COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP777-CR **Cir. Ct. No. 2010CF444**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SPENCER R. WNUK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Spencer R. Wnuk appeals from a judgment of conviction entered after a jury found him guilty of robbery and two counts of battery, all as a party to the crime (PTAC), and from an order denying his postconviction motion for a new trial. Wnuk argues that he is entitled to a new

trial in the interest of justice because the trial court erred in instructing the jury on: (1) the offense of robbery of the victim's cell phone and (2) the lesser included offense of attempted robbery of the victim's wallet. We conclude that the cell phone robbery instruction was supported by the evidence, and that any error in instructing the jury on the lesser offense of attempted robbery was harmless and did not prevent a full trial on the real controversy.[1] Therefore, Wnuk is not entitled to a new trial in the interest of justice.

¶2 At around 2:30 a.m., two men later identified as Spencer Wnuk and Chase Burns approached two students on the University of Wisconsin-Whitewater campus and asked if they knew of any parties in the area. The suspects said they had driven in from Stevens Point and were headed to La Crosse. One of the suspects asked to borrow student Matthew McDonnell's cell phone to make a quick call. McDonnell handed him the phone and the suspect appeared to enter some numbers. The suspect gestured as though he was going to return the phone, but instead asked if McDonnell had change for a ten-dollar bill. As McDonnell was retrieving his wallet, one of the suspects struck him in the back of his head and grabbed for the wallet. At the same time, the other suspect struck the second student, Evan Schwarzhuber, in the head with a beer can. McDonnell kept ahold of his wallet and ran away. He returned to see Schwarzhuber struggling to break free from the suspects. The suspects then fled the area with McDonnell's cell phone. Police responded to the scene and photographed the victims' injuries.

[1] Wnuk's appellate brief discusses the attempted robbery instruction first and the completed robbery instruction second. Because the lesser included attempt instruction came after and was dependent on the robbery instruction, we address Wnuk's claims in reverse order.

¶3 McDonnell's phone was found abandoned in front of the Liberty Bell Apartments in La Crosse. Police discovered that Wnuk's girlfriend, Brittany Bauer, lived in the complex, and that about an hour after the robbery, the cell phone had been used to call Bauer's number.[2] The phone was also used to call a woman named Samantha Giese. When officers described the suspects to Giese, she directed them to her ex-boyfriend, Burns, and his cousin, Wnuk. McDonnell and Schwarzhuber later identified Burns and Wnuk from a photo lineup.

¶4 Wnuk and his codefendant were arrested and, following a preliminary hearing, the State filed an information charging Wnuk as a party to the crimes of: (1) robbery by use of force, (2) misdemeanor theft (McDonnell's cell phone), (3) misdemeanor battery (McDonnell), (4) misdemeanor battery (Schwarzhuber), and (5) attempted misdemeanor theft (McDonnell's wallet).

¶5 At trial, the State filed an amended information omitting both the theft and attempted theft charges. Wnuk remained charged with robbery by use of force as to McDonnell's phone, and two counts of battery. On the robbery charge, the trial court instructed the jury pursuant to the pattern jury instruction and specified that the stolen property was McDonnell's cell phone. At the State's request, the trial court agreed to instruct the jury on the lesser offense of attempted robbery of McDonnell's wallet. The jury was instructed that if it was not satisfied beyond a reasonable doubt of Wnuk's guilt on the charged offense, "you must find the defendant not guilty of robbery, taking the cell phone, and consider the crime

[2] At trial, Bauer testified that about an hour after the robbery, Wnuk called and stated that he had just been involved in a fight and asked for directions from Whitewater to her apartment in La Crosse.

of attempted robbery of the wallet … a lesser included offense of robbery." The court stated:

> You should make every reasonable effort to agree unanimously on your verdict on the charge of robbery, taking the cell phone, before considering the lesser included offense of attempted robbery of the wallet. However, if after full and complete consideration of the evidence you conclude that further deliberation would not result in a unanimous agreement on the charge of robbery, taking the cell phone, you should consider whether the defendant is guilty of attempted robbery.

The court told the jury that it could not find Wnuk guilty of both robbery and attempted robbery and emphasized that if it found him guilty of robbery, it "must not consider the [lesser] offense of attempted robbery."

