COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1171-CR **Cir. Ct. No. 2013CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM JOHNATHAN WILKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: THOMAS J. VALE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten, and Blanchard, JJ.

¶1 PER CURIAM. William Jonathan Wilke appeals a judgment of conviction for burglary, robbery with threat of force, and possession of narcotic drugs, all as a repeater. Wilke contends that he was entitled to a mistrial based on the following violations of a pretrial order: (1) the circuit court read the repeater

allegation in the information to all of the prospective jurors at the outset of voir dire; (2) a State's witness testified to Wilke's drug use; and (3) an exhibit displayed to the jury on a large screen revealed that Wilke had a prior felony case. For the reasons set forth below, we conclude that the circuit court properly exercised its discretion by denying Wilke's motions for a mistrial. We affirm.

¶2 In September 2013, Wilke was charged with burglary, robbery with threat of force, and possession of narcotic drugs, all as a party to a crime and as a repeater. The court issued a pretrial order prohibiting witness testimony as to Wilke's prior convictions, and limiting witness testimony as to Wilke's illegal drug use to the month prior to and the month after the charged offenses on April 1, 2011.

¶3 On the first day of trial, during jury voir dire, the circuit court read the allegations in the information to the potential jurors. The court read each of Wilke's charges to the potential jurors, including that each of the three counts charged Wilke as "repeater" and alleged that Wilke committed each offense "as a habitual offender."

¶4 Defense counsel moved for a mistrial, citing ***Mulkovich v. State***, 73 Wis. 2d 464, 243 N.W.2d 198 (1976). He argued that Wilke was prejudiced because the potential jurors were informed that he had prior convictions, when the convictions would otherwise never have been revealed. The circuit court found that a mistrial was not warranted. The court explained that it would instruct the impaneled jury that any information provided to the jury before it was impaneled is not evidence.

¶5 On the second day of trial, the State presented testimony by Wilke's co-actor, Samuel Schutte. The State asked Schutte if he had been acquainted with

Wilke prior to March 2011. Schutte responded: "I had hung out with him a few times prior to that throughout the years." The State asked Schutte how he was acquainted with Wilke, and Schutte responded: "Mostly through, through just doing drugs or, or drinking."

¶6 Defense counsel objected and asked to be heard outside the presence of the jury. Counsel argued that Schutte's testimony that Schutte knew Wilke prior to March 2011 through doing drugs was contrary to the court's pretrial order limiting any reference to Wilke's drug use to the month prior to and the month after the charged offenses on April 1, 2011. He argued that the testimony was extremely prejudicial to the defense, and moved for a mistrial. The court found that the testimony as to Wilke's drug use prior to March 1, 2011, was not sufficiently prejudicial to warrant a mistrial. The court directed the jury to disregard Schutte's answer to the question as to how Schutte was acquainted with Wilke.

¶7 On the third day of trial, the State displayed an exhibit on a large screen in front of the jury. After the exhibit had been displayed for a short time, defense counsel asked to be heard outside the presence of the jury. Counsel argued that the exhibit revealed that Wilke had appeared in court in a criminal case, contrary to the court's pretrial order. Counsel stated: "I don't know from this perspective over here how well they could have seen it unless they've got pretty good eyesight, but nonetheless, I think … putting it on the screen violates the [pretrial order]."

¶8 The court noted that the exhibit was a map with bullet points on the left side, and that one of the bullet points stated: "According to the Wisconsin Court System, Circuit Court Access, William Wilke appeared in the Dane County

Court for Case No. 2011CF000309 on 31 March 2011." The court stated: "[I]t is relatively small print. The Court is having a little trouble reading it even from this distance. I am closer to the screen than the jury. [Defense counsel] noted the objection pretty quickly, and we removed the jury from here. I doubt they had time to read that." Defense counsel argued there was a potential for strong prejudice from the exhibit being shown to the jury. Counsel objected to further display of the exhibit unless the objectionable language could be excised. The State offered to resize the image so that the offending language would not be shown to the jury. The defense agreed to that process.

