COURT OF APPEALS
DECISION
DATED AND RELEASED

May 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. 95-1903-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREG D. GRISWOLD,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT A. DE CHAMBEAU, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

EICH, C.J. Greg Griswold appeals from a judgment convicting him on three counts of issuing worthless checks, and from an order denying his postconviction motion for a new trial.

His arguments attacking the conviction are somewhat confusing. He contends, for example, that the evidence establishes that the checks were postdated and were issued for past consideration and, as a result, "cannot be the basis of a conviction under § 943.24, STATS.," which expressly states that the statute does not apply to such checks.[1] He also argues, however, that the trial court erroneously refused to permit him to present evidence that the checks were either postdated or given for a past consideration, or both. Finally, he maintains that the trial court erred in failing to instruct the jury on both points and, finally, that he is entitled to a new trial because of misconduct on the part of one of the jurors.

If, as Griswold argues, there was evidence in the record to establish that the checks were either postdated or given for past consideration, he never requested the court to instruct the jury to consider that evidence in light of the language in § 943.24(4), STATS.; nor did he object to the instruction actually given by the court, which made no reference to either matter. That failure waives any objection to the instructions, placing Griswold's claims beyond our review under ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988), and similar cases.[2] We are also satisfied that Griswold is not entitled to a new trial on grounds of juror misconduct.

I. Postdating/Past Consideration: Waiver

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[1] The statute provides in pertinent part:

> (2) Whoever issues any single check ... for the payment of more than $1,000 ... which, at the time of issuance, the person intends shall not be paid is guilty of a Class E felony....
>
> (4) This section does not apply to a postdated check or to a check given for a past consideration ....

[2] As we discuss below, because Griswold never asked for such instructions, it is immaterial whether, as he claims, he could have presented "additional evidence" on postdating or past consideration, had the court so allowed. Nor, as we also discuss, has he persuaded us that we should exercise our discretion to order a new trial in the interest of justice under § 752.35, STATS., based on the court's failure to instruct the jury.

Taking at face value Griswold's claim that there was evidence in the record from which the jury could find that the checks in question were either postdated or were given for past consideration, the dispositive fact, as we see it, is that he never requested that the jury be instructed as to the effect of postdating or past consideration under § 943.24, STATS., and never objected to the instruction given by the court, which omitted any reference to those factors.

Section 805.13(3), STATS., states that a party's failure to object to interpose particularized objections to proposed jury instructions at the instructions conference "constitutes a waiver of any error in the proposed instructions ...."[3] The trial court expressly informed counsel of the instructions it proposed to give to the jury, specifically asking Griswold's attorney if he had any objections to the proposed instructions, or whether he wished to request any additional instructions, to which counsel responded that he did not. After the instructions were given and the jury was sent to its deliberations, the court again asked Griswold's attorney whether he had any objections to the instructions as actually read, and he again responded that he did not.

In ***Schumacher***, the supreme court held that the court of appeals lacks the power to "reach ... unobjected-to instructions," ***Schumacher***, 144 Wis.2d at 409, 424 N.W.2d at 680, and we have consistently followed that mandate. *See*, *e.g.*, ***State v. Marcum***, 166 Wis.2d 908, 916, 480 N.W.2d 545, 550 (Ct. App. 1992) (court of appeals may not review claimed instructional error in the absence of timely objection).[4]

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[3] Section 805.13, STATS., part of the rules of civil procedure, applies equally in criminal prosecutions. Section 972.01, STATS. See also § 972.10(5), STATS., which, like § 805.13, requires counsel in criminal cases to specify the particular ground for objection to instructions that are alleged to be "insufficient or ... [to] not state the law."

[4] We may, under ***Schumacher***, revisit instructions in the exercise of our discretionary power to reverse in the interest of justice under § 752.35, STATS., where it appears either that justice has miscarried or that the real controversy in issue has not been tried. ***State v. Schumacher***, 144 Wis.2d 388, 408, 424 N.W.2d 672, 680 (1988); ***State v. Marcum***, 166 Wis.2d 908, 916, 480 N.W.2d 545, 550 (Ct. App. 1992). Griswold does not so argue on this appeal, however--other than to state generally that "the purpose of jury instructions is to fully and fairly inform the jury of the rules of law applicable to the case," and that the instruction, as given, "did not fulfill this purpose."