¶6 The jury convicted Wnuk of all three counts in the information. Its verdict on the robbery count read: "We, the jury, find the defendant Spencer R. Wnuk, guilty of robbery (taking the cell phone) with use of force, as a party to a crime, as charged in the first count of the amended information." Wnuk filed a postconviction motion alleging that the trial court erred by instructing the jury on the offense of robbery of the cell phone and by allowing the charge of attempted robbery as a lesser included offense.[3] The trial court denied Wnuk's postconviction motion and he appeals.

[3] The postconviction motion also raised several claims of ineffective assistance of counsel, none of which are argued on appeal. At the postconviction hearing, Wnuk unequivocally represented that the trial court's instructional errors were being pursued as grounds for a new trial in the interest of justice, rather than under the rubric of ineffective assistance of counsel.

The trial court did not err in instructing the jury on the offense of robbery of the victim's cell phone.

¶7 Wnuk maintains that the trial court improperly instructed the jury on the charged offense of robbery of McDonnell's cell phone because neither the charge nor the corresponding instruction was supported by the trial evidence.[4] At bottom, Wnuk essentially claims that there was insufficient evidence to support the robbery conviction because the victim voluntarily lent the phone to the suspects prior to any show of force. We disagree.

¶8 Pursuant to WIS. STAT. § 943.32(1)(a)[5], robbery by use of force is committed by one who, "with intent to steal, takes property from the person or presence of the owner by … using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property." Here, the robbery was not complete when Wnuk first obtained physical possession of the cell phone from McDonnell without force, but when he subsequently used physical force to overcome McDonnell's resistance in order to retain, take, and carry the phone away from McDonnell's presence. The suspects' simultaneous striking of both McDonnell and Schwarzhuber certainly constituted force overcoming McDonnell's ability to resist. Taking the phone from McDonnell's physical presence, carrying it to La Crosse to make unauthorized calls, and abandoning it

[4] Acknowledging that any instructional error was waived by trial counsel's failure to object at the instructional conference or during trial, *see* WIS. STAT. § 805.13(3), Wnuk asks that this court exercise its discretionary reversal authority under WIS. STAT. § 752.35, to award a new trial in the interest of justice.

[5] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

after it ran out of power demonstrates an intent to permanently deprive McDonnell of the property. We conclude that ample evidence supported the trial court's jury instruction on the robbery of McDonnell's cell phone. *See* ***State v. Ellington***, 2005 WI App 243, ¶7, 288 Wis. 2d 264, 707 N.W.2d 907 ("Whether a jury instruction is appropriate, under the given facts of a case, is a legal issue subject to independent review." (citation omitted)). Because we determine that there was no error, we see no grounds on which to grant a new trial in the interest of justice.

Wnuk is not entitled to a new trial on the ground that the trial court erroneously instructed the jury that the attempted robbery of the victim's wallet was a lesser included offense of the robbery of the victim's cell phone.

¶9 Wnuk argues that he is entitled to a new trial in the interest of justice because the attempted robbery of McDonnell's wallet was not legitimately a lesser included offense of the cell phone robbery charge. In deciding whether to instruct the jury on a lesser-included offense, the trial court must first determine as a matter of law whether the requested instruction relates to an offense that qualifies as a lesser-included of the greater charged crime. *See* ***State v. Muentner***, 138 Wis. 2d 374, 385, 406 N.W.2d 415 (1987).[6] A lesser included crime is one "which does not require proof of any fact in addition to those which must be proved for the crime charged." WIS. STAT. § 939.66(1). An attempt to commit the charged crime is an included offense. § 939.66(4). Wnuk argues that his attempt to rob McDonnell of his wallet does not qualify as an included offense of the cell

[6] If the requested instruction qualifies as a lesser offense, the court must also determine whether the evidence of record provides a reasonable factual basis for acquittal on the greater offense and conviction on the lesser offense. ***State v. Muentner***, 138 Wis. 2d 374, 385, 406 N.W.2d 415 (1987).

phone robbery because they were actually two separate offenses with different facts and the cell phone theft was completed before the suspects attempted to steal McDonnell's wallet.

