

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 05, 2006

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. 2005AP1484-CR

Cir. Ct. No. 2004CF3785

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMETRIUS J. GRAYSON,

DEFENDANT-APPELLANT.

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

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Demetrius J. Grayson appeals from a judgment convicting him of one count of delivering a controlled substance (cocaine base), party to a crime. Grayson claims that the circuit court erred when it failed to grant his motion for mistrial following the admission of testimony describing Grayson's

arrest in 1998 on an unrelated charge. Because we conclude that the circuit court did not err in denying Grayson's motion, we affirm.

1. Background

¶2 On July 12, 2004, City of Milwaukee Police Officer Lemuel Johnson, while acting in an undercover capacity, purchased a baggie of what appeared to be crack cocaine from a person he recognized from a previous encounter as Grayson. When Officer Johnson testified at Grayson's jury trial, the prosecutor asked him to "briefly describe, not in detail, but briefly describe the circumstances" of his prior contact with Grayson. Officer Johnson made the following statement:

We were in the area of 32nd and Center, me and my partner. We were working on what we call a special car, and we made contact with Mr. Grayson, and we wanted him to identify himself, and it – he identified himself after, probably, 45 minutes of giving us the wrong name; and he finally identified himself as who he is, and we ran his name, and he had a warrant for his arrest, so we arrested 'em.

¶3 Grayson objected and the circuit court immediately gave the following curative instruction to the jury:

Ladies and gentlemen, the information you just heard about what -- the contact in 1998, I want you to know that that has been presented to you for only one purpose, on the issue of identification of this defendant on the day that this arrest took place.

Other than that, anything else that you've heard, anything that you've heard about the incident in 1998, is not relevant to this proceeding, and you should not use it for any other purposes. We'll proceed.

¶4 Subsequently, Grayson requested a mistrial outside the presence of the jury, arguing that the curative instruction was inadequate to overcome the

prejudice inherent in Officer Johnson's testimony. Grayson argued that Officer Johnson's description of his prior contact with Grayson constituted prejudicial evidence of other criminal acts within the meaning of WIS. STAT. § 904.04(2)¹ (2003-04).² The circuit court rejected Grayson's motion, offering the following analysis:

Okay. Let me just say, we did discuss this at sidebar, and the -- concern was that there was a statement that he had 45 minutes of contact with him and that it took a while or took that amount of time until they could get an -- correct I.D.

And the other statement was that when they looked him up, they found out there was a warrant on him at that time.

And I advised the jury that they could consider that only as to -- only as relevant to the issue of identification, and that any other information -- that they could not use it for any other purpose.

And clearly, the fact that they've had prior contact is relevant to identification.

The fact that the contact was not fleeting and lasted 45 minutes is relevant to identification.

The fact that he describes the behavior as less than -- than perfect or less than appropriate, or that there was a warrant, could have some negative impact or a prejudice

¹ WISCONSIN STAT. § 904.04(2) reads:

OTHER CRIMES, WRONGS OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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

against the defendant; and for that reason, I give the curative instruction.

It's unfortunate that the information came out in the manner it did, but I don't believe it rises to the level of a -- of a mistrial.

I'm going to deny your motion for mistrial, but if you'd like the Court to give any further curative instruction when I give the instructions at the end of the case, I'll consider whatever instruction you want to propose.

¶5 The jury returned a guilty verdict and the circuit court imposed a six-year sentence consisting of three years of initial confinement and three years of extended supervision. Grayson appeals.

2. Discussion

¶6 The decision whether to grant a motion for mistrial lies within the discretion of the circuit court. *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). “The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.” *Id.* On appeal, this court will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion by the circuit court. *Id.* “A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.” *State v. Bunch*, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶7 The question presented by this appeal is whether the trial court erred in determining that Officer Johnson's testimony was not inadmissible “other acts” evidence or that the trial court's curative instructions remedied any prejudice flowing from the testimony. The standard of review for a trial court's admission

of other acts evidence is whether the trial court properly exercised its discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶8 The supreme court set forth a three-step analysis to determine whether evidence of other acts is admissible under WIS. STAT. § 904.04(2) in *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). First, the trial court must determine whether the evidence is offered for an acceptable purpose such as motive, opportunity, intent or the like. *Id.* at 772. If so, the second step requires the circuit court to decide if the evidence is relevant. With respect to relevance, the circuit court must find that the proffered evidence is both related to a fact that is of consequence to the determination of the action and that the evidence has probative value before admitting it. *Id.* If the circuit court decides that the evidence passes steps one and two, the circuit court then must weigh whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Id.* at 772-73.

¶9 Our review of the trial transcript persuades us that the circuit court properly applied *Sullivan*'s three-step analysis to the evidence. The circuit court correctly determined that Officer Johnson's testimony met both the first and second steps set forth in *Sullivan*. Officer Johnson's testimony was directly linked to his knowledge of Grayson's identity, a proper purpose under WIS. STAT. § 904.04(2). Further, as the circuit court correctly noted, the issue of Grayson's identification was uniquely relevant to his trial since his sole defense to the charge was misidentification. Grayson argued at trial that he was not the man who delivered the baggie of crack cocaine at the scene. Consistent with this defense, Grayson asked the jury to find that the six-year interval between Officer Johnson's alleged first encounter with Grayson together with Officer Johnson's brief

transaction with the individual from whom he purchased the drugs underlying the instant charge undercut the credibility of his identification of Grayson.

¶10 The trial court's remarks also addressed whether the probative value of the evidence outweighed the danger of unfair prejudice. The court readily recognized that Officer Johnson's single reference to an arrest warrant for Grayson in 1998 was potentially prejudicial. The circuit court immediately gave a curative instruction, presumptively erasing the potential prejudice. *See State v. Collier*, 220 Wis. 2d. 825, 837, 584 N.W.2d 689 (Ct. App. 1998). ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court."). By giving a curative instruction, the circuit court addressed the minimal potential prejudice flowing from Officer Johnson's testimony and simultaneously avoided the drastic remedy of declaring a mistrial.

¶11 In sum, Officer Johnson's testimony met the first two prongs of the analytic framework used to determine whether other acts evidence should be admitted. To the extent that Officer Johnson's testimony about an arrest warrant carried a risk of unfair prejudice, the circuit court immediately addressed and remedied any arguable error by giving a curative instruction. We are satisfied that the circuit court provided an adequate basis for its decision to deny Grayson's motion for mistrial and, therefore, uphold it.

By the Court.—Judgment affirmed.

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

