**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 30, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-1610-CR** **Cir. Ct. No. 01CF006157**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KEVON D. DAVIDSON,**

**DEFENDANT-APPELLANT.**

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Kevon D. Davidson appeals from a judgment entered on a jury verdict finding him guilty of attempted armed robbery with the threat of force, as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.32, 939.05

(2001–02).[1] He also appeals from an order denying his postconviction motion for a new trial. Davidson alleges that his trial counsel rendered ineffective assistance by failing to move to sever his trial from a codefendant's. He also claims that the trial court erroneously exercised its discretion when it: (1) denied a codefendant's motion to sever the trials; and (2) gave supplemental instructions to the jury, which allegedly implied that the defendants were guilty. We affirm.

I.

¶2 Kevon D. Davidson, Leonard L. Washington, and Michael V. Manns were charged in the same complaint for attempting to rob a grocery store. Davidson and Manns pled not guilty and were joined for trial. Before the trial began, Manns filed a motion to sever. On the morning of trial, Manns's attorney argued that joinder would be prejudicial to Manns because, if Davidson testified, he would identify Manns as one of the robbers. The trial court did not then rule, however, because Davidson had not decided if he was going to testify.

¶3 At trial, Washington testified for the State against Davidson and Manns. According to Washington, the three men were driving around in Manns's car on November 16, 2001, when they agreed to rob a grocery store. Washington testified that the plan was for Davidson to take a twelve-pack of beer to the front counter and ask the cashier for a package of cigarettes. When the cashier behind the counter turned around to get the cigarettes, Washington would pull out a gun and Manns would lock the door to the store.

[1] All references to the Wisconsin Statutes are to the 2001–02 version unless otherwise noted.

¶4 Manns parked the car and Washington, Davidson, and Manns entered a small grocery store on 13th and Becher Streets one at a time. Washington testified that Davidson got a twelve-pack of beer and that he and Davidson walked up to the front counter. Davidson then asked the man behind the counter for a package of cigarettes. Washington testified that he, Washington, pulled out a gun and said: "Don't move. This is a robbery." The man behind the counter pushed Washington's hand away, took out his gun, and began to fire at Washington and Davidson. Washington was shot twice in the neck.

¶5 Neither Davidson nor Manns testified. Davidson's theory of defense was that, although he was in the store when Washington pulled out the gun, he was not involved in the robbery. Instead, Davidson's attorney claimed that Washington was not credible and that Davidson went to the store to buy beer and was surprised when Washington pulled out the gun. Manns's theory of defense, presented through his attorney's arguments to the jury and through a witness' testimony, was that he could not have committed the attempted robbery because he was in Appleton, Wisconsin at the time.

¶6 As we have seen, a jury found Davidson and Manns guilty of attempted armed robbery with the threat of force, as a party to a crime. The trial court sentenced Davidson to ten years in prison, with eight years of confinement and two years of extended supervision. Davidson filed a postconviction motion for a new trial. The trial court denied Davidson's motion.

## II.

### A. *Ineffective Assistance of Counsel*

¶7 Davidson contends that the trial court erroneously exercised its discretion when it joined Davidson and Manns for trial and denied Manns's motion to sever the trials. Davidson, however, did not file a motion to sever with the trial court. Accordingly, we will not review Davidson's allegation within the context of an alleged trial-court error. ***State v. Rundle***, 166 Wis. 2d 715, 732, 480 N.W.2d 518, 525 (Ct. App. 1992) (claim of prejudicial joinder waived when defendant fails to particularize reasons for severance in trial court). We can review this claim, however, if a defendant alleges ineffective assistance of counsel. Davidson does so here. Thus we review Davidson's joinder claim in the context of his ineffective-assistance-of-counsel claim. *See* ***State v. Brunette***, 220 Wis. 2d 442, 445, 583 N.W.2d 174, 180 (Ct. App. 1998).

¶8 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Strickland***, 466 U.S. at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

¶9 Our standard for reviewing this claim involves mixed questions of law and fact. ***Johnson***, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, present questions of law. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶10 Davidson offers two reasons to support his claim that he was prejudiced by his trial counsel's failure to move to sever. First, he contends that his trial counsel should have moved for severence because his defense conflicted with Manns's. Davidson argues that the defenses were mutually exclusive because in order for one defendant to prevail, the jury would have had to disbelieve the other defendant's theory of defense. We disagree.

