

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 11, 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

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

No. 96-2455-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Thomas E. Richmond,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Thomas E. Richmond appeals from a judgment entered after a jury convicted him of carrying a concealed weapon, contrary to § 941.23, STATS. He also appeals from an order denying his postconviction motion. He claims the trial court erroneously exercised its discretion in handling questions posed by the jury during its deliberations. Because the trial court did not erroneously exercise its discretion in responding to the jury's questions, this court affirms.

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

I. BACKGROUND

On June 22, 1995, the police were summoned to Washington Park by the defendant's brother, Tyrone. The defendant, Tyrone and another brother, Jermaine, had agreed to meet at Washington Park to play basketball. After the brothers arrived at the park, Tyrone saw Terrell Thomas, with a gun. He became concerned because Terrell had threatened to shoot him (Tyrone) on a prior occasion. Tyrone, therefore, went to the police station to report what he observed. He then returned to the park with the police.

Tyrone told the police that Terrell was standing in a grassy area near the basketball court. Tyrone then ducked down in the police car to avoid being seen. Officer Brown said there were two individuals standing in the grassy area that Tyrone had pointed to. One was Terrell and the other was the defendant. Brown observed the defendant holding a tote bag. Two other police officers who responded to the scene also observed the defendant holding the tote bag. The officers found a weapon in the bag and arrested the defendant for carrying a concealed weapon.

At trial, the three police officers testified that each had observed the defendant actually holding the tote bag. The defendant did not testify, but both of his brothers did offer testimony. Tyrone testified that he did not see the defendant near Terrell and he did not see the defendant holding the tote bag. Jermaine testified that he did not see the defendant holding the tote bag.

The case was sent to the jury. The jury sent five questions to the trial court during the deliberations. The first asked: "Was Jermaine at the North Basket or South Basket of the West Court at the time the Police approached [the defendant]?" The second asked: "What did Officer Kutz [sic] say, 'I knew the gun was in the bag because of past experience and the bag was opened' or did [the defendant] give him the information before the officer got to the bag?" The third asked: "We are deadlocked. How long do we have to deliberate?" The fourth asked: "Because the police report was read by Officer Czvaca, is that evidence and can we get a copy [of] that evidence?" The last question asked: "Can we get a copy of the transcript of the trial".

The trial court responded to the first two questions with the following instruction to the jury:

With respect to each of these two notes I have the same answer; and my answer is: You must rely on your collective memory of what the testimony was during the trial in order to resolve any issues of fact which have to be resolved here.

The trial court responded to the remaining questions with the following instruction to the jury:

And what I have to tell you is, it's much too early to start thinking about being deadlocked. You took an oath to deliberate in good faith, to listen to the testimony, and deliberate in good faith. It's much too early to begin to think like that. You have to go back into the jury room and deliberate in good faith. You can't abandon opinions that you firmly stand by; on the other hand, you do have an obligation to listen to the other jurors in the case with an open mind and try to reach a verdict. That's your duty as jurors. That's what I'm going to direct you to do.

... The police report itself was not admitted into evidence, therefore, it is not evidence. You cannot get a copy of that. What the police officer said on the stand, his testimony, is evidence; and as I've already told you, you should rely on your collective recollections of what that testimony was.... There is no existing transcript. I don't have a transcript to give you of the trial.

The jury returned a guilty verdict. Judgment was entered. Richmond filed a postconviction motion alleging that the trial court erred in responding to the jury's questions. The trial court denied the motion. Richmond now appeals.

II. DISCUSSION

Richmond claims the trial court erroneously exercised its discretion with respect to the answers it provided to the questions posed by the jury during deliberations. This court rejects Richmond's claims.

The issue presented here is a matter within the trial court's discretion and this court will not reverse the judgment unless the trial court erroneously exercised its discretion. *Kohlhoff v. State*, 85 Wis.2d 148, 159, 270 N.W.2d 63, 68 (1978). If the record demonstrates that the trial court examined the relevant facts, applied the proper standard of law and used a rational process to reach a reasonable conclusion, this court will not reverse a discretionary determination. *State v. Haskins*, 139 Wis.2d 257, 268, 407 N.W.2d 309, 314 (Ct. App. 1987).

As a preliminary matter, this court notes that at trial Richmond objected only to the trial court's response to the first question—whether Jermaine was on the north basket or south basket at the time the police arrived. Because Richmond failed to object to any of the remaining questions, he has waived his right to challenge the trial court's response to these questions. *State v. Peters*, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991). Accordingly, this court addresses only the jury's first question and the answer that the trial court provided.

When the jury submitted the first question, the trial court conducted a conference with the attorneys. Richmond's attorney wanted the trial court to tell the jury that Jermaine had testified that he was on the north court. He argued that the testimony was undisputed. The prosecutor argued that the question should not be answered because the jury should be able to discern an answer based on their collective memory of the testimony. The trial court determined that the answer to this question was not undisputed and that some ambiguity existed in the record as to where exactly Jermaine was at the time the police arrived. Therefore, the trial court decided to instruct the jury to rely on its collective memory to reach a decision on that issue.

The transcript does reveal some ambiguity with respect to Jermaine's testimony regarding where he was located at the time the police arrived. Jermaine testified that when the police arrived, he *went back over to the other court on the northern end* and started playing basketball. (Emphasis added.) This testimony implies that he was not on the north court when the police arrived, but went over to the north court after the police arrived. The trial court also explained its reasons for not simply re-reading certain testimony in response to the jury's question. The trial court reasoned that the testimony would not provide a clear answer to the jury's question and it would have been difficult to select "one portion of the testimony as opposed to another portion of the testimony." The trial court was concerned that attempting to re-read testimony to the jury may mislead the jury.

The preferential procedure is to re-read testimony to a jury that poses questions regarding witnesses' testimony. See *Kohlhoff*, 85 Wis.2d at 159, 270 N.W.2d at 68. Under the circumstances present in this case, however, the trial court's response was not an erroneous exercise of discretion. The trial court reached a reasonable conclusion based on the relevant facts and relevant law. It decided to instruct the jury to rely on its collective memory to answer the question because the record did not contain a clear answer to the jury's question. This approach, although less desirable than simply re-reading the relevant portions of the testimony at issue, was not an erroneous exercise of discretion.

By the Court. – Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.