the trial court. The lineup participants are physically similar in stature, weight, complexion, age and general appearance. Each participant had similar facial hair. There is no merit to

Reynolds's claim that the physical appearance of the participants caused the lineup to be unduly suggestive.

Reynolds also claims that the lineup was unduly suggestive based on his own uncooperative conduct. He kicked off his shoes and, therefore, was the only participant in bare feet. He contorted his fact and spoke different words than those required of the participants for the voice identifications. Based on this behavior, he argues that the lineup should have been delayed and he should have been provided an attorney. There is no requirement that the police take either step.

Reynolds bears the initial burden of establishing that the identification process was impermissibly suggestive, both as to degree of suggestiveness and the ease with which it could have been avoided. ***Simos v. State***, 83 Wis.2d 251, 256, 265 N.W.2d 278, 280 (1978). Reynolds has not satisfied this burden. Reynolds's own conduct caused the problems. There were sixteen witnesses viewing the lineup. Despite his conduct, only four of the sixteen witnesses positively identified him. Based on the foregoing, we conclude that the lineup was not unduly suggestive.

D. Informant's Identity

Next, Reynolds claims that the trial court erred in refusing to disclose the identity of the police informant who identified Reynolds as the suspect and provided police with his location. The trial court conducted an *in camera* review to determine whether the informant's testimony would be necessary for a fair trial. It heard testimony of the police lieutenant who received the tip and concluded the informant need not be produced.

Whether an informant should be disclosed and/or produced for testimony is a matter left to the discretion of the trial court, and we will not overturn the trial court's decision absent an erroneous exercise of discretion. ***State v. Outlaw***, 108 Wis.2d 112, 137, 321 N.W.2d 145, 158 (1982). The trial court found that there was nothing to suggest that the informant's testimony "may possibly be necessary to a fair trial or make the identification of defendant Reynolds as the person at the scene of the May 27, 1994 robbery and assault more or less probable."

According to the record, the confidential informant would have testified as follows:

> On Thursday, May 27, 1993, approximately four hours after the robbery and slashing of Mr. Odya, [the police lieutenant] received a call from a known confidential informant who identified the suspect in those offenses as Anthony Reynolds. The CI provided [the lieutenant] with an address, with information about a black woman occupant of the premises, and the location of a bloody t-shirt that the suspect allegedly wore during the offense. [The lieutenant] stated that the CI did not indicate any information to suggest that he/she had personal knowledge of the May 27, 1993 transactions, and there is no reason for [the lieutenant] to believe that the CI had personal knowledge of the May 27, 1993 offense. [The lieutenant] indicated that he did not ask the CI any questions, nor did

> he do anything personally to follow up on any of this information. [The lieutenant] indicates, however, that he immediately passed the information that the CI had provided to him on to the detectives in the Robbery Unit.

Based on this record, we cannot say that the trial court erroneously exercised its discretion. The testimony provided by the lieutenant does not suggest that the confidential informant had any knowledge which would be necessary for Reynolds to receive a fair trial.

E. Motion to Sever

Next, Reynolds claims the trial court erred in denying his motion to sever one count from the remaining counts. Reynolds argues that the facts involving victim Fox are totally dissimilar from the other counts and, therefore, trying all of the counts together prejudiced him. We will not disturb the trial court's refusal to grant a motion for severance in the absence of a finding that it erroneously exercised its discretion. ***State v. Hall***, 103 Wis.2d 125, 140, 307 N.W.2d 289, 296 (1981).

The standards applicable to this issue were explained in ***State v. Locke***, 177 Wis.2d 590, 502 N.W.2d 891 (Ct. App. 1993). Our review involves a two-step process. First, we must determine whether the initial joinder was proper. ***Id.*** at 596, 502 N.W.2d at 894. This is a question of law. ***Id.***

Joinder is proper when two or more crimes "are of the same or similar character or are based on the same act or transaction." Section 971.12(1), STATS. Crimes are considered the same or similar in character if they are the same type of offense that occurred over a relatively short period of time and the evidence as to each overlaps. ***Locke***, 177 Wis.2d at 596, 502 N.W.2d at 894.

