

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1650-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GALE JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Gale Johnson appeals from a judgment of conviction, claiming that the trial court erred in denying his motions for a mistrial. Johnson's first mistrial motion or, in the alternative, a motion to strike a juror, was made because a juror overheard a comment made by the prosecutor outside the

courtroom. Johnson's second mistrial motion was made because some jurors saw the bailiff removing his shackles. We affirm.

I. Background

¶2 A jury convicted Johnson of first-degree intentional homicide, while armed, in violation of WIS. STAT. §§ 940.01(1), 939.63 and 939.05 (1995-96), and attempted first-degree intentional homicide, while armed, as a party to a crime, in violation of WIS. STAT. §§ 940.01(1), 939.32, 939.63 and 939.05 (1995-96). On the second day of trial, the prosecutor informed the court that a juror had overheard a conversation between himself and a detective while the three men were in the bathroom. The trial court then held an *in camera* hearing on the incident. The juror told the court that he had overheard the prosecutor saying "something about the defense attorney taking...his time, and from what I understood, that he might be stalling or something, just delaying." The juror stated he immediately left the bathroom because he felt uncomfortable. The juror also told the trial court, however, that the comment did not create any negative feelings toward the defendant or his attorney, and that he could fairly and impartially listen to the evidence and decide the case.

¶3 Defense counsel moved for a mistrial or, in the alternative, that the juror be excused and, because there was one alternate juror, that the trial continue with the remaining twelve jurors. The trial court denied this motion. The trial court found: "I'm completely satisfied, based on the colloquy that we had with this juror, that he can be absolutely fair in this case. I'm completely satisfied that he understands that these are the kind of comments that attorneys make under the circumstances and that it has not affected his view."

¶4 Later in the trial, some jurors inadvertently saw the bailiff removing the shackles that bound Johnson to his chair when they returned to the courtroom. Defense counsel again moved for a mistrial or, in the alternative, requested a curative jury instruction. The trial court did not grant the mistrial motion, but did give the jury a curative instruction:

It has been brought to my attention that earlier today some of you were or perhaps all of you may have observed the defendant in some sort of restraints as you came into the courtroom. That is not evidence in the case. It's very important that you put it out of your mind and not consider it at all. You may not draw any inference whatsoever from any observation that you may have made. You may not discuss it among yourselves at all.

II. Analysis

¶5 The decision whether to grant a mistrial is vested within the sound discretion of the trial court. *See Wheeler v. State*, 87 Wis. 2d 626, 630, 275 N.W.2d 651, 653 (1979). In making its determination, the trial court must decide, in light of all the facts and circumstances, whether the claimed error is sufficiently prejudicial to warrant a mistrial. *See State v. Nienhardt*, 196 Wis. 2d 161, 166, 537 N.W.2d 123, 125 (Ct. App. 1995). The denial of a motion for a mistrial will be reversed only on a clear showing of an erroneous exercise of discretion by the trial court. *See State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988).

A. Remark Overheard By Juror

¶6 The trial court has discretion to discharge a regular juror during trial for cause. *See State v. Lehman*, 108 Wis. 2d 291, 299, 321 N.W.2d 212, 214 (1982); *see also Rodriguez v. Slattery*, 54 Wis. 2d 165, 169, 194 N.W.2d 817, 819

(1972). When a party seeks to have a juror discharged, the court must make a “careful inquiry into the substance of the request” and “exert reasonable efforts to avoid discharging the juror.” *Lehman*, 108 Wis. 2d at 300, 321 N.W.2d at 216. Further, “such inquiry generally should be made out of the presence of the jurors and in the presence of all counsel and the defendant.” *Id.*, 108 Wis. 2d at 300, 321 N.W.2d at 216–217. Moreover, “the court must approach the issue with extreme caution to avoid a mistrial by either needlessly discharging the juror or by prejudicing...the juror potentially subject to discharge or the remaining jurors.” *Id.*, 108 Wis. 2d at 300, 321 N.W.2d at 217.

¶7 Essentially, Johnson asserts that the trial court erroneously exercised its discretion when it accepted “at face value” what the juror said at the *in camera* hearing, claiming the trial court “ignored the seriousness of what [the juror] overheard.” We disagree. The trial court made a “careful inquiry” and exerted “reasonable efforts,” as required by *Lehman*. See *id.*, 108 Wis. 2d at 300, 321 N.W.2d at 216. The trial court determined that the juror could fairly decide the case and that “a finding of bias or prejudice...is stretching, to say the least,...particularly given the juror’s comments that it doesn’t affect him.” The trial court’s decision to deny Johnson’s mistrial motion was properly founded on a correct view of the law; it was not an erroneous exercise of discretion.

¶8 Johnson also complains that the trial court erred by allowing the “tainted” juror to remain instead of replacing him. As noted, a trial court is required to *avoid* discharging jurors by making a “careful inquiry” and “exert[ing] reasonable efforts.” *Lehman*, 108 Wis. 2d at 300, 321 N.W.2d at 216 (emphasis added). The trial court did that here and its decision not to dismiss the juror was a proper exercise of discretion.

B. Inadvertent View of Johnson's Shackles

¶9 Next, Johnson argues that the trial court erroneously exercised its discretion when it denied his motion for a mistrial based on the jury's inadvertent view of Johnson shackled to his chair. The trial court did, however, grant Johnson's alternative request: a curative instruction. This court presumes that a jury follows all instructions it receives from the trial court. *See State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). Thus, any prejudice that may have been created by the jury's brief observation of Johnson's shackles was cured by the trial court's instruction. *See Pankow*, 144 Wis. 2d at 47, 422 N.W.2d at 922–923. Johnson has not demonstrated how the trial court erroneously exercised its discretion in granting him the alternative relief he requested.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

