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DISTRICT II

February 12, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1280-CRNM State of Wisconsin v. Tyshan L. Simmons (L.C. #2011CF351)

Before Brown, C.J., Reilly and Gundrum, JJ.

Tyshan L. Simmons appeals a judgment convicting him of second-degree sexual assault of a child and of misdemeanor bail jumping as a repeater. Simmons's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Simmons received a copy of the report and has filed a response. Upon consideration of the no-merit report, the response, and an independent review of the record as

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment and relieve Attorney Erica L. Bauer of further representing Simmons in this matter.

Twenty-one-year-old Simmons was alleged to have had forcible penis-to-vagina intercourse with an intoxicated fourteen-year-old. Originally charged as first-degree sexual assault of a child under sixteen, the charge later was amended to second-degree sexual assault of a child. Because of recent disorderly conduct charges, Simmons also was charged with misdemeanor bail jumping. Simmons' first jury trial ended in deadlock and the trial court declared a mistrial. A second jury convicted him. Simmons was sentenced to fourteen years' imprisonment, comprising six years' initial confinement and eight years' extended supervision. This no-merit appeal followed.

Appellate counsel has filed a commendably comprehensive no-merit report. We agree with her analyses and conclusions that no issues of arguable merit could be raised regarding pretrial matters, mistrial, retrial, jury selection, opening statements or closing arguments, evidentiary rulings, sufficiency of the evidence, jury instructions, or the verdict. We briefly will touch on just a few areas.

The first jury deliberated from 11:28 a.m. until 10:58 p.m., nearly ten and a half hours. From 5:00 p.m. on, the jury advised the court several times that it believed it was at an impasse. The court twice read to the jury WIS JI—CRIMINAL 520, the supplemental instruction on juror agreement. The jury still could not break the deadlock and the court declared a mistrial. We consider whether Simmons' subsequent retrial raises the specter of double jeopardy.

Jeopardy attaches upon the swearing of the jury. WIS. STAT. § 972.07(2). A defendant may not be put in jeopardy twice for the same offense. U.S. CONST. amend. V; WIS. CONST. art. I, sec. 8. But the double jeopardy prohibition does not mean that a defendant must go free if the trial fails to culminate in a judgment. ***State v. Duckett***, 120 Wis. 2d 646, 649, 358 N.W.2d 300 (Ct. App. 1984). Rather, a court has the authority to discharge a jury from rendering a verdict—*i.e.*, grant a mistrial—when, in the court's opinion after considering all the circumstances, "there is a manifest necessity for the act" so as not to defeat the ends of public justice. *See* ***id.*** at 650.

Thus, the decision whether to grant a mistrial lies within the trial court's sound discretion. ***State v. Mink***, 146 Wis. 2d 1, 8, 429 N.W.2d 99 (Ct. App. 1988). "On review the test is whether, under all the facts and circumstances, giving deference to the trial court's first-hand knowledge, it was reasonable to grant a mistrial under the 'manifest necessity' rule." ***Duckett***, 120 Wis. 2d at 650 (citation omitted). Where the facts are not disputed, whether manifest necessity existed is a question of law. *See* ***Mink***, 146 Wis. 2d at 10-11.

Here, the foreperson repeatedly told the court that the impasse could not be resolved. The jury was assisted several times in its deliberations by having portions of the trial testimony re-read. *See* ***Wheeler v. State***, 87 Wis. 2d 626, 632, 275 N.W.2d 651 (1979). Also, the court twice instructed the jury to "make an honest effort to come to a conclusion on all of the issues." *See* WIS JI—CRIMINAL 520. By accepting the jury's statement that it could not reach a verdict, the court implicitly found that it had made the required effort. Under these circumstances, we conclude a manifest necessity existed and discharging the jury showed a proper exercise of discretion. We agree with appellate counsel that no arguable appellate issue exists in this regard.

We also consider, as did appellate counsel, whether an issue could be raised regarding a violation of the sequestration order. The victim and a social worker entered the courtroom while the victim's mother was testifying. The victim was to testify next. The trial court concluded that the apparently accidental violation of the order was not prejudicial and that there were no grounds for mistrial.

The purpose of sequestration is to separate witnesses so that they remain true to their own testimony. *See* ***State v. Green***, 2002 WI 68, ¶40, 253 Wis. 2d 356, 646 N.W.2d 298. Appellate counsel points out that, as a sequestration order generally does not authorize the exclusion of a victim from the courtroom, it would not have applied here. *See* WIS. STAT. § 906.15(1). The victim here also was a witness, however, so the order arguably applied to her as well. But the prosecutor already had summarized in his opening statement what the victim's testimony would be, based on her preliminary hearing testimony. She testified at trial consistent with that prior testimony. Thus, the record here could not support a contention that the victim tailored her trial testimony to her mother's. No arguable issue exists on this point.

Simmons raises one issue in his response. He contends that he was denied his right to a fair trial when a juror saw the bailiff escorting him back to the courtroom. Simmons points out that he was wearing a stun belt and contends that that the bailiff's "firm grip with his hand on my arm" constituted a visible restraint. Simmons contends that the court should have ordered a mistrial.

While in the courtroom, a criminal defendant's freedom from visible restraints is "an important component of a fair and impartial trial." ***State v. Champlain***, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007) (citation omitted). Where a juror views even

a chained or handcuffed defendant outside the courtroom, however, "the situation is psychologically different and less likely to create prejudice." ***State v. Cassel***, 48 Wis. 2d 619, 625, 180 N.W.2d 607 (1970).

As Simmons concedes, both he and the bailiff wore civilian attire. The bailiff therefore was not readily identifiable in his official capacity. Futhermore, Simmons' clothing obscured his stun belt and the sighting by the juror occurred outside of the courtroom. The mere presence of the bailiff's hand on Simmons' arm when both were clad in civilian clothing and when Simmons was without easily recognizable restraints does not raise an issue of arguable merit.

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of further representing Simmons in this matter.

Diane M. Fremgen
Clerk of Court of Appeals