COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP282-CR **Cir. Ct. No. 2003CF2912**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDRICK E. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Fredrick Jones appeals a judgment of conviction for one count of armed robbery and five counts of possession of a firearm by a felon. Jones contends his constitutional rights were violated when the court failed to question a possibly sleeping juror and when it allowed the sheriff's department

to add deputies to the courtroom. Because we discern no error in the court's exercise of discretion, we affirm the judgment.

Background

¶2 On the second day of Jones's five-day jury trial, defense counsel notified the court that one of the jurors appeared to be sleeping. The court had not observed the juror at that point, but no further discussion was had. The next day, defense counsel noted the same behavior in the same juror. The court advised defense counsel that it had been observing the juror and did not think she was sleeping. On the last day of trial, before sending the case to the jury, the court offered to strike the juror as the alternate. However, Jones denied the offer, explaining that the juror was one of only three minority jurors empaneled.

¶3 Also during the trial, it came to the court's attention that Jones had threatened to take one of the sheriff's deputies' guns. As a result, the sheriff stationed six to eight officers in the courtroom on the fourth day, although normally there were two or three officers to a courtroom. Jones challenged the placement of additional officers in the courtroom, arguing they would be prejudicial and undermine his presumption of innocence. The court overruled any objection, citing safety concerns, but nonetheless gave a cautionary jury instruction submitted by Jones.

¶4 Ultimately, the jury convicted Jones of all six charges he faced. The court sentenced him to ten years' initial confinement and five years' extended supervision on the armed robbery charge. For the felon with a firearm charges, Jones was sentenced to five years' initial confinement and five years' extended supervision on each count to be concurrent to each other and consecutive to the armed robbery sentence. Jones appeals.

Discussion

¶5 Implied in the constitutional right to an impartial jury "is the presence of jurors who have heard all of the material testimony." ***State v. Hampton***, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996). "How to proceed when faced with an assertion of jury inattentiveness is determined by the trial court's informed discretion." ***Id.*** at 670. The exercise of discretion contemplates "a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Discretionary decisions are not reversed unless clearly erroneous. ***State v. Grinder***, 190 Wis. 2d 541, 551, 527 N.W.2d 326 (1995).

¶6 Jones contends the trial court erred because it failed to question the juror about her inattentiveness. Relying on ***Hampton***, he asserts: "When it is unclear whether the juror is sleeping, the trial court must inquire further."

¶7 ***Hampton***, in reviewing other jurisprudence, noted "courts have universally taken the view that it must be demonstrated that as a result of the lack of attention, the juror failed to follow some important or essential part of the proceedings." ***Hampton***, 201 Wis. 2d at 672 (citing ***Tennessee v. Chestnut***, 643 S.W.2d 343, 346 (Tenn. Ct. App. 1982)). From that premise, the ***Hampton*** court concluded "if there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact finding process to establish a basis for the exercise of discretion." ***Hampton***, 201 Wis. 2d at 672-73.

¶8 In ***Hampton***, we ultimately concluded the trial court had erroneously exercised its discretion because it was conceded the juror had been sleeping and

the court simply foreclosed any inquiry. Here, however, the court determined as a factual matter that the juror was not sleeping. The court noted, on the final day:

> I was looking at that juror all along. And in my view, she was not asleep….
>
> … As far as I'm concerned, she wasn't asleep. I was watching her very closely. She closed her eyes but she opened them at appropriate times. She didn't keep her eyes closed. Her head—She wasn't having her head roll around from shoulder to shoulder, so I don't think she was asleep.
>
> If I thought she was asleep, I would have taken a break.

¶9 The court's statements constitute a factual determination that the juror was not asleep. Moreover, the court also perceived her to be attentive to the proceedings because, although she closed her eyes, she opened her eyes when appropriate. We do not disturb factual determinations absent clear error. WIS. STAT. § 805.17(2) (2003-04). Because the trial court determined the juror was neither asleep nor inattentive, there was no need for the court to question her individually to ascertain whether she missed key aspects of the trial.

¶10 To the extent that Jones believes the court should have questioned the juror as a precaution rather than a necessity, Jones never asked the court to make such an inquiry.[1] We do not fault the trial court for failing to undertake a discretionary measure where the defendant does not ask the court to exercise that

[1] Jones also takes issue with the court stating it *thought* the juror was not asleep. According to Jones, this meant it was "unclear whether the juror [was] sleeping" and required the court undertake an inquiry to know for certain. *See* ***State v. Hampton***, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996). However, we do not perceive the court's use of the verb "think" as indicating equivocation, especially when the court later explicitly found "she was not asleep." We generally do not require courts to use magic words and, as such, we know of no rule requiring the courts to state they know a fact with complete and utter certainty.

discretion.[2] *See* ***State v. Gollon***, 115 Wis. 2d 592, 604-05, 340 N.W.2d 912 (Ct. App. 1983).