Even if, as Griswold asserts, the record contains evidence from which the jury might determine that one or more of the checks at issue were either postdated or given for past consideration--an assertion the State hotly disputes--his failure to either request a jury instruction on the point or object to its omission in the instructions given by the court precludes our review of the issue. It follows that even if, as he also asserts (and the State again denies), he could have introduced additional evidence on the subject but for the court's evidentiary rulings, the result would be the same: because he failed to object to the instructions as given, the postdating/past consideration issues are beyond our review.[5]

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Where an argument is "broadly stated but never specifically argued," we consider the issue inadequately briefed and will decline to review it. ***Kinnick v. Schierl, Inc.***, 197 Wis.2d 855, 866, 541 N.W.2d 803, 807 (Ct. App. 1995) (citation omitted); ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988) (citation omitted). Griswold's brief statement does not satisfy us that this is a proper case for exercise of our discretionary reversal power under § 752.35, STATS.--a power the supreme court has stated is to be exercised "only in exceptional cases." ***Vollmer v. Luety***, 156 Wis.2d 1, 11, 456 N.W.2d 797, 802 (1990).

[5] Even so, Griswold's argument on the merits of his challenge to the trial court's evidentiary rulings is unavailing. The challenged rulings came during Griswold's attorney's cross-examination of a representative of the company to whom the checks were issued. The following questions, asked in succession, were objected to, and the objections sustained, on relevancy grounds: (1) "Was it your understanding that CCI [Griswold's company] was a start-up computer company?"; (2) "[W]hen you contacted CCI, did you ever ask for a credit application?"; (3) "Did you ever ask [CCI] for a prepayment or a cashiers check on delivery?"; (4) "Is it usual, when you do business with a company you have never done business with before, not to have a credit check?"; (5) "Is it your usual business practice to accept a company check for first shipment on delivery?"; and (6) "[A]re you aware that the credit department did a credit check with [CCI]?"

Griswold argues, without elaboration or explanation, that all of counsel's questions "were relevant ... to the issue of whether ... the check was given for past consideration under all the facts and circumstances" of the case; he states simply that "[i]t is obvious that the existence or absence of a creditor/debtor relationship and the precise circumstances surrounding such a relationship would be relevant to whether or not a worthless check as defined by Section 943.24, Stats.[,] was issued in this case." We note first that the purpose Griswold now ascribes to the answers sought by his counsel's questions was not apparent from the questions themselves, nor was such purpose brought to the court's attention by explanation or offer of proof. Under § 901.03(1)(b), STATS., unless either one of those conditions exists, the objecting party may not predicate a claim of error on the trial court's

II. Juror Misconduct

During the trial, Griswold's counsel related to the court a remark he said he overheard in a conversation between two jurors:

> I heard--I can't repeat it verbatim because I didn't write it down .... I remember him saying, "My feelings are very strong and I can't sit still," and I think I may have heard something regarding, "It's difficult to keep an open mind," or something regarding that, but I don't know what it was.

With counsel's consent, the trial court summoned the juror alleged to have made the remark, Juror Dandrea, and told him that the court had been informed that he may have made a comment to another juror to the effect that "it was difficult for you to sit still or sit through this, as you had very strong feelings." The court asked Dandrea whether he had in fact made such a comment, which he denied, stating that he had no "strong feelings" about the case, and did not recall stating anything to that effect to another juror. He also said that he did not tell another juror that he had "difficulty sitting through" the trial.

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rulings.

Finally, we note that the supreme court rejected a similar claim in ***Haskins v. State***, 97 Wis.2d 408, 294 N.W.2d 25 (1980). The defendant in ***Haskins*** claimed that the trial court erroneously limited his cross-examination of a witness by sustaining several prosecution objections on relevancy grounds. Upholding the trial court's rulings, the supreme court said: "Where no offer of proof was made with regard to any testimony excluded by the [trial court], and where no explanation was given as to why defense counsel thought the question was material, no abuse of discretion [in sustaining the objections] can be found." ***Id***. at 422-23, 294 N.W.2d at 35. The ***Haskins*** holding is consistent with the long-established rule that a trial court will not be held to have erroneously exercised its discretion in making a ruling when it was never asked to exercise that discretion in the first place. ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983).

The court then gave counsel the opportunity to question Dandrea, and Griswold's attorney asked simply whether he could wait until he heard all the evidence before making up his mind. Dandrea replied: "Yes, sir." Griswold's attorney did not ask the court for any ruling or relief, and the court declined to pursue the matter further because, in the court's view, even if Dandrea had made the remark, it was obviously so insignificant in his own mind that it did not warrant further inquiry. Griswold's attorney responded: "I understand," and the trial resumed.

Then, more than a year after the verdict was returned, Griswold moved for a new trial, supporting his motion with an affidavit of another juror, Michele Williams, stating that, during the lunch hour on the first day of Griswold's trial, a male juror (presumably Dandrea) remarked to her that "he had already made up his mind that Mr. Griswold was guilty and it didn't matter what was said ... in his mind Mr. Griswold was guilty and he wished it would hurry up and be over with." At the hearing on the motion, Griswold offered to have Williams testify as to the statements made in her affidavit, and the trial court declined the request, ruling that § 906.06(2), STATS., barred the testimony. The statute provides:

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith .... Nor may the juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.[6]

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[6] The statute exempts from the ban testimony relating to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Section 906.06(2), STATS. Griswold does not argue that the purported conversation constituted "extraneous information" within the meaning of the exception.

Even so, "extraneous information" within the meaning of the statute is information

Griswold asserts, without elaboration or citation to authority, that it was incumbent upon the trial court to question Williams at the time the incident was reported. He also states, in an equally cursory manner, that § 906.06(2), STATS., is inapplicable because Williams's testimony did not concern the jury's deliberations, but rather "regard[ed] the jurors falsely informing answering [sic] voir dire questions and the jurors lying to the Court when directly confronted with an indiscretion."

The argument is undeveloped and easily disposed of. The supreme court held in ***State v. Messelt***, 185 Wis.2d 254, 268, 518 N.W.2d 232, 238 (1994) (quoted source omitted), that when a juror is alleged to have improperly withheld information from the court that would relate to the juror's bias or prejudgment, the challenging party must demonstrate: "`(1) that the juror incorrectly or incompletely responded to a material question on voir dire; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party.'" Whether a juror is biased is "a matter of the circuit court's discretion," and the moving party, in order to succeed, "must offer more than a suggestion of partiality." ***Id***. at 269, 518 N.W.2d at 238 (citations omitted). Finally, according to ***Messelt***, "`[a] determination by the circuit court that a prospective juror can be impartial should be overturned only when bias is "manifest."'" ***Id***. (quoted source omitted). We agree with the State that Griswold has pointed to nothing in the record to sustain his position that Dandrea's presence on the jury prevented him from receiving a fair trial.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

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obtained from non-evidentiary sources, and "[t]he term does not extend to statements which simply evince a juror's subjective mental process." ***State v. Messelt***, 185 Wis.2d 254, 275, 518 N.W.2d 232, 241 (1994) (citation omitted).

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SUNDBY, J. (*dissenting*). Issuance of a post-dated check is not a crime. "The worthless check section makes a number of changes from existing law.... *Post-dated checks are excluded.*" William A. Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 375 (emphasis added).

> Post-dated checks are not included in view of the fact that some merchants encourage the giving of post-dated checks when the customer does not have sufficient funds on hand to pay for the purchase. The person who takes a post-dated check is put on notice that there may not be sufficient funds in the account of the issuer.

1953 Judiciary Committee Report on the Criminal Code, at 119 (Wis. Legislative Council, February 1953); *see also* WIS J I--CRIMINAL 1469A ISSUE OF WORTHLESS CHECK: FELONY: ONE CHECK FOR $1000 OR MORE--§ 943.24(2), Comment 8.

Section 943.24, STATS., provides in part:

> (2) Whoever issues any single check ... for the payment of more than $1000 ... which, at the time of issuance, the person intends shall not be paid is guilty of a Class E felony.
>
> ....
>
> (4) This section does not apply to a post-dated check ..., except a payroll check.

