COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0751

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

IN THE INTEREST OF DE MARIO O., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DE MARIO O.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. FLYNN, Judge.[1] *Affirmed.*

BROWN, J. The mother of DeMario O., a spectator at DeMario's juvenile delinquency trial, made a comment while the jury was in the

[1] Judge Nancy Wheeler was the trial judge. Judge Dennis Flynn heard the postconviction motions and issued the order.

courtroom and while court was out of session. DeMario claims the jurors overheard the comment and it prejudiced them. He contends that the trial court misused its discretion in denying his motion for a mistrial. In his brief-in-chief, DeMario further contends that the court erred by not at least giving a curative instruction. After the State responded and cited to that part of the closing instructions showing that the trial court did, in fact, give a curative instruction, DeMario's reply brief argues that the curative instruction was ineffectual because it should have been given earlier and was "buried" by the other instructions. But DeMario has failed in his burden to show prejudice. And because he did not raise the issues of timing and placing of the curative instruction until the reply brief, we should not even be addressing these issues. We do so anyway and, in doing so, determine that even if prejudice existed, DeMario has failed to show how the curative instruction was ineffective. We affirm.

A jury convicted DeMario of one count of battering a prisoner. The record shows that just prior to closing arguments, the jury was in the courtroom and the judge, the attorneys and DeMario were in conference out of the room. At some point, DeMario's mother commented aloud that she knew what was going on; she then commented that this was an unfair trial. As she was leaving the courtroom by a door next to the jury box, she again stated that the trial was unfair. The bailiff reported the mother's action to the trial court, and the trial court had the bailiff describe what happened for the record. The prosecutor commented that "those kind of statements and that kind of activity was occurring throughout the entire trial." He asked that the jury be given a curative instruction. DeMario's trial counsel, however, asked the trial court to declare a mistrial. The trial court denied the motion but decided to give a curative instruction, which it gave with the

other jury instructions following closing arguments. DeMario was found guilty and appeals.[2]

The decision to grant a mistrial lies within the sound discretion of the trial court. *See* ***State v. Pankow,*** 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). We will reverse a trial court's denial of a mistrial only when there is a clear showing of misuse of discretion. *See* ***id.*** If a curative instruction is given, any possible prejudice is presumptively erased. *See* ***State v. Bowie***, 92 Wis.2d 192, 210, 284 N.W.2d 613, 621 (1979). Thus, DeMario must show that the prejudicial impact of the statement is so great that any curative instruction fails to presumptively erase the prejudice against him and that a mistrial is warranted.

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[2] Originally, we issued an order dismissing DeMario's appeal without addressing the merits because there was no transcript. Without a transcript, we could not address the specific issues raised. DeMario's counsel asked us to reconsider and explained that she could not verify the contents of the record following the notice that the record was ready for transmittal because she was on maternity leave. She further blamed her legal assistant for failing to draw the clerk's notice of compilation of the record to her attention. Notwithstanding the fact that she bears the ultimate responsibility for the record, her explanation fails to address what we consider to be the main problem.

Counsel's briefs are supposed to cite to the record on appeal. *See* RULE 809.19, STATS. At the time she briefed the appeal, counsel obviously did not check the index to the record to provide those cites. Had she done so, she would have noticed that the transcripts were not part of the record. While her explanation perhaps explains her having missed the defective record at the time the record was transmitted to this court, it does not excuse her briefing the appeal with an inadequate record. It is a rather simple exercise for an appellate counsel, faced with the prospect of briefing an appeal when the record is incomplete, to move the court to correct the record.

Here, counsel never caught the problem with the record, despite several opportunities to gain this knowledge. We find this to be particularly frustrating in light of the fact that DeMario's postconviction motion was denied because the postconviction judge did not have a copy of the transcript and, not having been the trial judge, could not make a reasoned decision based upon the record. In our opinion, this should have alerted counsel to make completion of the record on appeal a priority. All of that being said, and now that we have the transcript, we nonetheless will consider the appeal on its merits because we do not wish to visit the errors of counsel upon her client.

On appeal, DeMario claims that his mother's statements could be taken as an inference by the jury that DeMario "was in fact guilty." He further submits that if the mother were perceived by the jury to be "rude, abrasive or harsh, it would likewise believe equally distasteful things about her son." He also attacks what he claims was the lack of a reasoning process by the trial court. He asserts that he is "entitled to a more direct and accountable explanation for denying the mistrial and jury instructions." He further complains that the mother had made remarks throughout the trial and that the trial court failed to take any action regarding these comments.

To begin, the record does not demonstrate that the jury overheard the remarks of the mother. While the mother made the remark about the unfair trial as she was leaving by a door next to the jury box, we cannot unequivocally conclude that the remark was overheard. Next, while DeMario may be convinced that the jury would think his mother to be boorish and transfer its dislike for her to her son, that is pure speculation. We cannot be certain *what* the jury thought of the mother's comments or whether it harbored any animus toward the mother or, indeed, whether it therefore directed any of that animus to the son. In sum, we cannot tell if the comments by the mother prejudiced the jury. All we have is an unsupported assertion that the comments *must have* had that effect. That is not enough for this court.

Further, even if there were prejudice, the trial court gave a curative instruction. The trial court told the jury that "there have been statements made in the courtroom by an observer who had a right to be present. But such statements are not evidence and should not be considered by you." A curative instruction presumptively cures any prejudice. *See* ***Bowie***, 92 Wis.2d at 210, 284 N.W.2d at 621. DeMario has not overcome that presumption. It is presumed by the courts in

this state that jurors will follow the instructions of the judge. There is no indication in the record that the jury declined to follow the judge's instructions here.

DeMario attacks the curative instruction as having come too late and as having been "buried" by other instructions. It is elementary that if an appellant fails to discuss an alleged error in its main brief, it may not do so in the reply brief. *See* ***Sisters of St. Mary v. AAER Insulation,*** 151 Wis.2d 708, 723-24 n.4, 445 N.W.2d 723, 729 (Ct. App. 1989). In his brief-in-chief, DeMario charged that the trial court failed to give a curative instruction. After the State pointed out that a curative instruction was given, DeMario shifted his attack to the timing and lack of prominence given to the instruction. We should not reach these issues.

But, as we pointed out in a prior footnote, because we do not want to visit the errors of appellate counsel upon her client, we will discuss the issues. First, the timing issue borders on the frivolous. The alleged remarks by the mother were made just prior to closing arguments. The instructions to the jury were given immediately following the closing arguments. The curative instruction was given near the beginning of the instructions. DeMario's counsel does not tell us how this short space of time has prejudiced her client to the extent that the jury would not heed the admonition. This is not a case where the alleged offensive conduct took place early in a long jury trial and the curative instruction was given much later. We reject the argument. Second, DeMario's counsel argues that the curative instruction was "buried." We suppose this means that when a jury hears many different instructions at one time, it will not listen to all of them. We find this to be an utterly unpersuasive argument: it has as its genesis the belief that a jury will not listen to all jury instructions given at the close of a trial. Perhaps the argument is that curative instructions, unlike the usual boiler plate instructions, deserve

special attention such that they should be given independently of other instructions. But boiler plate instructions are often curative instructions in themselves. *See, e.g.*, WIS J I—CRIMINAL 150 (Jury is to disregard all testimony ordered stricken from the record during trial); WIS J I—CRIMINAL 147 (Jury should disregard any improper questions that the court did not allow to be answered); WIS J I—CRIMINAL 157 (Remarks of the attorneys are not evidence, and if they implied the existence of facts not in evidence they should be disregarded). We reject this argument as well.

By the Court.—Judgment and order affirmed.

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