COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1715-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TREMAINE GRIFFIN,

DEFENDANT-APPELLANT.

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

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

SNYDER, P.J. Tremaine Griffin appeals from a judgment of conviction for one count of attempted armed robbery, party to a crime, in violation of §§ 943.32(2), 939.32 and 939.05, STATS. He was sentenced to a prison term of fifteen years. Griffin raises the following issues on appeal: (1) whether the trial court impermissibly directed a finding on certain facts, thereby invading the

province of the jury, and (2) if the trial court erred, whether the verdict was based on insufficient evidence which would prohibit a retrial on double jeopardy grounds.

We conclude that the trial court erred when it granted the jury's request for information from the police reports. The officers who had prepared the reports had testified; the trial court should have offered to read portions of the officers' testimony. The trial court then compounded its error by giving an extemporaneous summary of the evidence from the police reports. However, because there were two police eyewitnesses to the crime who testified at trial, we hold that the error was harmless and affirm the conviction.

While driving an unmarked squad car, two Racine police officers passed three men standing by the street. Officer Steven Madsen, who was riding in the passenger seat, stated that his attention was drawn to one of the men because he appeared to be holding or concealing something on his waistband. This individual was wearing a sports jersey with the number "84" on it. Madsen continued to observe the man, and as the squad car drove by, Madsen saw him draw a gun and point it at the head of one of the other two men. Madsen then lost sight of the group as the squad car turned a corner.

Lieutenant Christopher Larson, who was driving the squad car, stopped after turning the corner and backed up in order to return to where the three men were standing. When the officers were able to see the three men again, they had moved into the street. According to Madsen, one of the three men had been five or six feet from the other two when he first observed the group; when Madsen and Larson next saw the men, that individual had come closer to the other two and the officers observed him place his hands at the waist of the man at whom the gun

was pointed. Madsen then exited the squad car, drew his gun and ordered the three men to stop. The men scattered, but then dropped to the ground.

When Officer Andre Steward arrived on the scene, he saw Madsen with his gun drawn, yelling at two men on one side of the street and Larson searching a person on the other side of the street. Steward handcuffed the two men near Madsen, who were later identified as Thomas Hobson and Tremaine Griffin. Both were searched for weapons, but no weapons were found. After speaking to Madsen, who identified Hobson as the victim, Steward drove Hobson to the police department for an interview.

Hobson told Steward that he had been walking down the street when he was approached by two men, whom he identified as Jerome Williams and Griffin. Hobson said that Williams' street name was "J.G." and Griffin's was "Shawn," and he identified Williams as the one who had the gun. Hobson said that Williams demanded money.[1] Hobson also stated that Griffin had gone through his pockets while he was held at gunpoint and that Griffin said to Williams, "[I]f he don't give you the money, pop his ass," which meant "Shoot him." Hobson also told Steward that he would have been killed if the police had not arrived when they did.

Griffin was advised of his rights and agreed to speak with the police. Madsen and another officer conducted the interview. Griffin stated that he heard the individual with the gun, Williams, demand money from Hobson. Griffin admitted that he asked Hobson if he was going to hand over the money after he

[1] Williams' testimony was that this was money Hobson owed him.

saw money in Hobson's hand at one point. Griffin said that he "saw a gun was out," but he never saw Williams point the gun at Hobson.

When the case came to trial, both Larson and Madsen, the officers who were eyewitnesses, testified. Larson, who had been driving the squad car, testified that he first observed the men after the squad car had turned around and come back. At that time, he saw three men on the street. One of the men had a gun to the victim's head, the victim was backing away, and a third individual was patting his hands on the victim's torso. Larson testified that Griffin was the person who was patting down the victim.

Madsen's eyewitness testimony also identified Griffin as the individual who was patting down the victim. Madsen stated that he "caught a glimpse of someone running away" when he and Larson pulled up in the squad car, but he was certain that the individual running from the scene was never part of the group of three individuals who had been standing together. Griffin admitted to Madsen that he had asked Hobson if he was going to give up the money and that he saw money in Hobson's hand at one point. Griffin characterized his involvement as "just standing there while his friend, [Williams], was making demands for the money."

Madsen also interviewed Williams, who was a juvenile at the time of the robbery. Williams told Madsen that he had met up with a friend of his, whom he identified as Hobson, and stated that the two of them were talking about going to Great America on the Fourth of July. He denied ever drawing a gun or pointing it at anyone. Although Madsen told him what he had seen and that Griffin had said a gun was drawn, Williams did not change his story.