¶11 Joinder and severance of defendants in a criminal case is governed by WIS. STAT. § 971.12.[2] A trial court has the power to try defendants together

[2] WISCONSIN STAT. § 971.12 provides, as relevant:

> **Joinder of crimes and of defendants.**
>
> ….
>
> **(2)** JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(continued)

when they are charged with the same offenses, arising out of the same transaction, and provable by the same evidence. ***Haldane v. State***, 85 Wis. 2d 182, 189, 270 N.W.2d 75, 78 (1978). Whether to sever is within the trial court's discretion and we will not reverse absent an erroneous exercise of discretion. ***Id.***

> Nevertheless, there may be "circumstances where a joint trial would be unduly prejudicial to the interests of either or both of the defendants; and in that case the interests of administrative efficiency must yield to the mandates of due process. Such circumstances are found where the defendants intend to advance conflicting or antagonistic defenses."

***Id.***, 85 Wis. 2d at 189, 270 N.W.2d at 79 (quoted source omitted). Defenses are mutually antagonistic if the acceptance of the core of one party's defense precludes acquittal of the other party. ***United States v. Ziperstein***, 601 F.2d 281, 285 (7th Cir. 1979).

¶12 In this case, as the trial court pointed out in its decision and order denying Davidson's postconviction motion, Manns's defense did not necessarily contradict the defense proffered by Davidson:

> The jury could have rejected Washington's testimony, which was the strongest evidence linking Davidson and Manns to the crime, and still [have] acquitted both defendants based upon the evidence before it…. [T]he jury could have reasonably believed that Manns was in

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> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

> Appleton at the time of the offense as he claimed *and* that Davidson had no knowledge of the robbery plan if it had disbelieved Washington's testimony.

(Emphasis by trial court.) We agree. The trial transcripts show that both Davidson's and Manns's defenses denied any involvement in the robbery and that neither implicated the other in the offense. In fact, both defense attorneys were very clear that they were only making a case for their client and were careful not to mention the other defendant. Thus, Manns's defense that he was in Appleton when the attempted robbery occurred did not preclude a finding that Davidson was in the grocery store but did not participate in the robbery attempt. *See* ***State v. Denny***, 120 Wis. 2d 614, 621, 357 N.W.2d 12, 15–16 (Ct. App. 1984) (different defense tactics do not automatically mandate severance).

¶13 Second, Davidson contends that he was prejudiced by his trial counsel's failure to object to the admission of other-acts evidence relevant only to Manns's guilt. He claims that "[b]ecause Kevon Davidson was joined for trial with Michael Manns, the jury did hear this improper other[-]acts evidence and can only be assumed to have considered it along with all of the evidence admitted at the joint trial." Included in this allegation is Davidson's claim that his trial counsel was ineffective because he failed to request a limiting instruction under WIS. STAT. RULE 901.06.[3] Again, we disagree.

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[3] WISCONSIN STAT. RULE 901.06 provides:

> **Limited admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

¶14 Severance may be required when an entire line of evidence is relevant to the liability of only one defendant. ***State v. DiMaggio***, 49 Wis. 2d 565, 577, 182 N.W.2d 466, 473 (1971). In order to warrant severance, however, the entire line of evidence must be prejudicial. *See* ***State v. Suits***, 73 Wis. 2d 352, 362, 243 N.W.2d 206, 212 (1976). When it appears at trial that evidence applicable to only one defendant is being offered, the trial court has the option of severing the trial or giving the jury cautionary instructions. ***State v. Medrano***, 84 Wis. 2d 11, 23, 267 N.W.2d 586, 591 (1978).

¶15 In this case, the State presented evidence that: Manns's girlfriend and a relative had fabricated a receipt to prove that Manns was in Appleton at the time of the crime; Manns had three outstanding warrants for his arrest; and Manns lied to the police about his name when he was arrested for this crime. The trial court determined that this claim lacked merit because Davidson failed to show "how the admission of this evidence [against Manns] prejudiced *his* case." (Emphasis by trial court.) We agree.

¶16 Severance is designed to prevent the jury from becoming confused as to what evidence is applicable to which defendant. ***Nicholas v. State***, 49 Wis. 2d 678, 681, 183 N.W.2d 8, 10 (1971). Here, while the other-acts evidence tended to undermine Manns's alibi, Davidson does not show how this evidence compromised his defense. Manns's use of a false receipt, outstanding warrants, and failure to cooperate with the police are unrelated to Davisdon's defense that he was unaware of Washington's plan to rob the store. Moreover, the trial court instructed the jury to consider the evidence against each defendant separately:

> It is for you to determine as to each defendant whether that defendant is guilty or not guilty of the offense charged.

