COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0316-CR **Cir. Ct. No. 00 CM 10199**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDUARDO ALICEA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Reversed and cause remanded with directions*.

¶1 FINE, J. Eduardo Alicea appeals from a judgment entered on a jury verdict convicting him of criminal damage to property, as party to a crime. *See* WIS. STAT. §§ 943.01(1) & 939.05. He claims that the trial court erred in not granting his motion for a mistrial when a police detective testifying at the trial, Robert Hernandez, violated the trial court's order limiting the evidence that could

be presented to the jury. He also claims that the trial court erred in not permitting him to explain to the jury that the implication in the detective's testimony was not true. We reverse.

I.

¶2 The State charged Alicea and Lee A. Brown with battering Helberto Castro and Alfredo Soto, and with damaging Castro's car. Neither victim testified at the trial, and the State's case rested on the testimony of two citizen witnesses, as well as Alicea's statement to the police that he essentially did the things he was charged with having done following what he contended was Castro's and Soto's confrontation with him. Before the trial started, the State moved to have the trial court exclude evidence that Castro and Soto had falsely accused Alicea of an attempted armed robbery of a liquor store. Although Brown's lawyer argued that the false accusation went "to the heart of our defense" because Castro and Soto "started the confrontation" and "they made up allegations of an armed robbery to try to shift the focus from them and their role in how this incident got started to Mr. Brown and Mr. Alicea," the trial court granted the State's motion. The trial court then had the following discussion with Brown's lawyer:

> MR. [Ramon] VALDEZ: So if I'm straight on this, the State can't mention this stuff either?
>
> THE COURT: Correct.
>
> MR. VALDEZ: Okay. And 'cause I've done about a hundred jury trials now in the misdemeanor division, and there's going to be a stumble. One of the officers is going to say we'd got an armed robbery call, and that's why we went there. It's going to happen, Judge.
>
> THE COURT: If he's got--Mr. [David] Weber [the prosecutor] needs to discuss that with his witnesses because he's not allowed to use that information.

> MR. VALDEZ: My last trial the third question in response out of--from the State to the officer it came right out. I thought we just did a motion in limine on that. So it's going to happen. I just want to prep you on that.
>
> THE COURT: We'll entrust Mr. Weber with that not occurring.

The prosecutor told the trial court that "[a]ll the police reports indicate that they were dispatched for a purpose, and the purpose was not an armed robbery investigation."

¶3 The trial court's hope that the State's witnesses would comply with its pretrial ruling was not fulfilled. After testifying for the State that he had been a Milwaukee police officer for more than twenty-three years, and a detective since 1995, Detective Hernandez testified that his duties involved "[b]asically robberies," and gave the following answer to the prosecutor's question asking "what was [*sic*] the circumstances surrounding your meeting Mr. Alicea?": "Well, I was sent there to investigate the robbery that occurred there." Alicea's lawyer immediately objected, and the trial court responded: "The objection is going to be sustained and the answer will be stricken. Ladies and gentlemen of the jury, disregard Detective Hernandez's answer to the question." The trial court then had an on-the-record conference with the lawyers and Detective Hernandez. The prosecutor examined Hernandez outside of the jury's presence:

> Q. Were you present, Detective, when I discussed the subject of robbery?
>
> THE COURT: When?
>
> BY MR. WEBER:
>
> Q. Either this morning or last night?
>
> A. This morning you had mentioned something about it, right.

> Q. What did I tell you?
>
> A. You weren't talking directly to me, but you said we weren't allowed to use the word robbery.
>
> MR. WEBER: Nothing further.
>
> THE COURT: Given that statement, Detective, why did you make the statement that you did?
>
> THE WITNESS: He gave me the question. I just answered it. I just -- He asked me where I was dispatched, where I was sent to investigate. I said my assignment was to strong armed robbery over the air waves.

The trial court found that Detective Hernandez had "violated a previous court order." The trial court explained:

> I don't have any doubt that Mr. Weber did discuss this with Detective Hernandez. He did admit he answered the question he believed to be honestly. Mr. Weber told him not to do it, but he did it anyway.