Griswold was convicted of three counts of issuing worthless checks to Ocean Information Systems for merchandise delivered to Griswold on February 15, 1993. The three checks issued for payment of that merchandise on February 15 were dated February 17, 1993. The State does not dispute that these three checks were post-dated. The three counts involving the post-dated checks were Counts 9, 10 and 11. The trial court instructed the jury as follows: "Evidence has been received as to Counts #9, #10 and #11 that at the time the defendant issued the check, there was not enough money in the checking account upon which the check was drawn and that the defendant failed to pay

the check within five days after receiving notice that the check was not paid." However, the trial court did not give that part of the instruction that instructs the jury that: "The statute does not apply to a postdated check. Before you may find the defendant guilty, you must find beyond a reasonable doubt that the check was not a postdated check."

The effect of our decision is to punish a defendant criminally for something which is not a crime.

The State argues that the defendant waived the trial court's error in improperly instructing the jury because he did not request that the trial court instruct the jury that it had to find beyond a reasonable doubt that the checks which were the subject of Counts 9, 10 and 11 were not post-dated checks. A criminal defendant has a constitutional right to remain mute throughout a criminal trial, present no evidence, and not assist the State in any way in convicting him or her of a crime. The defendant cannot complain if he or she is convicted even though the defendant had a defense to the action, if the defendant did not present that defense. However, that doctrine applies only to facts and not theories of law. Further, that doctrine does not preclude the defendant from arguing that the State has failed to prove he or she committed a crime because the State failed to prove every element of the offense. Because it is undisputed that the checks which are the subject of Counts 9, 10 and 11 were post-dated checks, the defendant is free to argue that he has not committed a crime. There simply is no such crime as issuing a worthless post-dated check.

If the State's argument succeeds in this case, it could as easily succeed in another case in which the trial court fails to instruct the jury that the State must prove every element of the offense beyond a reasonable doubt. In ***State v. Avila***, 192 Wis.2d 870, 887, 532 N.W.2d 423, 429 (1995), the court stated: "The Due Process Clause of the Fourteenth Amendment places upon the prosecution in state criminal trials, the burden of proving all elements of the offense charged, and the burden of proving `beyond a reasonable doubt' *every*

fact necessary to establish those elements, ***In re Winship***, 397 U.S. 358, 364 (1970)." (Citation omitted; emphasis added.) A fact necessary to establish issuance of a worthless check is that the check was not a post-dated check.

The State cannot impose upon a criminal defendant the obligation to instruct the jury as to the law. That is the duty of the court, assisted by the State. "[I]t is the established rule of this court that objection to instructions is not waived where the instruction misstates the law (rather than being simply incomplete or imperfect) ...." ***Lambert v. State***, 73 Wis.2d 590, 607, 243 N.W.2d 524, 532 (1976); *see also* ***Pharr v. Israel***, 629 F.2d 1278, 1280 (7th Cir. 1980), *cert. denied*, 449 U.S. 1088 (1981). The State does not argue, nor could it, that the trial court misstated the law when it instructed the jury: "If you are satisfied beyond a reasonable doubt from the evidence in this case that the defendant issued a check for the payment of more than $1000 which, at the time of issuance, he intended not be paid, you should find the defendant guilty." This instruction misstates the law as to post-dated checks.

It is the duty of the trial court to instruct the jury as to all elements which the State must prove to find a criminal defendant guilty beyond a reasonable doubt. ***Claybrooks v. State***, 50 Wis.2d 87, 93, 183 N.W.2d 143, 147 (1971). Failure of the trial court to instruct *sua sponte* is not prejudicial unless the omission affects a substantial right of the defendant. ***Id***. Plainly, failure to instruct the jury that the State must prove each element of an offense beyond a reasonable doubt prejudices the defendant. In this case, the trial court was required to give the pattern instruction that before the jury could find the defendant guilty, it was required to find beyond a reasonable doubt that the checks which were the subject of Counts 9, 10 and 11 were not post-dated. The failure of the trial court to properly instruct the jury deprived Griswold of due process under the Fourteenth Amendment. I therefore dissent.