COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1451-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

REGINALD W. MCDANIEL,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

SULLIVAN, J. Reginald W. McDaniel appeals, after a jury trial, from a judgment of conviction for first-degree intentional homicide, while armed; false imprisonment; and armed robbery—all as party to a crime. McDaniel argues that the trial court erroneously exercised its discretion when it: (1) denied his motion to dismiss the amended information; and (2) denied his two motions for mistrial. We reject his arguments and affirm.

I. BACKGROUND.

The following facts were presented at trial. On May 14, 1994, John Pickens, Jr., was abducted at gunpoint from the parking lot of a Milwaukee tavern by McDaniel and two accomplices. The group drove through the city, threatening, assaulting, and demanding money from Pickens. Near 27th Street and Wisconsin Avenue, Pickens was forced into the back seat of the car. He tried to exit the car and one of McDaniel's accomplices shot him in the back. He died immediately.

The State originally charged McDaniel with felony murder, as a party to a crime. McDaniel waived his preliminary hearing. At the arraignment, on July 28, 1994, the prosecutor filed the original information, charging McDaniel with party-to-a-crime felony murder. At the arraignment, the prosecutor stated that if McDaniel pleaded not guilty and the case went to trial, the State would move "with leave of the Court to amend this case to a first degree intentional homicide while armed, armed robbery, and false imprisonment." McDaniel pleaded not guilty to the charges in the original information.

On September 9, 1994, at a pre-trial hearing, the prosecutor again stated that if the case went to trial, she would move the court to amend the information to the aforementioned offenses. Her deadline was that day. McDaniel did not plead guilty to the original information, and later that day the State filed an amended information with the new charges. On September 20, 1994, McDaniel filed a motion challenging the amended information, arguing first that the amendment was not timely; and second, that it was unprofessional conduct by the prosecutor to allegedly use the amendment as a means of coercing him into pleading guilty to the original information. The trial court denied McDaniel's motion, concluding that the amendment was timely and that McDaniel was not prejudiced by the amendment.

During trial, McDaniel moved twice for a mistrial. The first motion occurred during his cross-examination of State witness Police Detective Eric Moore. Moore was asked about an out-of-court statement made by Latrina McCoy, McDaniel's former girlfriend, in which she had incriminated McDaniel in the commission of the charged offenses. After Moore testified that he had

asked McDaniel why McCoy would implicate him in the crimes if there was nothing to her story, McDaniel's counsel asked Moore if he had viewed McCoy's story "as a fantastic story." Moore responded, "No. I did not. From my understanding, Miss McCoy was a very credible witness." McDaniel objected and moved to strike the comment. The trial court granted the motion and instructed the jury to disregard Moore's comment. McDaniel then moved for mistrial, which the trial court denied, stating that its instruction to the jury to disregard the comment was sufficient.

McDaniel's second motion for a mistrial occurred during his cross-examination by the State. The prosecutor questioned McDaniel about a seventeen-page statement he gave to police, and suggested he may have reconsidered the statement "every day" he had been "in jail." McDaniel objected and the trial court sustained the objection. The prosecutor restated the question: "And now you've been sitting in jail and it's the second day and you now want to give a little bit more and you tell Detective Moore a statement that you later say is the whole truth?" McDaniel moved for mistrial, arguing that the original question was unfairly prejudicial by making reference to the time he spent in jail. The trial court denied the motion, stating the prosecutor's restated question remedied the error. Further, the court offered to give an admonitory instruction to the jury, but McDaniel stated he was not seeking such an instruction.

The jury convicted McDaniel of all the offenses. He renews his arguments on appeal.

II. ANALYSIS.

A. Amendment of information.

McDaniel argues that the trial court erroneously exercised its discretion in denying his motion to dismiss the amended information for two reasons. We address each basis *seriatim*. We first note, however, that a trial court has wide discretion in determining whether to allow the amendment of an information; thus, we will not reverse such a determination absent an erroneous exercise of discretion. ***State v. Frey***, 178 Wis.2d 729, 734, 505 N.W.2d 786, 788 (Ct. App. 1993).

1. Alleged untimeliness and prejudice caused by amendment.

McDaniel first argues that the amendment of the information was untimely and was prejudicial to him. We disagree.

Section 971.29(1), STATS., provides: "A complaint or information may be amended at any time prior to arraignment without leave of the court." As we recently stated, however:

> In ***Whitaker v. State***, 83 Wis.2d 368, 265 N.W.2d 575 (1978), the supreme court declared that § 971.29 "does not directly address the question of the amendment of the information after arraignment and before trial. It neither authorizes nor prohibits such amendment." Nevertheless, the court held: "Subsection (1) of sec. 971.29 should be read to permit amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial, and the opportunity to defend."

State v. Webster, 196 Wis.2d 308, 318, 538 N.W.2d 810, 814 (Ct. App. 1995) (citation omitted).

