

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 31, 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.

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

No. 97-0302-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LEIGH A. PEDRETTI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. MCALPINE, Judge. *Affirmed.*

VERGERONT, J.¹ Leigh Pedretti appeals from a conviction for disorderly conduct contrary to § 947.01, STATS., criminal damage to property contrary to § 943.01(1), STATS., and possession of a controlled substance contrary to §§ 161.41(3r) and 161.50(1), STATS. Pedretti contends on appeal that the trial

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

court erroneously exercised its discretion in denying his request for a continuance of the trial on the ground that the transcript of the suppression hearing had not yet been prepared and provided him. He therefore requests a new trial. We conclude Pedretti has not shown that he was actually prejudiced by the unavailability of the transcript, and we affirm.

BACKGROUND

The charges arose out of an incident that occurred in the early morning hours just after Pedretti had left a bar. There was a dispute outside the bar between two friends of Pedretti, which attracted a crowd. Police officers arrived and attempted to disperse the crowd. Pedretti's interaction with one of the officers led to his arrest for disorderly conduct. After Pedretti was handcuffed and put in a police car, he kicked out the window of the car, which led to the charge of criminal damage to property. A search of his person incident to the arrest turned up a quantity of THC (marijuana), which led to the possession charge.

Pedretti filed a motion to dismiss and, in the alternative, to suppress evidence on the ground of unlawful arrest. At the hearing on January 17, 1996, three officers testified: James Quinn, Fritz Degner and Wendy Howland. Their testimony related to the circumstances leading to Pedretti's arrest for disorderly conduct and did not cover events after that point in time. The trial court denied the motion to dismiss and to suppress, concluding that the arrest was lawful.

Defense counsel requested a copy of the transcript of the hearing from the court reporter on or about the date of the hearing and several times between that date and the date of trial, scheduled for April 17, 1996. He contacted the court reporter again on April 15, and was told she hoped to complete it that day and fax it to him. Defense counsel did not receive the transcript before trial or

hear from the court reporter again, although he made additional attempts to contact her.

On April 17, 1996, just before the trial was to start, Pedretti, through counsel, requested a continuance because he had not yet received the transcript. Counsel advised the court that he did not make complete notes of the January 17 hearing because he had expected to have the transcript, and he believed there were inconsistencies and credibility issues that necessitated that he have the transcript to compare that testimony with the officers' trial testimony. The trial court denied the motion for a continuance. While it was mindful that a transcript could assist both sides—the defense in cross-examination and the prosecution in refreshing witnesses' memories—the court concluded that the unavailability of the transcript was not going to prevent an appropriate cross-examination of the officers. The court stated it would make an effort to contact the court reporter to see if even a partial transcript was available, but apparently that effort was not successful.

The trial proceeded on April 17, 1996, and on the next day the jury returned verdicts of guilty on all three charges.

DISCUSSION

On appeal, Pedretti contends that the trial court erroneously exercised its discretion in denying his motion for a continuance because the court reporter's failure to complete the transcript before trial was an "unforeseeable surprise," and the transcript was necessary to test the accuracy of the officers' trial testimony and point out any discrepancies among the testimony of the three and between the trial testimony of each and the hearing testimony of each. Pedretti contends that he was prejudiced by the denial of a continuance because there were, in fact, discrepancies.

A motion for a continuance is directed to the discretion of the trial court, and we will not reverse a denial of the motion unless the trial court erroneously exercised its discretion. *Angus v. State*, 76 Wis.2d 191, 195, 251 N.W.2d 28, 31 (1977). When a party claims that he or she is entitled to a continuance because of surprise, we will not find the denial of a continuance to be an erroneous exercise of discretion unless: (1) there was actual surprise; (2) where the surprise is caused by unexpected testimony, the party who sought the continuance shows that impeaching or contradictory evidence could probably be obtained within a reasonable time; and (3) the denial of the continuance was, in fact, prejudicial. *Id.* at 196, 251 N.W.2d at 31-32.

Translating the first two criteria into ones appropriate for the facts of this case, we assume for purposes of this decision that Pedretti has shown that he and his trial counsel were surprised by the unavailability of the transcript in that they made efforts to obtain it before trial and believed it would be available before trial, and that he has shown that the transcript would probably be available within a reasonable period of time. However, we conclude that Pedretti has not shown that he was actually prejudiced by the unavailability of the transcript.

