COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 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. 2007AP623-CR **Cir. Ct. No. 2005CF775**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TORREN M. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Torren Brown appeals a judgment of conviction for delivering cocaine as party to the crime, contrary to WIS. STAT. §§ 961.41(1)(cm)3 and 939.05, as a second or subsequent offense and as a repeater. *See* WIS. STAT.

§§ 961.48(1)(a); 939.62(1)(c). He also appeals an order denying his motion for postconviction relief. Brown contends the circuit court erred by sending a videotape and audiotape into the jury room during deliberations. Because we conclude the circuit court erroneously exercised its discretion and its error was not harmless, we reverse the judgment and order and remand for a new trial.

BACKGROUND

¶2 This case arises from a cocaine delivery at which Brown, his girlfriend, Tamara Vernosh, and a confidential informant, Boun Vue, were present. An audiotape was made of a phone conversation between Vernosh and Vue setting up the delivery. The delivery took place in a parking lot and was videotaped by police. During the delivery, Vernosh and Brown were in a vehicle, with Brown sitting in the passenger seat. Vue approached the passenger-side window. Vue testified that Brown took the money, counted it, and put it in his pocket before taking the cocaine from Vernosh and handing it over to him. After the delivery, police stopped Vernosh and Brown. The money used by Vue to purchase the cocaine was recovered from Vernosh.

¶3 Vernosh contradicted Vue's version of events, testifying that while Brown was present, Brown was not aware what was happening and did not handle the money or the cocaine. The videotape does not show any hand-to-hand transaction between Vernosh, Brown, or Vue. The camera angle as to Vernosh and Brown is through the rear-passenger window of their vehicle, with the view being partially obstructed by the vehicle's doorframes and headrests.

¶4 Both the audiotape of Vue's phone conversation with Vernosh and the videotape of the transaction were played at trial. Regarding the audiotape, the State theorized that, during pauses on the recording, Vernosh was consulting with

Brown. As the videotape was played for the jury, the officer who made the videotape testified that, if the tape is played in slow-motion, Brown can be seen looking down after Vue approached the vehicle. The videotape was not played in slow-motion in the courtroom. The State argued that Brown's head can be seen looking down on the videotape, suggesting that he was counting Vue's money.

¶5 During its deliberations, the jury requested that it be able to review the audiotape and videotape. The court concluded that because the recordings had been admitted into evidence, both would be sent into the jury room. The jury found Brown guilty.

¶6 Brown filed a motion for postconviction relief seeking, among other things, a new trial. Brown's motion relied, in part, upon the court's decision to allow the audiotape and videotape into the jury room. The court denied the motion. While the court conceded that the better practice would have been for the jury to review the audiotape and videotape in the courtroom, the court concluded that the error, if any, did not affect the result of the case.

DISCUSSION

¶7 Generally, whether an exhibit should be sent into the jury room during deliberations is a discretionary decision for the circuit court. ***State v. Anderson***, 2006 WI 77, ¶¶27-31, 291 Wis. 2d 673, 717 N.W.2d 74. We will affirm a circuit court's discretionary act if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). An error in sending an exhibit to the jury is subject to the harmless error test. ***Anderson***, 291 Wis. 2d 673, ¶27.

The beneficiary of the error has the burden of proving that the error was harmless. ***Id.***

¶8 Our supreme court addressed sending audio and video recordings into the jury room in ***Franklin v. State***, 74 Wis. 2d 717, 247 N.W.2d 721 (1976), and ***Anderson***, 291 Wis. 2d 673. In ***Franklin***, the court concluded it was error to allow an audiotape recording of a defendant's statement to police into the jury room. ***Franklin***, 74 Wis. 2d at 724-25. The court noted that giving the jury unsupervised access to recorded evidence entails the risk that the evidence will be damaged or erased and creates the possibility that the recorded evidence will be overemphasized relative to in-court testimony. ***Id.*** at 724. The court concluded that when a circuit court allows a jury to review such evidence, the jury should be brought back into the courtroom, in the presence of counsel, so that the court can retain control over the evidence. ***Id.*** at 724-25.

