

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 21, 2007

A. JOHN VOELKER
Acting Clerk of Court of Appeals

NOTICE

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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. 2006AP707-CR

Cir. Ct. No. 2004CF6120

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES C. WALKER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County:
KAREN E. CHRISTENSON, Judge. *Affirmed.*

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

¶1 FINE, J. James C. Walker appeals from judgments entered after a jury found him guilty of one count of armed robbery with the use of force, as a party to a crime, for robbing an Arby's restaurant in West Milwaukee on October 24, 2004, and two counts of first-degree intentional homicide, while armed, as a

party to a crime, for shooting and killing two Arby's employees, Nicole Joslyn and Alan Lowrie at that restaurant. *See* WIS. STAT. §§ 943.32(2), 939.05, 940.01(1)(a), 939.63. Walker claims that the trial court erroneously exercised its discretion when it denied his motions for a mistrial. We affirm.

I.

¶2 At Walker's trial, an accomplice, Michael Reit, testified that he had worked with Walker at the Arby's, and that Walker had been fired approximately one week before the crimes. According to Reit, Walker wanted to rob the Arby's because he was angry about being fired and asked Reit to get a gun and the pin numbers that Joslyn and Lowrie used to clock out.

¶3 Reit testified that he worked at the Arby's on the night of October 24, 2004. According to Reit, he went outside around 7:30 p.m. to smoke a cigarette and saw Walker near a black sport utility vehicle. Walker asked Reit if he had a gun and Reit told Walker that he did not, but that he had the pin numbers. Walker then said that he would be back at 11:00 p.m., and Reit returned to work. According to Reit, around 8:00 p.m., a woman whom he did not know called the Arby's and asked who was working. Reit told her that, in addition to himself, Joslyn and Lowrie were.

¶4 Reit testified that as he was leaving the Arby's around 10:30 p.m., he saw Walker at the main door and let him in. A man whom Reit did not know then got out of a black sport utility vehicle and walked into the restaurant. According to Reit, when Joslyn saw Walker and the man, she tried to activate the restaurant's alarm. The man took a gun from Walker and shot Joslyn in the leg. The man also told Lowrie to go into the freezer. Reit testified that the man then followed Lowrie into the freezer, and almost immediately Reit heard two gun shots.

¶5 Reit told the jury that when the man came out of the freezer, he handed the gun to Walker, and told Walker to shoot Joslyn. The third man then left and Walker dragged Joslyn to the freezer, where he told Reit to “finish her off,” and threatened to kill Reit if he did not. Reit testified that, as Joslyn pled for her life, he took the gun and pulled the trigger. He then gave the gun to Walker, who fired two more shots. According to Reit, he mopped up the blood while Walker took cash from the restaurant’s safe. Reit then clocked out Joslyn and Lowrie, and he and Walker left. Reit told the jury that, in exchange for his cooperation, he was charged with and pled guilty to two counts of felony murder. *See* WIS. STAT. § 940.03.

¶6 Juanita Howell testified that shortly after the crimes she and Walker were in the house of Walker’s sister, Apollonia Walker, when a news story about the murders came on the television. According to Howell, Walker’s sister began to cry and asked “why.” Howell testified that Walker responded that he “had to because they kn[e]w him.” Howell testified that she called the police one or two days later and received a \$1,000 reward for this information.

¶7 A police officer testified that when he secured the Arby’s parking lot shortly after the crimes the only litter he found was a beer can. A fingerprint expert from the Wisconsin State Crime Laboratory opined to a reasonable degree of professional certainty that three fingerprints on the can were Walker’s.

¶8 A police sergeant testified that telephone records of incoming calls to the Arby’s showed that on the evening of the crimes four telephone calls were made to the restaurant from a Danielle Baring’s house. Baring testified that Walker came to her house often, and, according to a police detective, told the

police that Walker was at her house when the telephone calls to the Arby's were made.

¶9 The chief operating officer for Arby's testified that \$3,258 in cash was stolen from the restaurant. According to a police detective, after the crimes, Walker paid a total of \$1,799.42 in cash over two days for car repairs, and the police found in Walker's house \$891 in cash.

¶10 A police detective testified that Walker was a passenger in a black Lincoln Navigator when he was arrested. Reit and a witness who worked at a nearby restaurant testified that the sport utility vehicle they saw in the Arby's parking lot on the night of the crimes looked like a picture of the Lincoln Navigator.

