COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0097-CR **Cir. Ct. No. 00CF1302**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY SHAWN MANN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Timothy Shawn Mann appeals from a judgment of conviction entered after a jury convicted him of two counts of delivery of cocaine, contrary to WIS. STAT. §§ 961.41(1)(cm)1 and 961.49(1)(b)6 (1999-2000), and

one count of bail jumping, contrary to WIS. STAT. § 946.49(1)(b) (1999-2000).[1] He also appeals from the trial court's order denying his postconviction motion for a new trial. Mann contends: (1) his due process rights were violated when his defense counsel failed to request a substitution of the judge; (2) the trial court erred in allowing a police detective to offer expert opinion testimony regarding how drug dealers operate; and (3) he is entitled to a new trial in the interest of justice because the evidence was inconsistent and insufficient. We disagree and affirm.

I. BACKGROUND.

¶2 On March 13, 2000, two undercover Milwaukee police officers, Timothy Graham and Steed Myles, went to the area of North 27th Street and Kilbourn Avenue to investigate complaints of drug trafficking. The officers split up and patrolled the area. As Officer Graham walked north on 27th Street, an individual, later identified as Mann, approached him. This individual asked Officer Graham if he was interested in buying crack cocaine. Officer Graham then purchased two corner-cut bags of crack cocaine for $20. The $20 bill used by Officer Graham in the transaction was a prerecorded bill.[2]

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The officers had written down the serial numbers of the bills that they intended to use in any potential undercover drug buys so that they could compare the serial numbers of any money later recovered from a suspect with the prerecorded list in order to provide additional evidence that the suspect made the illegal transaction.

¶3 Following the transaction, Officer Graham continued walking north on 27th Street and ducked around a corner for a moment. When he reemerged, he saw Officer Myles engaged in a transaction with the same individual from whom he had just purchased the crack cocaine. Officer Myles told the suspect that he wanted to buy $20 worth of crack cocaine and the suspect then sold him two corner-cut bags of crack cocaine for $20. The $20 bill used by Officer Myles was also prerecorded. Officer Myles later identified Mann as the individual who had sold him the cocaine.

¶4 Officer Myles then met Officer Graham back at their undercover vehicle. They immediately contacted uniformed officers, informed them of the location of their purchases, and attempted to re-establish visual contact with the suspect. Officers Graham and Myles then drove their unmarked vehicle back to the corner of 27th Street and Wells Street where they saw Mann exiting a corner grocery store. They directed the uniformed officers to arrest Mann. After taking him into custody, the officers found $46 in Mann's pants pocket. However, they did not find any drugs or any of the prerecorded bills in his possession.

¶5 On March 15, 2000, Mann was charged with two counts of delivery of a controlled substance and one count of bail jumping. The bail jumping count alleged that a few months before making the transactions in question, Mann had been released on bail for a felony charge of falsely presenting a noncontrolled substance as a controlled substance.[3] On September 20, 2000, a jury convicted Mann on all three counts. On December 12, 2000, the trial court sentenced him to

[3] On February 9, 2000, Mann pled guilty to the charge of falsely presenting a noncontrolled substance in violation of WIS. STAT. § 961.41(4)(am)1.a, and was awaiting sentencing.

ten years for each count with respect to counts one and two, consisting of six-years' imprisonment followed by four-years' extended supervision, and two years with respect to count three. All sentences were imposed concurrently.

II. ANALYSIS.

A. Mann's due process rights were not violated.

¶6 Mann claims that his due process rights were violated when his trial counsel failed to honor his wish to file a request for substitution of the judge. WISCONSIN STAT. § 971.20 guarantees a criminal defendant the right to request substitution of the judge in any criminal action. Section 971.20 states:

> **(2)** ONE SUBSTITUTION. In any criminal action, the defendant has a right to only one substitution of a judge, except under sub. (7). The right of substitution shall be exercised as provided in this section.
>
> ….
>
> **(4)** SUBSTITUTION OF TRIAL JUDGE ORIGINALLY ASSIGNED. A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and before arraignment.

