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**DISTRICT I**

August 10, 2016

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

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2015AP2236-CR

State of Wisconsin v. Jugady Dumario Banks  
(L.C. #2013CF4267)

Before Curley, P.J., Kessler and Brash, JJ.

Jugady Dumario Banks appeals from an amended judgment entered after a jury found him guilty of two counts of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.05 (2013-14).<sup>1</sup> He also appeals from an order denying his postconviction motion for a new trial. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition and affirm. *See* WIS. STAT. RULE 809.21(1).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

### ***Background***

Late one evening, D.E. went to the home of Rayshondra Harris to have his hair braided. D.E.'s girlfriend, J.C., was also there. When the two left Harris's house and went to D.E.'s car, they were surrounded by several men, one of whom pointed a shotgun at D.E. and told D.E. to give him "the money and the weed." The men took J.C.'s purse and D.E.'s cell phone, keys, and cash.

While the robberies were underway, a police car happened to drive down the street. Both D.E. and J.C. ran toward it as the men fled in the other direction. When police searched the nearby alley and yards, they found stolen items and clothing believed to have been worn by the men. The police left the evidence where they found it so that it could be photographed and processed.

About two hours after the robberies, a detective saw a car parked and running in the alley behind Harris's house. The detective saw a man heading toward the car carrying the sweatshirt that police believed was discarded by one of the men near a garage. The detective pulled her gun, ordered the passengers to stay in the car, and backup officers arrived seconds later.

The man carrying the sweatshirt turned out to be Banks's brother-in-law, Rashawn Crawford. He was seated in the backseat with Harris, who was Banks's girlfriend, and Banks. Banks was sitting on D.E.'s cell phone and D.E.'s keys were found near where Harris was seated.

The person sitting in the front passenger seat was identified as James Hightower, Banks's brother. No one was in the driver's seat. However, as the officers were removing people from

the car, another of Banks's brothers, Anthony Singleton, ran up screaming he was the owner and asking what the police were doing with his car.

Police interviewed Banks after his arrest. An audio and visual recording of the interview was preserved on CD, a copy of which was turned over to defense counsel in advance of trial. Banks's statement to police was exculpatory; he denied any involvement in the robberies and provided an alibi.

At a pretrial bail hearing held on January 6, 2014, defense counsel reported he received CDs of witness statements "that I just realized were not working this past week." The prosecutor responded that he sent the requested recording to defense counsel, but "I know he's had difficulty ... hearing the audio portion of some of the dis[c]s sent to him." The trial court directed the attorneys to meet and discuss the CDs within two weeks to ensure that defense counsel had the appropriate CD so that the trial could move forward.

At the outset of the first day of trial on March 31, 2014, defense counsel reported that the CDs he received from the State only had video, "the audio did not record," and the State told him it did not have any better recordings. In response, the prosecutor advised that he was not going to use the recordings unless a witness testified "very differently" than what he or she said, in which case the prosecutor would then call as witnesses the detectives who took the statements.

During the trial, the jury heard an analyst with the state crime laboratory testify that Banks was a "major contributor" of DNA found on one of the two masks discarded by the men near the crime scene and that Banks was a probable contributor of DNA found on one of the discarded gloves.

Banks testified on his own behalf and denied any involvement in the robberies, claiming that he was at a party elsewhere and did not arrive at Harris's house until much later. Banks said that after he arrived, he sat on the porch with Harris, D.E., and J.C. while police investigated the scene. Banks claimed he then called his younger brother, Anthony Singleton, to pick up him and Harris and drive them to Banks's mother's house. When Singleton arrived, Banks said Crawford was in the car with him. They then picked up Hightower.

According to Banks, on the way to his mother's house, Harris asked that they stop back at her house so that she could pick up some clothes. They did so and parked in the alley behind the house. According to Banks, he and Hightower got out of the car to urinate. Singleton got out of the car to visit a neighbor. Harris went inside her house and only Crawford remained in the car. A detective arrived as Banks and Hightower were returning to the car and shortly after Harris had returned. Banks noticed that Hightower had a sweatshirt with him when he returned to the car.

Police subsequently surrounded the car and ordered everyone out. Banks denied knowing how D.E.'s cell phone and keys ended up in the backseat of the car where he and Harris were seated.

Defense counsel questioned Banks on direct examination about his exculpatory statement as follows:

Q And you talked to the police after this happened, right?

A Yes.

Q And you told them what you told me today?

A Yes.

