COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP258-CR **Cir. Ct. No. 2009CF1358**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAURICE D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Maurice D. Jones appeals from a judgment of conviction, entered upon two juries' verdicts, on five felony counts. Jones contends that the circuit court gave an improper instruction when the jury signaled

a potential impasse following the first full day of deliberations. We reject Jones' challenge and affirm the judgment.

BACKGROUND

¶2 Jones was charged with one count of first-degree intentional homicide with use of a dangerous weapon, one count of armed robbery, two counts of attempted armed robbery, and one count of possession of a firearm by a felon, all as a repeat offender. His trial began on Monday, October 5, 2009. The jury's deliberations began at approximately 3:50 p.m. on Friday, October 9, 2009. The jury deliberated until 4:45 p.m. that day before being sent home for the weekend.

¶3 Deliberations resumed the following Monday. At around 4:20 p.m., the jury advised that it had reached two verdicts, but the jurors were uncertain whether they would be able to resolve the other three charges. The circuit court summoned the attorneys, and offered three options: to give the supplemental jury instruction on agreement, WIS JI—CRIMINAL 520 ("Instruction 520")[1] and expect

[1] WISCONSIN JI—CRIMINAL 520 states:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.

deliberations to finish that evening; to accept the two verdicts the jury had reached and set a new trial date for the remaining three counts; or to send the jurors home and have them resume deliberations in the morning. In explaining the three choices, the circuit court indicated that it would prefer not to give Instruction 520 at that time, viewing it as more of an "end of the line" option.

¶4 The State initially indicated that the circuit court could give Instruction 520 or have the jury come back in the morning, but the State did not have a preference. After the circuit court explained its reasons for not wanting to resort to Instruction 520 yet, the State expressed a preference for having the jury return in the morning. Jones' attorney consulted him—he was not immediately returned to the courtroom from the holding area—and informed the circuit court that Jones' preference was to accept the two verdicts the jury had reached. After a bit more discussion and in preparation for addressing the jury, the circuit court had Jones brought to the courtroom from the holding area. The circuit court then confirmed with Jones personally his desire to accept the two verdicts.

¶5 However, the circuit court ultimately determined that the jury should return in the morning. It explained that the trial had lasted for a whole week, and the jury had deliberated for only a minimal amount of time on Friday. Further, although the jury had spent all of Monday deliberating, the circuit court noted that "sometimes a night's rest makes it a lot easier to clear your head and to come back fresh."

¶6 The circuit court summoned the jury and instructed, in relevant part:

> [H]ere is what I am going to do. I am gonna let you go home for the night. And sometimes it helps to just get away from -- you know, you have a night's rest. And I know you have worked hard all day today, but I am going to have you come back tomorrow at 9:15, back up here in

> the jury room. And that should work out with, you know, my other jury that I have going too. But as soon as everyone is here at 9:15, as soon as everyone is here, you can start deliberation again.
>
> Okay. So I am gonna remind you to not discuss the case at all. I know it may be especially tempting tonight, because you have been talking about it all day with each other, but I will remind you not to talk with each other after you leave here, this courtroom, not to talk with anyone else, not to do any kind of research. All of the admonishments that you have abided so far are still in place.
>
> And I will see you tomorrow at 9:15. And you will, just as soon as everyone is here, you will start deliberating again. Okay, we'll keep your notebooks here for you. Have a good night.

¶7 The jury returned in the morning. After approximately forty-five minutes, the jury indicated that it had reached a third verdict but still could not agree on the two additional counts. This time, the circuit court gave Instruction 520. An hour later, the jury signaled it was still unable to reach verdicts on the final two charges. The circuit court accepted the three guilty verdicts on the robbery charges and declared a mistrial on the two outstanding charges. Another jury convicted Jones of the homicide and gun possession following a second trial.

¶8 For the homicide, Jones was sentenced to life imprisonment with eligibility for extended supervision in 2060. He was also sentenced to twenty years' imprisonment for the armed robbery, fifteen years' imprisonment for each count of attempted armed robbery, and five years' imprisonment for the gun charge, all to be served concurrently with the homicide sentence.

DISCUSSION

¶9 Jones contends that it was "prejudicial error offending basic due process" when, on Monday evening, the circuit court directed the jury to continue

deliberations without using Instruction 520. Specifically, Jones asserts that the instruction, "you will start deliberating again," is impermissibly coercive because, unlike Instruction 520, it does not sufficiently advise the jurors that they "need not abandon their conscientiously held convictions."

