COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2173-CR **Cir. Ct. No. 00-CF-2**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES J. KRISPIN, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. James J. Krispin appeals a judgment convicting him of fourth-degree sexual assault, two counts of second-degree sexual assault by use of force, and three counts of misdemeanor bail jumping, all as a habitual criminal. Krispin, claiming that the State engaged in prosecutorial misconduct, argues that the trial court erred by failing to grant his motion for a mistrial.

Alternatively, Krispin argues that a new trial should be granted in the interest of justice. We reject Krispin's arguments and affirm the judgment.

BACKGROUND

¶2 The relevant facts are undisputed. The present case arose from allegations that Krispin, a supervisor at Burger King, had sexually assaulted an employee. The victim, Bradley H., testified at trial that Krispin had sexually assaulted him on four Wednesdays in November and December of 1999—once in the Burger King break room, twice in the bathroom and once outside behind the dumpster.

¶3 At that time, one of the defense witnesses, Christopher Stockman, was in jail and also working at Burger King on Huber work release. At trial, Stockman testified that he worked each Wednesday, routinely arriving at 3:30 p.m. and smoking in the break room until his shift started at 4:30 p.m. Stockman further testified that neither Krispin nor Bradley could have left their shifts for five to ten minutes without the other employees noticing. On cross-examination, the following exchange occurred:

> [Prosecutor]: Are you sure that on November 3rd, 1999, you worked?
>
> [Stockman]: I'm most likely sure.
>
> [Prosecutor]: Most likely sure. What if I told you that the jail records show that you never checked out for work on that day, and you stayed in-house the entire day?
>
> ….
>
> [Stockman]: I probably wouldn't believe it, because that's the Whopper Wednesdays, and that's one of the most busiest times.
>
> [Prosecutor]: So you were working for sure on November 3rd, 1999.

> [Stockman]: Unless you can show me something that I wasn't, I was, because that's what I believe.
>
> [Prosecutor]: Okay.
>
> [Stockman]: I don't ever—never never missed a Wednesday.
>
> [Prosecutor]: No other questions for this witness

¶4 On redirect examination, defense counsel did not ask questions that specifically related to November 3. Ultimately, the State did not introduce any evidence that Stockman remained in jail on November 3. Defense counsel moved for a mistrial based on the prosecutor's cross-examination of Stockman. Specifically, defense counsel argued that the State had improperly impugned Stockman's credibility. The trial court denied the motion for mistrial and Krispin was convicted upon the jury's verdicts. This appeal followed.

ANALYSIS

I. MISTRIAL FOR PROSECUTORIAL MISCONDUCT

¶5 Krispin argues that the trial court erred by failing to grant his motion for a mistrial. Specifically, Krispin contends that "the State improperly and deliberately impugned the veracity of an essential defense witness," thus undermining Krispin's right to a fair trial and due process of law. We are not persuaded.

¶6 Ordering a mistrial due to prosecutorial misconduct is within the trial court's discretion. ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. ***State v. Bunch***, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995). In deciding a motion for a mistrial, the

trial court must consider the entire proceeding and determine whether the claimed error is sufficiently prejudicial to require a new trial. ***State v. Adams***, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶7 Here, the trial court acknowledged that the prosecutor had challenged Stockman as to whether he left the jail on November 3. However, the court also noted that Stockman "kind of held to his guns" and did not agree with the prosecutor's suggestion. The court further recognized that although this exchange seemed to indicate that the prosecutor would be presenting evidence to prove that Stockman was not at work on November 3, no evidence to that effect was introduced. Ultimately, the court concluded: "What [the prosecutor] did was to require a commitment from [Stockman] that he was sure that he was in fact at work that day. There is no question [the prosecutor] challenged Stockman, and there is no question that nothing was put in to discredit him." Based on these statements, we conclude that the trial court implicitly found that the prosecutor did not engage in misconduct.

¶8 Further, there is no basis in the record for Krispin's claim that the prosecutor deliberately and knowingly misled the jury. In response to Krispin's mistrial motion, the prosecutor explained that her cross-examination of Stockman was based on a misrepresentation by the jail that Stockman was not released for Huber privileges on November 3. The prosecutor further noted that when she later sought documentation to substantiate her line of questioning, she was informed that the jail had been mistaken and Stockman had, in fact, checked out of the jail on November 3. Because the trial court implicitly found that the prosecutor did not engage in misconduct and the record does not support Krispin's claims, we

conclude that the trial court did not erroneously exercise its discretion by denying Krispin's mistrial motion.[1]

¶9 In any event, the court instructed the jury: "Remarks of the attorneys are not evidence. If their remarks implied the existence of certain facts not in evidence, disregard any such implications and draw no inferences from the remarks." WIS JI—CRIMINAL 157. We presume that the jurors acted in accordance with this instruction. ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). These steps were sufficient to address the prosecutor's conduct and safeguard Krispin's due process right to a fair trial. *See* ***State v. Collier***, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court."). The drastic remedy of a mistrial was not necessary.

II. NEW TRIAL IN THE INTEREST OF JUSTICE

¶10 Krispin alternatively seeks a new trial under WIS. STAT. § 752.35,[2] which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason

[1] The State argues that Krispin failed to preserve the issue of prosecutorial misconduct by failing to sufficiently assert it as a basis for his mistrial motion in the trial court. We agree. It is undisputed that Krispin did not expressly refer to prosecutorial misconduct as a basis for his mistrial motion. Rather, Krispin argued that the State lacked the "sufficient quantum of evidence" necessary to imply that Stockman was not in jail on November 3. Generally, we will not decide issues that have not been raised in the trial court. ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Nevertheless, because the trial court implicitly found that the prosecutor did not engage in misconduct, we address the issue on its merits.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version.

miscarried."[3] To establish a miscarriage of justice, Krispin "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶11 Krispin has failed to demonstrate that the prosecutor deliberately and knowingly misled the jury. Further, there is no evidence in the record that a retrial would produce a different result. The evidence that Stockman worked every Wednesday was unrefuted. Accordingly, we conclude there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Krispin a new trial.

By the Court.—Judgment affirmed.

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

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[3] WISCONSIN STAT. § 752.35 addresses discretionary reversal and states:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.