¶11 A DNA analyst from the Wisconsin State Crime Laboratory found a blood stain on one of Walker's shoes. The DNA analyst testified that she compared DNA from Lowrie's blood to DNA in the blood on Walker's shoe and opined to a reasonable degree of scientific certainty that the blood on Walker's shoe was Lowrie's.

¶12 Walker testified in his defense. He claimed that on October 24, 2004, he woke up around 8:30 p.m., spoke briefly to his sister, Apollonia Walker, and drove to the house of his sister, Mary Walker, where he watched television all night. Walker denied that he went to the Arby's, and testified that the next day, when he took his car in for repairs the salesperson convinced him to have additional work done. Walker claimed that the cash found in his house was money he had been saving, and that the beer can from the Arby's parking lot must have been one that he drank from and threw away before he was fired.

¶13 Walker's sisters also testified. Mary Walker claimed that on the night of the crimes Walker arrived at her house near the end of the television show *Boston Legal*, and that he stayed all night. Apollonia Walker testified that neither Howell nor Walker were at her house when she learned of the crimes. Another sister, Loretta Walker, testified that she owned the Lincoln Navigator in which Walker was arrested. She admitted that she let Walker drive it, but claimed that he did not drive it on the day of the crimes.

II.

¶14 The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122, 134. “The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.” *Ibid*. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695, 702 (Ct. App. 1998). “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, 506–507, 529 N.W.2d 923, 925 (Ct. App. 1995).

¶15 Walker claims that the trial court erroneously exercised its discretion when during his trial it denied two motions for a mistrial. Walker made the first motion after Juanita Howell's testimony. When Walker's trial lawyer asked Howell on cross-examination why she was in custody, Howell answered: “Because the Judge put a warrant out for my arrest because I didn't want to testify.” On re-direct examination, the prosecutor asked Howell why she did not want to testify:

Q And why didn't you want to testify?

A Why didn't I?

Q Yeah.

A Because. Why should I?

Q And they burned down your porch, didn't they?

A Somebody ---

[WALKER'S LAWYER]: I object.

BY [THE PROSECUTOR]:

Q Your porch was burned down?

[WALKER'S LAWYER]: Object.

A Yeah.

THE COURT: Sustained.

BY [THE PROSECUTOR]:

Q Is that one of the reasons why you didn't want to testify?

A Yeah.

[WALKER'S LAWYER]: Same objection.

A My family is in danger.

[WALKER'S LAWYER]: Side bar.

THE COURT: Side bar.

(Discussion off the record.)

THE COURT: All right. Subject to what I said at side bar, you may ask her a question.

BY [THE PROSECUTOR]:

Q And why didn't you want to testify?

A Because. I don't really feel like I got nothing to do with it.

Q Are you scared?

A (Nods affirmatively.) Yeah.

Q Has anything happened to you from the point where you came forward to the police until now, personally, to you?

A No.

[THE PROSECUTOR]: That's all I have, thank you.

(Bolding omitted.) The trial court then instructed the jury to “disregard any remarks about a porch. I’ll order that stricken from the record.”

¶16 After the jury was excused, Walker moved for a mistrial, alleging that Howell’s testimony on re-direct examination introduced what he claims is “highly prejudicial” other-acts evidence. *See* WIS. STAT. RULE 904.04(2) (2003–04) (other crimes, wrongs, or acts); *Bowie v. State*, 85 Wis. 2d 549, 553–554, 271 N.W.2d 110, 112 (1978) (threat unconnected to defendant inadmissible). The trial court denied Walker’s motion:

Well, she didn’t support that having occurred. It was -- I think the record will reflect a statement which [the prosecutor] made that she did not endorse.

I then ordered the jury to disregard any reference to a porch burning and ordered that that remark be struck from the record so I’m going to deny your motion for a mistrial.

¶17 Walker’s trial lawyer made the second motion for a mistrial after Walker testified. Before the trial, the State filed a motion, seeking to introduce at Walker’s trial “the fact that in April of 2004, ... [Walker] stole money from his employer, Subway, because he was unhappy with the way he was treated in his job by the store manager.” The trial court determined that the admissibility of this evidence would depend on Walker’s testimony. The trial court held a sidebar after

Walker's direct-examination testimony and immediately before the prosecutor questioned Walker on cross-examination about the Subway theft. The prosecutor then asked Walker:

Q Now, you were at the -- when you were at Subway you were terminated; is that correct?

