**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 11, 1997

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. 95-3194-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Michael Daniels,

Defendant-Appellant.

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

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

PER CURIAM. Michael Daniels appeals from a judgment of conviction for second-degree sexual assault and intimidation of a witness. *See* §§ 940.225(2)(a) and 940.43(3), STATS. He also appeals from an order denying his postconviction motion. Daniels claims that the trial court improperly denied his motions for a mistrial. Daniels also seeks a new trial in the interest of justice. We affirm.

Evidence in support of the conviction is as follows. Daniels and the victim lived in separate units of a duplex. On the night in question, Daniels entered her unit, forced her into his unit of the duplex and assaulted her. Daniels was arrested and charged with sexual assault and kidnapping. In a separate action, Daniels was charged with intimidating the victim to keep her from testifying. All three charges were consolidated for trial.

Pretrial orders were entered precluding references to Daniels having allegedly committed a shooting before going to the victim's home. The trial court, however, did permit the victim to testify that Daniels had been in a fight and that he said that he wanted to have sex one more time because he was afraid that he was going to be arrested. The victim testified to that but also testified that in the process of sexually assaulting her, Daniels said that he was wanted for two attempted murders and that "a third one wouldn't be shit." After a sidebar, Daniels moved for a mistrial, which was denied by the trial court. Daniels declined the trial court's offer for a curative instruction, believing that it would draw additional attention to the testimony.

A later exchange between the victim and Daniels's attorney Lew Wasserman triggered another motion for a mistrial, which was denied by the trial court. Later, the victim's sister testified that she had seen a bruise on the victim's body and that Daniels had pulled a gun on another person. The victim had already testified about this earlier assault. Again, Daniels moved for a mistrial, arguing cumulative prejudice. The trial court denied the motion, ordered the testimony stricken, and gave a curative instruction regarding the testimony about the bruise and the gun. During jury instructions, the trial court instructed the jury to disregard all stricken testimony.

Daniels was found guilty of second-degree sexual assault and the intimidation of a witness, but was acquitted of kidnapping. His postconviction motion was denied without a hearing.

Daniels contends that the trial court should have granted his motions for a mistrial based upon three incidents: (1) the victim's testimony that Daniels said he was wanted for two murders and a third one "wouldn't be shit"; (2) the exchange between the victim and Daniels's counsel; and (3) the victim's sister's testimony that she had seen a bruise on the victim's body from

an earlier incident and that Daniels had pulled a gun on another individual. Trial courts have discretion on motions for mistrials and should grant them for incurable prejudicial errors. ***Haskins v. State***, 97 Wis.2d 408, 419-420, 294 N.W.2d 25, 33 (1980). A denial of a motion for a mistrial will be reversed only upon a clear showing of a misuse of discretion. ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). We will uphold a discretionary decision by the trial court if that decision is supportable by the evidence even though the trial court may have given a different reason or no reason at all. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis.2d 1, 30, 469 N.W.2d 595, 606 (1991).

First, Daniels claims that the victim's testimony that Daniels said he was wanted for two attempted murders so "a third one wouldn't be shit" warranted a mistrial. To obtain a conviction for second-degree assault, the State had to show that Daniels had sexual contact with the victim "without [her] consent" and by the "use or threat of force or violence." Section 940.225(2)(a), STATS. To obtain a conviction for kidnapping, the State had to show that Daniels carried the victim from one place to another "by force or threat of imminent force" and "without [her] consent." Section 940.31(1)(a), STATS. Daniels's statement to the victim that he had already attempted two murders so "a third one wouldn't be shit" was admissible because it was a part of the threat made by Daniels to the victim.