The second step involves reviewing whether properly joined crimes should be severed to avoid prejudice to the defendant. ***Id.*** at 597, 502 N.W.2d at 894. This decision is left to the discretion of the trial court. ***Id.*** The trial court must balance any prejudice to the defendant against the interests of the public in conducting a trial on the joined crimes. ***Id.*** We will uphold the trial court's discretionary determination "unless the defendant can establish that failure to sever the counts caused 'substantial prejudice.'" ***Id.*** (Citation omitted).

Reynolds argues that the Fox robbery should have been tried separately from the other charges because the crime involved a different *modus operandi*. The record demonstrates that the Fox robbery was not identical to the others. Nevertheless, it satisfied the requirements necessary for joinder. It was the same type of offense and it occurred during May 1993 in Milwaukee, just like all the other robberies. Further, it shared similar characteristics with several of the other charges in that the victim was attacked and robbed while in a car or truck, and the victim's keys and wallets were taken. We conclude initial joinder was proper.

We also conclude that the trial court did not erroneously exercise its discretion in refusing to sever this crime. The trial court found that Reynolds was not prejudiced by the joinder because the jury could distinguish between the various crimes charged and because the jury could be instructed that it must consider each crime separately. The record shows that a cautionary instruction was given. Under these circumstances, any potential prejudice was cured by the instruction. ***State v. Leach***, 124 Wis.2d 648, 673, 370 N.W.2d 240, 253 (1985). Accordingly, the trial court did not erroneously exercise its discretion in refusing to sever the Fox robbery from the others.

F. Identifications Admitted Despite Preliminary Exam Comments by Prosecutor

Reynolds next argues that because of comments made by the prosecutor in the presence of Kaczmarek and Collison at the preliminary hearing, their identifications should have been suppressed. Specifically, during Kaczmarek's testimony at the preliminary hearing, Reynolds indicated that he wanted to waive his right to a preliminary examination. When Kaczmarek asked what was happening, the prosecutor said "Actually, Mr. Kaczmarek, what's happening is that a very dangerous and very bad defendant has decided that rather than waste more of everybody's time, he is going to forego the rest of the hearing." The trial court did not accept the waiver, however, and then Kaczmarek identified Reynolds as the perpetrator. At another point during the hearing, Reynolds threatened Collison while he was testifying. The prosecutor said:

> If it becomes a difficulty, your Honor, the State will move to have this proceeding adjourned to a high security courtroom where the defendant can watch through a one-way mirror and listen over the loudspeaker. I do not [in]tend to allow witnesses to be humiliated or intimidated by a person who is going to spend the next 200 years in jail.

We need not address this argument, however, because Reynolds failed to object to either statement made by the prosecutor. Accordingly, he has waived his right to raise this issue on appeal. *See* ***State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991).

G. Expert Witnesses

Next, Reynolds argues that the trial court erred in excluding testimony from expert witnesses that he intended to offer on eyewitness and voice identification. The trial court had approved funding for these experts, but refused to let them testify because Reynolds failed to provide the court with sufficient

information from these experts to make a finding that their testimony would be admissible.

The decision to admit or exclude expert testimony is a discretionary one and will not be overturned on appeal as long as the trial court reached a rational conclusion based on the facts of record as applied to the pertinent law. ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). In ***Blair***, we provided the pertinent factors to examine in determining whether to admit expert testimony: (1) whether there are proper foundations for the expert's opinions; (2) whether the expert's testimony will overwhelm, confuse or mislead the jury; and (3) whether and to what extent the evidence is relevant to a disputed fact. ***Id.*** 164 Wis.2d at 78-79 n.9, 473 N.W.2d at 572-73 n.9.

The trial court reviewed the documents submitted by Reynolds's experts which described the testimony each intended to provide. The trial court analyzed the ***Blair*** factors in light of the documents submitted and concluded that the testimony should be excluded because neither document provided the court with sufficient evidence to find that the testimony would be admissible. We cannot say that the trial court erroneously exercised its discretion. It applied the ***Blair*** factors to the documents submitted and reached a reasonable conclusion.

H. Adjournment for Blood Expert

Next, Reynolds argues that the trial court erred in denying his motion for an adjournment so that he could obtain an expert to analyze the blood evidence in order to rebut the prosecution's blood expert who testified that the blood on Reynolds's T-shirt matched the blood of one of the victims. The trial court ruled that there was no prejudice to Reynolds in denying the motion because there is no evidence that his blood witness would have had any effect on the trial.