While the statute does not require a defendant to show cause for the substitution, *see* ***State v. Holmes***, 106 Wis. 2d 31, 34-35, 315 N.W.2d 703 (1982), the request must be filed before making any motions or before arraignment pursuant to § 971.20(4).

¶7 In the instant case, Mann made his initial appearance on March 16, 2000. At this time, he learned that his case had been assigned to the same judge who had just presided over his earlier case. After his preliminary hearing on March 22, 2000, Mann allegedly advised his attorney that he wished to file a request for substitution of the judge. His defense counsel, however, never filed a request for substitution of judge pursuant to WIS. STAT. § 971.20. Therefore, Mann's opportunity for substitution was lost when defense counsel failed to file a motion pursuant to § 971.20 before completion of the arraignment.

¶8 Mann contends that he was denied his "statutory and due process rights of substitution" and concludes that the remedy for the violation of this right is reversal of the conviction and remand to the trial court for a new trial. We disagree.

¶9 The rights that Mann asserts under the due process clause and the judicial substitution statute are rights that are protected from governmental, not private, interference. *See* ***Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶80, 237 Wis. 2d 99, 613 N.W.2d 849 ("The Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution prohibit government actions that deprive any person of life, liberty, or property without due process of law."), ***Journal Sentinel, Inc. v. Schultz***, 2001 WI App 260, ¶15, 248 Wis. 2d 791, 638 N.W.2d 76 ("[D]ue process can be violated only if there is 'state action.'"). Although Mann's attorney was appointed by the public defender's office, a public defender is a private actor. *See* ***Polk County v. Dodson***, 454 U.S. 312, 325 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."). Thus, because the failure on behalf of his defense counsel did not involve state action, we conclude that

counsel's failure to file a request for substitution violated neither Mann's statutory nor his constitutional due process rights.

B. Mann has failed to establish a claim for ineffective assistance of counsel.

¶10 Thus, our review is limited to whether the alleged error warrants a new trial due to ineffective assistance of counsel based on defense counsel's failure to file the substitution motion. However, Mann failed to the raise this issue in the trial court or on appeal.[4] Thus, because this issue was not raised below, giving the trial court and the parties an opportunity to develop and respond to the argument, we decline to address it. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827-29, 539 N.W.2d 897 (Ct. App. 1995) ("We will not … blindside trial courts with reversals based on theories which did not originate in their forum.").

C. The trial court properly allowed expert opinion testimony.

¶11 Mann next argues that the trial court erred in allowing Milwaukee police detective John Kaltenbrun to testify as an expert witness regarding how drug dealers operate.[5] Detective Kaltenbrun was called by the State to explain how Mann could have been the drug dealer in the transactions with Officers Graham and Myles despite the fact that he was not in possession of the prerecorded buy money at the time of his arrest. Mann objects to the following statements made by Detective Kaltenbrun at trial:

[4] In his own words, Mann has demonstrated a "clear intent to eschew a ***Strickland*** claim."

[5] It is undisputed that Detective Kaltenbrun did not have direct involvement in Mann's arrest or any direct knowledge of the facts of the case.

[STATE]: And in your experience when an arrest is made within let's say 15 minutes of the actual transaction, in every case do you recover the prerecorded buy money?

[DETECTIVE KALTENBRUN]: No, sir.

[STATE]: And do you have an opinion as to why that is?

[DETECTIVE KALTENBRUN]: Several factors come into play. You're talking about a time period of 15 minutes. If an arrest is made very shortly afterwards, the chances of recovery of the money are much higher.

Now, talking about a 15 minute time period – and that's actually a long period. If this person that had made the sale and obtained the money [] remained in view of the person who's covering it … and I'm able to locate myself in a position to constantly monitor where this person is and ensure that nobody else went up to him or any other transfers took place, then I could say, yes, that person should have the money.

