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DISTRICT IV

March 4, 2020

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

2018AP2254-CR State of Wisconsin v. Jesse J. Madison (L.C. # 2014CF307)

Before Kloppenburg, Graham and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jesse Madison appeals a judgment of conviction and an order denying his motion for postconviction relief.[1] The dispositive issue is whether the circuit court erred in finding that the

[1] The Honorable Steven G. Bauer presided over trial and entered the judgment of conviction. The Honorable Todd J. Hepler presided over postconviction proceedings and entered the order denying the postconviction motion.

jury did not receive an unredacted version of an exhibit. We conclude that the finding is not clearly erroneous. 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 (2017-18).[2] We affirm.

Madison was convicted of three counts of second-degree sexual assault of a child. He filed a postconviction motion relating to trial exhibit 14, which was the report from an examination of the victim by a sexual assault nurse examiner. Madison asserted that an unredacted version of that exhibit was accidentally given to the jury, and he argued, among other things, that his trial counsel was ineffective by not moving for a mistrial in response. The circuit court denied the motion without explanation or an evidentiary hearing.

Madison then appealed. Our summary order concluded that Madison had alleged sufficient facts to entitle him to an evidentiary hearing on his ineffective assistance of counsel claim. ***State v. Madison***, No. 2016AP2457-CR, unpublished slip op. at 4-5 (WI App Feb. 6, 2018). Accordingly, we reversed the order denying the postconviction motion and remanded for that hearing.

On remand, Madison filed another motion for a new trial. The State proposed to begin with an evidentiary hearing on whether the unredacted exhibit went to the jury, and Madison agreed. During that hearing, Madison's defense counsel from trial and the judge who presided at the trial both testified. The circuit court found that the jury did not receive the unredacted

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

exhibit, and since that finding undercut all of Madison's claims, the court denied his postconviction motion.

In this appeal, Madison first argues that the circuit court erred by taking evidence on whether the jury received the unredacted exhibit. Madison argues that, under the law of the case doctrine, we already decided in the first appeal that the unredacted version went to the jury, and that we did so based partly on the State's concession on appeal that it did. Madison argues that the law of the case doctrine applies not only to legal conclusions, but also to the facts on which those conclusions were based, when the parties had the opportunity to raise a factual issue earlier.

We reject this argument for two reasons. First, even if we accept Madison's premise that the law of the case doctrine may apply to facts when there was an earlier opportunity to litigate them, no such opportunity existed in this case. Since the circuit court initially denied Madison's postconviction motion without holding an evidentiary hearing, there was no hearing at which the State might have raised such a factual issue and presented evidence.

Second, and more importantly, Madison misunderstands the nature of the legal conclusion we made in the first appeal. We recognize that there are passages in our summary order that could be read as if this court itself made a finding of fact, based on the transcript, that the jury received the unredacted exhibit. However, the legal standard we applied was also stated in the order. As we explained, Madison was entitled to an evidentiary hearing if his motion alleged facts which, if true, entitled him to relief. ***Id.*** at 4.

In that context, to the extent we were drawing inferences from the transcript, we were doing so in the light most favorable to Madison's factual allegations. Phrased in the terms of the

legal standard, we were considering whether Madison's interpretation of the transcript, *if true*, would entitle him to relief. We concluded that it would, and therefore we remanded for an evidentiary hearing at which factual issues could be litigated. That hearing would potentially include a determination of whether Madison's interpretation of the transcript was, in fact, true, or whether it could be refuted by other evidence.

When viewed in this procedural context, it is clear that our decision in the first appeal did not prevent the circuit court from accepting evidence as to which version of the exhibit the jury received. If the circuit court had attempted on remand to revisit whether Madison's motion entitled him to any evidentiary hearing at all, then the law of the case doctrine might be implicated. However, here the circuit court continued the postconviction process from the proper point by holding an evidentiary hearing to consider factual issues relevant to Madison's motion.

We turn now to Madison's argument that the circuit court erred by finding that the jury did not receive an unredacted exhibit 14. We start by noting that a redacted version of exhibit 14 is in the record, along with the original version. The dispute here is not about whether a redacted version was created, but about whether an unredacted version went to the jury in addition to, or instead of, the redacted version.

We begin by reviewing the portions of the trial transcript that Madison relies on. Now that the factual issue is squarely before us in a way that it was not in the first appeal, we see that, although some portions of the transcript can reasonably be read as supporting the conclusion that Madison urges us to adopt—that an unredacted exhibit 14 went to the jury—there are also other reasonable interpretations of those portions that do not support this conclusion. Because this is

an important point, and the context surrounding those transcript portions is important, we now discuss the transcript in some detail.

After retiring to deliberate, the jury sent out a request for specific exhibits and asked questions. The circuit court started by addressing some of the exhibits. Exhibit 14 was one of the requested exhibits. Defense counsel expressed concerns about the jury receiving some of its content. The court reviewed the exhibit and initially concluded: "And so I'm not going to allow Exhibit 14."

Discussion of other exhibits followed, and then the court turned to the jury's questions. After discussion with counsel, the court formulated responses to the questions. It then stated: "Okay, I'm going to have the clerk make three copies of this, one for each side and one for our file." It appears that the court wrote responses by hand on the jury's questions, and then was having three additional copies of those responses made.

Discussion of other exhibits continued, including a decision by the court to send in one of the other exhibits, followed by "discussion off the record." Then the court stated: "We'll keep the original, yeah, for the file and then give them a copy of the answer." We understand these to be references to the original and a copy of the court's answers to the jury's question. In other words, the judge had received the copies of the answers that he had asked the clerk to make, and was describing what would happen with them.

Then there was more discussion off the record, followed by this exchange:

> THE COURT: Okay, here's 14.
>
> BAILIFF: This will go in now, Judge—
>
> THE COURT: Yep, okay.

There are two reasonable interpretations of this exchange. One reasonable interpretation is the one argued by Madison—that even though the court had decided not to send exhibit 14 back, the judge mistakenly presented the bailiff with that exhibit, the bailiff announced the intention to deliver it to the jury, and the judge approved that action.

Another reasonable interpretation is also possible. When the judge stated "here's 14," he may have been expressing aloud his own act of locating the exhibit on the bench, rather than presenting it to the bailiff. In other words, it may be that the judge was looking for that exhibit during the discussion off the record, or that the judge simply stated out loud his mental process as he reviewed what was on the bench in front of him.[3] Then, when the bailiff said "[t]his will go in now," it is possible that the bailiff was holding the copy of the answers that the court previously said would go to the jury, and that the judge, understanding what the bailiff was referring to, approved. This interpretation is reasonable because this exchange follows closely in the transcript after the discussion about the original and copies of the court's answers, and because there is no other place in the transcript where those answers appear to have been delivered to the jury.

Continuing on, after considerable discussion of other exhibits, defense counsel then returned to exhibit 14: "With 14, Judge, I'm thinking about 14 again." Defense counsel stated that he was now willing to have exhibit 14 go to the jury, if certain redactions were made. The

[3] This is also supported by something the court said later about a different exhibit: "Okay, here's 11. We're working on that one." The context of that statement suggests that the judge was not presenting the exhibit to anyone, but was noting its presence on the bench.

court and attorneys then had a detailed discussion about redacting specific pages, which eventually led the court to say that they would resolve it informally off the record.

When the court went back on the record, it was to deal with a new jury request for more exhibits. That led to a discussion about those exhibits. At one point during that discussion, defense counsel stated: "If 14 is going in as redacted, then I don't have a problem with 15." Further discussion of other exhibits occurred, at the end of which the court said, apparently to the bailiff: "Okay, you can take that in for now--." The bailiff responded: "Take those in and we're working on some others." The court agreed: "Yeah, we're working on the rest of them." Nobody said on the record at that point exactly which exhibits were going back to the jury.

Shortly after that, defense counsel and the clerk had an exchange in which they questioned whether exhibit 14 had already been sent to the jury. The clerk stated that she did not have it, and they both appeared to conclude that it had gone to the jury.

Almost immediately after that exchange between defense counsel and the clerk, the court stated: "Okay, let's deal with this one here now." Further discussion made it clear that the court was looking at exhibit 14. The prosecutor stated that "this newest version of 14 redacted comports with the discussion of Court and counsel." Defense counsel agreed. The court said it would send that in, and the clerk supplied a sticker. The court stated: "Okay, this one can go in," and the bailiff appeared to show understanding of that by saying "okay." No further discussion of exhibit 14 occurred.

Once again, there are two reasonable interpretations of the exchange between defense counsel and the clerk, in which they attempted to locate exhibit 14. It is plausible that their discussion, including the clerk's statement that the clerk no longer had the exhibit, meant that the

original, unredacted version of exhibit 14 had actually gone back to the jury. However, to be convincing, that interpretation would also require an explanation for their conduct during the immediately following exchange with the court about exhibit 14. If the clerk and defense counsel both believed that the original of exhibit 14 had already gone back to the jury, why would they not inform the judge of that when the judge attempted to resume discussion of that exhibit?

An alternative interpretation is also plausible, and perhaps more plausible. Defense counsel and the clerk may not have told the court that exhibit 14 had already gone to the jury because it became clear to them that their conclusion was incorrect. It may be that this question was quickly resolved for them, without a need for further verbiage, when the court resumed discussion of that exhibit. At that point it may have become obvious that the reason the clerk did not have the exhibit was that it was still on the bench.

In summary, a careful review of the transcript, and of the context of the exchanges that Madison relies on, shows that the transcript does not unambiguously demonstrate that an unredacted version of exhibit 14 went to the jury. Instead, the transcript is ambiguous, and with that ambiguity as background, we turn next to Madison's arguments related to the testimony of the trial judge at the postconviction motion hearing.

Madison argues that the testimony of the judge is not sufficient to support the finding that only the redacted version of exhibit 14 went to the jury. He relies on the judge's limited independent recollection of the events and what he regards as the judge's lack of explanation for the portions of the transcript that we discussed above. Madison also relies on favorable testimony by Madison's trial counsel.

Without attempting to parse through the testimony here, we are satisfied that the finding is not clearly erroneous. The judge's testimony did not directly support in any way Madison's contention that an unredacted version of the exhibit went to the jury. The testimony by the judge's assistant and Madison's trial counsel also did not add significant new factual information to support Madison's argument, beyond what was already available in the transcript from the trial. And, as we have discussed, the transcript itself is not conclusive in Madison's favor, and can reasonably be read in ways that do not support his claim.

On appeal, Madison argues based on theories of plain error, ineffective assistance of counsel, and new trial in the interest of justice. The finding that unredacted exhibit 14 did not go to the jury undercuts all of these theories. Therefore, we affirm.

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals