**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 17, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

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

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

**Appeal No. 2004AP2565-CR** **Cir. Ct. No. 2003CF14B**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ALAN E. BLANCHARD,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN De HEY, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Alan Blanchard appeals from an amended judgment convicting him of being party to the crimes of battery by a prisoner as a

habitual offender, assault by a prisoner by restraint of an employee as a habitual offender, and attempted escape.[1] He contends that the evidence was insufficient to support the escape charge; the circuit court erroneously exercised its discretion and violated his due process rights by giving the jury a supplemental instruction in response to a question about what they should do if they agreed on all but one count; and he was entitled to a mistrial based on a comment made by the prosecutor during closing argument. We reject each contention and affirm for the reasons discussed below.

## BACKGROUND

¶2 According to testimony adduced at trial, Grant County jail employee Dan Morgan was making his rounds when inmate Gregario Vargas threw a trash can at him, slammed Morgan back into two doors, held his arms behind his back and pushed him to the ground. Once Morgan was on the ground, fellow inmate Blanchard dug through one of Morgan's trouser pockets, then unfastened Morgan's belt, to which his keys were attached. During the altercation, Morgan was able to activate the radio in his shirt pocket and call for assistance. Both inmates left the area when they heard another jail employee approaching.

[1] Although the notice of appeal also mentions a postconviction order addressing the habitual offender sentence enhancers, Blanchard explicitly states in his brief that he is not challenging that order.

## DISCUSSION

*Sufficiency of the Evidence*

¶3 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762.

¶4 There are four elements to an escape charge under WIS. STAT. § 946.42(1)(b) (2003-04)[2]: (1) that the defendant was in custody; (2) that the custody was the result of being sentenced for a crime; (3) that the defendant escaped from custody; and (4) that the escape was intentional. WIS JI—CRIMINAL 1774. When the charge is attempted escape, the third element is modified to whether the defendant attempted to leave custody in any manner without lawful permission or authority. ***Id.***

¶5 Blanchard does not dispute there was sufficient evidence to prove that he was in custody as the result of being sentenced for a crime and lacked permission to leave that custody. He claims his actions were insufficient to demonstrate that he had formed the intent to leave the jail and would have escaped but for the intervention of the second jailer. Specifically, he argues that there was no evidence showing he had knowledge that any of Morgan's keys would actually

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

open the necessary doors in the cellblock to enable him to escape, since the jail doors opened electronically.

¶6 We are not persuaded by Blanchard's arguments. First, there was testimony that the jail doors could be opened both electronically and by a jailer's keys. The jury could reasonably infer that any inmate would know this, or at the very least would hope that was the case. Second, the jury could reasonably infer that Blanchard was searching for the jailer's keys when he reached into his pocket, then unfastened the belt to which the keys were attached. Third, the jury could reasonably infer that the most plausible reason Blanchard could have for wanting the keys was to use them to escape custody—regardless whether the keys would actually have enabled him to do so. Therefore, the jury could reasonably determine that Blanchard's conduct in searching the jailer's pocket and unfastening his belt showed his intent to escape. In sum, we are satisfied that the evidence was sufficient to support the verdict on the attempted escape charge.

*Jury Instruction*

¶7 About three hours after the case was submitted to the jury, the jury sent out a question asking, "What happens if we cannot agree on one of the counts?" The State moved to give the jury WIS JI—CRIMINAL 520, a supplemental instruction which advises jurors in part of their "duty to make an honest and sincere attempt to arrive at a verdict." Over Blanchard's objection, the court instructed the jury:

> What I will advise you of at this time is that a jury verdict can only be received if it is agreed to by all 12 members of the jury. You have to be unanimous. If you have reached a unanimous verdict in connection with any one of these charges and the court accepts that verdict, that means you will no longer be able to deliberate on that particular count. It means that you won't be able to change

> your mind on that particular count, and it means that there won't be any discussion that can lead to any change in that verdict.
>
> If my assumption is correct that you perhaps have arrived at a verdict in connection with two of the counts and you are certain that no further deliberation is necessary and that there won't be any changing based upon discussions that will occur in the future. Then those two verdicts may be received.
>
> For the other count the jury has to be unanimous again for the court to receive the verdict, and I will advise you that you jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate. They should be open minded and they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> With that I will ask that you resume deliberations ….

