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March 13, 2015

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

2013AP2575-CR State of Wisconsin v. Demetrius M. Boyd (L.C. # 2011CF160)

Before Lundsten, Higginbotham and Sherman, JJ.

Demetrius Boyd appeals his judgment of conviction. He also appeals the order denying his postconviction motion. Boyd argues on appeal that his constitutional protection against double jeopardy was violated when he was prosecuted a second time after the State caused a mistrial in his first trial. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1). Boyd also argues that he was denied the right to a fair trial because the circuit court and his trial counsel did not act in response to Boyd's disruptive behavior during trial. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

Boyd was charged with felony assault by a prisoner under WIS. STAT. § 946.43(2m)(a) (2009-10), based on an allegation that Boyd spit on a corrections officer when Boyd was being moved to a different cell. The incident was recorded on video.

Prior to trial, Boyd's counsel filed a motion in limine, seeking to exclude from evidence a ten-second portion of the video in which Boyd used "racial slurs," arguing that the language would be unfairly prejudicial. The circuit court granted the motion, and prohibited the playing of the ten seconds of the recording that contained the objectionable language. During the evidentiary phase of the trial, the prosecutor played the video for the jury, omitting the ten-second portion. However, during closing arguments, the prosecutor played portions of the video for the jury, including the ten-second portion. Defense counsel moved for a mistrial.

The circuit court, after listening to the prosecutor's explanation of what had happened, found that the prosecutor had not intentionally violated the court's order. However, the court granted the motion for mistrial, reasoning that it had already found that the ten seconds including the "racial slurs" was unduly prejudicial to Boyd. Boyd was tried again and, at the second trial, the prosecutor played the video for the jury without the ten-second portion. The jury returned a guilty verdict, and the court entered a judgment of conviction against Boyd. Boyd now appeals.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

On appeal, Boyd argues that, when he was retried, his Fifth Amendment protection against double jeopardy was violated. *See* U.S. CONST. amend. V; WIS. CONST. art. I, § 8(1). For the reasons discussed below, we disagree.

When a defendant successfully requests a mistrial, the general rule is that the double jeopardy clause does not bar a retrial because the defendant is exercising control over the mistrial decision. ***State v. Jaimes***, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669. However, there is an exception to this rule in cases of prosecutorial overreaching. The Wisconsin Supreme Court has held: "In circumstances where the defendant moves for, or consents to, a mistrial, reprosecution is barred only if prosecutorial and judicial actions provoke that mistrial by conduct that falls within the definition of 'overreaching' ...." ***State v. Copening***, 100 Wis. 2d 700, 724, 303 N.W.2d 821 (1981). The requirements for showing prosecutorial overreaching are:

> (1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.*, to harass him by successive prosecutions.

Id. at 714-15; *accord* ***Jaimes***, 292 Wis. 2d 656, ¶8.

Boyd fails to satisfy the first requirement. The circuit court found as fact that the prosecutor's action was unintentional. We will not reverse the circuit court's findings of fact unless those findings are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Boyd has not shown that that is the case here. The circuit court based its finding on the prosecutor's statement that she "would never intentionally disregard a clear order of the

Court" and that the unintentional playing of the excluded portion of the video was due to her having used a different computer during her closing argument than she did earlier in the trial.

In his postconviction motion, Boyd argued that the prosecutor acted intentionally. Boyd argued that the prosecutor was motivated by the fact that the State's case had notable weaknesses that became apparent by the end of the trial. Boyd also asserted that the prosecutor's failure to argue against a mistrial was evidence that she had acted intentionally to cause the mistrial.

The circuit court held an evidentiary hearing on the motion, at which it heard testimony from the prosecutor. The court again found that the prosecutor had not acted intentionally in playing the excluded portion of the tape. The court noted that, at the time the excluded portion was played, the prosecutor appeared to be "aghast" and had "very much a look that one would have if you made a mistake." The court also considered the fact that this particular prosecutor had many years of experience. Additionally, the court rejected the notion that the State's case was weak, and stated, instead, that the case was "very much a strong case." The court stated that it "refuse[d] to believe" that the prosecutor was somehow "ditching the airplane" at the end of the trial.

In considering the prosecutor's testimony, the court had to assess her credibility and, ultimately, believed her to be telling the truth when she said that she did not intend to play the excluded portion of the video. We will not overturn credibility determinations on appeal unless the testimony upon which those determinations are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Boyd has not persuaded us that that is the case here. Because Boyd has not made

the requisite showing that the prosecutor acted intentionally in playing the excluded video portion, we reject his argument that his retrial was barred by the double jeopardy clause due to prosecutorial overreaching.

Boyd also argues that his trial counsel was ineffective for not moving to dismiss further prosecution against him for double jeopardy reasons. Because we have concluded that retrying Boyd was not a violation of the double jeopardy clause, Boyd cannot show that his trial counsel performed deficiently in not moving to dismiss on that basis.

We turn next to Boyd's argument, first raised in his postconviction motion, that he was denied a fair trial because the jury observed disruptive behavior by Boyd at his second trial and neither his trial counsel nor the court acted to ensure that the jury did not consider Boyd's disruptive behavior. Boyd also asserted in his postconviction motion that he had asked to waive his presence in court, but that the circuit court did not honor his request.

