COURT OF APPEALS
DECISION
DATED AND RELEASED

June 19, 1996

No. 95-1457-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SANDY PEGUES,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Sandy Pegues appeals from a judgment of conviction of party to the crime of first-degree intentional homicide while armed with a dangerous weapon and armed robbery. He argues that he was improperly denied a continuance for the purpose of securing the testimony of a material defense witness, that a mistrial should have been granted upon the courtroom outburst of the victim's mother and that an out-of-court photo identification was impermissibly suggestive. We reject these contentions and affirm the judgment.

On May 18, 1994, as they walked along a road, two men were confronted by two other men demanding money. One victim was fatally shot. On May 31, 1994, the other victim picked Pegues from a photographic lineup as one of the men involved in the shooting. The eyewitness testified that Pegues was the man who shot his companion.

We first address the identification issue. The test to determine whether a witness's identification of a defendant is admissible has two facets. ***Powell v. State***, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978). First, we decide whether the procedure used during the identification was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Id.*** at 64, 271 N.W.2d at 616 (quoted source omitted). If the procedure was impermissibly suggestive, the State has the burden of showing that the identification is reliable under the totality of the circumstances. ***Id.*** at 66, 271 N.W.2d at 617.

The defendant bears the burden of establishing any undue suggestiveness. *See* ***id.*** at 65, 271 N.W.2d at 617. Pegues argues that the photo identification was suggestive because his picture was published in the newspaper before the witness made the identification and the witness had seen the newspaper photograph.

The trial court found that the newspaper photograph was a very small photograph and not of good quality. It noted that the quality was so different than those the witness was shown in the photo array that the witness did not believe it was the same photograph. The newspaper photograph was black and white and the photo array was comprised of color photographs. We recognize that it would have been better if the photograph had not been released to the newspaper and a lineup had been conducted. However, given the differences in color, size and quality between the newspaper photograph and that in the photo array, we conclude that the photograph identification was not unduly suggestive.

Pegues relies heavily on the witness's admission that he had the newspaper photo in mind when he viewed the photo array presented by the police. He also points to the witness's inconsistency in identifying the lighter complected assailant as being unarmed but identifying Pegues, who has a

lighter complexion than the other assailant, as the gunman. These points bear on the reliability of the identification under the totality of the circumstances. We need not reach the second prong of the admissibility test because we conclude that Pegues failed to meet his burden to establish that the identification was impermissibly suggestive. There was no error in admitting the out-of-court identification.

During the prosecution's opening argument, the victim's mother yelled a racial slur directed to Pegues and repeated it several times. Pegues moved for a mistrial on the ground that the mother's outburst, including tears and sobbing preceding it, was highly prejudicial.

> The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.

State v. Bunch, 191 Wis.2d 501, 506-07, 529 N.W.2d 923, 925 (Ct. App. 1995) (citations omitted).

Here, the ground for the mistrial request was not related to any conduct by or within the control of the State. Thus, we give the trial court's ruling great deference. ***Id.*** at 507, 529 N.W.2d at 925. We do not, as Pegues argues, apply the "manifest necessity" test. ***Id.***

The trial court individually questioned the jurors to ascertain if they had heard the offending remarks. Eight jurors did not hear the outburst. Although six jurors indicated that they had heard a racial slur made, each was able to assure the trial court that the remark did not affect his or her ability to

determine the case impartially on the evidence presented. Only one juror indicated a belief that the remark had been made by the victim's mother. Thus, we reject Pegues' claim that the remark was prejudicial because it demonstrated that the victim's mother believed Pegues had shot her son.

The trial court handled the entire matter with the utmost diligence and diplomacy. We accord deference to the trial court's superior opportunity to assess the impact of the remark on the jury. ***Id.*** at 513, 529 N.W.2d at 927. Based on the individual questioning of each juror, the trial court was within its discretion in denying the motion for a mistrial. Moreover, any prejudice arising from the outburst was cured by the trial court's immediate instruction to each juror to disregard the incident. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921-22 (Ct. App. 1988). We presume that the jury follows the instructions as given. *See* ***id.*** at 47, 422 N.W.2d at 922.