On cross-examination, the prosecutor asked Banks whether he told the detective during the interview that he and Harris were actually picked up by Singleton at Hopkins Street and Capitol Drive. Banks agreed that he had said this to the detective. In response to the prosecutor's next question, Banks denied telling the detective that Crawford and Hightower were both already inside the car when he and Harris were picked up by Singleton. As he had on direct, Banks insisted that Hightower was picked up after he and Harris were picked up by Singleton. The prosecutor did not challenge Banks's answer. The prosecutor did not ask any other questions about Banks's statement and did not call any rebuttal witnesses.

During the jury instruction conference, defense counsel requested an instruction allowing the jury to consider the lack of an audio recording of Banks's interview. The prosecutor claimed that he first learned that the audio portion of Banks's interview was available and playable on the final day of trial. The prosecutor explained that during discovery, he gave defense what the State had in its possession and he provided a second copy of the interview when defense counsel complained that there was no audio on the first CD given to him. The prosecutor also provided a written report of the interview during discovery.<sup>2</sup> The prosecutor acknowledged that he had not listened to the State's copy of the interview before trial because he did not intend to use Banks's statement at trial. He pointed out that he asked only one question on cross-examination about an inconsistency between Banks's statement and his trial testimony. The inconsistency related to which of Banks's brothers were in the car when Singleton picked him up.

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<sup>2</sup> At sentencing, defense counsel conceded that the audio recording of Banks's interview "did comport to what was in the [written] summary" turned over to him before trial.

The trial court denied Banks's alternative motions for a mistrial or for a curative jury instruction. The trial court concluded that the discovery violation, to the extent that there was one, was inadvertent and may have been the result of defense counsel's malfunctioning equipment.

Banks filed a postconviction motion for a new trial arguing that the trial court erred when it ruled on his motions following the alleged discovery violation. Banks claimed the State did not provide him full access to a recording of his interview with the police, which impeded his ability to prepare a response to the State's cross-examination of him. The trial court denied the motion.

#### *Discussion.*

Whether a discovery violation has occurred poses a question of law that we review *de novo*. See *State v. Lock*, 2012 WI App 99, ¶122, 344 Wis. 2d 166, 823 N.W.2d 378. As relevant here, the prosecutor was required to disclose, upon demand, any written or recorded statement made by Banks concerning the alleged crimes within a reasonable time before trial. See WIS. STAT. § 971.23(1)(a).

The prosecutor complied with the statute by turning over a written summary of Banks's interview with police and two copies of the CD containing the audio/visual recording. As set forth in the State's response, "[i]t appears that the lack of audio was primarily a problem with defense counsel's equipment and not with the CD itself because, when the CD was played on the [S]tate's computer at trial, there was audio." Banks does not reply to this argument and therefore concedes the issue. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97,

109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). There was no discovery violation in this case, and as such, no basis for granting Banks's mistrial request.

Banks alternatively requested a special jury instruction pursuant to WIS. STAT. § 972.115(2)(a), which provides:

*If a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available, upon a request made by the defendant as provided in s. 972.10(5) and unless the state asserts and the court finds that one of the following conditions applies or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case[.]*

(Emphasis added.) One such condition for not providing the instruction is as follows:

The law enforcement officer or agent of a law enforcement agency conducting the interrogation in good faith failed to make an audio or audio and visual recording of the interrogation because the recording equipment did not function, the officer or agent inadvertently failed to operate the equipment properly, or, without the officer's or agent's knowledge, the equipment malfunctioned or stopped operating.

Sec. 972.115(2)(a)3.

Here, Banks's statement was not offered or admitted into evidence. Additionally, an audio/visual recording was made available to the defense both before and at trial when the parties were able to listen to the audio on the prosecutor's computer. These reasons alone provide an adequate basis to conclude that the curative instruction was not appropriate. *See* WIS. STAT. § 972.115(2)(a).

Moreover, even if the lack of audio on the two CDs provided to the defense *was* somehow caused by the inadvertent failure of police operation of recording equipment, the curative instruction was not appropriate because the equipment malfunction was the result of a good faith failure. The State showed that good cause existed for not providing the instruction because it believed it had complied with WIS. STAT. § 971.23 when it provided defense counsel with two copies of the CD and an accurate written summary of the interview. The trial court explained that insofar as WIS. STAT. § 972.115(2)(a)3. is concerned:

when it relates to issues of recordings, if there are technical difficulties, that instruction does not have to be given. I don't even know that that's necessarily the State's fault. I don't necessarily blame defense counsel either. But it's just an unfortunate thing that occurred, in that his computer didn't work with the disc.

The trial court properly denied Banks's motion for a mistrial as there was no discovery violation. Additionally, the trial court properly concluded there was no basis for a curative instruction.

Upon the foregoing reasons,

IT IS ORDERED that the amended judgment and order are summarily affirmed, pursuant to WIS. STAT. RULE 809.21(1).

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