The State argues that since an information can be amended within a reasonable time after arraignment, with leave of the court, the question of timeliness is largely a question of prejudice. We agree. In ***Whitaker***, the time between the original information and the amended information was almost eight weeks. Here, between the filing of the original information at the July 28 arraignment and the State's presentation of the amended information of September 9, only six weeks had passed. Accordingly, we look to whether McDaniel's rights—including the right to notice, speedy trial, and opportunity to defend against the charges—were prejudiced. ***Id***.

McDaniel's right to notice was protected. He was informed of the possible amendment at the original arraignment; thus, he was aware of the potential charges he was facing. His right to a speedy trial was not violated; his trial began on the original date set for trial at the original arraignment. Finally, his opportunity to defend against the charges was not unduly compromised. He was aware of the offense charged in the original information. In sum, the amendment of the information was made within a reasonable time after the arraignment and McDaniel was not prejudiced by the amendment.

2. Alleged prosecutorial misconduct.

McDaniel next argues the amended information should have been dismissed because the prosecutor used the amendment procedure in an attempt to coerce him into pleading guilty to the original information. The trial court properly exercised its discretion in allowing the amended information.

In ***Thompson v. State***, 61 Wis.2d 325, 212 N.W.2d 109 (1973), the supreme court stated that it was an abuse of prosecutorial discretion for the State to charge a defendant with an offense "when the evidence is clearly insufficient to support a conviction." ***Id***. at 330, 212 N.W.2d at 111. Further, the court stated: "It is also an abuse of discretion for a prosecutor to bring charges on counts of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." ***Id***.

Neither of these practices is evident here. The evidence was clearly sufficient to support a conviction on the three offenses charged in the amended information. Further, the amended charges were not of "doubtful merit." The prosecutor explained that she initially thought this was a first-degree intentional homicide and she had always believed that. In her discretion, she decided this would be a "hard case" and wanted to give McDaniel the option of pleading to a lesser offense.

McDaniel has never challenged that the evidence in this case did not support the charges in the amended information or his conviction for those offenses. As the supreme court stated in ***Thompson***: "[W]here it is conceded by the defendant that the evidence was sufficient, not only to charge but convict, the prosecutor did not [erroneously exercise] his discretion or violate the ethics of the legal profession by bringing a charge of attempted first-degree murder [rather than diverting the defendant to noncriminal treatment]." ***Id***. at 330, 212 N.W.2d at 112. Further, McDaniel was not coerced into pleading to any charge—he exercised his right to a jury trial. The trial court properly exercised its discretion in denying McDaniel's motion to dismiss the amended information.

B. Motions for mistrial.

McDaniel next challenges the trial court's denial of his two motions for mistrial. Whether to grant or deny a mistrial clearly lies within the sound discretion of the trial court, and its decision on a mistrial motion will not be reversed on appeal unless the court erroneously exercises its discretion. ***Haskins v. State***, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980). A trial court must determine, when presented with a mistrial motion, whether the claimed error is so prejudicial as to require the extreme remedy of terminating a trial. ***Oseman v. State***, 32 Wis.2d 523, 528-29, 145 N.W.2d 766, 770 (1966).

We conclude that in both instances the trial court appropriately denied McDaniel's motion for mistrial. The first motion for mistrial occurred during McDaniel's cross-examination of Detective Eric Moore, who referred to McCoy as a "very credible witness." There was some disagreement as to whether Moore meant McCoy was personally or testimonially credible. McDaniel objected and the trial court struck the answer while directing the jury

to disregard it. Later, defense moved for a mistrial, stating the comment could be regarded by the jury as a general comment to McCoy's credibility. The trial court denied the mistrial, stating the instruction to the jury to disregard was enough. The trial court properly relied on the rule that admonitory instructions will be followed by the jury when given. *See* ***State v. Pitsch***, 124 Wis.2d 628, 645 n.8, 369 N.W.2d 711, 720 n.8 (1985).

The second defense mistrial motion arose during the State's cross-examination of McDaniel. While questioning McDaniel on the statement he had given to Detective Moore, the prosecutor made reference to McDaniel's presence in jail. McDaniel later moved for a mistrial, arguing the question he first objected to prejudiced him. This motion was denied by the trial court, but the court offered to submit a curative charge, which McDaniel declined. The error was not sufficient to warrant the "extreme" remedy of a mistrial. The trial court's sustaining of the original objection was an appropriate remedy. Further, any remaining error was properly corrected in the prosecutor's restated question.

