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**DISTRICT II**

October 1, 2014

*To:*

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

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2014AP189-CR

State of Wisconsin v. Gregory A. Miller (L.C. #2012CF540)

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

Gregory Miller appeals from judgments convicting him of burglary, battery, criminal trespass and carrying a concealed weapon, all as a repeat offender. Miller argues that the circuit court should have granted a mistrial when a defense witness testified on cross-examination that she had recently visited Miller in jail. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE

809.21 (2011-12).<sup>1</sup> We affirm because the circuit court properly exercised its discretion when it denied Miller's mistrial motion.

This appeal has its genesis in testimony from the burglary victim and Miller's girlfriend. The burglary occurred on May 14, 2012. At trial, the victim testified that on May 16, he went to the courthouse after being advised by law enforcement that "a suspect" in the burglary was appearing in intake court. The victim recognized Miller who "came out in the prison garb and did an initial appearance." Miller's counsel did not object to the victim's references to Miller's status as a suspect in custody. Because Miller did not object, he did not preserve a challenge to the victim's testimony. A defendant who fails to seek a mistrial at time of the allegedly prejudicial occurrence waives his or her right to claim prejudice later. *Pohl v. State*, 96 Wis. 2d 290, 302, 291 N.W.2d 554 (1980). We address this issue no further.

Miller's counsel did object to the girlfriend's reference to Miller's custody status. During cross-examination, the prosecutor asked Miller's girlfriend about the nature of her relationship with Miller. She responded that they had had an on-and-off again relationship over many years, but they had resumed their relationship about eighteen months ago. The following exchange then occurred:

Prosecutor: Before seeing him in court today when did you last see him?

Miller: Um, Saturday. I bring my daughter to see him.

Prosecutor: And you've seen him several times since he was arrested; isn't that true?

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<sup>1</sup> All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

Miller: In jail?

Prosecutor: You've seen him from the time he was arrested—you were informed he was arrested for burglary, correct?

At this point, Miller's counsel objected, and the court excused the jury. Miller's counsel requested a mistrial due to the prejudicial nature of the girlfriend's testimony that Miller was in custody. The prosecutor objected to the mistrial motion, arguing that he did not intentionally elicit the custody reference. The court determined that it would address the girlfriend's testimony via a cautionary instruction. The court then instructed the jury to disregard the girlfriend's testimony that she visited Miller at the jail. Although the court did not strike the testimony, the court firmly directed the jury to disregard the testimony during their deliberations "because it has nothing to do with your determinations in this case." The jury convicted Miller.

Miller rests his reversible error claim on the following: the girlfriend's testimony that Miller was in jail, the court's denial of his mistrial motion, the court's failure to strike the testimony and use of a cautionary instruction, and the court's final instructions to the jury that "[e]vidence is ... the sworn testimony of witnesses both on direct and cross-examination..." and advising the jury to "[d]isregard all stricken testimony." Miller argues that because the court did not strike the girlfriend's testimony, the final instructions defining evidence undermined the cautionary instruction to disregard her testimony that Miller was in jail.

A mistrial is appropriate only if the circuit court "determine[s], in light of the whole proceeding, ... [that] the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Doss*, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted). Whether to grant a mistrial is within the circuit court's discretion. *Id.* We will uphold a discretionary decision if we can perceive a reasonable basis for the court's decision. *State v. Thompson*, 146

Wis. 2d 554, 558-59, 431 N.W.2d 716 (Ct. App. 1988). We will only reverse if a defendant makes “a clear showing” that the court erroneously exercised its discretion. *State v. Knighten*, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997).

We presume that a jury follows a court’s instructions, *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780, including curative or cautionary instructions, *State v. Lukensmeyer*, 140 Wis. 2d 92, 110, 409 N.W.2d 395 (Ct. App. 1987). We may “conclude that such instruction erased any possible prejudice, unless the record supports a conclusion that the jury disregarded the trial court’s admonition.” *State v. Sigarroat*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894.

The record does not support an argument that the jury failed to heed the circuit court’s admonition to disregard the girlfriend’s testimony regarding Miller’s custody status and not consider it during deliberations. We are unpersuaded that the circuit court’s final instructions defining evidence and directing the jury not to consider stricken testimony undermined the court’s prior specific cautionary instruction or somehow relieved the jury of that prior, specific instruction.

In exercising its discretion to deny Miller’s motion for a mistrial, the circuit court clearly rejected Miller’s argument that his girlfriend’s testimony about his custody status was so prejudicial that a mistrial was the only remedy. Miller has not made a clear showing that the court erred in denying his request for a mistrial and giving a cautionary instruction to address the testimony.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*