

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0232-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD A. MOECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order¹ of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Reversed and cause remanded.*

Before Vergeront, Roggensack and Deininger, JJ.

¹ Moeck also appeals from an order of the circuit court denying his motion for postconviction relief. In his postconviction motion, Moeck argued that his trial counsel was ineffective. Because we are reversing the judgment of conviction on grounds unrelated to his postconviction motion, we do not discuss the merits of the order.

¶1 ROGGENSACK, J. Richard A. Moeck appeals from a judgment convicting him of seven criminal counts, all as a repeater, relating to an alleged sexual assault. The seven counts are: two counts of first-degree sexual assault, contrary to § 940.225(1)(b), STATS.; one count of false imprisonment, contrary to § 940.30, STATS.; one count of intimidating a victim, contrary to § 940.45(1), STATS.; one count of robbery, contrary to § 943.32(1)(a), STATS.; one count of battery, contrary to § 940.19(1), STATS.; and one count of bail jumping, contrary to § 946.49(1)(a), STATS. Moeck claims that the circuit court should have granted his motion for a mistrial after it improperly informed the jury that Moeck was charged as a repeater. Moeck also raises numerous other contentions of error. However, because we conclude that the circuit court should have granted his motion for a mistrial, we do not reach them. Accordingly, we reverse Moeck's judgment of conviction.

BACKGROUND

¶2 Moeck was charged with seven criminal counts relating to a sexual assault of a twenty-three-year-old male. Immediately after the jury was sworn, the circuit court gave the jurors preliminary instructions. It stated:

THE COURT: Very well, ladies and gentlemen, we will now begin the trial of the State of Wisconsin versus Richard Moeck. You are reminded as you were informed at jury selection that Mr. Moeck is charged with eight (sic) offenses. Counts I and II allege sexual assault as a repeater. Count III alleges false imprisonment as a repeater. Count IV alleges intimidation of a victim as a repeater. Count V alleges robbery by threatening the use of

force. Count VI alleges battery. Count VII alleges bail jumping. I did it again, didn't I?²

MS. MATOUSEK [the prosecutor]: Um-hum.

THE COURT: Ladies and gentlemen of the jury, the fact that whether or not Mr. Moeck may have been previously convicted of a crime is not to enter in your deliberations in this matter. You will receive specific instructions as to that at the end of this case.

At the first break, Moeck moved for a mistrial. The circuit court denied the motion for a mistrial, but did agree to instruct the jury that he had not been previously convicted of sexual assault. The court acknowledged to counsel that it should not have referred to Moeck's repeater status:

THE COURT: Very well, frankly the Court screwed up again and I did it right during jury selection and then I read that. Yeah, I—you know, I've said now and in the last trial I really don't think it had any effect.... I think probably Mr. Burgos' suggestion that they be informed he's never been convicted of any crime involving a sexual assault, they will be told that. I will tell them that when they come out. The motion for a mistrial, however, is denied.

¶3 Moeck was subsequently convicted of all seven criminal counts. He appeals the resulting judgment of conviction.

DISCUSSION

Standard of Review.

¶4 Whether to declare a mistrial is directed to the trial court's discretion. See *State v. Copenig*, 100 Wis.2d 700, 709-10, 303 N.W.2d 821,

² The circuit court had made the same mistake of referring to Moeck's repeater status at the first trial, at which time Moeck objected. However, the circuit court declared a mistrial when the jury was unable to progress beyond a 9-3 split.

826-27 (1981). When we review a discretionary determination, we examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *See State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888, 892-93 (Ct. App. 1997), *review denied*, 217 Wis.2d 518, 580 N.W.2d 689 (1998). In considering whether to grant a mistrial, the trial court must determine, in light of the whole proceeding, whether the claimed error was prejudicial so that a mistrial was warranted. *See State v. Hampton*, 217 Wis.2d 614, 621, 579 N.W.2d 260, 263 (Ct. App. 1998); *review denied*, 219 Wis.2d 922, 584 N.W.2d 122 (1998). However, the constitutional question of whether a defendant's right to a fair trial was violated is a question of law that we review without deference to the circuit court. *See id.*

Court's Announcement of Moeck's Repeater Status.