The final issue is whether the trial court erroneously exercised its discretion in denying Pegues' request for a continuance. The motion was made before the trial started on the ground that George Gutierrez, a codefendant in this matter, was refusing to testify. Gutierrez entered a no contest plea to charges arising out of the shooting. He was supposed to be sentenced the day before Pegues' trial but sentencing was adjourned. After the sentencing was adjourned, Gutierrez, through his attorney, informed Pegues that he would plead the Fifth Amendment if called to testify. Pegues wanted to delay the trial until after Gutierrez had been sentenced, apparently in the hope that it would dispel Gutierrez's fear of intimidation by the prosecution.

A motion for a continuance based upon a need to obtain the attendance of an unavailable witness is within the trial court's discretion, and its decision will not be overturned absent a clear showing that the trial court erroneously exercised its discretion. *See* ***State v. Anastas***, 107 Wis.2d 270, 272-73, 320 N.W.2d 15, 16 (Ct. App. 1982). The factors the trial court should consider are: the likelihood that the defendant will be able to produce the unavailable witness's testimony at a delayed trial, the likelihood that the witness will give evidence which is both significant and favorable to the defendant's case, whether the defendant diligently attempted to secure the evidence in time for trial, the length of delay requested and the burdens on both the trial court and the prosecution if the continuance were granted. ***Id***. at 273-74, 320 N.W.2d at 17.

Pegues argues that the trial court failed to make the required legal analysis and improperly focused on whether Gutierrez had a valid Fifth Amendment privilege not to testify. It is clear from the record that the trial court's focus was in response to the manner in which the issue was argued to the trial court. During the trial, Pegues examined Gutierrez in the form of an offer of proof for the purpose of determining whether he would invoke the Fifth Amendment. Pegues suggested that the trial court could order Gutierrez to answer questions upon concluding that after sentencing Gutierrez no longer had a Fifth Amendment privilege. Pegues cannot now complain that the trial court improperly focused on whether Gutierrez could invoke the privilege.

Further, whether Gutierrez continued to have a Fifth Amendment privilege was the only relevant consideration. It bears on the factors of prejudice to Pegues and the likelihood that he could produce Gutierrez's testimony at a delayed trial.

The trial court concluded that even after sentencing, Gutierrez was free to assert the Fifth Amendment. This was a correct view of the law. In ***State v. Marks***, 194 Wis.2d 79, 92, 533 N.W.2d 730, 734 (1995), the court held that a person retains the Fifth Amendment privilege while an appeal is pending or before the time for an appeal as of right or plea withdrawal has expired.

Arguably the trial court would have been in a better position to determine if Gutierrez had a continuing Fifth Amendment privilege after sentencing because then it would have been known to Gutierrez whether he intended to pursue postconviction relief. *See* ***id.*** at 95-96, 533 N.W.2d at 735 (a witness's ability to plead the Fifth based solely on the witness's expressed sentence modification concerns is limited and the witness must show an appreciable chance of success on the motion to modify the sentence). Here, however, Gutierrez's invocation of the Fifth was not limited to incriminating himself on the crimes for which he had entered a plea but not yet been sentenced on. Gutierrez expressed concerns that his testimony could incriminate himself on matters unrelated to the crimes still pending, including gang-related activities.

The trial court correctly concluded that an adjournment of the trial would not have produced Gutierrez's testimony. At no point in the offer of

proof did Gutierrez or his attorney indicate that Gutierrez would testify after sentencing. Given Gutierrez's fear that his testimony might implicate him in other unrelated crimes, it was unlikely that Gutierrez would waive his Fifth Amendment privilege even after sentencing. Pegues sought to question Gutierrez about Pegues' level of intoxication the night of the shooting and whether another codefendant, Joe Rodriguez, stated that he had been the shooter. There was other evidence that Pegues was intoxicated. Pegues was charged as a party to the crime and it was not critical that he establish Rodriguez as the shooter. Balancing the unlikelihood that a continuance would have produced the desired testimony and a lack of substantial prejudice to Pegues, we conclude the trial court properly exercised its discretion in denying the motion for an adjournment.

By the Court.—Judgment affirmed.

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