COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP22-CR **Cir. Ct. No. 2011CF246**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KAMEL M. KHATIB,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Kamel Khatib appeals an order denying his motion to dismiss following a mistrial.[1] Khatib argues there was no manifest necessity

[1] This court granted leave to appeal a nonfinal order on February 6, 2012.

requiring a mistrial and, therefore, the charges must be dismissed on double jeopardy grounds. We disagree and affirm.

BACKGROUND

¶2 The State charged Khatib with physical abuse of a child, aggravated battery, obstructing an officer, and disorderly conduct. The complaint indicates that Khatib was involved in a fight with Stephen Kelly and A.J., age sixteen. Shortly after a verbal dispute with Kelly, Khatib believed Kelly and A.J. were going to physically attack him. Khatib therefore commenced a preemptive attack. Police lieutenant Steve Diedrich interviewed Khatib, A.J., Kelly, and other witnesses. Kelly and A.J. received municipal citations for battery and disorderly conduct, respectively. Khatib's case proceeded to trial, with Khatib asserting he acted in self-defense.

¶3 At trial, Khatib's attorney attempted to cross-examine Kelly, A.J., and Diedrich about the ordinance citations. Kelly was questioned as follows.

> [Defense Counsel]: And you were charged with battery as a result of this, correct?
>
> [Kelly]: Yes.
>
> ....
>
> [Defense Counsel]: Okay. And so you—once you got summons[ed] in on this battery charge, you admitted it, correct?
>
> ….
>
> [Kelly]: Yes.
>
> [Defense Counsel]: Okay.
>
> [Prosecutor]: Judge, I'm going to object and move to strike.

> [Court]: That is sustained and should be stricken. The jury should disregard that.

Defense counsel asked Kelly no more questions on the subject. On re-direct, the prosecutor clarified with Kelly that he received an "ordinance ticket" for the battery defense counsel had inquired about.

¶4 When Khatib's attorney questioned A.J., the following exchange took place.

> [Defense Counsel]: All right. And you didn't dispute the disorderly conduct allegations that you were provided with, correct?
>
> [Prosecutor]: Judge, I'm going to object—
>
> [Court]: That's sustained. Counsel, you cannot ask that question without permission of the Court ahead of time. And you've done it repeatedly. So don't do it. Sustained. And that will be stricken.

¶5 Finally, Khatib's attorney questioned Diedrich:

> [Defense Counsel]: All right. Now, ultimately you decided that—you interviewed [Khatib], I believe, on April 2nd. And you decided that [Kelly] and [A.J.] should be getting a cite or summons into court, also?
>
> [Prosecutor]: Judge—
>
> [Court]: Sustained. That's completely irrelevant. The Court has ruled on that before. It's something that should not be brought up.
>
> [Defense Counsel]: I guess I'm not sure of the rationale behind that ruling, Your Honor. This is—
>
> [Prosecutor]: Judge, I think if we're going to have this discussion, it needs to be outside the presence of the jury under the circumstances.
>
> [Court]: Well, it's clearly inadmissible and prejudicial. And, I don't know, do you want to approach?

[Bench Conference]: (Held Off The Record)

[Court]: Okay. The jury will have to step out.

¶6 The State then moved for a mistrial. It argued that WIS. STAT. § 906.09,[2] which permits impeachment by evidence of criminal convictions, requires court permission before introducing such evidence. Additionally, the State argued the citation evidence was inadmissible under that section because the citations were civil, not criminal, matters. Further, the State argued a mistrial was appropriate because Khatib's attorney had attempted to introduce the evidence three times, despite being admonished by the court the first two times. It also observed that defense counsel's argument was disingenuous when he asserted he was "not trying to admit or bring anything before the jury related to the outcome of those citations." Khatib's attorney failed to provide any alternative basis for introducing the evidence. The court agreed the evidence was inadmissible under § 906.09, determined the State had been prejudiced, concluded a remedial jury instruction would be inadequate, and declared a mistrial.

¶7 Khatib later moved to dismiss the charges, arguing there was no "manifest necessity" for declaring a mistrial. The court denied the motion, and Khatib now appeals.

DISCUSSION

¶8 When a circuit court declares a mistrial over a defendant's objection, the court's decision implicates the constitutional protection against double jeopardy. "The protection against double jeopardy limits the ability of the State to

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

request that a trial be terminated and restarted." ***State v. Seefeldt***, 2003 WI 47, ¶17, 261 Wis. 2d 383, 661 N.W.2d 822. "However, the prohibition against retrial is not a mechanical rule to be applied to prevent any second trial after the first trial is terminated prior to judgment." ***Id.***, ¶18. Rather, the court explained:

> [G]iven the importance of the constitutional protection against double jeopardy, the State bears the burden of demonstrating a "manifest necessity" for any mistrial ordered over the objection of the defendant. If a trial is terminated without manifest necessity and over the defendant's objection, the State is not permitted to commence a second trial against the defendant. "Manifest necessity" means a "high degree" of necessity.

Id., ¶19.