¶10 "A circuit court has broad discretion when instructing a jury." ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. We generally review a circuit court's jury instructions for an erroneous exercise of discretion. *See* ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989). Whether a jury improperly applied otherwise appropriate instructions in a way that denied a defendant due process is a question of constitutional fact we review *de novo*. *See* ***State v. Burris***, 2011 WI 32, ¶24, 333 Wis. 2d 87, 797 N.W.2d 430.

¶11 The State contends that Jones has not preserved his challenge to the court's instruction because he did not timely object to the instruction that was given.[2] *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988) (court of appeals has "no power to reach the unobjected-to instructions").

¶12 The holding in ***Schumacher*** derives from WIS. STAT. § 805.13(3) (2009-10),[3] which provides, in relevant part:

[2] The State also contends that Jones has not preserved a challenge because, although Jones now argues the circuit court should have given Instruction 520 on Monday night, he did not so request when given the option. While we understand the State's argument, we question whether we should rely on it to deem the issue unpreserved in this situation, given that, by the time Jones' counsel was asked for her opinion on how to proceed, the circuit court had already expressed its own preference not to give Instruction 520.

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

> At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. … The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. … *Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.*

(Emphasis added.) Thus, to the extent that an objection was required, we would agree that a failure to object to the instruction would constitute waiver—or, more accurately, forfeiture—of any challenge.[4] *See, e.g.*, ***State v. Zelenka***, 130 Wis. 2d 34, 44, 387 N.W.2d 55 (1986).

¶13 However, it is not clear whether a waiver or forfeiture doctrine should be applied here. First, WIS. STAT. § 805.13(3) requires timely objections to proposed instructions to be made during the jury instruction conference. Here, the challenged instruction was not proposed at an instruction conference.

¶14 Second, Jones' challenge is not so much to the fact that some instruction was given as it is to the substance of that instruction. "Failure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error." WIS. STAT. § 805.13(4). To the extent that Jones objects to a "material variance or omission" between the instruction he expected and the way that the instruction was actually given, a lack of an objection would not result in waiver.

¶15 Third, the jury received a *supplemental* instruction. "After the jury retires, the court may reinstruct the jury as to all or any part of the instructions

[4] We do note that Jones chose not to file a reply brief. To that end, we could have determined that he simply conceded the waiver argument to the State. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

previously given, or may give supplementary instructions as it deems appropriate." WIS. STAT. § 805.13(5). This subsection, unlike subsections (3) and (4), contains no language describing the effect of a failure to object to a supplemental instruction. Thus, it is not evident that Jones actually was required to object to the supplemental instruction, either when the circuit court indicated a plan to give an instruction or when the circuit court actually instructed the jury.

¶16 We thus turn to whether the jury instruction actually given was somehow improper. "'[A] verdict cannot stand when the jury [has] been subjected to any statements or directions naturally tending to coerce or threaten them to agreement either way, or to agreement at all, unless it be clearly shown that no influence was thereby exerted.'" ***State v. Echols***, 175 Wis. 2d 653, 666, 499 N.W.2d 631 (1993) (quoting ***Brown v. State***, 127 Wis. 193, 201, 106 N.W. 536 (1906)). Thus, we must "'consider the supplemental charge given by the trial court in its context and under all circumstances.'" ***Echols***, 175 Wis. 2d at 666 (quoting ***Lowenfield v. Phelps***, 484 U.S. 231, 237 (1988) (one set of internal quotation marks omitted)). We examine the instruction as given "in its context and under all circumstances" to determine whether it "naturally tended to coerce or threaten the jury to agreement." ***Echols***, 175 Wis. 2d at 666-67.

¶17 We simply cannot conclude that the circuit court's instruction to the jury was coercive. The circuit court simply requested that the jurors go home to clear their heads after the day's work and "start deliberating again" in the morning once all the jurors had arrived. "Nothing in the brief instruction suggested that a particular outcome was either desired or required[.]" ***United States v. Prosperi***,

201 F.3d 1335, 1341 (11th Cir. 2000). We thus conclude that it was not error for the circuit court to instruct the jury as it did rather than with Instruction 520.[5]

By the Court.—Judgment affirmed.

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

[5] We also note that any error in instructing the jury appears harmless. *See* ***State v. Lohmeier***, 205 Wis. 2d 183, 192, 556 N.W.2d 90 (1996). The sentence for the homicide conviction controls here, and Jones expressly disavowed any challenge to that conviction.