Ten minutes later, the jury returned guilty verdicts on all counts.

¶8 Blanchard argues that the circuit court erroneously exercised its discretion and violated his due process rights by giving the supplemental instruction when the jury had not announced it was deadlocked and had not been out very long. Blanchard acknowledges that in ***Quarles v. State***, 70 Wis. 2d 87, 90-91, 233 N.W.2d 401 (1975), the Wisconsin Supreme Court held that it is not necessary for the jury to announce that it is deadlocked before the circuit court can give a supplemental instruction. Rather, the court held that WIS JI—CRIMINAL

520 is not coercive[3] so as to violate due process and may be properly given "when the jury has deliberated for some time without reaching an agreement." ***Id.*** at 91 (citation omitted). Blanchard attempts to distinguish ***Quarles*** on the ground that the jury there had been out longer than the jury here.

¶9 We are not convinced that the distinction cited by Blanchard is significant. While the jury here may not have been out as long as the jury in ***Quarles***, the jury here made a specific inquiry to the court about what would happen if they could not agree on one of the counts. Therefore, the circuit court did not need to rely on the length of time that the jury had been out in order to determine that the jury might be having difficulty reaching an agreement. The court could fairly make that inference based on the jury's inquiry. In this context, we are satisfied that the circuit court's decision to give the supplemental instruction was well within its discretion and did not violate Blanchard's due process rights.

*Closing Argument*

¶10 The prosecutor commented during closing argument:

> Is Mr. Blanchard a part of this criminal conduct or is he a hero, and that's the question. Because the defense would have you believe that he is the hero out of all of this. That he is the hero, and all kinds of questions come to mind with that. If he is the hero, then why is he telling different statements to Detective Kopp? If he is the hero and only

[3] Blanchard claims that he is not arguing that the instruction here was coercive. He seems to miss the point, however, that the underlying basis for a due process claim based on a supplemental instruction is its coercive nature. That is, if the instruction is not coercive, it does not violate due process. *See e.g.,* ***United States v. Beattie***, 613 F.2d 762, 764-66 (9th Cir. 1980). Therefore, notwithstanding the contradictory statements in his brief, we construe Blanchard's due process argument to be that the instruction was coercive because the jury had not deliberated long enough to indicate that it had been unable to reach an agreement.

> trying to help, why does he leave like keying the radio or pulling on the cord out of the statement to Detective Kopp? If he is the hero, then why does he fail to tell Detective Kopp during two separate interviews that he was calling for help? If he is the hero, then why doesn't he yell for help? If he is the hero, why doesn't he run for help? If he is the hero, why doesn't he push Vargas, which we would be able to see on the video tape? Why doesn't he hit Vargas on the head, which we would be able to see on the video tape? None of that makes sense.
>
> He is not the hero and that's why we are here today. Because on behalf of Dan Morgan and on behalf of the State of Wisconsin we submit to you that he should not be deemed the hero and we ask that you not deem him the hero.

Blanchard claims the prosecutor's "hero" statements crossed the line between permissible argument based on the evidence and a suggestion that the jury should decide the case based on factors outside of the evidence. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). He further contends the argument was so unfair as to deny him due process. We disagree.

¶11 As the State points out, Blanchard's primary defense was that he was actually attempting to help the jailer by grabbing his radio and calling for help. In this context, we do not read the prosecutor's comments as a suggestion that, if Blanchard was not a hero, he must be guilty. Rather we view the prosecutor's remarks as an attempt to discredit Blanchard's testimony that he was attempting to help the jailer. In short, the prosecutor's comments were a measured response invited by the defense and unlikely to have led the jury astray. ***State v. Wolff***, 171 Wis. 2d 161, 168-69, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). We are therefore satisfied the circuit court properly denied Blanchard's motion for a mistrial.

*By the Court.*—Judgment affirmed.

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