Whether to grant or deny a motion to adjourn is within the discretion of the trial court and we will not reverse the trial court decision absent an erroneous exercise of discretion. ***State v. Fink***, 195 Wis.2d 330, 338, 536 N.W.2d 401, 404 (Ct. App. 1995). We cannot conclude that the trial court's denial constituted an erroneous exercise of discretion because Reynolds has failed to show how the trial court's action prejudiced him. He did not introduce evidence indicating that the blood on the T-shirt did not match the blood of one of the victims or how his expert would rebut the evidence proffered by the State. Accordingly, he was not prejudiced by the trial court's failure to grant an adjournment and we have no basis to reverse the judgment on these grounds.[1]

I. Bench Warrant for Juanita Hamilton

Next, Reynolds claims the trial court denied him due process by refusing to order Juanita Hamilton to be produced on the last day of trial. He argues that the trial court should have issued a bench warrant to procure her presence. He also claims that his trial counsel provided ineffective assistance for failing to make sure Juanita was present to testify. Juanita was supposed to offer testimony that would rebut that of her daughter, Sally Hamilton, regarding the number of people with access to Sally's apartment where Reynolds was arrested.

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[1] Reynolds also argues that his trial counsel was ineffective for failing to procure a blood expert on a timely basis. The trial court determined that this conduct was not prejudicial because Reynolds failed to demonstrate how the blood expert would have had any impact on the outcome of the trial. We agree. Again, Reynolds has failed to show how this conduct was prejudicial and, therefore, we reject his claim. ***Strickland v. Washington***, 466 U.S. 668, 694 (1984) (to succeed on an ineffective assistance claim, defendant must show that counsel performed deficiently and that such conduct was prejudicial).

Reynolds, however, does not cite any authority to support either argument. Accordingly, we decline to address his undeveloped complaints. ***State v. Scherreiks***, 153 Wis.2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989).

J. Ineffective Assistance-Voir Dire

Next, Reynolds claims he received ineffective assistance of trial counsel because voir dire was not recorded. For a defendant to succeed on an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984) must be satisfied. A defendant must show that counsel's performance was deficient and prejudicial. ***State v. Bentley***, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996).

The decision to record voir dire, however, rests within the discretion of the trial court. SCR 71.01(1)(f). The record demonstrates that trial counsel did request that the voir dire be recorded and the trial court denied the request. Reynolds cannot demonstrate that his counsel's conduct was deficient because the request to record voir dire was made. Accordingly, there is no basis for Reynolds's complaint that he received ineffective assistance of trial counsel on these grounds.

K. Presence at Trial

Next, Reynolds claims that the record does not show that he waived his right to be present during portions of the trial. We reject this claim.

Reynolds repeatedly engaged in disruptive or disrespectful behavior. He also spontaneously left the court room. The trial court repeatedly informed him of his right to be present. Despite these repeated instructions, Reynolds continued to leave or engage in disruptive conduct. Accordingly, there is an

adequate record to show that he waived his right to be present. *See* ***State v. Dickson***, 53 Wis.2d 532, 546, 193 N.W.2d 17, 25 (1972) (right to be present at trial may be waived expressly or by conduct).

L. Unduly Harsh Sentence

Last, Reynolds claims that the sentence of 217 years in prison was unduly harsh. Sentencing is a matter left to the discretion of the trial court, ***State v. Glotz***, 122 Wis.2d 519, 524, 362 N.W.2d 179, 183 (Ct. App. 1984), and will not be disturbed unless there was an erroneous exercise of discretion. ***Id.*** Discretion is properly exercised if the trial court examined the three primary factors—(1) the gravity of the offense, (2) the character of the offender, and (3) the need to protect the public. ***Id.*** The record demonstrates that the trial court considered these factors in imposing sentence.

Further, we will not conclude that the trial court imposed an unduly harsh sentence unless it was "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975). Given the degree of harm Reynolds caused, and the multiple victims that were involved, we cannot say that the sentence imposed was unduly harsh.

By the Court.—Judgment and order affirmed.

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