



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

September 15, 2021

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County
Electronic Notice

Angela Dawn Wenzel
Electronic Notice

Michael D. Graveley
District Attorney
Electronic Notice

John W. Kellis
Electronic Notice

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

2020AP137-CR	State of Wisconsin v. Chad J. Elliott (L.C. #2017CF78)
2020AP138-CR	State of Wisconsin v. Chad J. Elliott (L.C. #2017CF973)

Before Gundrum, P.J., Neubauer and Reilly, 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).

In these consolidated appeals, Chad J. Elliott appeals from judgments convicting him of felony theft (false representation), felony bail jumping and misdemeanor obstructing an officer. On appeal, Elliott argues that his trial was not fair and the circuit court misused its discretion when it denied his motion for a mistrial. 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 (2019-20). We affirm.

Elliott misrepresented all aspects of his life to D.H. in order to enter into a romantic relationship with her and obtain access to her financial resources and other assets. The charges against Elliott included theft of jewelry from D.H. by intentionally deceiving her using a representation he knew to be false and made with intent to defraud. In addition to D.H.'s testimony, three other women testified that they had similar experiences with Elliott.

The testimony that is the subject of Elliott's mistrial motion occurred during D.H.'s testimony. D.H. testified that once she learned Elliott's true identity and that he had misrepresented himself to her, her family did a "background check." D.H. "found out that he had an extensive criminal history, that he had been in prison before for four years." Elliott objected and moved to strike. The circuit court sustained Elliott's objection and granted his motion to strike. The court addressed the jury as follows:

There is a couple of things. Number one, let's start with the hearsay. It is hearsay because she doesn't know this of her own knowledge. She is relying on something that she checked out, and we don't know whether she did that accurately or not, and if the district attorney wishes to offer this evidence, she needs to do it in a way that passes our tests here. We have pretty strict rules about what is and is not admitted into evidence, and that will have to be fulfilled, so the mere fact that someone goes and checks something out on the Internet, while it may dictate what the person does in ordinary life, it doesn't necessarily find its way into the courtroom as evidence, what the person found. Does that make sense? Okay.

The second thing is you are going to—there is no question. As the case progresses, you are going to hear testimony about events for which the defendant is not now on trial, and it's very important that you not consider this evidence to conclude that the defendant has a bad character, is a bad person, and for that reason is probably guilty of what he's accused of here today. You'll hear all of the evidence in the case, but this evidence about prior imprisonment, if it's true, will come in only to support the proposition that there was a motive, for example, for him to lie about his name, and I'll

instruct you further on the proper use to be given to that testimony,^[1] but the most important factor for you to remember is that we are talking about the cases that are on trial here, and you are not to assume if there is evidence of other wrongdoing at other times, that that proves he is a bad actor and he's more likely to have committed these crimes. Does that make sense? Okay. Any questions about that? (No response.)

Thereafter, Elliott sought a mistrial because evidence that he was in prison was highly prejudicial and violated what Elliott characterizes as the State's agreement not to introduce incarceration evidence.² The State objected to the mistrial motion because Elliott had a motive to conceal his ex-inmate status by giving D.H. a false name and motive was an acceptable basis for permitting the evidence. The State further argued that the distinction between disclosing a prior conviction and a prior incarceration was minimal for purposes of the mistrial analysis. The circuit court agreed that Elliott's status as an ex-inmate provided motive to conceal his identity from the women he targeted and was relevant to the State's burden to show that Elliott made false statements to the victim in the course of committing the theft of her jewelry. The circuit court stated that it had permitted evidence of Elliott's prior convictions to be placed before the jury and the additional fact that he had been incarcerated was not substantially more prejudicial than the prior conviction evidence. The circuit court implicitly denied the mistrial motion.

We consider Elliott's fair trial and mistrial claims together.³ The circuit court struck D.H.'s answer about Elliott's prior incarceration and gave a curative instruction. In doing so, the

¹ On appeal, Elliott does not challenge the circuit court's instructions to the jury after the close of evidence.

² Elliott did not argue in the circuit court that prosecutorial misconduct required a mistrial.

³ Elliott does not directly challenge the circuit court's ruling at an April 15, 2019 hearing on his motion in limine relating to other acts evidence.

circuit court properly exercised its discretion. *See State v. Lombard*, 2003 WI App 163, ¶18, 266 Wis. 2d 887, 669 N.W.2d 157 (circuit court acted within its sound discretion in giving the curative instruction), *aff'd*, 2004 WI 95, 273 Wis. 2d 538, 684 N.W.2d 103; *see State v. Robinson*, 145 Wis. 2d 273, 286, 426 N.W.2d 606 (Ct. App. 1988) (striking testimony is within the circuit court’s discretion). A curative instruction diminishes the potential for prejudice, *see State v. Hunt*, 2003 WI 81, ¶72, 263 Wis. 2d 1, 666 N.W.2d 771, and the jury presumably followed the court’s instruction in this case, *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998).

Whether to grant a mistrial was within the circuit court’s discretion. *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61. Elliott bore the burden to show that a mistrial was necessary. *See State v. Harrell*, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). “[R]egardless of the extent of the trial court’s reasoning [denying the mistrial motion], we will uphold a discretionary decision if there are facts in the record which would support the trial court’s decision had it fully exercised its discretion.” *State v. Payano*, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). A curative instruction is an alternative to a mistrial. *See State v. Moeck*, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783.⁴

In the course of addressing Elliott’s mistrial motion, the circuit court determined that his status as an ex-inmate was not substantially more prejudicial than the permitted evidence of Elliott’s prior convictions. Additionally, the evidence showed Elliott’s motive to conceal his

⁴ Our analysis is not altered merely because the circuit court gave a curative instruction before Elliott had a chance to request a mistrial.

identity from D.H. and was relevant to the State's burden to show that Elliott made false statements to the victim in the course of taking her jewelry by theft.

We conclude that the circuit court's decision to strike D.H.'s testimony and give the jury a curative instruction was sufficient to address any prejudice arising from the disclosure that Elliott had been in prison and protected Elliott's right to a fair trial. See *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998) (we independently review a defendant's claim that a witness's testimony rendered his trial not fair).

On the question of whether a new trial is necessary, the circuit court "must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial as to warrant a mistrial." *Id.* The record as a whole contains a mountain of evidence against Elliott provided by the victim, D.H., three other women whom Elliott lured into relationships, and Elliott's former spouse (who testified to her knowledge of Elliott's background and personal characteristics, which were at odds with what Elliott told the women he lured). In addition, Elliott had a trial strategy of arguing that the State did not meet its burden on the theft by false representation charge⁵ while not disputing that the State proved that he transferred D.H.'s jewelry to a pawn shop without her permission, obstructed an officer investigating the whereabouts of the jewelry,

⁵ Elliott argued to the jury that (1) he had promised to repay and had repaid small amounts of money to the women he lured, showing an intent to repay rather than an intent to defraud; and (2) his false representations regarding his assets, employment and lifestyle were intended to lure the women into a relationship with him and were not made so that he could steal from them.

and committed bail jumping by failing to update his address with the court.⁶ Elliott had a fair trial.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to 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

⁶ While we have considered all of the arguments in the briefs, we only discuss those arguments that are necessary to our decision. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (we are not bound to the manner in which the parties have structured or framed the issues). Arguments not mentioned are deemed rejected. *Id.*

