COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0092-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRY RAHEEM JONES,
A/K/A TOMIE LEE JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Terry Raheem Jones, a/k/a Tomie Lee Jones, appeals from a judgment of conviction entered after a jury found him guilty of possession of a controlled substance, cocaine base, with intent to deliver, in

violation of §§ 161.16(2)(b)(1) and 161.41(1m)(cm)(2), STATS., 1993-94.[1] Jones argues that: (1) the trial court erred in denying his motion to suppress evidence, alleging that the evidence was illegally seized from his home; (2) the trial court erred in denying his motion for a mistrial; and (3) the trial court erred in admitting evidence that it had previously held inadmissible. We affirm.

I. BACKGROUND

According to the testimony of Officer Jeffery Hadrian and Officer Richard Jaeger, and as either explicitly or implicitly found by the trial court, the facts are as follows. On January 4, 1996, Officer Hadrian, Officer Jaeger and two other officers went to the apartment building in which Jones lived to investigate a report of drug trafficking. The officers watched the building for about thirty minutes and noticed that many people were coming to the building for a very short time and then leaving. The officers then went into the building. While in the hallway, Officer Hadrian saw Jones exiting his apartment. Officer Hadrian identified himself as a police officer and asked Jones to speak with him, but Jones quickly returned to his apartment and closed the door. Officer Hadrian then ran down the hall to Jones's apartment and knocked on the door. After a ten to fifteen second delay, Jones opened the door. Officer Hadrian again identified himself, and Jones asked Officer Hadrian what he wanted. Officer Hadrian said that he and Officer Jaeger were investigating a report of drug trafficking, and he asked Jones if they could enter his apartment and talk with him. Jones told the officers, "Come on in."

[1] Effective July 9, 1996, §§ 161.16(2)(b)(1) and 161.41(1m)(cm)(2), STATS., 1993-94, were recodified in chapter 961, STATS., 1995-96. *See* 1995 Wis. Act 448, §§ 173, 245, 515.

Once inside the apartment, Officer Hadrian noticed two corner cuts of cocaine base on the ledge of a half-wall that separated the kitchen from the dining area. When Jones realized that Officer Hadrian had noticed the cocaine, he said that it belonged to someone named Marvin. Officer Hadrian then asked Jones if he had any knowledge of drug trafficking in the building. Both Jones and his girlfriend, Tawanna Steward, who also lived in the apartment, said that they knew nothing about drug trafficking. Officer Hadrian then requested consent to search the apartment. Both Jones and Steward consented.[2] The officers searched the apartment and found cocaine in a bedroom trash can. Officer Hadrian then read Jones his ***Miranda*** rights and asked him for identification.[3] Jones identified himself as Tomie Lee Jones, but the officers later learned that Tomie Lee was not Jones's name. While Officer Hadrian was speaking to Jones, Officer Jaeger found some cocaine under the couch. Officer Jaeger also searched Jones and found $681 in twenty, ten and one dollar bills in the right pocket of Jones's pants. Jones admitted to the officers that the cocaine found under the couch belonged to him. He said that he had purchased three packages of cocaine earlier that day, that he had sold two of them and that he planned to sell the third. Jones then offered to act as a confidential informant for the police to assist in arresting other drug dealers in order to avoid going to jail. In response to this offer, the officers did not take Jones into custody on January 4, 1996. Jones was arrested on January 18, 1996, and a jury subsequently found him guilty of possession of cocaine with intent to deliver.

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[2] As noted below, Jones denied that he or anyone consented to search.

[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

II. DISCUSSION

Jones argues that the officers illegally entered and searched his apartment without a warrant and without consent, and, therefore, the trial court erred in denying his motion to suppress the evidence seized from his apartment. Warrantless searches "are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967) (footnotes omitted). One such exception is consent. ***Id.***, 389 U.S. at 358 n.22. "Whether consent was given and the scope of the consent are questions of fact we will not overturn unless clearly erroneous." ***State v. Garcia***, 195 Wis.2d 68, 75, 535 N.W.2d 124, 127 (Ct. App. 1995).

At the hearing on the suppression motion, Jones testified that he opened the door to his apartment after he heard the doorbell; that upon opening the door, Officer Hadrian and Officer Jaeger grabbed him, cuffed him, and searched the right pocket of his pants; and that the officers then proceeded to search his apartment without consent. Contrary to Jones's testimony, Officer Hadrian testified that Jones invited the officers into his apartment and that both Jones and Steward gave the officers consent to search the apartment. The trial court determined that Officer Hadrian was a more credible witness than Jones, and therefore found that Jones had consented to the officers' entry and search of his apartment. A trial court's findings of fact will be upheld on appeal unless "clearly erroneous." RULE 805.17(2), STATS., made applicable to criminal proceedings by § 972.01, STATS. "Because the trial court is the sole judge of credibility, this court will not reverse a credibility determination unless we could conclude, as a matter of law, that no finder of fact could believe the testimony." ***Garcia***, 195 Wis.2d at 75, 535 N.W.2d at 127. Officer Hadrian's testimony that Jones gave consent is

not so incredible that no finder of fact could believe the testimony, and thus the trial court's finding that Jones gave consent is not clearly erroneous.

