COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0516-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DANIEL AGUILAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Daniel Aguilar appeals from a judgment of conviction for four counts of party to the crime of armed robbery and five counts of first-degree recklessly endangering safety. He argues that various counts of the amended information should have been dismissed because they were not transactionally related to the evidence adduced at the preliminary hearing. He also

claims that it was error to admit prior testimony of a victim and statements the victims made to the police identifying him as one of the robbers. We affirm the judgment.

The first issue is whether the multiple counts charged are transactionally related so as to be based on the evidence adduced at the preliminary hearing. *See* ***State v. Williams***, 198 Wis.2d 479, 492-93, 544 N.W.2d 400, 405 (1996). The issue arises because there were multiple occupants in the apartment that Aguilar and his codefendant entered, but only a few of the victims' names were mentioned in the testimony presented at the preliminary hearing.[1] Our review is limited for two reasons.

Aguilar filed motions to dismiss the information and amended information on the ground that charges were made for victims who had not even

[1] The complaint charged five counts of party to the crime of armed robbery while masked. It alleged that there were seven people in the apartment at the time. At the preliminary hearing held on June 28, 1994, the only witness was victim Miguel Blas. He confirmed that there were five men present at the apartment when Aguilar and another entered brandishing a gun and demanding money. He recounted how the robbers took money from himself and a man named Raul, and that the robbers attempted to take money from Salvador Patino. A struggle over the gun ensued and Aguilar baited his codefendant to shoot Patino. The prosecution filed an information charging five counts of party to the crime of armed robbery while masked with respect to Blas, Daniel Delgado, Javier Patino, Jose Anamon and Salvador Patino.

After Aguilar withdrew his ***Alford*** plea, an amended information was filed charging two counts of masked armed robbery (as to Blas and Delgado), two counts of attempted masked armed robbery (as to Javier Patino and Anamon), and seven counts of recklessly endangering safety (as to Yvonne Rodriguez, Salvador Patino, Javier Patino, Blas, Jose de Avila, Delgado and Raul Villalobos). Finally, a second amended information was filed charging three counts of masked armed robbery (as to Blas, Javier Patino and Villalobos), two counts of attempted masked armed robbery (as to de Avila and Salvador Patino), and the seven counts of recklessly endangering safety.

been mentioned in the preliminary hearing testimony.[2] At the December 8, 1995 motion hearing, the trial court proposed that an additional preliminary hearing be conducted with respect to the charges that Aguilar challenged. Aguilar's attorney stated, "I have no problem with that." Thus, Aguilar stipulated to a continuation of the preliminary hearing and cannot be heard to complain about the informations filed before the completion of the continued preliminary hearing.[3]

Aguilar also filed a motion to dismiss six counts of the twelve-count second amended information filed on December 15, 1995, after the completion of the continued preliminary hearing. Aguilar again argued that there was no evidence adduced at the preliminary hearing to support specific counts.[4] The trial court denied the motion.

The State contends that any challenge to the charging documents is cured by a fair and error-free trial. *See* ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991). We agree. The remedy, if error occurred, is to dismiss

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[2] A recurrent theme in Aguilar's arguments that the first and amended informations be dismissed is that the trial court found no probable cause for certain crimes. Even if we were to read the trial court's ruling as Aguilar does, any discussion regarding whether the prosecution had or had not established probable cause as to the precise felonies charged in the complaint was inappropriate, unnecessary and inconsistent with precedent recognizing the quasi-judicial charging discretion of the prosecutor. *See* ***State v. Akins***, 198 Wis.2d 495, 513, 544 N.W.2d 392, 399 (1996).

[3] For this reason, we summarily reject Aguilar's claim, which is made for the first time on appeal, that the trial court lost personal jurisdiction over him because the preliminary hearing was not completed within ten days of being taken into custody. A defendant may waive objections to the trial court's personal jurisdiction. *See* ***Armstrong v. State***, 55 Wis.2d 282, 285-86, 198 N.W.2d 357, 358 (1972).

[4] At the continued preliminary hearing, Aguilar's codefendant, victim Rodriguez and victim de Avila testified. Aguilar's motion to dismiss argued that there was not sufficient evidence that Villalobos or Delgado were at the apartment or that Rodriguez was the target of the robbery or in any way endangered. He also claimed that it was unfair to include crimes against de Avila because they had not been mentioned in the complaint.

the charges and permit the prosecution to refile them and conduct a new preliminary hearing. However, Aguilar was acquitted of crimes against Raul Villalobos and Daniel Delgado, the two persons he claimed were not shown to be in the apartment, and guilt beyond a reasonable doubt was established at trial on the other charges Aguilar claims should have been dismissed. The remedy runs counter to the principles recognized in ***Webb*** regarding conserving judicial resources. *See* ***id.*** at 629, 467 N.W.2d at 111. We do not review the claim of error.[5]

Citing ***State v. Hooper***, 101 Wis.2d 517, 538-39, 305 N.W.2d 110, 121 (1981), Aguilar suggests that the reckless endangering safety charges were made to punish him for withdrawing his plea and forcing the case to trial. This is not a ***Hooper*** situation. ***Hooper*** stands for the proposition that it is a misuse of prosecutorial discretion to bring "'charges on counts of doubtful merit for the purpose of coercing the defendant to plead guilty to a less serious offense.'" ***Id.*** at 538, 305 N.W.2d at 121 (quoted source omitted). The charges were related to the evidence adduced at the preliminary hearing and certainly did not lack merit. There is no basis to claim misuse of prosecutorial discretion.

