

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2009AP936-CR

Cir. Ct. No. 2002CF755

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH E. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. Keith E. Williams has appealed from a judgment convicting him of one count of second-degree sexual assault and one count of false imprisonment. The sole issue on appeal is whether the trial court erroneously exercised its discretion by denying his motion for a mistrial. Because we conclude

that the trial court acted within the scope of its discretion in denying a mistrial, we affirm the judgment.

¶2 Williams was originally charged in this case in 2002. At a jury trial in March 2003, he was found guilty of one count of second-degree sexual assault and one count of false imprisonment, and was acquitted of two other sexual assault charges. Subsequently, the trial court granted Williams' postconviction motion for a new trial, and this court affirmed the trial court's order. *State v. Williams*, No. 2005AP453-CR, unpublished slip op. (Wis. Ct. App. Feb. 1, 2006).

¶3 Williams' new trial began in August 2007. At trial, defense counsel referred to the victim's prior testimony as a means of impeaching her. However, defense counsel did not state that the testimony was from a prior trial.

¶4 On redirect examination of the victim, the prosecutor stated: "And [defense counsel] referred back to your testimony and said in the first trial you never gave testimony about [your top] being ripped. Do you remember him asking you that?" After the victim replied affirmatively, the trial court asked to speak to both counsel outside the presence of the jury and witness, and defense counsel moved for a mistrial. Although he did not dispute the prosecutor's representation that his reference to the prior trial was unintentional, defense counsel argued that the jury now had knowledge that there was a previous trial in this matter, and Williams was prejudiced by this information. Defense counsel argued that a curative instruction was inadequate. However, the trial court decided that a curative instruction was the appropriate remedy, and instructed the jury as follows:

The Court instructs you that this trial involves the defendant being charged with the two crimes described in the Criminal Information. The evidence has disclosed that this witness has given a prior statement and prior sworn testimony under oath. You may only consider such prior

statement and testimony as it relates to this trial and these two counts.

¶5 The prosecutor then continued with redirect examination of the victim. However, shortly into his questioning, he again referred to the prior trial, stating: “During the first trial Mr. Anderson was asking you about the halter top, State’s Exhibit No. 15.” Defense counsel asked for a sidebar and again moved for a mistrial. In support of the motion, defense counsel contended that people have a general understanding of the concept of double jeopardy, and would logically conclude that Williams previously had been found guilty in this case and that his conviction had been reversed, leading to retrial. Although defense counsel again contended that a curative instruction was insufficient, the trial court concluded that a mistrial was unwarranted. When the jury returned, the trial court informed the jurors that it was going to admonish the prosecutor and read him the instruction it had previously given the jurors. It then stated:

This court informs you, Mr. Dooley, that this trial involves the defendant being charged with the two crimes described in the Criminal Information. The evidence has disclosed that this witness has given a prior statement and prior sworn testimony under oath. You may only consider such prior statement and testimony as it relates to this trial and these two crimes.

¶6 The trial court also required the prosecutor to apologize to the jury. The prosecutor then stated to the jury that he apologized if he had unintentionally violated the court’s ruling that was read to the jury previously and if his actions had in any way confused the issues before the jurors in this case. No further references were made to the prior trial, and the jury returned verdicts of guilty.

¶7 On appeal, Williams argues that the prosecutor’s references to his prior trial prejudiced his right to a fair trial, necessitating a mistrial. He contends that prejudice inheres because the jury was left with the unmistakable conclusion

that he had been tried once before and convicted. He contends that jurors would be aware that a person cannot be retried after acquittal, and therefore must have concluded that he had previously been found guilty and convicted. He contends that the trial court's curative instruction highlighted that a prior trial had occurred, and thus exacerbated rather than mitigated the problem. He also contends that the trial court failed to provide adequate reasons for its decision, and that its decision did not demonstrate the trial court's application of appropriate legal standards to the facts of record.

¶8 The decision to grant or deny a motion for mistrial lies within the sound discretion of the trial court. *State v. Doss*, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. The trial court must determine, in light of the entire proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *Id.* The law prefers less drastic alternatives, if available and practical. *State v. Collier*, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998). A mistrial is appropriate only when a manifest necessity exists for the termination of the trial. *Id.*

¶9 An order denying a motion for mistrial will be reversed by this court only on a clear showing of an erroneous exercise of discretion. *Doss*, 312 Wis. 2d 570, ¶69. On review, steps taken by the trial court to mitigate prejudice may be balanced against any possible prejudice. See *State v. Johnson*, 75 Wis. 2d 344, 366, 249 N.W.2d 593 (1977). An erroneous exercise of discretion occurs if the trial court makes an error of law or fails to base its decision on the facts in the record. *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61.

¶10 We conclude that the trial court acted within the scope of its discretion in denying a mistrial. Initially, we note that the prosecutor's references

to the prior trial did not indicate that Williams had been convicted in the prior trial. A prior trial could have resulted in a hung jury or mistrial rather than a guilty verdict. Consequently, as recognized by the trial court, it would be speculative to determine that, based on the prosecutor's references to the prior trial, the jurors concluded that Williams previously had been found guilty.¹

¶11 The trial court determined that, even though the prosecutor's two references to the prior trial were improper, the matter could be remedied by a curative instruction. Contrary to Williams' contention, the trial court set forth adequate reasons for its decision and relied upon the facts of record. It took note of the extensive prior testimony in this case, and the difficulties inherent in referring to the prior testimony on retrial. It concluded that prejudice to Williams was not clear because the prosecutor did not indicate that Williams had been convicted in the first trial. It concluded that based upon these facts, a curative instruction was the appropriate alternative. It then twice instructed the jurors that they could consider the prior statement and testimony only as it related to this trial and the two crimes charged here.

¶12 We reject Williams' argument that the mere possibility that a juror could have surmised that he was found guilty in the prior trial mandated a mistrial. Potential prejudice is presumptively erased when the trial court properly gives an admonitory instruction. *Collier*, 220 Wis. 2d at 837. This court will assume that a

¹ This fact distinguishes this case from *State v. Lee*, 346 So. 2d 682 (La. 1977), which is relied upon by Williams. In that case, the prosecutor specifically told the jurors that the defendant had been convicted in a prior trial. *Id.* at 683-84. The Louisiana Supreme Court found the prosecutor's conduct to be prejudicial and concluded that it deprived the defendant of a fair trial. *Id.* However, the court did not hold in either *Lee* or *State v. Reed*, 324 So. 2d 373, 380-81 (La. 1975), that a prosecutor's mere reference to the fact that the defendant had previously been tried mandated a mistrial.

jury acts in accordance with a properly given admonitory instruction. *State v. Lukensmeyer*, 140 Wis. 2d 92, 110, 409 N.W.2d 395 (Ct. App. 1987). Nothing in the record provides a basis to conclude that this assumption should not apply here. We therefore conclude that any prejudice to Williams was presumptively erased by the trial court's curative instruction.

¶13 We also reject Williams' argument that the trial court's decision to give the second curative instruction and require the prosecutor to apologize to the jury elevated any potential prejudice to the point that a mistrial was compelled. The trial court's decision to repeat the curative instruction rather than ordering a mistrial was justified for the same reasons that supported its initial decision to give the curative instruction. Because its decision was reasonable and supported by the facts of record, no basis exists to disturb its denial of a mistrial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