A Yes, sir.

Q And you didn't like the female employees there; is that right?

A I liked them all.

Q Okay. Didn't you tell the police when you were fired at the Subway shop the reason why you stole the money from the Subway shop in Wauwatosa is because you didn't like the way the female employees were treating you?

[WALKER'S LAWYER]: I object, your Honor.

BY [THE PROSECUTOR]:

Q Is that correct?

A No, sir.

THE COURT: Sustained.

(Bolding omitted.)

¶18 After the jury was excused, the trial court summarized the sidebars:

With respect to the record there, we did have a sidebar about the State's desire to introduce the -- the situation at Subway where the State's theory is that Mr. Walker took money in retaliation for a firing. That was at the close of direct examination.

And I said that at that point there was not a foundation, that we hadn't -- I hadn't foreclosed that a foundation would appear through the cross-examination. Then we had another sidebar a while later when [the prosecutor] indicated that he thought that he now had established the foundation. I did not agree, but he indicated

he was going to ask questions about Mr. Walker's difficulties with female employees at the Subway. And I agreed that that was appropriate.

Subsequently, during that cross-examination, there was reference made to money being taken. [Walker's lawyer] objected. And I sustained the objection. I didn't want to highlight or red flag that any further. So I didn't say anything additionally at that point. And I think then on redirect you went back and addressed the situation about missing money at Subway.

Walker then moved for a mistrial, arguing that the prosecutor had violated the trial court's order when it placed what he claims was "otherwise inadmissible prejudicial" other-acts evidence before the jury. The trial court again denied Walker's motion: "Well, you objected. I sustained the objection. I'm going to deny your motion for a mistrial. The record will speak for itself."

¶19 Walker contends that the trial court erroneously exercised its discretion when it denied his motions for a mistrial because it: (1) denied the motion based on the porch-burning under the mistaken belief that Howell denied her porch had burned down, and (2) denied the motion based on the Subway theft "[w]ithout any analysis." We disagree.

¶20 First, as we have seen, Howell testified that nothing had happened to her "personally," although she did not want to testify because, among other things, she was still afraid. This testimony was perfectly admissible. See *State v. Rodriguez*, 2006 WI App 163, ¶¶29–31, ___ Wis. 2d ___, ___, 722 N.W.2d 136, 148–149. Additionally, the trial court instructed the jury that it should "disregard any remarks about a porch," and the trial court ordered any reference to the porch "stricken from the record." This cured whatever adverse inference the jury may have had in connection with the alleged porch-burning. See *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury presumed to follow

instructions). Moreover, the curative instruction aside, the fleeting reference to the porch was insufficient to warrant the drastic remedy of a mistrial. *See Bowie*, 85 Wis. 2d at 554–555, 271 N.W.2d at 112–113 (witness’s brief and vague reference to being threatened harmless error).

¶21 Second, as we have also seen, the trial court sustained Walker’s objection to the alleged stealing from the Subway restaurant. As noted, we assume that the jury follows the trial court’s instructions. *See Truax*, 151 Wis. 2d at 362, 444 N.W.2d at 436. Further, the last words the jury heard from the witness stand on this subject were Walker’s *denial* that he had taken any money.

¶22 Third, the evidence of Walker’s guilt was substantial:

- Reit testified that Walker planned and participated in the Arby’s robbery and the shootings.
- DNA evidence showed that blood on Walker’s shoe was from one of the shooting victims.
- The only piece of litter in the Arby’s parking lot, a beer can, had Walker’s fingerprints on it.
- Telephone calls to the Arby’s were made hours before the crimes from a house that Walker was visiting.
- During a news story about the crimes, Walker told his sister he “had to because they kn[e]w him.”
- The sport utility vehicle that Walker was riding in at the time of his arrest was similar to the sport utility vehicle that two witnesses saw in the Arby’s parking lot on the night of the crimes.

- Walker, who was unemployed and previously worked in low-paying jobs, had thousands of dollars in cash immediately after the crimes.

Given the overwhelming evidence against Walker, and the trial court's instructions to the jury, there is no reasonable possibility that the challenged testimony, whether viewed individually or cumulatively, had any impact on the jury's verdicts. Accordingly, the trial court properly denied Walker's motions for a mistrial.

By the Court.—Judgments affirmed.

Publication in the official reports is not recommended.