Aguilar argues that the preliminary hearing testimony of Blas should not have been read to the jury at trial because the prosecution failed to establish that Blas was unavailable. *See* § 908.045(1), STATS. To establish under

[5] Even if the issue is properly before this court, we conclude that even in the absence of evidence that specific victims were present or robbed, the counts charged in the information were transactionally related to the evidence adduced at the preliminary hearing. All that is necessary is that the counts charged in the information "flow from the same transaction for which evidence has been introduced at the preliminary hearing." ***State v. Richer***, 174 Wis.2d 231, 247, 496 N.W.2d 66, 71 (1993). A new transaction was not commenced as Aguilar and his codefendant moved from victim to victim within the apartment.

§ 908.04(1), STATS., that a witness is unavailable because his or her attendance could not be procured, the prosecutor must make a showing that diligent attempts were made to procure attendance of the witness. *See* ***State v. LaFernier***, 44 Wis.2d 440, 444-45, 171 N.W.2d 408, 410-11 (1969). The length to which the prosecution must go to produce a witness is a question of reasonableness. *See* ***State v. Nelson***, 138 Wis.2d 418, 437, 406 N.W.2d 385, 393 (1987).

Aguilar claims that the prosecution only showed that a police investigator had attempted to locate Blas thirteen months before the beginning of the trial.[6] Aguilar ignores the officer's testimony that he was informed that Blas had returned to Mexico and that he made several attempts to locate Blas without success. The trial court found that process was attempted for production of Blas at the trial. The trial court's finding that the prosecution made a good-faith effort in attempting to produce Blas for trial is not clearly erroneous. *See* § 805.17(2), STATS. (made applicable to criminal proceedings by § 972.11(1), STATS.). There was no erroneous exercise of discretion in admitting Blas's former testimony. *See* ***State v. Barksdale***, 160 Wis.2d 284, 287, 466 N.W.2d 198, 199 (Ct. App. 1991) (the decision to admit hearsay under an exception rests within the trial court's discretion).

Aguilar makes two claims regarding the admission of statements Blas and Delgado made to police identifying Aguilar as one of the robbers. Police

[6] The State suggests that because Aguilar in his postconviction motion did not challenge the trial court's determination that Blas was unavailable and did not have anything to dispute the belief that Blas had returned to Mexico, Aguilar has "conceded away any argument on appeal that Miguel Blas was improperly declared unavailable." However, at trial Aguilar argued that the prosecution had not met its burden of establishing unavailability or good faith effort to locate. The issue is not waived. Section 974.02(2), STATS., provides that a defendant is not required to file a postconviction motion in the trial court prior to an appeal on issues previously raised.

officers were permitted to testify about the identification made when Blas and Delgado were taken to a hospital where Aguilar was being treated for injuries sustained in the apartment fight. Aguilar claims that it was error to admit the statements pursuant to an excited utterance exception to the hearsay exclusion and that their admission violated his right of confrontation.

The State argues that the statements were admissible, regardless of whether Blas or Delgado was available to testify, as nonhearsay statements "of identification of a person made soon after perceiving the person." Section 908.01(4)(a)3, STATS. Although the trial court rejected the notion that the statements were nonhearsay, we may sustain the trial court's determination on different grounds. *See* ***State v. Sharp***, 180 Wis.2d 640, 650, 511 N.W.2d 316, 321 (Ct. App. 1993). Whether a statement is hearsay is a question of law which we decide de novo. *See* ***id.*** at 649-50, 511 N.W.2d at 320-21.

Section 908.01(4)(a), STATS., provides that a statement of identification is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." Blas testified at the preliminary hearing about the hospital identification and was subject to cross-examination as to his identification. His statement was properly admitted as nonhearsay.

Delgado was not a witness at trial. Although it may have been error to admit his statement identifying Aguilar, it was harmless error in light of Blas's identification. Moreover, identification was not at issue as Aguilar himself testified that he was with his codefendant and went to the apartment to rescue his codefendant. Aguilar sustained injuries which indicated that he had been part of the melee that occurred in the apartment.

Based on our conclusion that the admission of the identification statements was not error or was harmless error, we reject Aguilar's contention that he was denied his right of confrontation.[7] *See* ***State v. Lomprey,*** 173 Wis.2d 209, 220-21, 496 N.W.2d 172, 177 (Ct. App. 1992) (confrontation clause violations are subject to harmless error analysis).

By the Court.—Judgment affirmed.

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

[7] At trial, Aguilar did not raise a confrontation challenge to the admission of the identification statements of Blas and Delgado. By the failure to make a specific objection, the right to review of the issue is waived. *See* ***State v. Marshall***, 113 Wis.2d 643, 653, 335 N.W.2d 612, 617 (1983). *See also* ***State v. Caban***, 210 Wis.2d 598, 605, 563 N.W.2d 501, 505 (1997) (the party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court).