

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 18, 2008**

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. 2008AP563-CR**

**Cir. Ct. No. 2006CF21**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL C. PARRISH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Rusk County:  
FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Parrish appeals a judgment, entered upon a jury's verdict, convicting him of one count of second-degree sexual assault as a repeater. Parrish asserts the court erroneously denied his motion for a mistrial; did not ascertain whether Parrish knowingly, intelligently, and voluntarily waived his

right to testify; and did not give the correct jury instructions. We reject Parrish's arguments and affirm.

¶2 Parrish had sexual intercourse with Ashley P., who was fifteen years old at the time. At trial, one of the officers investigating the case was asked by the State: "Okay. And when you spoke with the defendant in jail—excuse me. When you spoke with the defendant about the case after you had spoken to Ashley, did you ask him whether Ashley had been at the house the night she was listed as a runaway?"

¶3 After the officer was excused from the stand, Parrish moved for a mistrial, arguing the jail reference was prejudicial. The State responded that the reference was inadvertent, stated the fact Parrish was in jail would not be used in the closing argument, and pointed out that Parrish was dressed in civilian clothes, was not in shackles or handcuffs, and had come in the same door to the courtroom as the public.

¶4 The court noted it was true Parrish had been interviewed while in jail and there had been no motion in limine to exclude such a reference. Further, defense counsel had been "very careful in articulating" in the opening statement that there might be some evidence Parrish was imperfect. Thus, the court concluded, "I don't think it's really that prejudicial, if it's prejudicial at all. To me, I don't think it's going to affect the jury even if they caught it." The court denied the motion.

¶5 Parrish's first argument on appeal is that the trial court erroneously denied the mistrial motion. The decision whether to grant a mistrial is committed to the trial court's discretion. *State v. Doss*, 2008 WI 93, ¶69, 754 N.W.2d 150. The court must determine whether the claimed error was, in light of the entire

proceeding, sufficiently prejudicial to warrant a new trial. *Id.* We will reverse the denial of a mistrial motion only upon a clear showing the court erroneously exercised its discretion. *Id.*

¶6 Here, Parrish makes no attempt to show the court erroneously exercised its discretion. In fact, Parrish's *only* argument is: "The Assistant District Attorney ... should have known better. It is common knowledge that evidence/testimony of a defendant's incarceration is not to be brought before a jury absent a specific request or order. To argue or accept that they made an inadvertent mistake is simply not credible."

¶7 None of these conclusory, unsupported statements goes to the court's exercise of discretion, which contemplates a process of reasoning through the facts of record. *See State v. Gallion*, 2004 WI 42, ¶19, 270 Wis. 2d 535, 678 N.W.2d 197. The court articulated precisely why it did not consider the statement prejudicial. To this, we add our observation that based on the transcript, it appears just as likely the jury would have viewed the State's reference to Parrish being in jail as an error, because the prosecutor stopped herself after mentioning jail, excused herself, then rephrased the question. We see no flaw in the court's reasoning and therefore no error in its determination.<sup>1</sup>

¶8 Parrish also argues the court failed to properly conduct a colloquy on his decision not to testify. Because a criminal defendant has a fundamental right

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<sup>1</sup> Parrish adds to his appellate argument two other alleged bases for a mistrial: the investigating officer's testimony that Parrish eventually stopped the interview and requested an attorney, and the police chief's testimony that while executing a search warrant in this sexual assault case, police found drug paraphernalia. However, the mistrial motion was based solely on the reference to Parrish's incarceration. The other errors were never objected to during trial, much less made the basis for a mistrial motion.

to testify, the court must ensure waiver of this right is knowing, intelligent, and voluntary. *State v. Weed*, 2003 WI 85, ¶¶40-41, 263 Wis. 2d 434, 666 N.W.2d 485. A colloquy helps the court be certain waiver is appropriately made, but is not always necessary. *Id.*, ¶¶43-44.

¶9 However, issues not preserved in the trial court, even issues of constitutional magnitude, will generally not be considered on appeal. *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Parrish does not show he raised this issue below, either by a contemporaneous objection or a postconviction motion. The burden to show preservation is his. *Id.* Thus, the issue has been waived.

¶10 Finally, Parrish contends the court erred by not giving WIS JI—CRIMINAL 315 regarding his decision not to testify. Failure to object to, or request, a jury instruction constitutes waiver. WIS. STAT. § 805.13(3) (2005-06); *State v. Olexa*, 136 Wis. 2d 475, 483-84, 402 N.W.2d 733 (Ct. App. 1987). Parrish neither requested instruction 315 nor objected to its absence. He cannot allege error now.

*By the Court.*—Judgment affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