¶9 Wilke contends first that the circuit court's error in reading the repeater allegations warranted a mistrial under ***Mulkovich***. He cites ***Mulkovich***'s holding that "the trial Judge's error in reading the repeater charge to the jury was prejudicial and a mistrial should have been granted at the time the motion was timely made by defendant's counsel." *See* ***Mulkovich***, 73 Wis. 2d at 473. He contends that, here, the court's six references to the repeater allegations in its reading of the information to the jury—by reading the "repeater" and "habitual offender" language as to each of the three charges—was prejudicial and notes that the defense timely moved for a mistrial. Wilke argues that, while the circuit court in ***Mulkovich*** read the repeater allegations in the information to the impaneled jury, the rationale in ***Mulkovich*** applies equally to the situation here, where the repeater allegations were revealed to all of the potential jurors at voir dire. He cites language in ***Mulkovich***, 73 Wis. 2d at 471, which relied on ***Wells v. State***, 40 Wis. 2d 724, 732, 162 N.W.2d 634 (1968), for the proposition that "'comment by the state on voir dire [as to repeater allegations], either by way of statement or by way of reading the entire information, was prejudicial.'" Thus, according to Wilke, ***Mulkovich*** stands for the proposition that a court's reading of the entire

information, including the repeater allegations, to the prospective jurors during voir dire requires a court to grant a timely motion for mistrial by the defense.

¶10 The State responds that ***Mulkovich*** does not stand for the proposition that a court must automatically grant a defense motion for a mistrial when repeater allegations are read to potential jurors. Further, the State argues that, here, mistrial was not warranted in light of the fact that the court allowed testimony that Wilke was involved in illegal drug activities for the month before and after the date of the charged offenses. The State also distinguishes ***Mulkovich*** on grounds that, in ***Mulkovich***, 73 Wis. 2d at 468, the court read to the jury not only that the State charged Mulkovich as a repeater, but also that Mulkovich had been convicted of a felony in the preceding five years, and more specifically, that he had been convicted of forgery in that time period. The State also distinguishes ***Mulkovich*** on the basis that, there, the court read the entire information to the impaneled jury, while here, the court read the entire information to the prospective jurors, and then properly instructed the impaneled jury.

¶11 The State then argues that the reasoning in ***State v. Knighten***, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997), applies here. Knighten moved for a mistrial when, during voir dire, a prospective juror stated in front of the other prospective jurors that she had seen Knighten in shackles, and asked why Knighten was in custody if he was presumed innocent. ***Id.*** at 842-44. The court denied the motion, finding that the court's cautionary instruction to the jury that Knighten's custodial status had no bearing on his guilt and the jurors' assurances they would follow the instruction were sufficient to cure the error. ***Id.*** at 844. We upheld the court's exercise of discretion, stating that "[w]e assume a jury follows all of the instructions that it receives." ***Id.*** at 845. The State asserts that here, as in

Knighten, the court's instructions to the jury were sufficient to cure the error and were presumably followed by the jury.

¶12 We conclude that the circuit court properly exercised its discretion by denying the defense motion for a mistrial. "Whether to grant a mistrial is a decision that lies within the sound discretion of the circuit court." ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The court must determine whether, in light of the proceedings as a whole, the claimed error is sufficiently prejudicial to warrant a new trial. ***Id.*** "Not all errors warrant a mistrial; 'the law prefers less drastic alternatives, if available and practical.'" ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) (quoted source omitted). Further, the potential prejudice to the defendant from an error at trial is presumptively erased when the circuit court gives a proper admonitory instruction. ***Id.***

¶13 Here, the circuit court admittedly erred by informing the prospective jurors during voir dire that Wilke was charged as a "repeater" and was alleged to have committed the charged acts as a "habitual offender" as to each of his three charges. However, the court did not, as in ***Mulkovich***, state that Wilke had been previously convicted of a felony or that Wilke had been convicted of a specific crime.[1] Additionally, the court did not define the terms "repeater" or "habitual offender" for the prospective jurors. Indeed, as posited by the State, the jury may just as well have interpreted the undefined "repeater" and "habitual offender"

[1] For purposes of this opinion, we need not resolve the dispute between the parties as to whether ***Mulkovich v. State***, 73 Wis. 2d 464, 243 N.W.2d 198 (1976), is distinguishable on grounds that, there, the jury had been impaneled when it was informed as to the repeater allegations.

allegations as flowing from the fact that Wilke was charged with three separate offenses in this case.

