**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

October 28, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-2981-CR**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**THOMAS K. MALMQUIST,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

SCHUDSON, J. Thomas K. Malmquist appeals from the judgment of conviction, following a jury trial, for operating a motor vehicle while under the influence of an intoxicant. He argues that he was denied a fair trial because: (1) the trial court erroneously exercised discretion in several ways regarding the sequestration of witnesses; (2) the trial court erroneously exercised discretion in admitting evidence of his prior convictions; and (3) the prosecutor

improperly referred to the results of the refusal hearing in her opening statement. This court concludes that no prejudice resulted from any error regarding sequestration; that although the trial court may have failed to properly exercise discretion regarding admission of Malmquist's prior convictions, their admission was proper; and that Malmquist waived his challenge to the prosecutor's opening statement. Accordingly, this court affirms.

Two West Allis police officers, David A. Hoffmann and John Lovas, testified at the refusal hearing and trial. The trial was conducted immediately following the refusal hearing. The trial court, while ordering sequestration of witnesses at each proceeding, viewed the refusal hearing and trial as separate actions and, therefore, allowed the State to change in-court officers from Officer Hoffman at the refusal hearing, to Officer Lovas at the trial. Moreover, the trial court rejected Malmquist's contention that hallway communication between the officers, in between the refusal hearing and the trial, constituted a violation of either sequestration order.

At the refusal hearing, Officer Hoffmann testified first and then remained in the courtroom when Officer Lovas testified. At the trial, Officer Hoffmann again testified first. Officer Lovas, however, as the newly-designated in-court officer for the trial, heard Officer Hoffmann's testimony before Officer Lovas testified at trial. Officer Hoffmann, having heard Officer Lovas's testimony at the refusal hearing, would have had the benefit of hearing that testimony regardless of whether he or Officer Lovas would have become the in-court officer at the trial. Officer Lovas, however, would not have heard any of Officer Hoffmann's testimony at either proceeding unless Officer Lovas was designated the in-court officer for the trial and unless Officer Hoffmann preceded him in testifying at trial. Unfortunately, that is exactly what occurred.

Understandably, Malmquist complains that the trial court's separation of the refusal hearing from the trial for purposes of sequestration orders hardly establishes the fire wall between witnesses that sequestration intends to erect. *See* ***James v. Heintz***, 165 Wis.2d 572, 582-83, 478 N.W.2d 31, 36 (Ct. App. 1991). In this case, however, he suffered no prejudice from what may have been the trial court's errors in establishing and enforcing sequestration.

Malmquist argues that the officers' hallway discussion between the refusal hearing and trial violated the sequestration orders and, further, that the trial court erred by failing to determine the content of the officers' hallway discussion. Malmquist, however, did not seek to provide an offer of proof or call the officers to establish what they said. Instead, he now maintains that it was the trial court's responsibility to do so as part of its obligation to enforce the sequestration order under § 906.15, STATS.

Whether the trial court, *sua sponte*, should have done so, or whether Malmquist, under § 901.03(1)(b), STATS., should have done so, is not entirely clear.[1] Malmquist's failure to make the attempt, however, is revealing. After all, although Malmquist argues that the discrepancy between Officer Hoffmann's refusal hearing testimony and trial testimony regarding whether Malmquist requested a blood test was prejudicial, he does not contend that the discrepancy derived from the hallway conversation. Indeed, he posits what is far more likely: that, if not inadvertent, Officer Hoffmann's differing trial testimony resulted from

[1] Section 901.03(1)(b), STATS., explicitly ties the requirement of an offer of proof to rulings "excluding evidence." Here, although the trial court's ruling was not one directly excluding evidence, it was one that hinged the allowance of testimony on the exclusion of information about what had transpired in the hallway. Thus, it was functionally equivalent to a ruling excluding evidence for which an offer of proof would have been essential to the full evaluation of the issue.

