COURT OF APPEALS
DECISION
DATED AND RELEASED

May 21, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2250-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH C. BANKS,

Defendant-Appellant.

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

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Keith C. Banks appeals from a judgment of conviction, following a jury trial, for kidnapping (party to a crime), two counts of first-degree sexual assault, armed robbery (party to a crime), and carjacking (party to a crime). He argues that: the trial court erroneously instructed the jury; the prosecutor offered improper rebuttal during closing argument; and his

convictions should be reversed in the interest of justice. We reject his arguments and affirm.

Banks and a co-defendant abducted a woman as she was getting out of her car, took her to a park, and sexually assaulted her. Despite the fact that she was blindfolded most of the time, she was able to identify both her assailants at a lineup, though she was primarily able to identify Banks by his voice.

The issue at trial was identification. The trial court instructed the jury according to WIS J I—CRIMINAL 141 (the long version), in part as follows:

> Consider the witness's opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to *see and hear the events, and any other circumstances of the observation*.

(Emphasis added.) During the course of its deliberations, the jury sent out a question, which read: "[T]he physical ability of witness to see *and* hear the events, and any other circumstances of the observation"—"Is it *and* or could it be *or* or both"? (Emphasis in original.) The parties and the trial court interpreted the jury's question to ask whether identification could be based on voice, appearance, or both. Over defense counsel's objection, the trial court responded that the "and" could be "or" or both.

A trial court has wide discretion in using jury instructions to "'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. Waites***, 158 Wis.2d 376, 385, 462 N.W.2d 206, 209 (1990) (citation omitted). In reviewing alleged error in jury instructions, "we do not view the challenged word or phrase in isolation." ***State v. Foster***, 191 Wis.2d 14, 28, 528 N.W.2d 22, 28 (Ct. App. 1995). We must view the jury instructions as a whole to determine whether they misstated the law or misdirected the jury. ***Id.*** Additionally, "[j]ust as the initial jury instructions are within the trial court's discretion, so,

too, is the 'necessity for, the extent of, and the form of re-instruction' in response to requests or questions from the jury." ***State v. Simplot***, 180 Wis.2d 383, 404, 509 N.W.2d 338, 346 (Ct. App. 1993) (citation omitted). "[W]hen the court receives an inquiry from the jury, it should 'respond ... with sufficient specificity to clarify the jury's problem.'" ***Id.*** at 404-405, 509 N.W.2d at 346.

Banks argues that the trial court's response improperly permitted or directed the jury to ignore the weaknesses in the victim's visual identification. Banks is wrong. The trial court's reinstruction was legally correct. The instruction directed the jury to *consider* both voice and visual forms of evidence. The reinstruction did nothing to reduce the jury's opportunity to consider the weaknesses of the victim's visual identification. Further, in addition to WIS J I—CRIMINAL 141, the jury was given instructions on reasonable doubt, witness credibility, and on the alibi defense, which combined with the witnesses' testimony and the arguments of counsel, focused the jury's attention on the identification issue. *See* ***Waites***, 158 Wis.2d at 385-389, 462 N.W.2d at 209-211. The instructions, as a whole, remained accurate, fully and fairly informed the jury of the applicable rules of law, and assisted the jury in making a reasonable analysis of the evidence. *See* ***id.***, 158 Wis.2d at 385, 462 N.W.2d at 209.[1]

Banks next argues that the trial court improperly failed to grant his motion for a mistrial based on the prosecutor's rebuttal argument. Defense counsel for Banks's co-defendant argued, in essence, that the victim had not been sexually assaulted because her injuries were too minor to be consistent with her testimony regarding the assaults. On rebuttal, the prosecutor argued:

> Counsel, both defense counsel and I, stipulated that the Crime Lab found that there was semen on the face of [the victim], and that's certainly consistent with her testimony that she was forced to suck both men's penises, and in fact she testified that she had to suck Mr. Arms' [Banks's co-defendant] penis after he had had his penis in her vagina. And there's also

[1] Banks also claims that the trial court's reinstruction violated his due process rights. Because we conclude that the reinstruction was a correct statement of law, we do not address his constitutional argument.

> testimony that there was a sperm found in her mouth swab, or we stipulated to that, and that there was a sperm found in the vaginal swab. *Now these things didn't just come through the air, ladies and gentlemen, and there's absolutely no evidence that there's any other source for this semen on [the victim].*

(Emphasis added.)

Banks claims that these comments went beyond the stipulated evidence in the case that told the jury that the semen and sperm had been recovered on those swabs "but there was not enough semen present for testing to be done." In Banks's estimation, the significance of the prosecutor's remark related to the fact, unknown to the jury, that the victim had had sex with someone hours before the assault. The trial court denied Banks's motion for a mistrial, reasoning that the prosecutor had been responding to "the contention on closing arguments about the lack of semen" to establish that the assaults had taken place.

"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 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). "We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion." ***Id.***

Although the State initially argues waiver because neither defendant objected to the prosecutor's remark until after the jury was sent to deliberate, we address the merits of Banks's argument. Wrenched from context, the prosecutor's remarks might seem to violate the rape shield preclusion of references to semen sources. In this case, however, the argument was a proper rebuttal to closing argument by counsel for Banks's co-defendant who contended that the evidence did not even show that a sexual assault had taken place. The trial court did not erroneously exercise its discretion by denying Banks's mistrial motion.

Finally, Banks argues for a new trial in the interest of justice. His argument, however, is simply a re-hash of the two arguments we have already

rejected. Therefore, we also reject his final argument. *See* ***Mentek v. State***, 71 Wis.2d 799, 809, 238 N.W.2d 752, 758 (1976) ("Zero plus zero equals zero.").

By the Court. – Judgment affirmed.

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