

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2007

David R. Schanker
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. 2006AP1837-CR

Cir. Ct. No. 2005CF33

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY M. PRESBY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County:
RICHARD DELFORGE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry Presby appeals a judgment convicting him of sexual assault. He contends the court should have granted his motion for a mistrial based on his assertion that one of the jurors did not hear, or chose not to listen to, material portions of the trial. Specifically, Presby argues the court

erroneously exercised its discretion by not holding a hearing to determine what that juror heard. We disagree and affirm.

BACKGROUND

¶2 Presby was convicted of one count of sexual assault of a child under thirteen years of age, contrary to WIS. STAT. § 948.02(1).¹ During voir dire, the circuit court asked juror Edward Rabas if he was having a difficult time hearing. Rabas responded he was and asked the court to speak into the microphone. Rabas then stated he was able to hear both attorneys.

¶3 Throughout the trial, Rabas signaled the court when he was having difficulty hearing. The court and both attorneys also repeatedly confirmed that he could hear the court's proceedings. At the beginning of day two, the court announced it would "try to speak into the microphone again today for Mr. Rabas and anybody else that may have difficulty hearing" The court told Rabas to raise his hand if he was having a problem hearing. Rabas responded: "Yeah. But you were too far away yesterday see. You're doing real fine right now."

¶4 During the jury's deliberations, the jury foreperson sent two letters to the judge requesting an alternate juror because of Rabas's conduct. The first note alleged Rabas stated he did not listen to the trial "because it was not any of my damn business." The second note alleged Rabas had no recollection of who, what, and why they were there.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 Upon receiving the letters, the court discussed with both parties how to proceed. Both Presby and the State agreed to instruct the jury to continue its deliberations. The jury was then called back in to be instructed, when the following exchange took place between the court and Rabas:

THE COURT: Then we're back on the record, and the jury's returned to the courtroom. The Court will acknowledge that it did receive two notes from the jury. Mr. Rabas, I see that you're holding your hand next to your ear. Can you hear me?

A JUROR: Yeah, I can hear you.

THE COURT: What did I just say?

A JUROR: Yeah.

THE COURT: What did I just say?

A JUROR: I wasn't listening. I could hear you talk.

THE COURT: You could hear me talk. Did you understand what I said?

A JUROR: I – see, I wasn't even listening. I was just sitting down, you know.

THE COURT: Can you hear me now?

A JUROR: Yeah. I can hear you.

THE COURT: What did I just say?

A JUROR: You said can you hear me now.

After this exchange, Presby moved for a mistrial on the basis that the exchange demonstrated Rabas did not hear or chose not to listen to the trial. The court rejected the motion. After being instructed to continue its deliberations, the jury returned with a guilty verdict.

¶6 Presby requested the court poll the jurors individually as to their vote. The court did so and each juror confirmed he or she agreed with the verdict. Presby then moved the court to conduct voir dire of Rabas to determine what his vote was. The court denied this motion, stating that it was clear how Rabas had voted.

¶7 Presby requested the court take notice of the fact that Rabas looked around before answering how he had voted to presumably see how other jurors were voting. The court denied this request stating that it did not see Rabas look around. In fact, the court noted Rabas was sitting in the front row and did not look around during the polling.

¶8 Presby then made a motion for a new trial based on the events at trial. The court rejected this motion as well. Presby appeals.

DISCUSSION

¶9 Presby argues the circuit court erroneously exercised its discretion by denying his motion for a new trial based upon Rabas's inability to hear or refusal to listen to trial testimony. Whether a juror has been inattentive is placed within the circuit court's discretion. *State v. Hampton*, 201 Wis. 2d 662, 670, 549 N.W.2d 756 (Ct. App. 1996). We examine the record for the reasons underlying the court's decision to determine whether the court properly exercised its discretion. *Id.* If the record "indicates that the court examined the facts of the case and reasoned its way to a conclusion that is: (a) one a reasonable judge could reach and (b) consistent with applicable law, we shall affirm even if it is not one with which we ourselves agree." *Id.*

¶10 Presby bases his claim of an erroneous exercise of discretion on the court's failure to voir dire Rabas to determine whether he missed testimony because of his hearing problem or whether he missed the testimony because he refused to listen. The State argues Presby waived this issue because he never asked the court to determine whether Rabas missed testimony due to Rabas's hearing problem or whether Rabas failed to listen to testimony. Instead, the State asserts Presby only asked the court to voir dire Rabas "on what his vote is." The State concludes the court properly exercised its discretion by denying the request because it had individually polled each juror and found no ambiguity in the responses.

¶11 Presby did not file a reply brief to refute the arguments proffered by the State. Accordingly, he has conceded the State's contentions. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶12 However, even assuming Presby has not conceded the State's arguments, the record does not reveal any basis to conclude the court erroneously exercised its discretion. We addressed the issue of juror inattentiveness in *State v. Hampton*, 201 Wis. 2d 662, 549 N.W.2d 756 (Ct. App. 1996) (*Hampton I*) and *State v. Hampton*, 217 Wis. 2d 614, 579 N.W.2d 260 (Ct. App. 1998) (*Hampton II*). In the *Hampton* cases, we noted the circuit court, when faced with allegations of juror inattentiveness, must exercise its discretion in two areas. First, whether to grant a mistrial is discretionary. *Hampton II*, 217 Wis. 2d at 621. Second, the court must exercise its discretion in deciding whether a hearing on the juror's attentiveness is necessary. *Hampton I*, 201 Wis. 2d at 673. This hearing is unnecessary unless there is first a sufficient showing of juror inattentiveness. *Id.* at 672-73.

¶13 Here, Presby did not and has not made a sufficient showing of Rabas's inattentiveness to establish such a hearing is necessary. In fact, the record contains many observations of the court and both attorneys as to Rabas's ability to hear and understand the case. For example, it was apparent during initial voir dire that Rabas had hearing difficulties. As a result, the court accommodated Rabas's difficulties by using a microphone. The court also stated it had made an extra effort to observe Rabas to ensure he was able to hear all the testimony. Throughout the trial, when Rabas appeared to have difficulty hearing, the court asked him if he could hear and/or reminded the person speaking to use the microphone. The court did not believe "there was any difficulty in Mr. Rabas hearing any of the witnesses on the stand as they were using the microphone."

¶14 Presby points to the two letters sent from the jury to the court as evidence Rabas did not hear or chose not to listen to the trial. While we agree the letters' contents are troubling, they do not constitute a sufficient showing to warrant a hearing for two reasons. First, upon receiving the letters, the court discussed with both attorneys what it should do. Each agreed Rabas appeared to have heard and understood the testimony. Specifically, Presby's attorney said the following regarding Rabas:

I agree with Mr. Conley [the district attorney] that, in fact, this Court went to extreme lengths to accommodate his hearing. He appeared responsive. His comments were appropriate. He let us know usually by signaling – putting his hand to his ear and alerting the Court that he was having trouble hearing. The Court would ask him, he'd tell you whether he could hear us or not, and we went on.

Both parties agreed to instruct the jury to continue its deliberations.

¶15 Second, throughout the trial, Rabas was asked about his ability to hear what was going on and he answered those questions. These exchanges

indicate that Rabas was in fact listening and paying attention. Additionally, the court explicitly found that Rabas “did hear all of the testimony.” The court said it “was able to see ... [Rabas’s] demeanor as he was here in the courtroom, ask him the questions, receive the answers, and I do feel that he was able to listen to all of the testimony.”

¶16 Presby also points to two of the court’s exchanges with Rabas as evidence supporting his claim Rabas could not hear or chose not to listen at trial. However, taken in context, these statements do not support that conclusion.

¶17 The first exchange occurred at the start of the second day when Rabas stated, “Yeah. But you were too far away yesterday see. You’re doing real fine right now.” Presby asserts this statement demonstrates Rabas was inattentive during the first day of testimony. In context, this statement refers to the judge and does not show Rabas missed material portions of the prior day’s trial.

¶18 The second exchange occurred before the court instructed the jury to continue its deliberations. Presby again asserts this exchange supports the conclusion that Rabas was inattentive. As noted by the court, this exchange took place as the jury was entering the room, when there was extraneous noise from the jurors entering. The court noted this noise prevented Rabas from hearing it correctly and once the noise decreased Rabas had no trouble answering the court’s questions. These two exchanges do not support Presby’s conclusion that Rabas was inattentive at trial. Therefore, the record demonstrates the court’s decision to deny a mistrial was a proper exercise of its discretion.

By the Court.—Judgment affirmed.

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