his familiarity with Officer Lovas's refusal hearing testimony. Significantly, Malmquist points to no other discrepancy or anything else in the testimony of either officer that even hints at hallway collusion.[2]

Thus, in the first place, nothing in the record documents the substance of the officers' hallway conversation and, in the second place, everything in the record establishes that, even under a very unlikely worst case scenario, the hallway conversation cultivated collusion on nothing more than the virtually immaterial subject of whether Malmquist requested a blood test. Therefore, even assuming (as this court does) that the officers' hallway contact did indeed violate what should have been a consistent sequestration order spanning both proceedings, and even assuming (as this court does) that the State should not have been allowed to alter its in-court officers or the order of their testimony, the violations produced no prejudice. *See* ***State v. Bembenek***, 111 Wis.2d 617, 637, 331 N.W.2d 616, 626 (Ct. App. 1983) ("[I]f there is no prejudice to the defendant, it is not error to allow a witness to testify even if the party calling the witness participated in the violation [of the sequestration order].").

The trial court permitted the State to impeach Malmquist with four prior convictions: operating while under the influence in 1993; possession of controlled substance in 1993; fleeing from officer in 1985; and burglary, party to a crime, in 1980. The defense objected to the last two as too remote, but the trial court ruled:

[2] The *de minimis* nature of the discrepancy in Hoffmann's two testimonies – on the subject of whether Malmquist asked for a blood test – is further established by the fact that, as Malmquist concedes, at trial he did not even attempt to impeach Officer Hoffmann with his inconsistent prior testimony from the refusal hearing.

> I know what the Federal rule is, but this is State court. It's my practice to permit impeachment with prior convictions, and I'm going to permit it here going back as far as 1980. I think that it's relevant to the issue of credibility, and that's all.

"When a circuit court exercises discretion, the record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case." ***State v. DeSantis***, 155 Wis.2d 774, 777 n.1, 456 N.W.2d 600, 602 n.1 (1990). Thus, to the extent that the trial court based its decision on its "practice," the trial court failed to exercise discretion with a proper focus on the facts and circumstances of this specific case. However, "[a]n appellate court may engage in its own examination of the record to determine whether the facts provide support for the circuit court's decision." ***Id***.

This court has explained:

> A prior conviction on any crime is relevant to the credibility of a witness's testimony. Our law presumes that a person who has been convicted of a crime is less likely to be a truthful witness that a person who has not been convicted. The fact and the number of such convictions are therefore relevant evidence.
>
> ….
>
> When deciding whether to admit evidence of prior convictions for impeachment purposes [under § 906.09, STATS.,] a trial court should
>
> > consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement …, the probative value of the evidence of the crime is substantially outweighed by the danger of undue prejudice.

***State v. Kruzycki***, 192 Wis.2d 509, 525, 531 N.W.2d 429, 435 (Ct. App. 1995) (citations omitted). This court, having examined the record, agrees with the trial court that the four criminal convictions were "relevant to the issue of credibility."

The record discloses no details about the offenses. Clearly, the trial court, under the ***Kruzycki*** criteria, could have probed for additional information. The defense, however, failed to argue anything other than "remoteness in time" as the basis for exclusion of the two oldest offenses. There is a certain irony in that argument. If, as ***Kruzycki*** reiterates, conviction for "any crime" is relevant to credibility, would not prior convictions be all the more relevant because they span so many years as to establish the ever-lessening likelihood that a defendant is credible? Here, Malmquist has offered nothing about the "remoteness" of the two oldest convictions that should have led to their exclusion as a basis for impeachment.

Malmquist also argues that the prosecutor's opening statement reference to the refusal finding was improper. Malmquist, however, failed to object promptly; he did not raise the issue until completion of all trial testimony. Thus, he waived this claim. *See* ***State v. Fawcett***, 145 Wis.2d 244, 256, 426 N.W.2d 91, 96 (Ct. App. 1988).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.