If under circumstances where this person – and I'm presuming that we are talking about the defendant…. If he's gone out of view either into a store, made purchases, he's talking with another individual, he's made other transactions under circumstances where money can be exchanged in a store or making a purchase to another person for selling more drugs, then the money itself is going to transfer to other people's hands.

….

[STATE]: Do you have an opinion whether there's awareness among experienced drug dealers involving the importance of buy money?

[DETECTIVE KALTENBRUN]: The most common reply from someone as they are being arrested especially when they don't have the buy money on them [-] and later on I talked to them and they confess to the offense [-] the most common thing that's stated is I don't have the buy [money.]

To me this displays an evidence that they're well aware that we record the money, and they do things in order to separate themselves from what is positive evidence linking them to that specific crime.

¶12 Mann does not challenge Detective Kaltenbrun's qualifications as an expert in the field of drug investigations.[6] Mann does contend, however, that because Detective Kaltenbrun had no direct knowledge of the event in question, his testimony was mere speculation that went well beyond his experience and training. Thus, Mann concludes that the trial court erred in allowing Detective Kaltenbrun to draw any conclusions as to what Mann actually did with the buy money. Rather, he contends that the trial court should have limited his testimony to what drug dealers generally do with buy money.

¶13 "The admissibility of evidence is directed to the sound discretion of the trial court, and we will not reverse the trial court's decision to allow the admission of evidence if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995) (citation omitted). The admissibility of expert opinion testimony is assessed in light of WIS. STAT. § 907.02. *See* ***id.*** WISCONSIN STAT. § 907.02 allows expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Whether expert testimony assists the fact finder is a discretionary decision of the trial court. *See* ***Brewer***, 195 Wis. 2d at 305.

[6] Generally, "[t]he question of an expert witness' qualifications is a matter resting in the sound discretion of the trial court, and unless it is shown that the trial court [erroneously exercised] its discretion its ruling will stand." ***Simpsen v. Madison Gen. Hosp. Ass'n***, 48 Wis. 2d 498, 509, 180 N.W.2d 586 (1970). The record in the instant case demonstrates that Detective Kaltenbrun had been employed by the Milwaukee Police Department for over fifteen years, had worked in hundreds of drug investigations, had been part of the Vice Control Division for nearly seven years, was familiar with the procedure for purchasing illegal drugs with prerecorded currency, and received substantial training in the area of drug investigation. Thus, even if Mann had challenged Detective Kaltenbrun's qualifications, we would have concluded that the trial court did not erroneously exercise its discretion in qualifying him as an expert in the field of drug investigations.

¶14 Mann admits that Detective Kaltenbrun could have testified that, "based upon his experience, it was possible the buy money *might* not be found on Mann." Mann also concedes that the trial court could have allowed him to testify that "it would not necessarily be surprising if the buy money was not found on Mann." However, Mann contends that the trial court crossed the line in allowing the detective to testify that "based on what he had learned about the case, the buy money *would not* be found on Mann."

¶15 First, we disagree with Mann's characterization of Detective Kaltenbrun's testimony. Detective Kaltenbrun testified:

> If he's gone out of view either into a store, made purchases, he's talking with another individual, he's made other transactions under circumstances where money can be exchanged in a store or making a purchase to another person for selling more drugs, then the money itself is going to transfer to other people's hands.

Thus, Detective Kaltenbrun stated that if certain activities took place after the buy, the prerecorded buy money might have left Mann's possession. He did not testify that he observed Mann engaging in any of these activities, or that he actually saw Mann transfer the buy money. Thus, Detective Kaltenbrun's testimony was properly limited to his expert opinion regarding drug activity.

¶16 Second, testimony in the form of an opinion otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact. *See* WIS. STAT. § 907.04[7]; *see also* ***State v. Williams***, 168 Wis. 2d

[7] WISCONSIN STAT. § 907.04 states:

> **Opinion on ultimate issue.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(continued)

970, 989, 485 N.W.2d 42 (1992), *rev'd on other grounds by* ***State v. Stevens***, 181 Wis. 2d 410, 511 N.W.2d 591 (1994). Therefore, even if the detective's testimony gave an opinion as to whether he believed Mann transferred the buy money, such testimony is admissible.

