COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1266-CR **Cir. Ct. No. 2008CF412**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEVELL WILLIAMS,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Jevell M. Williams appeals the judgment entered after a jury convicted him of two counts of armed robbery, *see* WIS. STAT. § 943.32(2), and the order denying his motion for postconviction relief. Williams argues that: (1) he deserves a new trial in the interest of justice because he claims that the State

intimidated his alibi witness to keep her from testifying; and (2) the trial court erred in admitting testimony by a detective that the officers "determined that robbery did in fact occur." We affirm.

I.

¶2 In January of 2008, William Walker and his girlfriend, Rochelle McCloskey, were getting out of his car when they were robbed at gunpoint by a man wearing a mask over half of his face. Despite the mask, Walker recognized the robber as Williams. Walker and McCloskey got into Walker's car and followed Williams. Walker saw Williams get into a car, which Walker knew was Williams's. Walker had McCloskey take down the license plate number and then pulled alongside Williams to confirm the identification.

¶3 Walker did not immediately report the robbery because, as he told the jury, Williams's "family's pretty much like family to me" and he thought he would be able to recover on his own what was stolen. When he could not, he went to the police, told detective Gary Thundercloud what had happened, and gave the detective the license plate number and Williams's name. The license plate number matched a silver 1999 Buick Century owned by Williams and his mother.

¶4 The police arrested Williams, and he pled not guilty, claiming that he was at home with his girlfriend, Fatina Bobo, and another woman, Amanda Wilson, at the time of the robbery. Williams was released on bond, which included a "NO CONTACT ORDER" directing him to not have any "contact whatsoever" with Walker or McCloskey either directly, or indirectly, "through another person or persons."

¶5 On the second day of trial, the prosecutor told Williams's lawyer that Williams's girlfriend, Bobo, had gone to Walker's house the night before and was "saying things to [Walker] to get him to no longer move forward with the case." Williams's lawyer told the trial court about this violation of the no-contact order. The prosecutor explained to the trial court that Bobo could be charged for intimidating a witness. The trial court contacted the public defender's office to get a lawyer to explain her apparent violation of the no-contact order. After talking to Bobo, Bobo's lawyer reported that if called to testify, Bobo would assert her Fifth Amendment right against self-incrimination. Ultimately, Williams decided not to call Bobo as a defense witness. As we have seen, the jury convicted Williams.

II.

A. *Alibi Witness.*

¶6 As noted, Williams claims that the prosecutor unfairly prevented his alibi witness from testifying by "intimidating" her, and, as a result, violated his right to present a defense. We disagree.

¶7 This issue is controlled by ***State v. Koller***, 87 Wis. 2d 253, 274 N.W.2d 651 (1979), which considered whether the defendant's due process right to present a defense was violated when a defense witness chose not to testify after the prosecutor said it may file charges against that witness. ***Id.***, 87 Wis. 2d at 274, 274 N.W.2d at 662. In ***Koller***, the defense called William Kretlow to testify. ***Id.***, 87 Wis. 2d at 275, 274 N.W.2d at 662. The trial court interrupted Kretlow's testimony to talk with the lawyers, presumably because the substance of the testimony raised implications of Kretlow's possible self-incrimination. ***Ibid.*** The trial court then told Kretlow that: "The District Attorney has advised this court that you may be re-charged with this crime. So I am advising you at this time that

anything you sa[y] in this case in open Court, any answer you give or any information you give, may be used against you in a Court of law at a subsequent trial, if you are charged with this offense." ***Ibid.*** Kretlow did not continue with his testimony. ***Id.***, 87 Wis. 2d at 276, 274 N.W.2d at 662.

¶8 Koller argued on appeal that his defense was unfairly compromised by the State's threat to prosecute his witness. ***Id.***, 87 Wis. 2d at 257, 278, 274 N.W.2d at 653, 664. ***Koller*** rejected the contention: "In the instant case, there were no ex parte communications with the witness. The prosecutor did what … was the proper course[;] he advised the judge of the situation and the judge informed the witness of his rights." ***Id.***, 87 Wis. 2d at 280–281, 272 N.W.2d at 665.