¶10 Even assuming that the attempted robbery did not qualify as a lesser included offense, we conclude that Wnuk is not entitled to a new trial. First, any error was harmless.[7] The trial court instructed the jury to "make every reasonable effort to agree unanimously" on the robbery charge before considering the lesser offense and that it should consider the lesser offense of attempted robbery only if it was unable to reach unanimous agreement on the greater charge. Because the jury found Wnuk guilty of the cell phone robbery, it had no reason to reference the allegedly improper lesser offense instruction. *See* ***State v. Deer,*** 125 Wis. 2d 357, 364, 372 N.W.2d 176 (Ct. App. 1985) (the jury is presumed to follow its instructions). Because the jury convicted Wnuk of the greater offense, any error in providing an improper lesser included offense was harmless. *See* ***State v. Truax***, 151 Wis. 2d 354, 363, 444 N.W.2d 432 (Ct. App. 1989) (where the jury convicted defendant on the greater offense, any trial court error in failing to provide a properly requested lesser included instruction was harmless).

¶11 Second, we conclude that Wnuk is not entitled to a new trial in the interest of justice because even if the lesser included instruction was improper, it did not prevent a full trial on the real controversy. WIS. STAT. § 752.35 (recognizing this court's authority to reverse a judgment appealed from "if it

[7] The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). A reasonable possibility is a "possibility sufficient to undermine our confidence in the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919.

appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."). Wnuk asserts that the attempted robbery instruction confused the jury by erroneously linking the taking of the cell phone with the attempt to take McDonnell's wallet. We disagree.

¶12 An improper jury instruction may warrant reversal where the "instruction obfuscates the real issue or arguably caused the real controversy not to be fully tried." ***State v. Sanders***, 2011 WI App 125, ¶13, 337 Wis. 2d 231, 806 N.W.2d 250 (Ct. App. 2011) (citation omitted). "An appellate court may order a new trial on the real-controversy-has-not-been-fully-tried aspect even though it cannot conclude that there would be a different result following a retrial." ***Id.*** We will exercise our discretionary reversal power "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶13 It is not apparent to this court how the inclusion of an unconsidered lesser offense, even if improper, could have operated to prevent a full trial on the real controversy in this case, whether Wnuk was guilty of the crime of robbery. The jury was properly instructed on the essential elements of the robbery offense and was clearly and repeatedly directed to consider the robbery charge without reference to the lesser-included offense. The State's theory at trial was that Wnuk committed the robbery by removing and keeping the cell phone from McDonnell's presence by using force only after Wnuk had "borrowed" it with McDonnell's consent. Wnuk's theory of defense was that he had an alibi and was misidentified as a codefendant. The form of the jury's guilty verdict shows that it properly understood that the robbery charge and its requisite force element related only to the taking of the cell phone. Nothing in the record suggests that the lesser included offense instruction prevented a full trial on the real controversy.

¶14 Wnuk draws our attention to ***State v. Austin***, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833, wherein the appellate court concluded that the trial court's failure to properly instruct the jury on self-defense required reversal in the interest of justice. Austin was acquitted of the greater charge of first-degree recklessly endangering safety, but convicted of the lesser included offense. Austin raised the affirmative defenses of self-defense and defense of others. The trial court failed to clarify for the jury the State's burden of proof as to Austin's affirmative defenses. Because it was undisputed that Austin had stabbed both victims, the appellate court stated that the "only real issue was whether Austin was properly acting in his or [another's] defense" and that "[b]y not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question." ***Id***., ¶23.

¶15 Wnuk asserts that as in ***Austin***, the erroneous instruction did not provide the jury with the proper analytical framework for analyzing the facts and applying them to the law. We fail to see the parallel. In ***Austin***, the jury was not properly instructed on the defendant's affirmative defenses, the existence of which were at the center of his case. Here, the trial court provided an allegedly improper lesser included instruction, which, given Wnuk's conviction on the charged offense, was never even considered. Given our earlier conclusion that the trial court's robbery instruction was proper, the lesser included instruction, even if improper, did not create a faulty framework for analyzing whether Wnuk was guilty of the greater charged offense. Wnuk has failed to establish that the attempted robbery instruction had any bearing on the issues considered by the jury such as to prevent a full trial on the real controversy.

By the Court.—Judgment and order affirmed.

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