¶17 Third, and finally, we conclude, as we did in ***Brewer***, that the case of ***State v. Whitaker***, 167 Wis. 2d 247, 481 N.W.2d 649 (Ct. App. 1992) provides proper guidance. As summarized in ***Brewer***:

> In ***Whitaker***, the defendant was convicted for shooting a woman following the breakup of a party; the state's theory of the case was that the violence during and after the party was gang-related. There was eyewitness testimony that when the defendant shot the victim, the defendant was wearing a baseball cap with someone else's name on it. To buttress the identification testimony, the state put in a police officer's expert testimony that gang members exchange clothing to frustrate identification. The defendant argued on appeal that the topic of the officer's testimony was not outside the general knowledge and experience of the average juror and thus did not require expert testimony. Without deciding whether expert testimony was required under the circumstances, we stated that expert testimony is permitted when it will assist the trier of fact to understand the evidence.... We then held that the trial court did not misuse its discretion in concluding that the officer's testimony could assist the jury in evaluating the evidence. We further held that the officer's testimony about his "knowledge, skill, experience, [and] training" established a sufficient threshold foundation for his opinion testimony on gang activity.

Brewer, 195 Wis. 2d at 306-07 (citations omitted).

Additionally, WIS. STAT. § 907.02 further provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¶18 Thus, ***Whitaker*** stands for the proposition that "a properly qualified expert on gang activity may give an opinion if such opinion will assist the jury to evaluate an issue in the case." ***Id.*** at 307-08. Similarly, we conclude that a properly qualified expert on drug activity may give an opinion if such opinion will assist the jury to evaluate an issue in the case. Here, Detective Kaltenbrun's testimony regarding the use of prerecorded buy money, as well as a drug dealer's possible knowledge of the use of buy money and resulting method of transferring the money, would assist a jury in determining whether a suspect transferred possession of the buy money. Accordingly, under ***Whitaker*** and ***Brewer***, we conclude that the trial court did not erroneously exercise its discretion in admitting the detective's expert opinion testimony.

D. Mann is not entitled to a new trial in the interest of justice.

¶19 Lastly, Mann contends that he is entitled to a new trial. Mann states: "A party may move to set aside a verdict and request a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or in the interests of justice." Mann also points out that "circuit courts have the discretion … to set aside a verdict and order a new trial where the real controversy was not fully tried." While Mann lists these standards for setting aside a verdict and granting a new trial, he fails to develop any cogent argument based on any one of these theories. Rather, he continues by describing what he refers to as "numerous aspects which are remarkable about the facts of this case."

¶20 For us to decide these issues, we would first have to develop them. However, we cannot serve as both advocate and judge. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Therefore, because these

issues are inadequately briefed, we decline to address them. *See* ***id.*** (stating that this court will not address issues on appeal that are inadequately briefed).[8]

¶21 Accordingly, based upon the foregoing reasons, the trial court is affirmed.

By the Court.—Judgment and order affirmed.

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

[8] The gist of Mann's argument appears to be that he is entitled to a new trial due to a number of factual inconsistencies. For example, Mann finds it "remarkable" that he was convicted despite the fact that he possessed no drugs or buy money at the time of his arrest. He also points out that Officers Graham and Myles contradicted each other's testimony with respect to where they parked their unmarked patrol car. Mann's argument continues by outlining other facts that he describes as ranging from "suspicious" to a "major contradiction."

We agree with the State that "Mann's appellate brief reads like a closing argument to the jury." We take this opportunity to remind Mann that the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Rather, the test is whether this court can conclude that the trier of fact could have been so convinced by evidence that it had a right to believe and accept as true. *See* ***id.*** Given that credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, we pause to note that the jury could have been so convinced by the evidence to convict Mann.