COURT OF APPEALS
DECISION
DATED AND RELEASED

January 10, 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(1), STATS.

NOTICE

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No. 95-2003-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RANDALL J. GIBAS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Calumet County: PETER L. GRIMM, Judge. *Affirmed.*

NETTESHEIM, J. The threshold issue in this case is whether the trial court misused its discretion by granting Randall J. Gibas's motion for a mistrial based upon an ex parte communication between the court bailiff and the jury during the jury's deliberations. We conclude that the court did not misuse its discretion by granting the mistrial.

Because we uphold the mistrial order, we address a second issue raised by the State since it is likely to recur in any further trial.[1] The State contends that the trial court misused its discretion by rejecting proffered "other acts" evidence against Gibas. We also affirm the trial court's ruling as to this issue.

The controlling facts and procedural history of this case are not disputed. The State charged Gibas with endangering the safety of another by use of a dangerous weapon pursuant to § 941.20(1)(c), STATS. The complaint was based on the statement of Lori A. Sasse who alleged that while she and Gibas were on an undercover stakeout as members of the Lake Winnebago Area Metropolitan Enforcement Group, Gibas picked up his handgun, placed it up to or into his mouth, commented on how easy it would be to commit suicide, and then put the gun to Sasse's left temple and ordered her to remove her clothing.

The matter was originally assigned to the Honorable John W. Mickiewicz. By a pretrial motion, the State asked Judge Mickiewicz to allow the use of other acts evidence against Gibas. This evidence would have contended that about two months prior to the charged incident, Gibas unholstered his service weapon and pointed it at another officer. Judge Mickiewicz denied the State's request.

[1] The State indicates that if we uphold the trial court's mistrial order, it intends to retry Gibas. The trial court's order granting a mistrial is silent as to whether the court will allow a retrial.

Gibas then sought dismissal of the complaint based upon his allegation that representatives of the Department of Justice had engaged in "outrageous governmental conduct" within the meaning of ***United States v. Russell***, 411 U.S. 423 (1973). Specifically, Gibas contended that the department had threatened his fellow workers with reprisals if they assisted in his defense. ***State v. Gibas***, 184 Wis.2d 355, 358, 516 N.W.2d 785, 786 (Ct. App. 1994), *cert. denied*, 513 U.S. ___, 115 S. Ct. 729 (1995). Judge Mickiewicz agreed with Gibas and dismissed the charge. The State took a permissive appeal. We accepted the case for review, reversed the dismissal order and remanded for further proceedings. ***Id***. at 364, 516 N.W.2d at 788.

On remand, Judge Mickiewicz recused himself and the matter was assigned to the Honorable Peter L. Grimm, whose rulings we review on this appeal.

The case proceeded to a jury trial on March 23, 1995. During the trial, the State renewed its request to introduce the other acts evidence against Gibas. Judge Grimm, like Judge Mickiewicz before him, denied this request. Following two days of testimony, the case was submitted to the jury. The critical issue at the trial was the competing credibility of Sasse, who related the events stated in the complaint, and Gibas, who denied the allegations.

The jury received the case at approximately 5:30 p.m. on the second day of trial. At approximately 8:45 p.m., the jury announced that it had reached a verdict. Before bringing the jury into the courtroom, Judge Grimm advised the parties on the record of an event which had been reported to him by

the bailiff, Jerome Koenig. Judge Grimm stated that at approximately 8:00 p.m., he had entered the courtroom. At that time, he was informed by Koenig that the jury had previously inquired of Koenig as to what would happen if it could not reach a verdict. Koenig's response, according to Judge Grimm's recollection, was, "['Y]ou will[']' or words to that effect." Judge Grimm also admonished Koenig to "get it in writing" the next time the jury presented a question.

Gibas immediately moved for a mistrial. Since the jury had not yet announced its verdict, Judge Grimm took the motion under advisement and stated that he would conduct an evidentiary hearing on the matter, if necessary, after the verdict was announced. The jury found Gibas guilty, and Judge Grimm immediately undertook an evidentiary hearing at which Koenig testified.