At trial, Hobson's testimony differed from the statement he had given police after the incident.[2] At trial he denied that Griffin had aided and abetted Williams in the attempted armed robbery. He further testified that a third person, whom he knew only as "Shawn," was also with Williams and said he could not say whether it was Griffin or "Shawn" who had aided Williams. Hobson testified, "I didn't see [Griffin] around me …. If the police witnessed and say it was—he was around me, I guess that's what it was." He denied telling the police that Griffin went through his pockets, denied saying that Griffin was near him during the robbery, and denied telling the police the names of the individuals who had accosted him. He also testified that he was certain that Williams, Griffin and "Shawn" were three different individuals.

Williams' testimony at trial was that he had pointed a gun at Hobson, but he maintained that Griffin had not said anything to Hobson, nor had Griffin touched Hobson in any way. He placed "Shawn" across the street during the confrontation. Griffin testified on his own behalf. He stated that he was with "Shawn" and Williams earlier and they had talked about going to Great America. He denied that he did anything improper and said that "Shawn was the third person with Hobson and Williams when the squad car passed the group. He claimed that he had gone into a nearby house to smoke a cigarette; when he came out, he saw that "something was happening" and was inadvertently arrested.[3]

[2] Hobson also admitted that he had been the subject of threats with reference to his testifying against Griffin, including being told, "[M]ake Tremaine Griffin out or we'll be by to see you and put you in a cemetery."

[3] The witnesses in this case were sequestered prior to testifying. The woman who owned the house where Griffin claimed to have gone alone to smoke a cigarette testified. She stated that Griffin, Williams and "Shawn" had all been together at her house.

After hearing all of the foregoing testimony, the jury began deliberations. The jury foreperson sent out a request for all of the police reports on the date of the incident. These police reports had been admitted into evidence during trial, but no portion of them had been read to the jury. The court and counsel then read through the police reports to determine which portions of the reports correlated to the testimony received at trial. The court informed counsel that it intended to read those portions of the reports that contained the same information that had been disclosed at trial. Defense counsel objected and asked instead that the jury be told to "just rely on their collective memory with regards to what was testified to with regards to that."

The jury was brought back into the courtroom. A juror asked, "We want to know at any time during the initial investigation there was a mention of a fourth individual, so-called Shawn. We're not clear in any of the initial statements that were taken." The court then read portions of a police report aloud. At the conclusion of the reading, the court added:

> [THE COURT]: All right. Now that one report is the only report where the name Shawn is mentioned. There's the other report by Officer Madsen and if you want me to read that portion to you, let me know, but this is the only report.
>
> [JUROR]: Our question was is the number of individuals that Mr.—the victim met that day. Does any report mention anything?
>
> [THE COURT]: *You heard what the victim told them. You heard what the victim told them. Victim told them that these 2 individuals came up to him. Period. This is what the victim told him.* Okay? Very good…. [Emphasis added.]

The jury returned a guilty verdict without further questions or intervention from the court.

Discussion

Griffin claims that the above comments "denied [him] his constitutional right to an impartial court, and invaded the province of the jury as the trier of fact." The State responds that the trial court's decision "responded reasonably and accurately to the jury's request for the reports of Investigator Madsen and Officer Steward …."

Just as the initial jury instructions are within the trial court's discretion, so also is the "necessity for, the extent of, and the form of re-instruction" given in response to requests or questions from the jury. ***State v. Simplot,*** 180 Wis.2d 383, 404, 509 N.W.2d 338, 346 (Ct. App. 1993) (quoted source omitted). When a court receives an inquiry from a jury, it should "respond … with sufficient specificity to clarify the jury's problem." ***Id.*** at 404-05, 509 N.W.2d at 346 (quoted source omitted). We review this issue on a misuse of discretion standard.

However, before considering the substantive issue of the trial court's response to the jury's query, we note that the State argues that Griffin has waived review of this issue. The State claims that "defense counsel waived the present objections to [the trial court's] closing remark, by failing to object to it at the time, so that the judge could immediately clear up any alleged misconceptions by the jury." We decline to hold this issue waived. Waiver is a rule of judicial administration which we may, in the proper exercise of discretion, choose not to apply. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). In recognition of the absolute prohibition of judges commenting upon the

evidence, *see* ***State v. Pruitt***, 95 Wis.2d 69, 81, 289 N.W.2d 343, 348 (Ct. App. 1980); *see also* ***State v. Davidson***, 44 Wis.2d 177, 192, 170 N.W.2d 755, 763 (1969), we choose to address this issue on its merits. We also can choose to address a waived issue in the interest of judicial economy, such as to avoid a later claim of ineffective assistance of counsel. *See* ***State v. Harrell***, 182 Wis.2d 408, 417, 513 N.W.2d 676, 679 (Ct. App. 1994).