¶9 The prosecutor here did exactly what ***Koller*** held was proper. The prosecutor did not speak directly with Bobo. Rather, he told the defense lawyer and the trial court what Bobo had done and that her apparent violation of the no-contact order could subject her to liability if she testified. The trial court then appointed a lawyer for Bobo to properly protect her rights. After Bobo consulted with the lawyer, she exercised her Fifth Amendment right not to testify. The prosecutor did nothing wrong. Thus, the cases upon which Williams relies where the prosecutor *did* have *ex parte* contact with the witnesses are not in point. *See, e.g.*, ***State v. Fosse***, 144 Wis. 2d 700, 702–703, 706–707, 424 N.W.2d 725, 726–727, 728–729 (Ct. App. 1988).

¶10 Williams argues, however, that "[w]ithout this testimony, [he] was clearly left without a defense" and "should be provided a new trial in the interest of justice." We disagree. First, although a defendant has a right to present a defense and call witnesses to testify on the defendant's behalf, that right is not

absolute, and will give way when a witness has a privilege to not testify. *See* ***Taylor v. Illinois***, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). Thus, courts routinely recognize that a witness's Fifth Amendment right will trump the defendant's right to present a defense. *See* ***United States v. Serrano***, 406 F.3d 1208, 1215 (10th Cir. 2005) (collecting cases). Second, as the trial court found in its order denying Williams's motion for postconviction relief: "It was not the prosecutor's actions here, but rather Ms. Bobo's actions in depriving the defendant of his planned alibi testimony."

B. *Admission of Detective Thundercloud's Statement.*

¶11 Williams argues that the trial court erred when it allowed Detective Thundercloud to testify that the officers: "determined that robbery did in fact occur." He claims this was improper opinion testimony. In the context of this case, we disagree.

¶12 A trial court's decision to admit or exclude evidence is discretionary, and we will not reverse if it was "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (quoted source omitted). Evidence is admissible when it is relevant, WIS. STAT. RULE 904.01, and evidence setting the context of a case can be relevant. *See* ***State v. Shillcutt***, 116 Wis. 2d 227, 236–237, 341 N.W.2d 716, 720 (Ct. App. 1983) ("other acts" evidence under WIS. STAT. RULE 904.04(2)).

¶13 Detective Thundercloud told the jury what happened when Walker came into the police station to report the robbery:

> Q. And, the person who robbed him, did he give you a name?
>
> A. He did.
>
> Q. What was the name?
>
> A. He said the name was Jevell Williams.
>
> Q. And, did he provide you with any other information regarding Jevell Williams?
>
> A. He did. He stated, after the incident where he was robbed, he got into his personal vehicle and followed a vehicle and got the license plate of a vehicle he described as a '99 or 2000 silver Buick.
>
> ….
>
> Q. Now, with a name, description of vehicle and license plate number, in your experience, what do you do with that type of information?
>
> A. Well, we determined that robbery did in fact occur.

Williams's lawyer objected at this point, but was overruled. The detective finished his answer, describing the procedure they follow:

> And, we determine[d] who the victim was with, determined there was a second victim, girlfriend, identified as Rochelle McCloskey and … we do a check on those people and a check of the license plate given to us by the victim.

¶14 Contrary to Williams's assertion, these excerpts show that the detective was not telling the jury that it was his opinion that Williams was guilty of the robbery, but, merely, that he had enough to go on to further investigate Walker's complaint. Thus, on the cross-examination of the detective, Williams's lawyer asked about the detective's assertion on direct-examination "that robbery did in fact occur":

> Q. Detective, did you know whether or not what the person who was providing you this information, what they were telling you was absolutely true?

A. Based on his statements, I took the complaint.

Q. You took the complaint, correct?

A. Yes.

Q. Your job is to take the complaint. What about running a license plate confirms for you that a robbery took place?

A. Lists the person identified, alleged suspect. … And suspect vehicle.

Q. But all it lists to is the vehicle of the person whose name he provided to you, right?

A. Correct.

Q. That is the information you are able to confirm?

A. Right.

Q. So, when you volunteered it confirmed a robbery took place, really all the information confirmed was that he provided you a name and license plate that matched. True?

A. Correct.

The trial court did not erroneously exercise its discretion in overruling Williams's objection to the detective's comment.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.