Brown's lawyer asked the trial court to declare a mistrial or at least let the defendants explain to the jury that the robbery accusation was not true:

> This officer admitted that he was warned by Mr. Weber not to mention those words armed robbery or strong armed robbery and just openly did it. I think that's a serious sanction [*sic*]. I think everybody was cautioned about that in particular, and he openly violated that order. I think a mistrial is in order.
>
> And if the Court is not going to grant the mistrial, then I think we get to go into the information that was provided by the alleged victims [Castro and Soto] that was false.
>
> ….
>
> I don't think you can unring the bell because now the jury is going to be speculating on what is all this robbery business. I just -- You can't unring the bell. It opens the door again. I think you can ring the bell. Certainly the ring opens the door for us to go into all the impeachment evidence.

Alicea's lawyer joined in the requests made by Brown's lawyer.

¶4 The trial court reflected on what Detective Hernandez had done: "Interesting how Mr. Valdez did predict this would occur, and the response from Mr. Weber is that it would not occur, and it did occur. I think that speaks of Mr. Valdez's experience as an attorney." The trial court denied the motion for a mistrial and the alternative relief Alicea and Brown had requested, but it made the following findings:

> First off, I find it was an improper violation of the Court's eminent [*sic*] rule for Detective Hernandez to mention robbery. Second, I find Mr. Weber did what he was supposed to it [*sic*] and told Detective Hernandez not to the discuss [*sic*] the reasons for the investigation or mention the words armed robbery or strong armed robbery or robbery. Third, I find Detective Hernandez in this instance did in response to a question offer that information in violation of the Court's order.

The trial court ruled, however, that the prejudice to the defendants did not warrant a mistrial because, in essence it believed that the "five words can be disregarded" by the jury. It did warn that if its order were again violated so that "Mr. Valdez's prediction becomes accurate again if with this witness or another witness," there might be no "way around a mistrial." As already noted, the trial court also denied the defendants' request for alternative relief—it did not permit them to explain to the jury that the robbery accusation was not true. The trial court ruled that the explanation was "not relevant," and, also, "[i]f it's relevant, I think it's unduly prejudicial."

¶5 The trial court admonished Detective Hernandez to do what the trial court had found Detective Hernandez already knew he should do: "to not discuss the robbery investigation or strong armed robbery investigation before the jury." When the trial resumed, the trial court told the jury to "ignore" and not "consider"

Detective Hernandez's answer to the prosecutor's question "concerning the reason or the purpose of an investigation."

¶6 As noted, the jury convicted Alicea of criminal damage to property. It also, however, found him not guilty of hitting either Castro or Soto. Brown was acquitted on all the charges that were lodged against him.

II.

¶7 We start with a proposition that is occasionally enshrouded by a desire to win—in the context of criminal trials, to *convict*—but must remain a visible pole star of our justice system: fairness, where principles akin to the "golden rule" are followed not merely because that is what the law requires but because it is *right*. Many years ago, the United States Supreme Court expressed this in the context of a prosecutor's responsibilities:

> [H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Police officers, too, are "servants of the law"; indeed, they must have an alert self-scrutiny "to refrain from improper methods calculated to produce a wrongful conviction" because much of what they do is hidden from outside view. The trial court found specifically that Detective Hernandez knowingly violated its order. By telling the jury that the "circumstances surrounding" his "meeting [with] Mr. Alicea" were that he "was sent there to investigate the robbery that occurred there," Detective Hernandez implied—and let the jury infer—that Alicea was somehow involved in a robbery.

The implication and the resulting inference were all the more powerful because Detective Hernandez had just finished telling the jury that his duties involved "[b]asically robberies."

¶8 As everyone in the courtroom whose words are recorded in the transcript recognized, with the possible—but not likely—exception of Detective Hernandez, Detective Hernandez's tying Alicea to a "robbery" was improper and, at the very least, beclouded Alicea's character in violation of the principle recognized by the prohibition in WIS. STAT. RULE 904.04(2) of proving bad character by bad acts ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."). Indeed, a generation ago, the Wisconsin Supreme Court emphasized that an accused has "'the fundamental right to be tried only upon evidence which bears upon the specific offense charged,'" calling it "'an ancient right firmly imbedded in our jurisprudence.'" ***Mulkovich v. State***, 73 Wis. 2d 464, 471–472, 243 N.W.2d 198, 202 (1976) (quoted source omitted). ***Mulkovich*** explained:

> "From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him."

