COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0556-CR **Cir. Ct. No. 01CF006606**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTOINE J. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

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

¶1 WEDEMEYER, P.J. Antoine J. Russell appeals from a judgment of conviction after a jury found him guilty of attempted armed robbery, party to a crime, as a habitual criminal, and contributing to the delinquency of a child,

contrary to WIS. STAT. §§ 943.32(1)(b), (2), 939.05, 939.32, 939.62(1)(c), (2), 948.40(1), (3), 4(b) and 939.62(1)(c), (2) (2003-04).[1]

¶2 Russell claims the trial court erred: (1) in permitting the transcript of a material witness's deposition to be read to the jury even though the witness was not personally served with a subpoena to appear at the trial; and (2) in the manner in which the jury instruction for contributing to the delinquency of a child, WIS. STAT. § 948.40, was given, thereby denying him the right to an unanimous jury verdict.

¶3 Because the material witness was under a continuing obligation to be present at trial and the trial court did not erroneously exercise its discretion in admitting the deposition testimony of an unavailable material witness, and because the manner in which the jury instruction for contributing to the delinquency of a minor was given was permissible or, at the very most, it constituted harmless error, we affirm.

BACKGROUND

¶4 The jury trial for these charges was originally scheduled for November 4, 2002. The State, however, requested an adjournment to procure a material juvenile witness, Tywon P., who participated in the events that led to the charges in this case.[2] The court adjourned Russell's trial until February 26, 2003. On December 27, 2002, the warrant for Tywon was returned. The court ordered

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] A second juvenile, Tamal R., was also involved, but he died after he was shot during the armed robbery.

that he be held in secure detention until January 3, 2003. On January 2, 2003, a hearing took place in regard to the production of Tywon as a witness. At that time, a deposition was scheduled for January 10, 2003. At the deposition, the State served Tywon with a subpoena for the trial date of February 26, 2003. Tywon signed the back of the subpoena, acknowledged its receipt and stated that he would be in court on the trial date. The court admonished Tywon that if he did not appear at the trial date, another warrant would be issued for him. He indicated that he would honor the subpoena. He was then released on his own recognizance.

¶5 On February 20, 2003, Russell's trial counsel moved to withdraw. The court granted the request and rescheduled the trial for May 21, 2003. On the trial date, the court was informed that Tywon was not available because he had run away from home. The court issued a body attachment and a material witness warrant for Tywon and adjourned the trial until May 28, 2003. Subpoenas for both trial dates were served on Tywon by mail. On May 28, 2003, the State informed the court that Tywon had not yet been found. At the hearing, the State outlined its efforts to procure Tywon's presence and asked the court to admit into evidence Tywon's deposition. Russell objected, arguing that because Tywon had not been personally served with a subpoena, his deposition should not be admitted.

¶6 The court adjourned the trial to the following day and advised the State to make additional efforts to locate Tywon for the purposes of establishing his unavailability. On May 29, the State detailed its efforts to locate Tywon, including those of the previous day. Over Russell's objection, the court ruled that the deposition could be admitted. In its ruling, the trial court noted that Tywon was not an adverse party, but a witness, and mailing subpoenas to witnesses is standard procedure. It further ruled that Russell's rights had been preserved in that cross-examination of Tywon had occurred at the deposition, even though the

cross-examination was conducted by Russell's previous trial counsel. The trial was then conducted. The jury found Russell guilty of both attempted armed robbery and contributing to the delinquency of a minor. Russell now appeals his convictions.

ANALYSIS

A. Deposition.

¶7 Russell first claims the trial court improperly admitted Tywon's deposition testimony at trial because he had not been personally served with a subpoena to appear at trial. Thus, he argues the State had not made its required showing under WIS. STAT. § 967.04(5) that Tywon was unavailable at trial so that his deposition could be admitted as former testimony. The State responds that Russell reads more into the statute than is required and, when combined with the record clearly establishing Tywon's unavailability, the trial court did not err. This issue is resolved by the interpretation of a statute.[3]

¶8 Statutory construction is a question of law reviewed independently by this court, benefiting from the analysis provided by the trial court. ***State v. Vanmanivong***, 2003 WI 41, ¶16, 261 Wis. 2d 202, 661 N.W.2d 76. The admissibility of former testimony under the hearsay exception in WIS. STAT. § 908.045(1), however, is a discretionary call on the part of the trial court. ***State v.***

[3] For reasons unknown, Russell limits his "unavailability" argument to the State's failure to *personally* serve the witness, Tywon, with a subpoena for the May 21 adjourned trial date. He makes no attempt to challenge the other efforts the State made to produce Tywon for trial either on May 21, May 28 or May 29. Accordingly, he has waived his right to challenge the trial court's decision admitting Tywon's deposition on any other grounds.

Tomlinson, 2002 WI 91, ¶39, 254 Wis. 2d 502, 648 N.W.2d 367. We shall not overturn the trial court's decision unless it is clearly erroneous. ***Id.***

¶9 WISCONSIN STAT. § 967.04(5)(a) reads as follows:

> At the trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the rules of evidence, may be used if any of the following conditions appears to have been met:
>
> 1. The witness is dead.
>
> 2. The witness is out of state, unless it appears that the absence of the witness was procured by the party offering the deposition.
>
> 3. The witness is unable to attend or testify because of sickness or infirmity.
>
> 4. *The party offering the deposition has been unable to procure the attendance of the witness by subpoena.*

(Emphasis added.)

¶10 The sole basis for Russell's claim is that the subpoena for the adjourned trial date of May 21, 2003, was only *mailed* to Tywon and, as a result, "there was no showing by the State [under WIS. STAT. § 967.04] that [Tywon] would not appear at trial if personally served with a subpoena." For two reasons, Russell's argument is unavailing.

