COURT OF APPEALS
DECISION
DATED AND FILED

November 20, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP212-CR
2008AP213-CR

Cir. Ct. Nos. 2005CF598
2005CF1120

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO LAMONT TUCKER,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Antonio Lamont Tucker appeals judgments convicting him of two counts of armed robbery, and one count of felon possessing a firearm. He contends that the circuit court should have declared a mistrial at the

beginning of the trial and during closing arguments. He also contends that the circuit court erred by allowing the State to introduce inadmissible testimony at his trial. We affirm.

¶2 The State charged Tucker in connection with armed robberies occurring on or about November 1, 2004, February 14, 2005, and February 23, 2005. He was prosecuted separately on the February 14 charge. However, at the beginning of the voir dire, the circuit court engaged in the following discussion with the prosecutor and defense counsel:

THE COURT:	The Information also charges that Antonio Tucker on or about Monday, February 14th, 2005, in the city of Beloit, Rock County, Wisconsin, with intent --
MR. URBIK:	Judge, I'm sorry to interrupt, but I think that's the wrong violation date.
THE COURT:	What date?
MR. URBIK:	February 23rd.
THE COURT:	That is the third one.
MR. URBIK:	Yes.
MR. DANIEL:	He's on the second one.
THE COURT:	I'm on the second one.
MR. URBIK:	Well the first one should be November 1st.
THE COURT:	That's right.
MR. URBIK:	Okay.
THE COURT:	There's a second one, February 14th. There's a third one, which is February 23rd.

¶3 Tucker then unsuccessfully moved for a mistrial because the circuit court inadvertently informed the prospective jurors of the third pending armed robbery charge.

¶4 The State's case included evidence that the tread pattern of shoes found at a residence Tucker frequented matched a pattern found at the scene of the February 23 robbery. A witness testified that Tucker wore the shoes in question on February 23. Another witness, Andre Shelly, testified that Tucker was with him when Shelly stole the same shoes from a store. Shelly also testified that he stole the shoes to purchase crack cocaine. Tucker objected to Shelly's testimony as irrelevant.

¶5 In closing arguments defense counsel referred to evidence that Tucker had one prior criminal conviction. In reply, the prosecutor responded, over Tucker's objection, that "[t]here is no evidence one way or the other whether the defendant has any other convictions. [Defense counsel] misled you to the extent that he implied that you should consider that [Tucker had only one prior conviction] as fact." Tucker subsequently moved for a mistrial, arguing that the prosecutor improperly commented on Tucker's failure to present evidence as to the number of his convictions. Again, the circuit court denied a mistrial. The jury returned a guilty verdict, leading to Tucker's conviction and this appeal.

¶6 Tucker first contends that the court should have granted a mistrial after inadvertently informing the prospective jurors of the third armed robbery charge. In Tucker's view, this was highly prejudicial information about another bad act. However, we conclude that the court's reference to a third date was harmless, and therefore failed to provide a basis for a mistrial. *See* ***Bowie v. State***, 85 Wis. 2d 549, 553-554, 271 N.W.2d 110 (1978) (no mistrial warranted on

harmless error). It is not clear whether any prospective jurors understood that the court was referring to another armed robbery as opposed to expressing a confusion or mistake about dates. Nor is it clear that the jurors would have understood that Tucker was being prosecuted on a third charge. In any event, we cannot reasonably conclude that the court's passing reference to "a third one," before the jury was even selected, had any effect on the verdict. An error is harmless if the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict. ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. Such is the case here.

¶7 Tucker waived his contention that testimony about Shelley's theft of shoes and the reason for it was inadmissible. Defense counsel objected generally to Shelley's testimony as irrelevant. However, the State had evidence that the shoes were the ones used by the robber, and Shelley's testimony helped establish Tucker's link to those shoes. It was therefore highly relevant. On appeal, Tucker contends that the evidence was cumulative because Tucker's link to the shoes was undisputed. He also contends that it was highly prejudicial other acts evidence because Shelley testified that Tucker accompanied him during the shoe theft. Both arguments are waived because Tucker did not specifically object to Shelley's testimony on either grounds. *See* ***State v. Peters***, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

¶8 Tucker next contends that the circuit court should have granted a mistrial based on the prosecutor's argument in closing concerning the number of his prior convictions. Tucker characterizes the prosecutor's argument as a suggestion that Tucker may have had more than one conviction when there was no evidence of more than one. However, before the prosecutor spoke, defense counsel had asked the jury to consider that Tucker only had one conviction, a

proposition for which there was also no evidence. In so doing, defense counsel invited the prosecutor's response, and the trial court therefore properly denied a mistrial under the doctrine of invited response. *See* ***United States v. Young***, 470 U.S. 1, 12-13 (1985) ("if the prosecutor's remarks were 'invited' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction.").

¶9 Finally, Tucker asks for a new trial in the interest of justice, arguing that the trial court's errors prevented a full and fairly tried case. Because we conclude that the circuit court committed no errors in denying the motions for mistrial and admitting Shelley's testimony, we deny the request.

By the Court.—Judgments affirmed.

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