Id., 73 Wis. 2d at 472, 243 N.W.2d at 202–203 (quoted source omitted). Thus, in ***State v. Albright***, 98 Wis. 2d 663, 298 N.W.2d 196 (Ct. App. 1980), one of the reasons we reversed a drunk-driving conviction was because a testifying police

officer volunteered that after he had arrested the defendant the officer removed from the defendant's car a chain and a knife. ***Id.***, 98 Wis. 2d at 666, 675–676, 298 N.W.2d at 198–199, 203. We explained:

> The reference to confiscated weapons was improper. The testimony created unfair prejudice which substantially outweighed any probative value. Testimony by a state trooper that he confiscated a chain and knife from Albright's car clearly inferred impropriety or illegality on the part of Albright. While a chain or knife does not necessarily constitute a weapon, removal by an officer infers that they were in this case. The resulting prejudice to Albright is that the jury might unjustifiably conclude on the basis of this confiscation that Albright was engaged in violent and unlawful activity and therefore it would convict him on the basis of these uncharged "crimes." We view this evidence as intending the inference we draw from it because we have been provided with no other plausible explanation for offering such obviously irrelevant evidence. We note that this information was not solicited by the prosecutor, but was volunteered by the highway patrolman.

Id., 98 Wis. 2d at 675–676, 298 N.W.2d at 203. *See also* ***Harris v. State***, 52 Wis. 2d 703, 704–705, 191 N.W.2d 198, 199 (1971) (law-enforcement officers should not slip in unfairly prejudicial testimony).

¶9 As we have seen, the trial court here determined that an instruction to the jury would suffice and not only declined to declare a mistrial but also refused to let the jury know that Alicea and Brown had nothing to do with any "robbery." Our task is to determine whether this was either a reasonable exercise of the trial court's discretion or, as the State argues in the alternative, "harmless error."

¶10 As both parties recognize, a trial court has broad discretion whether to grant a mistrial, what to tell the jury, and what evidence is admissible. *See* ***Albright***, 98 Wis. 2d at 677, 298 N.W.2d at 204 (motion for mistrial); ***White v.***

Leeder, 149 Wis. 2d 948, 954–955, 440 N.W.2d 557, 559–560 (1989) (jury instructions); ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (admission of evidence). An appropriate exercise of discretion requires that the trial court apply the correct legal principles. ***State v. Mordica***, 168 Wis. 2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992).

¶11 It is a close call whether the trial court's instruction to the jury to "ignore" and not "consider" Detective Hernandez's response of "to investigate the robbery that occurred there" could have, in the context of this case where Brown was acquitted completely and Alicea was acquitted on two of the three charges, cured the prejudice. As ***Mulkovich***, 73 Wis. 2d at 472, 243 N.W.2d at 203, explained: "'In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character of criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect.'" (Quoted source omitted.) Indeed, asking jurors to "ignore" and not "consider" something that they have already heard may be, in Learned Hand's words written in a different context, "a mental gymnastic which is beyond, not only their powers, but anybody's else." ***Nash v. United States***, 54 F.2d 1006, 1007 (2d Cir. 1932). Although the trial court might have been within the broad ambit of its discretion in concluding that its instruction to the jury prevented the jury from using Detective Hernandez's improper comment to view Alicea as a bad person worthy of conviction, *see* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (juries are presumed to follow instructions), its failure to permit the defendants to explain to the jury that the implication that they were involved in a robbery was false not only compounded Detective Hernandez's unfairly prejudicial comment but was also based on an erroneous view of the law.

¶12 First, the implications in Detective Hernandez's volunteered statement were that Alicea and Brown were involved in a robbery, were therefore bad people, and, accordingly, were the type of persons capable of committing the crimes with which they were charged. Although WIS. STAT. RULE 904.04(2) properly excludes this type of propensity evidence, that evidence is excluded *not* because it is not "relevant"—life experience tells us that people tend to act in conformity with what they have done in the past—but because it is *too* probative and would therefore swamp the jury's dispassionate assessment of the other evidence. Thus, defusing the implication in Detective Hernandez's comment would have reduced the force of the improper propensity testimony. Accordingly, contrary to the trial court's analysis, the defendants' proffered explanation *was* relevant—it would have given the jury a reason to follow the trial court's instruction to ignore Detective Hernandez's volunteered remark and thus, in the words of WIS. STAT. RULE 904.01, would have made "the existence" of a "fact that is of consequence to the determination of the action [the defendant's propensity to do bad things] ... less probable."

¶13 Second, the trial court erroneously analyzed the "prejudice" balancing imposed by WIS. STAT. RULE 904.03. All evidence that makes a fact more or less probable is "prejudicial" to the party opposing admission of that evidence. *See* ***State v. Scheidell***, 227 Wis. 2d 285, 303 n.10, 595 N.W.2d 661, 670–671 n.10 (1999) ("[T]he standard for unfair prejudice is not whether the evidence harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case on an improper basis."). The test is thus not whether the evidence is "prejudicial" but whether, to paraphrase RULE 904.03 (evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice"), the evidence is "unfairly prejudicial." *See also*

Mordica, 168 Wis. 2d at 605, 484 N.W.2d at 357. Here, although evidence tending to defuse the propensity testimony injected by Detective Hernandez's improper comment might have been "prejudicial" to the State because it would have deprived the State of an advantage, it would not have been *unfairly* prejudicial to the State because, as we have seen, the State had no right to that evidence. *Cf.* ***id.***, 168 Wis. 2d at 600–607, 484 N.W.2d at 355–358 (defendant had right to introduce evidence bolstering his contention that his confession was designed to shield someone else). The trial court erred in preventing the jury from learning that the implication in Detective Hernandez's comment that Alicea was involved in a robbery was false. We now turn to the State's alternative contention that this error was harmless.

¶14 When the State argues that a trial-court error was harmless so that reversal is not warranted, it has the burden of showing that the there is "no reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222, 232 (1985). The burden of proof is "'beyond a reasonable doubt.'" ***State v. Burton***, 112 Wis. 2d 560, 570, 334 N.W.2d. 263, 268 (1983) (quoted source omitted). Whether the State has met this high burden is a question of law that we review *de novo*. *See* ***State v. Harris***, 199 Wis. 2d 227, 256–263, 544 N.W.2d 545, 557–559 (1996) (undertaking *de novo* analysis). We believe that the State has not carried its burden.

¶15 In support of its harmless-error argument, the State points to Alicea's statement and the testimony of the citizen witnesses, and contends that the error's impact was *de minimis* because its case was so strong. Given, however, that the jury acquitted Alicea of the battery charges, even though he admitted hitting Castro and Soto, and acquitted Brown of all the charges that were lodged against him, we cannot say on our *de novo* review that the State has proven its

case was so strong that the propensity evidence improperly tossed into the case by Detective Hernandez did not contribute to Alicea's conviction. Accordingly, his conviction must be reversed.

¶16 The reversal of Alicea's conviction does not end the matter, however. As noted, the trial court found specifically that Detective Hernandez knowingly violated its order not to mention a "robbery." Normally, a person who violates a court order is subject to a contempt proceeding—either summary or nonsummary. *See* WIS. STAT. ch. 785. The trial court never explained why, in light of its finding, it did not consider either holding Detective Hernandez in summary contempt, *see* WIS. STAT. § 785.03(2), or commence a nonsummary proceeding, *see* WIS. STAT. § 785.03(1). Detective Hernandez is not a rookie; by his own testimony he has had extensive law-enforcement experience. Additionally, and most troubling to not only us but also, from the trial court's comments, to the trial court as well, were the experiences related by Brown's lawyer, and his prescient prediction of what might happen.

¶17 If, as explained by ***Berger***, convictions should be achieved by proper and not improper means, there must be some mechanism to deter those who are tempted to use "improper methods calculated to produce a wrongful conviction," ***id.***, 295 U.S. at 88, from doing so. Merely reversing a conviction is not an effective deterrent because that does not affect those who, like Detective Hernandez here, ignore a trial court's order. Accordingly, by virtue of our superintending authority over the circuit court, WIS. STAT. § 752.02 ("The court of appeals has supervisory authority over all actions and proceedings in all courts except the supreme court."), we remand this matter to the trial court, specifically the Honorable Michael B. Brennan because he is more familiar with the case than would be a judge taking Judge Brennan's calendar by virtue of the rotation system

in effect in Milwaukee County, for an evidentiary hearing to be held within ninety days of the filing of this opinion, at which at least the following persons should testify: Alicea's trial lawyer, Brown's trial lawyer, the prosecutor, Detective Hernandez, and anyone else whom either the trial court, or the person he designates to adduce evidence at the hearing, *see* WIS. STAT. § 785.03(1)(b), believes would have evidence as to whether Detective Hernandez should be held in contempt for violating the trial court's order. Whether Detective Hernandez is to be found in contempt, of course, is a matter within the trial court's reasoned judgment.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.