As to the issue of Boyd's presence at trial, WIS. STAT. § 971.04(1)(b) provides that a defendant "shall be present" at trial. An exception to this requirement exists for misdemeanor trials where the defendant is excused with leave of the court. WIS. STAT. § 971.04(2). Another exception exists for cases where the defendant "voluntarily absents himself … without leave of the court," in which case the court has authority to proceed with the trial. WIS. STAT. § 971.04(3).

Boyd asserts that a defendant has a right to waive his presence at trial. However, as the State points out, none of the cases he cites support that assertion. In ***State v. Divanovic***, 200 Wis. 2d 210, 220, 546 N.W.2d 501 (Ct. App. 1996), the issue was whether the defendant, who had voluntarily absented himself from trial, had waived his right to be present. ***Diaz v. United***

States, 223 U.S. 442, 453 (1912), involved a defendant who claimed he was denied his right to be present for all portions of his trial. In ***United States v. Crutcher***, 405 F.2d 239, 243 (2nd Cir. 1968), the court noted that a defendant *may* waive the right to be present, but did not address whether a defendant has a *right* to waive his presence at trial. Finally, in ***Illinois v. Allen***, 397 U.S. 337, 342-43 (1970), the issue was whether a trial court has the right to continue a trial when the defendant is not present. None of these cases support Boyd's assertion that a defendant has a right to absent himself or herself from trial. Because Boyd has not pointed to any authority providing that he had a right to be absent from trial, we are not persuaded that any violation of such a right occurred.

We turn, then, to the issue of whether the failure of counsel or the court to address Boyd's disruptions at trial resulted in a violation of his right to a fair trial. Boyd made numerous comments during the trial. For example, when the State called a prison officer as a witness, Boyd said: "That's the officer that lied and said I made (indistinguishable) officer by the way, please." Boyd made several other comments during the officer's testimony and after the video of the cell extraction incident was played for the jury. Boyd also hummed audibly during the officer's cross-examination.

Boyd argues that the circuit court erroneously exercised its discretion in not warning him, asking him to leave the courtroom, or telling the jury to disregard his comments. The circuit court addressed and rejected these arguments at the postconviction motion hearing, concluding that Boyd's disruptions during trial were not so serious as to jeopardize his right to a fair trial.

The State correctly points out in its brief that the court could not have removed Boyd from the courtroom without implicating Boyd's constitutional right to be present at his trial. *See*

Allen, 397 U.S. at 338. In arguing that the court should have warned him to stop his behavior, Boyd fails to explain what exactly the court should have warned him about—that is, what would happen if Boyd did not stop his disruptive behavior. Because of Boyd's constitutional right to be present at trial, the court was under no obligation to warn Boyd that he might be removed from the courtroom if he did not stop his behavior. Thus, we are not persuaded that the circuit court erroneously exercised its discretion in failing to warn Boyd or to remove him from the courtroom.

Boyd also argues that the circuit court could have instructed the jury not to consider Boyd's disruptive behavior in reaching a verdict. He argues in his brief that the court "essentially determined" that the jury did not observe the behavior, but then fails to point to any such determination by the court. Regardless of whether or not the jury observed Boyd's behavior, the court analyzed the issue as if the jury *did* observe the behavior. The court stated that it considered giving a cautionary instruction to the jury, but concluded that such an instruction would have only "punctuated" Boyd's behavior and potentially would have had a negative impact on Boyd.

The circuit court has broad discretion as to the instructions it will give to a jury in any particular case. ***McMahon v. Brown***, 125 Wis. 2d 351, 354, 371 N.W.2d 414 (Ct. App. 1985). We agree with the State that Boyd has not shown any erroneous exercise of discretion by the court in its decision not to instruct the jury to ignore Boyd's behavior. The court reasonably concluded that instructing the jury to ignore Boyd's behavior had the potential to draw attention to it and prejudice the jury against him. In addition, we agree with the State's assertion that Boyd should not be permitted to benefit from his own poor behavior.

Boyd's final argument is that his counsel provided ineffective assistance by failing to take steps to minimize the prejudicial impact of Boyd's disruptive behavior. Boyd argues that he was prejudiced because his behavior may have swayed the jury's determination of guilt. However, Boyd fails to explain what his counsel might have done differently that would have had any impact on the outcome of the trial. The record shows that the jury went into deliberations at 3:00 p.m. and, at 3:17 p.m., came back and asked the court if the jurors could view the video of the incident again. Neither party objected, and the jury again viewed the video in the courtroom. The jury left the courtroom at 3:33 p.m., and returned at 3:45 p.m. with a verdict. This chronology suggests that it was the video, and not Boyd's courtroom behavior, that weighed heavily in the jury's decision to return with a guilty verdict. Because Boyd fails to demonstrate what, if anything, his counsel could have done differently regarding Boyd's disruptive behavior, let alone how Boyd was prejudiced, we conclude that his ineffective assistance argument is without merit.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals