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DISTRICT I

October 19, 2021

To:

Hon. Janet C. Protasiewicz
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

John Barrett
Clerk of Circuit Court
Milwaukee County
Electronic Notice

John D. Flynn
Electronic Notice

Angela Conrad Kachelski
Electronic Notice

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

2020AP389-CR

State of Wisconsin v. David D. Harris (L.C. # 2015CF5452)

Before Donald, P.J., Dugan and White, 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).

David D. Harris appeals a judgment convicting him of one count of racketeering, as a party to a crime; one count of manufacturing/delivering heroin, as a party to a crime; and four counts of operating a motor vehicle without the owner's consent, one of which was as a party to a crime. Harris argues that the circuit court erroneously exercised its discretion when it denied his motion for a mistrial. He also argues that there was insufficient evidence to support the guilty verdicts as to four counts of operating a motor vehicle without the owner's consent. After

review of the brief and record, we conclude at conference that this case is appropriate for summary disposition. We affirm. *See* WIS. STAT. RULE 809.21 (2019-20).¹

Harris was charged with twelve crimes related to a large and sophisticated drug sales operation that he participated in with three other men, who called themselves the Big Money Addicts (BMA). According to the complaint, they took phone and text orders for drugs and delivered them using stolen vehicles with tinted windows. The jury trial lasted for over two weeks, and involved nearly fifty witnesses and over one hundred exhibits. At one point during trial, the State attempted to play a video exhibit with audio but could not get the audio to function as a result of a technical problem. As various people tried to get the video to operate properly, the jury repeatedly saw the beginning of the thirteen-second video clip, which depicted Harris pointing a gun at the camera. The thirteen-second clip was eventually played for the jury in its entirety without sound. Harris moved for a mistrial, arguing that the repeated playing of the initial portion of the video was unduly prejudicial. The circuit court denied the motion. The jury found Harris guilty of six of the twelve charges.

Harris first argues that the circuit court should have granted his motion for a mistrial because the jury saw a video of him holding a large package of money and pointing a gun at the camera.² Whether to grant a motion for mistrial is committed to the discretion of the circuit court. *State v. Knighten*, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997). “A motion

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² It is unclear how many times the jury saw the first portion of the clip. Harris’s counsel said that he counted it as being played eighteen times. However, Harris did not dispute that as people attempted to fix the audio, the television onto which the video was being projected for the jury was turned off, so the jury did not see the video the entire time.

for a mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial.” *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). “Evidence is unduly prejudicial when it threatens the fundamental goals of accuracy and fairness of the trial by misleading the jury or by influencing the jury to decide the case upon an improper basis.” *State v. DeSantis*, 155 Wis. 2d 774, 791-92, 456 N.W.2d 600 (1990).

This technical problem with the audio occurred in the midst of a very lengthy trial. The trial lasted over two weeks and the jury heard testimony from nearly fifty witnesses, including Harris’s co-defendants, who gave detailed descriptions about how the four BMA members engaged in various types of criminal activity over an extended period of time. In addition, over one hundred exhibits were introduced as evidence, including multiple images of Harris with large amounts of currency, an image of Harris in a vehicle with a two-toned gun in his hand, and an image showing him with four phones on lanyards around his neck—the four phones were a symbol of the BMA—and with a bottle of alcohol in one hand and a stack of cash. We agree with the State that Harris’s argument “boils down to the unpersuasive assertion that if the jurors had seen the [beginning of the video clip] one time, they would not have convicted him of racketeering, but because they saw it more than once, they did.” This argument just does not hold water. In light of the length of the trial and the quantity of evidence presented, we conclude that the repeated showing of the seconds-long video clip of Harris holding a gun and money did not mislead the jury or cause the jury to decide this case on an improper basis. Harris has not shown that the circuit court erroneously exercised its discretion when it denied the motion for a mistrial.

Harris next argues that there was insufficient evidence adduced at trial for the jury to find him guilty of four counts of operating a vehicle without the owner's consent. When we review the sufficiency of the evidence to support a conviction, we do not "substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Harris's co-defendants Kyawn Lewis and Rashawn Smith both testified that Harris drove the four cars that were the subject of the charges, a 2009 Ford Escape, a 2006 Saab, a 2008 Nissan Altima, and a 2014 Honda Accord. Lewis and Smith also both testified that Harris knew the vehicles were stolen. While Harris testified that he did not drive the cars, we review the evidence in the light most favorable to the State and the conviction. The testimony of Lewis and Smith was sufficient to support the guilty verdicts the jury rendered on all four counts of operating a vehicle without the owner's consent.

Upon the foregoing,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* 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