At this hearing, Koenig testified that about one hour into its deliberations, the jury had knocked on the jury room door. Koenig answered the knock and a juror asked, "What if we can't come to a decision?" Koenig testified, "I thought it was required that they did. At least arrive[] at a decision." At another point, Koenig testified, "I told them that it's required that they come up with an answer or that they come with an answer." In a written decision, Judge Grimm ruled that Koenig's communication with the jury was a constitutional violation pursuant to ***State v. Burton***, 112 Wis.2d 560, 334 N.W.2d 263 (1983), and that the violation was not harmless. Accordingly, Judge Grimm granted Gibas's mistrial request.

The State brought a petition for leave to appeal Judge Grimm's nonfinal order granting the mistrial. We previously granted the petition. Thus, this case is before us for a second time.

MISTRIAL

The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. ***State v. Bunch***, 191 Wis.2d 502, 507, 529 N.W.2d 923, 925 (Ct. App. 1994). The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial to warrant a new trial. ***Id***. We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. ***Id***. 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. ***Id.*** at 507-08, 529 N.W.2d at 925. Moreover, when a defendant's motion for a mistrial is prompted by conduct unrelated to the State's misconduct, we are required to give the court's ruling "great deference." ***Id***. at 508, 529 N.W.2d at 925 (quoted source omitted).

The burden for demonstrating that grounds for a mistrial exist lies with the party seeking the mistrial. *See* ***State v. Harrell***, 85 Wis.2d 331, 337, 270 N.W.2d 428, 432 (Ct. App. 1978). The State contends that Gibas has not met this burden because the communication was not improper, and, even if it was, it was not prejudicial.

The leading case regarding communication with a jury during deliberations is ***Burton***. There, the trial judge entered the jury room without the

knowledge or presence of the parties. The judge made inquiries regarding the jury's deliberations and provided the jury with information regarding accommodations had the deliberations continued into the evening. ***Burton***, 112 Wis.2d at 563-64, 334 N.W.2d at 264-65. The supreme court held that such an ex parte communication, even though reported, was a per se constitutional violation of the defendant's right "to be present at his trial and to have counsel at every stage where he needs aid in dealing with legal problems." ***Id***. at 564-65, 334 N.W.2d at 265. However, the court went on to hold that the error was harmless beyond a reasonable doubt. ***Id***. at 571-73, 334 N.W.2d at 268-69.

The State contends that ***Burton*** does not govern this case because here the bailiff, not the judge, participated in the communication. However, the bailiff is an extension and representative of the court. As Judge Grimm aptly observed, "The jury bailiff is a figure of authority and does function under the court's jurisdiction and authority." When the bailiff interacts with the jury, whether properly or improperly, he or she is acting in an official capacity as a representative of the court.

The State argues that if we fail to draw a distinction between judge and bailiff communications with the jury, then all bailiff communications constitute a constitutional violation. This argument is flawed because it assumes that the function of the bailiff is to independently communicate with the jury. This, however, is not the role of the bailiff. Section 756.098(2), STATS., recites the bailiff's duties during jury deliberations:

> You do swear that you will, to the utmost of your ability, keep all jurors sworn on this trial together in some private and convenient place, subject to the direction of the

> court, until they have agreed on their verdict or are discharged by the court, and that you will not, before they render their verdict, communicate to any person the state of their deliberation or the verdict they have agreed upon, so help you God.

This oath does not command or permit the bailiff to communicate with the jury. To the contrary, it directs just the opposite—to keep the jury free from such contacts. Again, we quote Judge Grimm: "The role of the bailiff is … to keep the jury free from outside influence …." When the bailiff takes it upon himself or herself to communicate information to the jury, the bailiff steps outside this oath.

This does not mean that all communications between a jury and the bailiff are illegal. To the contrary, we recognize that such routinely occur and are necessary to meaningful deliberations. However, all such exchanges, whether substantive or procedural, important or mundane, are *communications between the jury and the court, not between the jury and the bailiff.* The role of the bailiff in these exchanges is that of *a conduit* between the court and the jury and vice versa.

Here, Koenig's answer to the jury's question exceeded his role as a conduit. Not only did he fail to pass the jury's inquiry on to Judge Grimm, he also presumed to speak for Judge Grimm.[2]

[2] Although it is not dispositive of this case, we note that Koenig's handling of the jury's question violated various provisions of the written instructions which the clerk of court provides to bailiffs in Calumet County. These instructions include provisions that all questions from the jury are to be relayed to the judge in written form and that the bailiff is to make no comments to the jury regarding the case unless directed by the judge.

We therefore uphold Judge Grimm's ruling that the communication between Koenig and the jury constituted a constitutional violation as a matter of law.

The State next argues that even if the communication was a constitutional violation, the error was harmless. The State's argument, however, is based on an erroneous premise. The State contends that the burden to show that no prejudice resulted from the constitutional violation error rests with Gibas. However, ***Burton*** holds that "[t]he standard for determining whether constitutional error is harmless … requires the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Burton***, 112 Wis.2d at 570, 334 N.W.2d at 268 (quoted source omitted).

Nonetheless, we will assess the effect of the constitutional violation. To assess the impact of the error, a court must take into account the substance of the communication and circumstances under which the communication took place. *See* ***id***. at 571, 334 N.W.2d at 268. Ultimately, we must answer whether, on the basis of the entire record, there is a reasonable possibility that the constitutional error might have contributed to the conviction. ***Id***.

As to the substance of the communication, we observe that the question posed by the jury was not an innocuous inquiry dealing with a ministerial matter unrelated to the case. Instead, the question and the answer focused on the jury deliberation process itself. Moreover, Koenig's response

was an incorrect statement of the law. Although a trial court will make every reasonable effort to obtain a verdict, the jury is not required to deliberate until a verdict is reached, and the court does not so instruct the jury.[3] This factor weighs in favor of Judge Grimm's holding that the error was not harmless.

As to the circumstances surrounding the communication, we observe, as did Judge Grimm, that this case involved a credibility battle between Sasse and Gibas. There were no independent witnesses to the alleged crime. As Judge Grimm also noted, the question at least raised the reasonable specter that the jury was deadlocked or at a stalemate. As such, Judge Grimm reasonably concluded that "[t]he jury may very well have had dissenters who abandoned their dissent with the belief that they would not or could not be discharged from a deadlock[ed] jury." This factor also weighs in favor of Judge Grimm's ruling.

Finally, we return to the ultimate standard of review which we are required to apply in a mistrial case. As we have noted, the question is committed to the sound discretion of the trial court. ***Bunch,*** 191 Wis.2d at 507, 529 N.W.2d at 925. Although the historical facts in this case regarding Koenig's communication with the jury are undisputed, the reasonable inferences to be drawn from those facts regarding prejudice placed Judge Grimm in the role of a fact finder. In that capacity, the judge was in a superior position over us to

[3] In fact, when a jury reports that it is deadlocked and the trial court chooses to order the jury to continue its deliberations, the jury is advised it will not be required to deliberate until a verdict is reached—just the opposite of Koenig's instruction. *See* WIS J I—Criminal 520. We recognize that here the jury did not expressly advise that it was deadlocked. The question, however, suggested that such a condition might have existed and Judge Grimm so noted.

make not only the factual call, but the ultimate discretionary call regarding prejudice.

A trial court's better position depends upon its having experienced or "sensed" the trial itself. ***Id***. at 511, 529 N.W.2d at 926 (quoted source omitted). Our supreme court has said:

> In a variety of decisions involving review of circuit courts' discretionary actions, … a major reason circuit courts are given discretionary authority over matters that involve evaluation of the circumstances surrounding a trial is that *the circuit judge is present at trial and is therefore better able to understand what occurred …. In exercising discretion on whether to grant a mistrial, the circuit court is in a particularly good "on-the-spot" position to evaluate factors such as a statement's likely impact or effect upon the jury.*

Schultz v. Darlington Mut. Ins. Co., 181 Wis.2d 646, 657, 511 N.W.2d 879, 883 (1994) (quoted source omitted; emphasis added); *see also* ***Bunch***, 191 Wis.2d at 512, 529 N.W.2d at 927.

Having presided over the entire trial and personally experienced the chemistry of the case, Judge Grimm was in a far better position than us to assess the degree of prejudice occasioned by Koenig's improper and incorrect communication to the jury. The judge's written decision carefully balanced the competing interests at stake: Gibas's constitutional right to a fair trial against the burden placed on the criminal justice system by granting a mistrial and necessitating a further trial. Moreover, the judge's decision represents a thorough and rational decision-making process. As such, it constitutes a classic example of the correct exercise of judicial discretion. We affirm the ruling.

OTHER ACTS

Next, we address the State's challenge to Judge Grimm's further order which barred the State from using other acts evidence against Gibas. This evidence would have demonstrated that about two months prior to the alleged incident involving Sasse, Gibas unholstered his service weapon and pointed it at another officer.

Judge Grimm concluded that even if probative under any of the recognized exceptions to the general rule excluding such evidence under § 904.04(2), STATS., the prejudicial effect of the evidence substantially outweighed its probative value. Judge Grimm specifically expressed his concern that "if this act is admitted into evidence, the jury is going to conclude that because he did it on a prior occasion, he must have done it on this time. That's exactly the inference that the statute is designed to prohibit." A few lines later in the transcript, the judge additionally observed, "[T]he jury will conclude the defendant is a bad person and acted in conformity with this character of a prior occasion." This ruling was consistent with the pretrial ruling previously made by Judge Mickiewicz.

Although there is an abundance of other acts case law in Wisconsin, this case is unique because it presents the rare situation in which the State is appealing an adverse other acts trial court evidentiary ruling.

The State contends that the other acts evidence was admissible under various of the exceptions recited in § 904.04(2), STATS. However, the State never squarely addresses the principal basis upon which Judge Grimm

excluded the evidence: that the prejudicial effect of the evidence outweighed its probative value. We will.

As with all evidentiary rulings, the admissibility of other acts evidence is committed to the sound discretion of the trial court. *See* ***State v. Tabor***, 191 Wis.2d 483, 489, 529 N.W.2d 915, 918 (Ct. App. 1995). The prejudice prong of an other acts analysis addresses the "potential harm of a jury reaching the conclusion that because the defendant committed a bad act in the past, the defendant necessarily committed the current crime." ***Id***. at 496, 529 N.W.2d at 920-21 (quoted source omitted). This, of course, was the very concern expressed by Judge Grimm.[4] And, as the judge correctly noted, this is the very purpose of the other acts statute. "The general policy of § 904.02(2), STATS., is one of exclusion; the rule precludes proof of other crimes, acts or wrongs for purposes of showing that a person acted in conformity with a particular disposition on the occasion in question." ***State v. Johnson***, 184 Wis.2d 324, 336, 516 N.W.2d 463, 466 (Ct. App. 1994).

In the seminal other acts decision of ***Whitty v. State***, 34 Wis.2d 278, 297, 149 N.W.2d 557, 565-66 (1967), *cert. denied*, 390 U.S. 959 (1968), our supreme court cautioned that other acts evidence should be used sparingly, only when reasonably necessary and that such evidence normally carried a calculated risk. Judge Grimm's ruling in this case was in solid keeping with this strong message of ***Whitty***.

[4] Although Judge Mickiewicz's ruling is not before us, it appears that his ruling was based on a similar concern.

We must acknowledge, however, that the post-***Whitty*** case law has, with rare exception, approved the use of other acts evidence at the behest of the State. Thus, we cannot fault the State for believing that it has a strong argument for admission of the other acts evidence in this case. This court has previously expressed its concern about this gradual, but steady, dismantling of ***Whitty***. *See* ***Johnson***, 184 Wis.2d at 341, 516 N.W.2d at 468; *see also* ***id.*** at 351-52, 516 N.W.2d at 472-73 (Anderson, P.J., concurring); ***State v. Rushing***, No. 95-0663 (Wis. Ct. App. Oct. 10, 1995, ordered published Nov. 28, 1995) (Myse, J., concurring). However, the supreme court has never overruled ***Whitty***. It would be beyond our primary error-correcting function, *see* ***State v. Fawcett***, 145 Wis.2d 244, 253, 426 N.W.2d 91, 95 (Ct. App. 1988), to reverse a trial court ruling which squarely follows existing supreme court precedent.

Nonetheless, we are compelled to state that the current state of other acts law is in disarray. On one hand, ***Whitty*** clearly augurs against the admission of such evidence in most cases. On the other hand, most of the post-***Whitty*** law has routinely approved the use of such evidence. Thus, there are no longer any meaningful guidelines in this area of the law, leaving both the trial courts and criminal law practioners at sea on this question. We again express our belief that it is time for the supreme court to step into this discussion and to restate the current law of other acts.

By the Court.—Order affirmed.

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