The jury's initial request was for the police reports which detailed the information gathered from various witnesses and the statements of those involved. The jurors knew the reports had been admitted into evidence but had never heard what they said. The trial court's response was to redact the information in the reports and read to the jury those portions that contained information that the officers had testified to. Not only did the police reports contain hearsay statements, but because the officers who wrote the reports testified, there was no need to utilize the reports in responding to the jury's question. Although a trial court is required to be responsive to requests from the jury, the strictures of proper trial procedure should never yield to the convenience of the jury. In this case, the proper procedure to follow regarding the jury's request for the information from the police reports would have been to offer to read portions of the police officers' trial testimony back to the jury, rather than portions of the reports themselves.

Griffin, however, claims that a more significant error occurred as a result of the jury's request for the police reports. He argues that the trial court's comments summarizing the victim's statement "invaded the province of the jury as the trier of fact." It is established that a trial judge bears the responsibility for maintaining an atmosphere of impartiality. *See* ***Breunig v. American Family Ins. Co.,*** 45 Wis.2d 536, 547, 173 N.W.2d 619, 626 (1970). Where the fact finder is a

jury, rather than a judge, proof of all essential elements must be tendered to the jury. *See* ***State v. McAllister,*** 107 Wis.2d 532, 533, 319 N.W.2d 865, 866 (1982). A judge may not, through any improper actions, direct a verdict of guilt against a defendant in a criminal case. *See* ***id.*** Not even an undisputed fact may be determined by the judge. *See* ***United States v. Sheldon,*** 544 F.2d 213, 221 (5th Cir. 1976).

Griffin argues that "the jury's query concerning 'the number of individuals that [Hobson] met that day' was directed to an essential element of the offense for which Griffin was charged …." He claims that his constitutional right to a fair trial was denied by the trial court's comments on the testimony of the victim and how many individuals came up to him. We agree that the trial court erred in making such a summary statement. The trial court's statement impermissibly commented on a fact that was in dispute and upon which conflicting testimony had been received.

Having concluded that the trial court erred, we must next consider whether the trial court's comment on the evidence was harmless error. In order to hold the error harmless, we must be convinced that "the error did not affect the result or had only a slight effect." ***State v. Dyess,*** 124 Wis.2d 525, 540, 370 N.W.2d 222, 230 (1985). The test to be employed is "whether there is a reasonable possibility that the error contributed to the conviction." ***Id.*** at 543, 370 N.W.2d at 231-32; ***State v. Sullivan,*** No. 96-2244-CR, slip op. at 24 (Wis. Mar. 25, 1998). The conviction must be reversed unless the court is certain that the error did not influence the jury. *See* ***Sullivan,*** slip op. at 24. The burden of proving a lack of prejudice is on the beneficiary of the error, in this case, the State; the State must establish that there is no reasonable possibility that the error contributed to the conviction. *See* ***id.*** If the verdict is only weakly supported by

the record, our confidence in the reliability of the proceeding may be more easily undermined than where the verdict is strongly supported by evidence unaffected by error. *See* ***Dyess,*** 124 Wis.2d at 545, 370 N.W.2d at 232-33.

After a careful reading of the record, we conclude that the State has carried its burden to show that the trial court's error was harmless. The State had the testimony of two police eyewitnesses, as well as Steward, who took Hobson's statement in the immediate aftermath of the crime. The testimony by all three police officers meshed with Griffin's initial statement as to what had occurred. The trial testimony of the participants was confusing, due in large part to the fact that each individual's version of what happened changed between the incident and the time of trial.

The testimony offered by defense witnesses that there was a fourth person present during the robbery resulted in widely disparate testimony which conflicted on key points. Only one participant, Williams, admitted to being a more central figure than he had in his initial statement to police; however, he and the victim, Hobson, were unable to remember exactly who else was involved. The elusive "Shawn" became increasingly implicated, yet no two witnesses seemed to agree on exactly when Shawn made an appearance and where he was at key points in time.

The confusion created by various witnesses' testimony was likely responsible for the jury's request. Had the trial court responded properly to the jury's query, a reading of the officers' testimony would have shown that the only mention of "Shawn" immediately after the incident was in reference to Griffin's street name. This was the information sought by the jury. Based on the police

eyewitness testimony alone, we conclude that the trial court's comment was harmless and did not contribute to Griffin's conviction.

Griffin argues that because "[t]he acts of the defendant, told from the non-exculpatory perspective of the police, are equivocal … and therefore subject to various interpretations," the police version is not sufficient to support the verdict. We disagree with this characterization of the police testimony. The police eyewitnesses saw three individuals. Both officers positively identified those individuals as Hobson, Williams and Griffin. Williams and Griffin were arrested within moments of the officers observing the crime. Statements from those individuals directly involved in the robbery contained only minor discrepancies between what the officers observed and what was admitted to. There was sufficient evidence to support the conviction.

Given the extensive nature of the police eyewitness testimony, we conclude that the trial court's comments did not unfairly influence the jury's verdict. The verdict in this case is "strongly supported by evidence untainted by error." ***Id.*** We are not persuaded by Griffin's claim that the evidence is insufficient. We therefore affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.