¶9 The "manifest necessity" determination is a matter of trial court discretion. ***State v. Barthels***, 174 Wis. 2d 173, 183, 495 N.W.2d 341 (1993). "In exercising its discretion, the trial court must examine the circumstances leading to the state's motion and should consider the alternatives before depriving the defendant of the right to have the original tribunal render a final verdict." ***State v. Collier***, 220 Wis. 2d 825, 835, 584 N.W.2d 689 (Ct. App. 1998). The amount of deference to be accorded to a mistrial declaration varies with the reason necessitating the mistrial. ***State v. Duckett***, 120 Wis. 2d 646, 650, 358 N.W.2d 300 (Ct. App. 1984). A decision to declare a mistrial in response to defense counsel's misconduct "is entitled to special respect," a standard akin to "great deference." ***Arizona v. Washington***, 434 U.S. 497, 510 (1978).

¶10 Khatib argues there was no manifest necessity because the ordinance citation evidence was admissible on grounds other than WIS. STAT. § 906.09. He contends Kelly's citation was relevant to issues of self-defense, A.J.'s citation impeached A.J.'s testimony, and all of the citation evidence was admissible on

confrontation grounds in order to explore witness bias, interest, or motive to testify. Khatib faults the State for failing to establish that the evidence was inadmissible on *all* grounds. He further asserts the court should have provided more time for his attorney to evaluate the situation.

¶11 We reject Khatib's arguments. Any fault in failing to identify a proper rationale for admitting the citation evidence lies with Khatib's trial counsel. "A party objecting to the admission of evidence need not specify the rule into which the evidence does *not* fit. Rather, the proponent has the burden to show why the evidence is admissible." ***State v. Jenkins***, 168 Wis. 2d 175, 187-88, 483 N.W.2d 262 (Ct. App. 1992) (citation omitted). Yet, when the court sustained the State's first two objections, defense counsel did not even respond. After the third objection, when the State requested a mistrial, Khatib offered no alternative authority for introducing the evidence. Further, Khatib's argument relies on ***Seefeldt***. That case provides no support because there defense counsel did contemporaneously offer an alternative basis for admissibility. *See* ***Seefeldt***, 261 Wis. 2d 383, ¶8.

¶12 We also reject the assertion that the court should have provided Khatib's counsel more time to respond. The citation evidence was clearly inadmissible for purposes of impeachment under WIS. STAT. § 906.09. *See* ***State v. Chu***, 2002 WI App 98, ¶37, 253 Wis. 2d 666, 643 N.W.2d 878 (ordinance violations are not admissible under § 906.09). Thus, properly prepared counsel would have anticipated the objections and, if he believed the evidence was admissible for a proper purpose, would have identified that basis upon the State's objection. In any event, counsel did not request more time.

¶13 We conclude the court properly exercised its discretion by granting a mistrial rather than, as Khatib suggests, giving a curative instruction. The court expressly considered that option and rejected it. At trial, the court reasoned:

> [T]his is the third time now that it has come up. And the Court made a pretty strong ruling the last time that it was subject matter that was not properly brought to the attention of the jury. I had it stricken. I told them to disregard it. …. [T]hese things are not matters that are subject to the jury's review and should not even be approached at all. The statute doesn't even cover citations because clearly they have a different burden of proof. And the officer's issuing [the ticket].
>
> So I believe that is highly prejudicial to continually bring that up. And how do we ask the jurors to disregard it after it's now come up three times? I think that the minds of the jurors have been [too] tainted now to try to correct it with an instruction to the jury to disregard, which I have in the past.
>
> So reluctantly I will grant the request for the mistrial.

¶14 Further, at the subsequent motion hearing, the court explained:

> [I]n the Court's opinion of how this came down is that you didn't care what the Court's ruling was. You were just going to continue to do it in the face of the Court telling you you couldn't. And you were persistent in that. Now, we had already instructed the jury to disregard. You didn't at that point even ask for a hearing out of the presence of the jury but just continued to persist and ask the question … regardless of what the Court ruled.
>
> ….
>
> I already did give an instruction to the jury to disregard. How many times do I have to tell a jury to disregard when it becomes absolutely a mockery of the system? It seems like when it keeps on being brought up, you just can't keep on telling the jury to disregard that because they're going to be thinking about it then all the time.
>
> ….

> Doesn't that in itself present a manifest necessity once you conclude the jury cannot disregard something because it's been brought up now three times?
>
> ….
>
> You know, what was it going to take to get you to stop asking the question?
>
> ….
>
> I think what [the prosecutor] stated to the Court is the real reason for asking the questions. It is an effort to persuade the jury about the character of the persons issued the citation through the opinion of the officer that they had done something wrong. … The Court didn't have an opportunity to weigh in on it, but the questions kept on coming.
>
> And eventually there comes a time when enough is enough and it creates a necessity, you might call it a manifest necessity, to say, you can't do it anymore, and mean something. Defense counsel was admonished before the jury on the second occasion, which normally would be sufficient, but it wasn't.

¶15 Because the mistrial here was granted due to defense counsel's misconduct, the trial court's decision is entitled to greater deference. *See* ***Arizona***, 434 U.S. at 510, 513 ("Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases."). The court considered the facts of record, explained its reasoning, considered alternatives, and ultimately reached a reasonable conclusion. It therefore properly exercised its discretion.

By the Court.—Order affirmed.

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