COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2666-CR **Cir. Ct. No. 00-CF-129**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EMMANUEL PETTIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN B. TORHORST, Judge.[1] *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

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[1] Racine County Circuit Court Judge Dennis J. Flynn presided over trial and sentencing. Racine County Circuit Court Judge Allan B. Torhorst presided over postconviction proceedings.

¶1 PER CURIAM. Emmanuel Pettis appeals from a judgment of conviction of two counts of possession of drugs with intent to deliver within 1,000 feet of a school, as a repeat drug offender and habitual offender. He also appeals from an order denying his postconviction motion for a new trial. He argues that the trial court erroneously exercised its discretion in denying his motions for mistrial based on the State's discovery violation and violation of an in limine order. We conclude that a mistrial was not required and affirm the judgment and order.

¶2 Pursuant to a search warrant, police searched Pettis's car and found crack cocaine and marijuana in the trunk. In the prosecution's opening statement, reference was made to the large sum of cash found on Pettis at the time of his arrest, the discovery of receipts in Pettis's residence for the purchase of furniture and stereo equipment for more than $1,000, and that Pettis was unemployed at that time. A police officer testified that according to Pettis's statement, Pettis was not employed at the time of his arrest. The defense objected, indicating that it had not been provided with any statement by Pettis in which Pettis stated he was unemployed. Upon voir dire of the police officer it was explained that during the booking process Pettis indicated he was not employed. The response was reflected by the absence of any entry in the place on the booking form for listing an employer.

¶3 Pettis moved for a mistrial on the ground that the prosecution had failed to disclose the statement about Pettis's unemployed status. The trial court found that the information was part of discovery when the booking form was provided to the defense. It also concluded that a manifest necessity did not compel a mistrial.

¶4 Pettis argues that the fact that the area of the booking form for employment was left blank was no disclosure at all and that disclosure of the statement after the commencement of the trial was a violation of the prosecution's duty to provide discovery. The State concedes that Pettis's statement during booking was an oral statement which should have been disclosed prior to trial under WIS. STAT. § 971.23(1)(b) (2001-02),[2] that the statement was not timely disclosed, and that it should have been excluded from trial. The State defines the issue as whether Pettis was prejudiced by admission of the statement to the booking officer that he was not employed.

¶5 The State properly defines the issue because even though there was not timely disclosure, the remedy is not always a mistrial. *See* ***State v. Bunch***, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995) ("the law prefers less drastic alternatives, if available and practical"); WIS. STAT. § 971.23(7m)(a) (to remedy a party's failure to comply with the disclosure statute the court may grant the opposing party a recess or a continuance). Here the trial court offered Pettis an alternative remedy of a continuance and he declined. Where, as here, the trial court offers an adjournment so that the defense can review and assess the undisclosed information, the trial court does not erroneously exercise its discretion in denying the motion for a mistrial. *See* ***State v. Givens***, 217 Wis. 2d 180, 192, 580 N.W.2d 340 (Ct. App. 1998).

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[2] WISCONSIN STAT. § 971.23(1) requires the prosecution, upon demand, to furnish a defendant with a written summary of all oral statements made by the defendant, and the witnesses thereto, which the prosecutor plans to use at trial. Such a demand was made in this case.

All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶6 The relevant inquiry is whether the improper admission of Pettis's statement that he was unemployed was prejudicial. ***State v. DeLao***, 2002 WI 49, ¶60, 252 Wis. 2d 289, 643 N.W.2d 480. The test is whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985).

¶7 Pettis only argues that he was prejudiced by the inability to assess, prior to trial, the strength of the State's case and the weakness of his own. This is not compelling prejudice in light of the evidence at trial. Pettis was aware at the very beginning of the trial that the prosecution maintained he was unemployed. There was evidence that Pettis was carrying a large amount of cash and had purchased expensive items. In rebuttal, Pettis's girlfriend testified that at the time of his arrest, Pettis was employed through a temporary employment service, that their shared household had S.S.I. income, that she had been employed and saved money to buy furniture with Pettis, and that she gave Pettis the cash found at the time of his arrest to pay their rent. The prosecution's closing argument made no reference to Pettis's unemployment and did not suggest that drug dealing was the only explanation for his possession of the cash or other purchases. Other strong evidence of drug dealing existed by an officer's observation that the night before the search, five cars drove up to Pettis's residence and people exiting the cars were in the residence for only a short period of time. Finally, Pettis's statement that he was unemployed did not conflict with his defense strategy that the drugs in the car belonged to his brother. Our confidence in the outcome is not undermined by the admission of Pettis's statement that he was unemployed. Therefore, Pettis is not entitled to a new trial because the error was not prejudicial.

¶8 During trial Pettis also moved for a mistrial when the prosecutor's question to a police officer brought out information about Pettis's probationary

status. Before trial the court ruled that the prosecution could introduce into evidence a travel pass issued in Pettis's name and found in the car. The pass was issued by Pettis's probation officer and the defense argued that its admission was prejudicial because it showed Pettis was on probation. As a result, the parties stipulated that the document would not go to the jury and the prosecutor agreed to refer to the document simply as "an authorization for travel with no reference to who authorized it or issued it." On the second day of trial, a police officer explained that he had found the document under the driver's seat of the car. The prosecutor then asked, "Is there a signature on that document?" The officer replied, "A probation officer, Michael Neil." Pettis objected and moved for mistrial on the ground that the prosecution had violated the pretrial order that no reference be made to the fact that the document was issued by a probation officer.

¶9 The prosecutor's question was a blatant violation of the in limine order. The prosecutor should have realized that the question was imprecise and likely to elicit the inadmissible reference to issuance by a probation officer. It should never had happened when the prosecution's stipulation was made just the day before. We admonish the prosecutor that eliciting testimony so clearly in violation of a pretrial stipulation is unnecessary recklessness putting the trial result at risk.

¶10 The decision whether to grant a motion for a mistrial is within the discretion of the trial court. ***Bunch***, 191 Wis. 2d at 506. "The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***Id.*** A manifest necessity for the termination of the trial must exist. ***Givens***, 217 Wis. 2d at 191. We consider whether the trial court erroneously exercised its discretion. ***Bunch***, 191 Wis. 2d at 506.

¶11 In response to the objection, the trial court instructed the jury to disregard the police officer's answer. "[A]ny prejudicial effect that might have flowed from the testimony was cured by the court's immediate instruction to the jury to disregard the testimony in its entirety." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). Pettis complains that the trial court's curative instruction was inadequate because it did not adequately inform the jury as to the specific testimony it was to disregard. He also contends the prejudice could not be erased unless the jury was instructed that a defendant's prior convictions are to be considered solely for the purpose of assessing a person's credibility.

¶12 We reject the contention that the curative instruction should have been more detailed. First, Pettis did not object to the form of the curative instruction and any claim of error is waived. ***State v. Huebner***, 2000 WI 59, ¶¶10-11, 235 Wis. 2d 486, 611 N.W.2d 727. Second, as the postconviction court found, a more detailed instruction would have drawn the jury's attention to Pettis's probationary status by mentioning it a second time. The desire not to call the jury's attention to a potential prejudicial circumstance of trial procedure is a reasonable choice not only by defense counsel but the trial court as well. *Cf.* ***Watson v. State***, 64 Wis. 2d 264, 279, 219 N.W.2d 398 (1974) (recognizing that defense counsel faces a difficult choice when considering a corrective instruction which again calls to the jury's attention a potentially prejudicial circumstance). We conclude that the trial court's curative instruction was the best it could be under the circumstances.

¶13 We further conclude that the brief mention of "probation" carried little prejudice because the jury could draw a negative inference from the fact that Pettis had a travel pass. A reasonable juror would be aware that a law abiding

citizen would not need a travel pass. The manifest necessity test is a high one. ***State v. Collier***, 220 Wis. 2d 825, 839, 584 N.W.2d 689 (Ct. App. 1998). Since a somewhat negative inference was permissible in any event, the identification of Pettis's probation agent was not prejudicial and did not require a mistrial.

By the Court.—Judgment and order affirmed.

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