> You must make a finding as to each defendant separately and at the close of these instructions, the Court will submit to you separate verdicts regarding each defendant.

Given this instruction and the fact that the other-acts evidence applied only to Manns, Davidson's assertion of trial-court error in rejecting his ineffective-assistance-of-counsel claim is without merit. *See, e.g.*, ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989) (jury presumed to follow instructions).

B. *Supplemental Instructions*

¶17 Davidson also argues that the trial court gave the jury improper supplemental instructions. Specifically, he objects to the following comments that the trial court made to the jury at the end of the day and after it began to deliberate:

> We were hoping, Ladies and Gentlem[e]n of the Jury, that you would have a verdict by now, but it looks like it's going to take a little more time. It's going on [five] o'clock, and I know you have been here all day and have had a pretty full day, so we're agreed that probably because of the court cost to just recess your deliberations until tomorrow morning and come in tomorrow.
>
> When would you like to start?
>
> ….
>
> Okay. We're up to [nine] o'clock. You know, it might help if you read the jury instructions. I don't know if you have done that, particularly the jury instruction that talks about not speculating, not searching for doubt, but to search for the truth. You have all the evidence that there is; there isn't any other evidence. The evidence that you have should be sufficient for you to reach a verdict.
>
> I have to-- I'm going to be out of town tomorrow and Friday. I have to be at a conference. So one of the other judges that is available will take the verdict when you reach it. I'll be available by telephone in case you have any

> further questions. So I won't be here when you reach your verdict; and, therefore, I want to thank you for your services. I want to thank you for your efforts. And I'm sure you will arrive at a verdict, just that you are being very careful and deliberate, obviously, and that's what you are supposed to do.
>
> So perhaps looking at the evidence fresh tomorrow morning when you have all had a good night's rest, then you can look at it from a fresh angle, and you will be able to reach a verdict.
>
> So then, what we will do is we will collect the evidence and the verdict forms and the depositions. We will keep these until all twelve of you are back here again. Don't begin your deliberations until all twelve of you are together. When all twelve of you are together, you can buzz, and then they will bring in the evidence again and the jury instructions and verdict forms. Then you can resume your deliberations, and I'll be in touch by phone. Hopefully, you'll have a verdict without too much further agony on your part. Okay.
>
> Once again, thank you for your services, and we will see you again sometime in the future. All right? Then you will be back tomorrow morning to resume your deliberations again.
>
> Do not discuss this case with anyone in and out, particularly while in your--in the middle of your deliberations. It's up to the twelve of you to decide this case, not the twelve of you and somebody else. You have all the evidence you're going to get. That's all the evidence there is in this case. You have got it. There's no reason why you can't reach a verdict on the evidence that you have, and so don't go off and conduct any further investigation on your own. Don't go to the scene. Don't go to the internet. You'll reach a verdict between the twelve of you.
>
> After the case is over, you can discuss it with whoever you like, but until then, don't discuss it with anyone. Okay? Have a pleasant evening and be back here at [nine] o'clock tomorrow.

Davidson contends that these remarks were coercive because they implied to the jury that the defendants were guilty. We disagree.

¶18 WISCONSIN STAT. RULE 805.13(5) (applicable to criminal cases through WIS. STAT. § 972.01), gives the trial court broad discretion to reinstruct the jury as to all or any part of the instructions, or to give such supplementary instructions as it deems appropriate. *See* ***Hareng v. Blanke***, 90 Wis. 2d 158, 166, 279 N.W.2d 437, 441 (1979).

> [A] verdict cannot stand [, however,] when the jury ha[s] been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that influence was thereby exerted…. Our review of a petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court in its context and under all circumstances.

***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631, 634 (1993) (quoted sources and internal quotation marks omitted).

¶19 In this case, the trial court's comments to the jury were not coercive when considered in context. It is apparent from the trial court's remarks that there were two main reasons why it gave the jury supplemental instructions: (1) to inform the jury that the trial-court judge was not going to be available the next day to accept the jury's findings; and (2) to prevent the jury from considering outside evidence because the jury was not going to be sequestered. The trial court did not express any opinion on whether the evidence showed that the defendants were guilty or not guilty, and did not suggest that the jury was required to reach a verdict. Davidson's allegation of trial-court error here is also without merit.

*By the Court.*—Judgment and order affirmed.

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