¶11 Jones also argues he was denied his "right to the presumption of innocence when the trial court allowed the Sheriff to place seven or eight deputies in the courtroom" instead of the two or three deputies normally present. The parties dispute whether courtroom security decisions are reviewed under the erroneous exercise of discretion standard. As the State points out, the two cases Jones cites for his standard of review deal with shackling of prisoners. However, the Supreme Court Rules indicate that case-specific courtroom security protocol will be left to the trial court's discretion, *see* SCR 70.39(5) (2003-04), and the State supplies no alternate standard.

¶12 When reports of a defendant's threats are the basis for increased security, the defendant should be offered an opportunity to explain or rebut the reports. ***State v. Clifton***, 150 Wis. 2d 673, 682, 443 N.W.2d 26 (Ct. App. 1989). Jones was given such an opportunity. Jones's counsel had been informed by the court of a report that claimed Jones planned to grab a deputy's gun. Counsel inquired of the court how this report came to light. The court replied that the sheriff's department had received information from a source the department declined to reveal. Counsel pointed out there was no way for the court to know

[2] The State argues that, in any event, Jones waived his remedies. According to the State, the available remedies—assuming an inattentive juror is shown—are a mistrial or discharging the juror. Regarding a mistrial, Jones argues the court foreclosed that possibility by cutting off his counsel's argument and stating it would not grant a mistrial. Nonetheless, the request must be put on the record to preserve it for appeal. *See* ***Frion v. Craig***, 274 Wis. 550, 555, 80 N.W.2d 808 (1957). While the court did offer to dismiss the juror, Jones declined because the juror was one of only three African-Americans on the panel. The State does not respond to Jones's argument that he should not be forced to trade his constitutional right to a representative jury for his right to an attentive jury.

the motive of the so-called informant and stated there were no details about what Jones planned to do with the gun. A few moments later, however, Jones admitted threatening a deputy.

¶13 Jones nonetheless takes issue with what he perceives to be the court's deferral to the sheriff, rather than its own exercise of discretion. However, a review of the transcript reveals that the court satisfactorily exercised its discretion even though it ultimately agreed with the sheriff's plan.

¶14 First, the court acknowledged that the threat was valid—counsel initially appeared to concede its truth, and then Jones himself confirmed he had made a threat. The court then referenced an event that had happened about a year earlier in another branch's courtroom. There, a defendant grabbed a deputy's gun resulting in injury to the deputy and death to the defendant. Finally, the court expressed a preference for preventative, rather than corrective, security measures. We discern no error. These are valid considerations, and the fact that the court ultimately adopted the recommendations of the sheriff rather than specifically crafting and articulating its own plan does not mean the court failed to exercise discretion.

¶15 Jones also takes issue with the number of deputies in the courtroom, arguing they unfairly tainted the jury against him. But deployment of courtroom security is not inherently prejudicial. *See* ***Holbrook v. Flynn***, 475 U.S. 560, 568-69 (1986); ***Clifton***, 150 Wis. 2d at 682. A jury might infer nothing at all from the presence of additional officers, or it could infer the officers are present to prevent external disruptions. ***Clifton***, 150 Wis. 2d at 682. Rather, when a courtroom arrangement is challenged as inherently prejudicial, the question is whether there

is an unacceptable risk that impermissible factors may come into play. ***Holbrook***, 475 U.S. at 569. Such challenges are to be considered on a case-by-case basis. ***Id.***

¶16 Here, Jones fails to present us with any facts that would make us suspect the courtroom setup. We do not know if the deputies were in uniform or plain clothes. We do not know if the deputies were armed, let alone conspicuously so. We do not know where the deputies were stationed, whether they were close to the defendant or randomly located near entrances or in the gallery. We do not know how many deputies were normally in the courtroom, although it was evidently either two or three. And we do not even know how many deputies were assigned in total because Jones variously references six, seven, or eight deputies.[3] In short, Jones fails to provide any facts that would lead us to conclude the security arrangement might have caused prejudice. With no showing of prejudice, our inquiry ends. *See* ***id.*** at 572.

¶17 Additionally, Jones submitted a cautionary jury instruction about the presence of security, which the court later gave to the jurors. We presume jurors follow their instructions. *See* ***State v. Gary M.B.***, 2004 WI 33, ¶33, 270 Wis. 2d 62, 676 N.W.2d 475.

By the Court.—Judgment affirmed.

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

[3] Thus, counsel engages in unnecessary hyperbole by arguing about an exponential increase in security. While an increase from two deputies to eight is technically exponential (two raised to the third power), no other increase is.