¶14 In exercising its discretion to deny the mistrial motion, the court determined that, rather than grant a mistrial, it would instruct the jury that evidence is limited to what is presented at trial and that anything stated during voir dire is not evidence. The court ultimately instructed the jury that the evidence was limited to what was presented during the trial and that the jurors were not to consider anything from before trial began. The court also instructed the jury that statements, comments, or questions by the court, counsel, or prospective jurors during voir dire were not evidence and should not be considered by the jurors in any way. The court read the charges in the information to the jury twice, at the outset of trial and after closing arguments, both times without the "repeater" and "habitual offender" language. The court instructed the jury in closing instructions to consider only the evidence presented during trial, that evidence was only the testimony of sworn witnesses, exhibits received by the court, and facts stipulated by the parties, and that the information is an accusation only and should not be considered as evidence in any way. We presume jurors follow a circuit court's instructions at trial. ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998).

¶15 We also conclude that ***Mulkovich*** does not compel a different result. In ***Mulkovich***, 73 Wis. 2d at 468, the circuit court read to the impaneled jury the charge in the information that Mulkovich "was convicted of a felony during the five (5) year period immediately preceding the commission of the crime" for which he was on trial, that "Mulkovich was convicted of the crime of Forgery," and that "Mulkovich is a Repeater." The defense moved for a mistrial. ***Id.*** at 469. The circuit court acknowledged that it was error to read the repeater charge to the

jury, but found the error was not prejudicial. ***Id.*** at 469-70. The court determined that, rather than grant a mistrial, the court would admonish the jury that the information contained charges only, subject to proof at trial. ***Id.*** at 470.

¶16 The supreme court reversed the circuit court's decision to deny the motion for a mistrial. ***Id.*** at 467-68. The court concluded that it was prejudicial error to read to the jury the allegation that Mulkovich was a repeater and had been previously convicted of a felony. ***Id.*** at 467. It held that "a defendant charged under a repeater statute has the right to have all evidence of any prior conviction kept from the jury trying the instant offense. Prejudicial error is committed when such information is given to the jury." ***Id.*** at 468 (citation omitted). The court also held that the circuit court's admonitions to the jury that the information contained charges only, subject to proof at trial, did not cure the error. ***Id.*** at 470. It explained: "Clearly the cat was out of the bag, and the general admonitions of reaching a verdict in conformance with the proof was irrelevant to the judge's assertion that the defendant had committed one or more felonies in the past." ***Id.*** Thus, the court held that the "error in reading the repeater charge to the jury was prejudicial and a mistrial should have been granted at the time the motion was timely made by defendant's counsel." ***Id.*** at 473.

¶17 Here, in contrast to ***Mulkovich***, the circuit court did not inform the jurors that Wilke had been convicted of a felony or that Wilke had previously been convicted of any specific crime. Rather, the court stated that Wilke was charged as a "repeater," and that the State alleged that Wilke committed criminal acts as a "habitual offender," as to each of the three charges. ***Mulkovich*** does not dictate that a circuit court must grant a defense motion for a mistrial any time when, as here, the circuit court reveals to the jurors that the defendant is charged as a repeater. Instead, the ***Mulkovich*** court held that the circuit court's error in that

case—informing the jury that Mulkovich was charged as a repeater on the basis that he had a prior felony conviction of forgery in the preceding five year period—was sufficiently prejudicial to require a mistrial. As explained above, the facts in this case supported the court's exercise of discretion in denying the defense motion for a mistrial.

¶18 Wilke also contends that the subsequent two violations of the circuit court's pretrial order during trial exacerbated the error of reading the repeater charges to the prospective jurors. He contends that, together, the three errors—reading the repeater charges to the prospective jurors, testimony by Schutte that Wilke had engaged in drug use prior to March 2011, and displaying that Wilke had appeared in another criminal case on a screen in front of the jury—deprived him of a fair trial. We disagree.

¶19 First, as to the testimony by Schutte, we do not agree that the single reference to Schutte knowing Wilke prior to March 2011 related to doing drugs was highly prejudicial to Wilke. The court allowed testimony that Wilke was engaged in drug use during March and April 2011, and the jury therefore already knew about Wilke's involvement with drugs. Moreover, the court told the jury to disregard Schutte's statement, and we presume juries follow such instructions. *See* ***Adams***, 221 Wis. 2d at 12. Second, as to the information regarding Wilke's appearance in a different case being displayed to the jury, the circuit court noted on the record that it was unlikely that any juror was able to read that information, given the position of the exhibit and the short amount of time it was displayed. On this record, we conclude that neither of the violations of the pretrial order exacerbated the reading of the repeater allegations to the prospective jurors during voir dire. We affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).