¶11 First, WIS. STAT. § 967.04 plainly and clearly does not require *personal* service of a subpoena. Rather, the test is whether "[t]he party offering the deposition has been unable to procure the attendance of the witness by subpoena." WIS. STAT. § 967.04(5)(a)4. The phrase "personal service" does not appear in the statute. Russell does not present us with, nor can we find, any authority that requires us to read those words into the statute. *See* ***State v. Hall***,

207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997) (when a statute's language is clear, we cannot read words into the statute).

¶12 Second, Russell does not deny that on January 10, 2003, Tywon was personally served a subpoena for the original trial date of February 26, 2003. Instead, he argues that because Tywon was only served a subpoena by mail for the two subsequently adjourned trial dates of May 21, 2003, and May 28, 2003, Tywon was no longer obligated to the trial court under the original subpoena that was personally served on January 10, 2003. This reasoning cannot withstand the test of legal scrutiny. Once a witness has been personally served with a subpoena to testify, the trial court acquires jurisdiction over the witness obligating that witness to be present until excused. This includes continued or postponed hearings. ***Blackmer v. United States***, 284 U.S. 421, 443 (1932) (witness is bound by subpoena until it is vacated); 68 Op. Att'y Gen. 251 (the witness is bound to obey the subpoena until excused; "subpoenaed person has a 'continuing obligation' … to appear at the later date"; witness must attend as long as commanded even when the original date in the subpoena was continued to a later date). Once Tywon was personally served with a subpoena for Russell's first trial date of February 26, 2003, the service of a new subpoena was not required to maintain the obligation on Tywon's part to attend the adjourned May 21 trial date.

¶13 On January 10, 2003, when Tywon was personally served, he was also admonished that if he did not appear for the trial, both a body attachment and a material witness warrant would be issued. Furthermore, it is undisputed that the State, although not required to, attempted to again personally serve Tywon. Only after attempting personal service failed did the State serve him by mail. In addition, Tywon's counsel was in contact with him throughout the course of the proceedings and advised him of the new trial date of May 21, 2003. Thus, we

reject the contention that personal service of a subpoena for the new trial date was required in order to conclude that Tywon's deposition was admissible under WIS. STAT. § 967.04.

B. Erroneous Jury Instruction.

¶14 Russell next claims the trial court erred in the manner in which it instructed the jury for the charge of contributing to the delinquency of a minor. The trial court instructed the jury that before it could find Russell guilty of contributing to the delinquency of a minor, the State had to prove, by evidence which satisfied the jury beyond a reasonable doubt, that the following two elements were present:

> First, Tywon [P.] or Tamal [R.] were under the age of 18 years[.]
>
> Knowledge of Tywon [P.]'s or Tamal [R.]'s ages by the defendant is not required and mistake regarding Tywon [P.]'s or Tamal [R.]'s ages is not a defense.
>
> Second, the defendant intentionally encouraged or contributed to the delinquency of Tywon [P.] or Tamal [R.].

¶15 Russell claims the instruction as given was unconstitutional because it deprived him of his right to an unanimous jury verdict. He argues there can be no confidence that the verdict was unanimous as to the elements for either child because the jury was instructed in the disjunctive; i.e., the jury was instructed to find that Tywon *or* Tamal were under the age of eighteen, and that Russell intentionally encouraged or contributed to the delinquency of Tyron *or* Tamal. Russell thus concludes that the jury could have found that Tywon was under the age of eighteen, but not Tamal, and that Russell contributed to the delinquency of Tamal, but not Tywon. We are not convinced.

¶16 In a jury trial, an accused has the right to unanimity with respect to the ultimate issue of guilt or innocence. ***Holland v. State***, 91 Wis. 2d 134, 143, 280 N.W.2d 288 (1979). In analyzing whether proper unanimity occurred in a jury trial, our supreme court has declared:

> The first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. If more than one crime is presented to the jury, unanimity is required as to each. If there is only one crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.

State v. Lomagro, 113 Wis. 2d 582, 592, 335 N.W.2d 583 (1983) (citations omitted). Finally, any errors in a jury instruction that jeopardized an accused's right to a unanimous verdict are subject to the harmless error rule. ***Jackson v. State***, 92 Wis. 2d 1, 11-12, 284 N.W.2d 685 (Ct. App. 1979). We reject Russell's claim of error for two reasons.

¶17 First, Russell was charged with one count of contributing to the delinquency of a child. The purported contributee was either Tywon or Tamal. The jury was only asked to decide whether Russell's action contributed to the delinquency of a person under the age of eighteen years. The night of the attempted armed robbery, it is undisputed that Tamal and Tywon were the main actors. Russell, in his testimony, denied any involvement in the actions of Tywon or Tamal that evening. Tywon's deposition testimony, however, described in detail Russell's involvement with the actions of Tywon and Tamal in attempting to find a victim to rob; i.e., encouraging the two juveniles to participate in a robbery, supplying them with a gun, and driving them to a site to accomplish the deed.

Under Tywon's version of what happened, Russell's actions prior to the attempted robbery were conceptually similar as they related to either Tywon or Tamal.

¶18 Second, regardless of how one characterizes Russell's actions leading up to the described incident, there was no question raised during the testimony as to the ages of either Tamal or Tywon. Tamika, the twin sister of Tamal, clearly stated that on the date of the incident, December 4, 2001, Tamal was sixteen years old. This evidence was not controverted. As for Tywon, in his deposition he testified he was fifteen years old on December 4, 2001. This testimony was not challenged. Thus, there was no evidence in the record to even suggest that either Tamal or Tywon was not under the age of eighteen years. Consequently, if any error exists in the manner the jury instruction was presented, it constitutes harmless error. Therefore, the conviction for contributing to the delinquency must stand.

By the Court.—Judgment affirmed.

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