¶9 ***Anderson*** involved a videotape of a victim's interview with a social worker in a sexual assault case. ***Anderson***, 291 Wis. 2d 673, ¶¶4-5, 10-11. The court reiterated that when a circuit court allows a recording to be replayed during jury deliberations, the recording is to be replayed in the courtroom. ***Id.***, ¶¶30, 32. The court elaborated that this practice allows a circuit court to ensure that the jury does not play the recording multiple times and allows the court to instruct the jury to minimize the risk of overemphasis. ***Id.***, ¶31.

¶10 From ***Anderson***, it is clear that, while courts must exercise their discretion to determine whether a jury should be permitted to review recorded evidence during deliberations, courts do not have discretion to send that evidence into the jury room. *See* ***id.***, ¶¶29-30. Instead, when a court decides to permit a

jury to review recorded evidence, the recorded evidence must be reviewed in the courtroom. ***Id.***, ¶¶30-31.

¶11 Here, the circuit court erred in two ways. First, the court erroneously exercised its discretion when assuming that, because the recordings were admitted into evidence, the jury should automatically be permitted to review them during deliberations. The court failed to consider the appropriate factors: whether the exhibit will aid the jury in proper consideration of the case, whether a party will be unduly prejudiced by submitting the exhibit, and whether the exhibit could be subjected to improper use by the jury. ***Id.***, ¶27. Second, the circuit court erred by sending the audiotape and videotape into the jury room, rather than replaying the evidence in the courtroom. ***Id.***, ¶¶30-31.

¶12 The State argues that the recordings here were not required to be replayed in the courtroom. The State contends that the confession in ***Franklin*** and the witness interview in ***Anderson*** are distinguishable from the recordings here and, as a result, no risk of overemphasis existed. We disagree.

¶13 The State assumes that the risk of overemphasis is derived solely from what is depicted on a recording. Another concern, however, is what the jury does with a recording. *See* ***Anderson***, 291 Wis. 2d 673, ¶31. A videotape, for example, can be paused or played in fast-forward or slow-motion. A jury can also rewind and replay all or specific portions of a videotape multiple times. Further, the State's argument fails to acknowledge that, aside from the risk of overemphasis, another concern with sending recorded evidence into the jury room is that the evidence could be damaged by a jury. ***Id.***, ¶30. This risk is unrelated to a recording's content. The procedure in ***Anderson*** is designed to manage all of

these concerns, requiring courts to maintain control over recorded evidence and allowing courts to instruct the jury when appropriate. ***Id.***, ¶¶30-31.

¶14 Alternatively, the State argues that sending the recordings into the jury room was harmless error. In order for the court's error to be harmless, the State has the burden of showing that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)).

¶15 The State relies on the overall strength of its case against Brown. Aside from Brown, Vue and Vernosh were the only people who witnessed what occurred inside the vehicle during the cocaine delivery. Their testimony was contradictory. While the State contends that Vernosh's credibility is questionable because of her relationship with Brown, Vue's credibility is also questionable because he admitted having twelve criminal convictions at trial. *See* ***State v. Stuart***, 2005 WI 47, ¶46, 279 Wis. 2d 659, 695 N.W.2d 259 (the number of criminal convictions is relevant to a witness's credibility).

¶16 The recorded evidence was therefore an important part of the State's case. While the jury heard the audiotape and viewed the videotape during the trial, it asked to review them again during deliberations. A jury's request to review evidence during deliberations generally reflects doubt or disagreement by some of the jurors. ***Anderson***, 291 Wis. 2d 673, ¶121. As a result, when combined with the credibility issues surrounding Vue, we cannot agree that the State's case against Brown was overwhelming.

¶17 Our supreme court's concern about how a jury's use of recordings might affect its deliberations was based on the risk that the evidence could be

overemphasized relative to in-court testimony or other evidence. ***Anderson***, 291 Wis. 2d 673, ¶31. Because the recordings were not replayed in the courtroom, the circuit court was unable to maintain control over the evidence. *See* ***id.*** As a result, it is unknown what the jury did with the recordings. The more the jury reviewed the recordings, the greater the risk they were overemphasized. *See* ***id.*** Without knowing what the jury did with the recordings, the court was unable to fully assess this risk or minimize it by crafting an appropriate jury instruction. *See* ***id.*** We therefore remand Brown's case to the circuit court for a new trial.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.