COURT OF APPEALS
DECISION
DATED AND RELEASED

October 4, 1995

NOTICE

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.

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No. 95-1724-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICK CHAMBERS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

BROWN, J. Patrick Chambers appeals his convictions for criminal trespass and disorderly conduct. His sole claim is that the trial court erred when it failed to declare a mistrial after two separate witnesses provided inadmissible testimony concerning his past behavior, thereby prejudicing his defense. We affirm.

The charges against Chambers arise out of an incident at Karen Van Hierseele's home during the early morning hours of November 1, 1994. That evening she was startled by sounds at her window. She called to her son Paul Van Hierseele, who grabbed his gun and ran outside to find the source while she called the police.

Once outside, Paul recognized Chambers's car which was parked nearby. He then came across Chambers and confronted him at the front door. By that time, Paul's sister Andrea Van Hierseele, who was Chambers's girlfriend, had also come to the front door. An argument erupted after Paul and Andrea told Chambers to go away. But after some pushing and shoving, Chambers made his way through the front door and vestibule. The police then arrived and took control of the scene.

As grounds for his appeal, Chambers points to two passages during the trial testimony. The first concerns Paul's response to questions about why he reacted that evening:

Q:Just with respect to that evening, sir, why were you upset when you ran outside?

A:Because I had a feeling it was him, and we have had problems with him before and threats.

Q:Okay. What—

Defense Attorney:Now, Your Honor, I will object and move to strike.

The Court: Granted.

Next, Chambers also objected when Karen testified about her feelings that evening.

Q:How long were you upset by this incident, Mrs. Van Hierseele?

A:Well I know I was quite upset even when the police came I — I —I was shaking a lot. I — you know, I didn't — I was just very afraid.

Q:Okay. What were you afraid of?

A:I was afraid that he was going to hurt her again.

Defense Attorney:Objection. Move to strike.

The Witness:I'm sorry.

The Court:Motion granted. The testimony —

Defense Attorney: Your Honor, at this point I'm going to move for a mistrial. This is the second time this has happened.

The Court: Noted. I'll let you argue it outside of the jury's presence.

Soon thereafter, the court heard Chambers's arguments.

There the trial court, although holding off on its ultimate ruling until the end of trial, temporarily denied Chambers's request. The court reasoned:

> Andrea Van Hierseele testified that she was not afraid of Mr. Chambers on this particular evening, and while the jury should not have heard the testimony[, "]I was afraid he was going to hurt her again,["] I don't think it is so prejudicial that it will impact on the jury so completely that they cannot properly consider the two crimes with which he is charged and the elements of those crimes, which is basically the disturbance/disorderly conduct/breach of peace type scenario.

Chambers now challenges the trial court's decision not to grant his mistrial motion.

Whether to grant a mistrial is a discretionary decision for the trial court. *See* ***Haskins v. State,*** 97 Wis.2d 408, 419-20, 294 N.W.2d 25, 33 (1980). The decision will not be reversed unless there has been a clear misuse of

discretion. ***Id.*** We look to see if the trial court based its ruling on the facts within the record and applied the appropriate legal standards, and to determine if there was a rational basis for the decision. *See* ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

Chambers's theory, both here and before the trial court, is that these prosecution witnesses deliberately provided this inadmissible testimony to prejudice the defendant and ensure a conviction.[1] To bolster the argument, he adds that these witnesses had been warned by the prosecutor about making references to Chambers's past.[2] He claims that the witnesses' inadmissible testimony had a "devastating impact" on the defense. Although Chambers argued to the jury that he had Andrea's consent to enter the house, he believes that the jury's focus was shifted to how Paul and Karen felt about Chambers and to how he was a dangerous person.

We disagree. Even after acknowledging that this evidence was found to be inadmissible and potentially prejudicial, the jury had heard evidence from all three of the Van Hierseeles. Although the jury had to resolve

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[1] He specifically uses the term "evidentiary harpoon." While we were unable to find this term within any Wisconsin cases, we recognize that other jurisdictions rely on this terminology. *See, e.g.,* ***United States v. Hooks***, 780 F.2d 1526, 1535 n.3 (10th Cir.) (collecting cases), *cert. denied*, 475 U.S. 1128 (1986).

[2] Before trial, the prosecutor noted during a discussion about sequestering witnesses:

> Just for the court's information, [and Defense counsel's information], I did warn my witnesses — the defendant was on probation for another incident — not to mention that fact and not — so that the jury would find out unfairly about any prior convictions.

a conflict over whether Andrea signaled to Chambers that he could enter the property, it had ample evidence to reach the conclusion it did. Besides, if the jury was somehow affected and concluded that Paul and Karen feared Chambers because of past run-ins, this would not have had any direct bearing on his defense that *Andrea* told him that he could stay on the property.

Chambers nonetheless contends that the State acknowledged that the testimony provided by Paul and Karen was extremely damaging since it asked the court to consider giving the cautionary jury instruction used when "other acts" evidence is presented. Still, appellate analysis involves a question of whether the trial court acted reasonably. Here, the trial court's refusal to give the instruction was based on a concern that it "would only highlight the testimony." We believe that this is a reasonable rationale. We cannot say that the risk of negative jury bias was so great that the trial court acted irrationally when it concluded that saying nothing to the jury was the best way to address Chambers's concern.

By the Court.—Judgment affirmed.

This decision will not be published. *See* RULE 809.23(1)(b)4, STATS.