Daniels could have requested a limiting instruction under RULE 901.06, STATS., but did not do so. *See* ***State v. Stawicki***, 93 Wis.2d 63, 76, 286 N.W.2d 612, 618 (Ct. App. 1979) (trial court need not give a RULE 901.06 instruction *sua sponte*).[1]

[1] The State argues that Daniels's statement would have been admissible under RULE 904.04(2), STATS., even though it did not fall within one of the specific examples listed in the rule. *See* ***State v. Bedker***, 149 Wis.2d 257, 264-265, 440 N.W.2d 802, 804-805 (Ct. App. 1989) (specific examples listed in rule not exclusive). Daniels's statement, however, was relevant to the "threat" elements of both second-degree sexual assault and kidnapping, irrespective of whether Daniels was telling the victim the truth. *See* ***Estelle v. McGuire***, 502 U.S. 62, 69 (1991) (prosecution can introduce evidence relevant to element on which it bears burden of proof, even when that element is not contested by the defendant). The State's RULE 904.04(2) analysis fails because a predicate to the admissibility of a prior act under that rule is evidence sufficient to support a jury finding that the prior act actually happened. *See* ***State v. Schindler***, 146 Wis.2d 47, 52-56, 429 N.W.2d 110, 112-

Daniels next argues that he is entitled to a mistrial based on the following exchange between the victim and his attorney:

Q [by Mr. Wasserman, Defense Counsel]: [] [Y]esterday you told us that you hate Mr. Daniels. Do you hate me, too?

A: No, I don't hate you.

Q: Is there some reason why you're angry right now?

A: Yes, I am, because I don't see how you can defend somebody who has done something wrong to a person. I don't understand that and I don't understand how come I have to prove I'm a good person. I did nothing to him.

THE DEFENDANT: 'Cause you done lied.

THE WITNESS: If he's so innocent and such a good person, why he not up here trying to prove what he did was wrong or right?

This colloquy was invited by Daniels's lawyer with his improper question to the witness: "Do you hate me too?" A party may not invite error then argue that the error supports reversal because error invited by the complaining party is not reversible error. *See* ***State v. Staples***, 99 Wis.2d 364, 375, 299 N.W.2d 270, 275-276 (Ct. App. 1980).

Finally, Daniels argues that the testimony of the victim's sister that she had seen a bruise on the victim resulting from a prior assault by Daniels and that she saw Daniels draw a gun on another person was improperly before the jury. As noted, the trial court struck the testimony and instructed the jury to disregard it, but denied Daniels's motion for a mistrial.

(..continued)
114 (Ct. App. 1988). There was no such evidence before the jury.

Regarding the allegedly objectionable testimony about the bruise the victim's sister saw on the victim after an earlier assault by Daniels, the victim had already testified about that earlier assault. The victim's sister's testimony, therefore, was merely cumulative to the previously properly admitted testimony and cannot possibly be deemed sufficiently prejudicial to warrant the granting of a mistrial. *Cf.* ***State v. Britt***, 203 Wis.2d 25, 42, 553 N.W.2d 528, 535 (Ct. App. 1996) (improperly admitted hearsay evidence which was cumulative to properly admitted evidence does not warrant reversal).

Regarding the victim's sister's comment that Daniels once "pulled a gun" on another individual, it, too, is not sufficiently prejudicial to warrant a new trial. In denying Daniels's motion for a mistrial, the trial court struck the witness's testimony and instructed the jury to disregard it. *See* ***State v. Medrano***, 84 Wis.2d 11, 25, 267 N.W.2d 586, 592 (1978) (Any prejudice resulting from testimony concerning other crimes committed by a defendant is generally cured by sustaining an objection and instructing the jury to disregard the testimony.). Further, during the jury instructions, the trial court instructed the jury to disregard all stricken testimony. Jurors are presumed to follow the court's instructions. ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989).

In sum, the trial court did not misuse its discretion in denying Daniels's motions for a mistrial.

Finally, Daniels contends that he should be granted a new trial in the interest of justice. In order for this court to exercise its discretionary power under § 752.35, STATS., it must appear from the record that the real controversy has not been tried or that it is probable that justice has been miscarried. Daniels's argument is just a rehash of his previous arguments and we are unpersuaded that Daniels was denied a fair trial. *See* ***State v. Mentek***, 71 Wis.2d 799, 809-810, 238 N.W.2d 752, 758 (1976).

By the Court.—Judgment and order affirmed.

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