In sum, we reject McDaniel's arguments and affirm the judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 95-1451-CR(D)

FINE, J. (*dissenting*). In this state a prosecutor may not charge a defendant with one crime rather than another crime "for coercive reasons"; nor may the prosecutor "overcharge[] to induce plea bargains." ***Unnamed Petitioners v. Connors***, 136 Wis.2d 118, 141, 401 N.W.2d 782, 792 (1987), *overruled on other grounds*, ***State v. Unnamed Defendant***, 150 Wis.2d 352, 362–365, 441 N.W.2d 696, 700–701 (1989).[1] Such practices tend to extort guilty pleas from the innocent:

> Underlying many plea negotiations is the understanding — or threat — that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case if he had pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.

U.S. NAT'L ADVISORY COMM'N OF CRIMINAL JUSTICE, COURTS 363 (1973), *quoted in* Ralph Adam Fine, *Plea Bargaining: An* Un*necessary Evil*, 70 MARQ. L. REV. 615, 622 (1987). Thus, a report issued almost thirty years ago by President Lyndon B. Johnson's Commission on Law Enforcement recognized that a prosecutor's threat "to seek a harsh sentence if the defendant does not plead guilty" places "unacceptable burdens on the defendant who legitimately insists upon his right to trial." PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967), *quoted in* Fine, 70 MARQ. L. REV. at 621–622. I have discussed this problem at length in ESCAPE OF THE GUILTY at 59–84 (1986), which gives examples of innocent persons who wanted to plead guilty because of charge-related threats by prosecutors.

Section 971.29(1), STATS., provides that an amended Information may not be filed after arraignment unless the trial court grants leave: "A

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[1] Although this practice *is* permitted in the federal system, *see* ***Bordenkircher v. Hayes***, 434 U.S. 357 (1978) (five-to-four decision), the Wisconsin Supreme Court has just reaffirmed that people in this state have protections against the unwarranted exercise of authority by government agents that are greater than the minimum standards applicable under the United States Constitution. ***State v. Miller***, No. 94-0159, slip op. at 9 (Wis. June 19, 1996) (freedom of religion); *see also* ***State v. Doe***, 78 Wis.2d 161, 171, 254 N.W.2d 210, 215–216 (1977).

complaint or information may be amended at any time prior to arraignment without leave of the court." *See* ***Whitaker v. State***, 83 Wis.2d 368, 374, 265 N.W.2d 575, 579 (1978) (Section 971.29(1) permits "amendment of the information before trial within a reasonable time after arraignment, with leave of the court."). As the Majority notes, whether to permit an amendment of an Information is within the trial court's discretion. The trial court must be more, however, than a mere rubber stamp: once a prosecutor has filed an Information, and there has been an arraignment, the trial court must evaluate the public interest in determining whether to permit the prosecutor to dismiss or amend that charge. *See* ***State v. Kenyon***, 85 Wis.2d 36, 46–47, 270 N.W.2d 160, 165 (1978) (dismissal). This was not done here.

The original Information in this case was filed July 28, 1994. It charged McDaniel with felony murder as party to a crime. The arraignment was held on that date. The amended Information, which charged first-degree intentional homicide while armed, false imprisonment, and armed robbery—all as party to a crime, was filed on September 9, 1994. The record does not reflect that either the prosecutor sought first the "leave of court" required by § 971.29(1), STATS., or that the trial court gave it. At the most, the prosecutor indicated that if McDaniel persisted in his assertions of innocence and in his intention to have a jury trial, she would seek leave of court to amend. Indeed, the procedure followed here was the reverse of what the statute requires: the prosecutor filed the amended Information *without* first getting leave of the trial court, and the defendant, ten days later, filed a motion styled "Defendant's Motion in Opposition to Amendment of Information." (Upper casing omitted.)

As the Majority points out, the only circumstance affecting the prosecutor's decision to up the ante on McDaniel was that McDaniel wanted to exercise his right to a jury trial under Article I, Section 7 of the Wisconsin Constitution rather than plead guilty as the prosecutor wanted. How in

heaven's name can that possibly be a viable reason under our form of government?[2]

I would reverse the judgment of conviction, and remand for trial on the original charge of felony murder, as party to a crime.

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[2] The trial court reflected that this was a common practice of the Milwaukee County District Attorney. Although the trial court was "disturbed" by the practice, it concluded that it did not "constitute unprofessional practice":

> The methods of pressure to induce a plea in this case constitute unprofessional conduct[?] I find it does not. Only disturbing thing is years ago it used to be State was amending down [to get a guilty plea], now for some reason I see more and more cases with different [assistant] D.A.'s [*sic*] seem to be amending up and I don't know if there's been a change in the District Attorney's policies but I'd like to see charges issued that the State can, I believe, prove and there not be amendments down or amendments up.

The trial court's prescription for justice, simple and unencumbered by the myriad intricacies and fictions of expediency-based plea bargaining as it is, is but a summary of the American Bar Association Standards for prosecutors approved in ***State v. Karpinsky***, 92 Wis.2d 599, 608–609, 285 N.W.2d 729, 735 (1979), and reflects the type of analysis that the trial court was required to apply under § 971.29(1), STATS., but did not.