Jones next argues that the trial court erred in denying his motion for mistrial, which was based on the admission of an oral statement he had made to Officer Hadrian regarding his willingness to act as a confidential informant; he claims that he was entitled to a mistrial because the State failed to disclose the statement to defense counsel pursuant to a discovery request and § 971.23(1), STATS., 1993-94.[4]

The decision as to whether or not to grant a mistrial is within the sound discretion of the trial court. ***State v. Pankow***, 144 Wis.2d 23, 47, 422

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[4] Jones's discovery request demanded that the district attorney:

> Furnish the defendant with a written summary of all oral statements of the defendant which the District Attorney plans to use in the course of the trial. The term "summary," as demanded herein, should be in the most complete form available to the State and should cover every issue of fact or circumstances allegedly discussed between the defendant and the other party to the conversation; Sec. 971.23 (1), Wis. Stats., Kutchera v. State, 69 Wis.2d 534, 230 N.W.2d 750 (1975).

Section 971.23(1), STATS., 1993-94, provided:

> DEFENDANT'S STATEMENTS. Upon demand, the district attorney shall permit the defendant within a reasonable time before trial to inspect and copy or photograph any written or recorded statement concerning the alleged crime made by the defendant which is within the possession, custody or control of the state including the testimony of the defendant in an s. 968.26 secret proceeding or before a grand jury. Upon demand, the district attorney shall furnish the defendant with a written summary of all oral statements of the defendant which the district attorney plans to use in the course of the trial. The names of witnesses to the written and oral statements which the state plans to use in the course of the trial shall also be furnished.

Effective January 1, 1997, 1995 Wis. Act 387, § 7 recodified this section at § 971.23(1)(a), (b), STATS., 1995-96, without a significant substantive change. *See* 1995 Wis. Act 387, §§ 7, 37.

N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial to warrant a new trial. ***Id.*** The denial of a motion for mistrial will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Id.***

We find that the trial court properly exercised discretion in denying Jones's motion for mistrial. Section 971.23, STATS., 1993-94, provided only two sanctions for non-compliance with its provisions: (1) exclusion of the proffered evidence; or (2) a recess or continuance. *See* § 971.23(7), STATS., 1993-94[5]; ***State v. Calhoun***, 67 Wis.2d 204, 217–218, 226 N.W.2d 504, 510 (1975). The trial court could reasonably have concluded that the discovery violation was not sufficiently prejudicial to warrant a new trial, but rather that it warranted only the less drastic curative measures provided by the statute. Because the statute provides only these less drastic curative measures as sanctions for non-compliance, Jones has failed to make a clear showing that the trial court erroneously exercised its discretion in denying his motion for a mistrial.[6] *See* ***Calhoun***, 67 Wis.2d at 217, 226 N.W.2d at 510 (the discovery statute controls as to the rights of a defendant and the procedures to be followed in enforcing those rights).

[5] Effective January 1, 1997, 1995 Wis. Act 387, § 19 recodified this section at § 971.23(7m)(a), STATS., 1995-96, without substantive change. *See* 1995 Wis. Act 387, §§ 19, 37.

[6] In his reply brief, Jones also argues that the trial court erred in failing to exclude the evidence because the language of the statute mandates exclusion for non-compliance, unless good cause is shown for failure to comply. We do not address this issue, however, because Jones has raised it for the first time in his reply brief. *See* ***Bilsie v. Swartwout***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981) (appellate court will not consider issues raised for the first time in a reply brief).

Additionally, Jones failed to object timely to the evidence regarding his willingness to act as a confidential informant, and he has therefore waived the issue. RULE 901.03(1)(a), STATS., requires a party to make a specific and timely objection to the admission of evidence in order to preserve the issue for appeal. Jones failed to object to the evidence when it was elicited on direct examination; he did not object until after he had completed cross-examination of the witness. This objection was not timely, and Jones has, therefore, waived the issue. *See* ***Caccitolo v. State***, 69 Wis.2d 102, 113, 230 N.W.2d 139, 145 (1975).

Jones's final argument is that the trial court erred in admitting evidence that he possessed marijuana after the date of the cocaine offense because the trial court had previously granted his pre-trial motion in limine to exclude evidence of Jones's other misconduct.

Trial courts are granted broad discretion in determining whether to admit or exclude proffered evidence. ***State v. Larsen***, 165 Wis.2d 316, 319–320, 477 N.W.2d 87, 88 (Ct. App. 1991). Our review is limited to determining whether the trial court erroneously exercised this discretion. ***Id.***, 165 Wis.2d at 320 n.1, 477 N.W.2d at 89 n.1. We will not overturn a trial court's evidentiary ruling unless there was no reasonable basis for it. ***Id.***, 165 Wis.2d at 320, 477 N.W.2d at 88.

The record reveals that the trial court had a reasonable basis for admitting the marijuana evidence, and, therefore, we hold that the trial court did not erroneously exercise its discretion. On direct examination, in response to defense counsel's question, Jones stated that he did not use drugs. Jones thereby opened the door to the evidence that he had been found in possession of marijuana by denying on direct-examination that he used drugs. *See* ***Harris v. New York***,

401 U.S. 222 (1971) (evidence otherwise inadmissible under ***Miranda*** is admissible for impeachment purposes when a defendant takes the stand and testifies contrary to that evidence); *see also* RULE 906.08(2), STATS. (cross-examination into specific instances of conduct of a witness, other than a conviction of a crime, is permissible if probative of truthfulness or untruthfulness). Jones cannot seek to enforce the ruling on the motion in limine in order to "provide himself with a shield against contradiction of his untruths." ***Harris***, 401 U.S. at 224. We therefore find that the trial court properly exercised its discretion in admitting the proffered evidence despite the earlier ruling on the motion in limine because Jones himself opened the door to the evidence with his statement on direct-examination.[7]

By the Court.—Judgment affirmed.

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

[7] Based upon the foregoing analysis, we also reject Jones's argument that the prejudicial effect of the evidence substantially outweighed its probative value, and it therefore should have been excluded. *See* RULE 904.03, STATS.