Although Pedretti does not expressly say so, his argument on prejudice goes only to the disorderly conduct charge since the testimony at the January 17 hearing did not pertain to the other two charges. Pedretti points to discrepancies between the January 17 testimony and the trial testimony of the officers, and among the testimony of the officers, which, he claims, his counsel was not able to explore on cross-examination without the transcript. We first recount the inconsistencies that Pedretti refers to and then discuss their significance.

Sergeant Quinn testified on January 17 that Officer Howland gave Pedretti a little push to keep him from coming where Quinn was located; he testified that he saw only John Finco touch Officer Howland; and he testified that Finco had some kind of contact with Officer Howland, but he was not sure if it was a strike or what kind of contact it was. At trial, Sergeant Quinn testified that Officer Howland pushed Pedretti to get him to move down the street; Pedretti pushed back; and Howland then pushed Pedretti with more force so that Pedretti lost his balance. Quinn also testified that John Fennigkoh² grabbed Officer Howland by the shoulder and, and after subduing Fennigkoh, Sergeant Quinn ordered Officer Howland to arrest Pedretti for disorderly conduct.

Officer Degner testified on January 17 that Howland pushed Pedretti and all Pedretti did in response was “kind of pushed his chest up to him, like I’m not going to move and kind of stepped back towards Officer Howland.” Apparently Pedretti considers this to be inconsistent with Sergeant Quinn’s testimony on both January 17 and at trial that Pedretti “pushed” Officer Howland. Pedretti also points out that on January 17 Officer Degner testified that John Finco *tried* to grab Officer Howland and gives no indication that any contact was made, whereas at trial the officer testified that John Fennigkoh *grabbed* Officer Howland’s shoulder.

Officer Howland testified on January 17 that he was attempting to get Pedretti to leave the area, Pedretti refused to do so, and he pushed Pedretti to get him to leave, but he does not say that Pedretti touched him. At trial Officer Howland testified that, after he pushed Pedretti the second time to get him to move

² It appears that John Finco and John Fennigkoh are the same person.

on, Pedretti pushed him back. Also, at the January 17 hearing, Officer Howland testified that when he tried to get Pedretti to move, Pedretti made such statements as “he had every right to be there,” Officer Howland “couldn’t make him move,” and “there were witnesses down there that can see [Officer Howland] was violating his rights.” However, at trial Officer Howland testified that after he pushed Pedretti to get him to move, Pedretti said, “If you do that again, I’m going to knock you on your ass.” And, when asked the actual words Pedretti used, Officer Howland answered: “‘Fucking pigs,’ just words indicating the fact, number one, he had no respect for the police or what we were trying to do and, number two, he felt that we were overbearing, militant, trying to be all controlling.”

Viewing these discrepancies in the context of all the testimony at trial, we are persuaded that they would not have altered the jury’s verdict. The officers’ testimony at trial and at the January 17 hearing was consistent on the significant facts: Sergeant Quinn attempted to get the crowd to disperse. He recognized Pedretti as one of the crowd and heard Pedretti shout an obscenity, as did Officer Degner, who arrived shortly after Sergeant Quinn. Officer Howland, who arrived shortly after Officer Degner, asked Pedretti to move on; Pedretti refused and verbally challenged Officer Howland; Officer Howland had to push him; Pedretti still refused to move. The testimony differed, among the three officers at the January 17 hearing and between the testimony of each at trial, on certain points, such as whether Officer Howland pushed Pedretti once or twice; whether Pedretti initiated physical contact with Howland; and whether Pedretti said “fucking cops” or “fucking pigs” or other words indicating resistance and disrespect. On cross-examination at trial, defense counsel brought out discrepancies between the trial testimony and the officers’ reports and between the

testimony of each of the officers, including some of the same discrepancies that Pedretti argues were revealed by the transcript. However, none of the discrepancies brought out at trial, just as none of the discrepancies the transcript reveals, brings into question the officers' ability to recall the events or the honesty of their efforts to do so. The essential events that were the basis for the conviction on the disorderly conduct charge were not disputed at trial and the transcript does not create any significant dispute. Accordingly, Pedretti has not shown that the unavailability of the transcript prejudiced him.

By the Court.—Judgment affirmed.

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