¶5 Moeck contends that the circuit court should have granted his motion for a mistrial because the court's announcement that he was a repeater was prejudicial error which denied him the right to a fair trial. A defendant's status as a repeater under § 939.62(2), STATS., is not an element of any crime of which Moeck was charged. Rather, it would have caused him to be subject to an increased penalty for the crimes of which he was convicted. *See Block v. State*, 41 Wis.2d 205, 212, 163 N.W.2d 196, 199 (1968). Both the Wisconsin Supreme Court and the United States Supreme Court have recognized that a jury may improperly rely on prior convictions as evidence of a defendant's bad character and "deny him a fair opportunity to defend against a particular charge." *See State v. Alexander*, 214 Wis.2d 628, 643-44, 571 N.W.2d 662, 668 (1997) (quoting *Old Chief v. United States*, 519 U.S. 172, 181 (1997)). For this reason, a defendant charged under a repeater statute has the right to keep evidence of prior convictions

from the jury. *See Mulkovich v. State*, 73 Wis.2d 464, 468, 243 N.W.2d 198, 201 (1976).

¶6 Moeck argues that he was in a position similar to the defendant in *Mulkovich*, and as such, he was entitled to a mistrial. In *Mulkovich*, shortly after empanelling the jury, the circuit court read the jury the Information charging Mulkovich with burglary, including the repeater allegation. Mulkovich was convicted. *See id.* at 468, 243 N.W.2d at 201. On appeal, the supreme court held that it was prejudicial error for the circuit court to tell the jury that Mulkovich was charged as a repeater. *See id.*

¶7 The court noted several reasons why the error was prejudicial. First, the timing of the inappropriate reference to Mulkovich's repeater status was made early in the trial, almost immediately after empanelling the jury; and second, it was made by the trial judge. *See id.* at 469-70, 243 N.W.2d at 201-02. Additionally, the court rejected the State's argument that the error was not prejudicial because the defendant admitted in the course of the trial that he had committed the previous felonies. *See id.* at 470, 243 N.W.2d at 202. The court reasoned that at that point, Mulkovich was compelled to take the stand and admit the prior convictions because the circuit court had already read the repeater charge. *See id.* It explained that "[t]he reading of the [I]nformation was direct evidence of prior crime put in by the state before the defendant had an opportunity to admit or deny prior convictions" and that it was "not used, as perhaps it could have been, for impeachment purposes." *See id.* The court reasoned that because the information had been given to the jury at an inappropriate time (early in the trial), it may have had "substantial influence" on the defendant's decision to take the stand. *See id.*

¶8 The court in *Mulkovich* also distinguished those cases cited by the State in which Wisconsin courts have not found prejudice where a defendant's repeater status was made known to the jury. The court stated that in many of those cases, there was evidence that the defense deliberately waived the objection, only to save the issue for appeal.³ See *id.* at 471, 243 N.W.2d at 202. The court also stressed that in some of the cases cited, the district attorney, not the judge, had read the repeater allegation to the jurors. See *id.* The court then concluded that the error in reading the repeater charge was prejudicial and a mistrial should have been granted.⁴ See *id.* at 473, 243 N.W.2d at 203.

¶9 The State concedes that under *Mulkovich*, it was error for the circuit court to read the repeater charge. However, the State contends that such error was not prejudicial for two reasons: (1) the circuit court corrected its mistake with a subsequent instruction; and (2) because Moeck was planning to testify,⁵ the jury would have been informed of his prior convictions even if the court had not done so. While we agree with the State that it was error to inform the jury that Moeck

³ For example, in *Wells v. State*, 40 Wis.2d 724, 162 N.W.2d 634 (1968), the assistant district attorney made reference to the defendant's repeater status in his introductory statement to the jury panel. After the selection of the jury, the judge called a conference and stated to the attorneys that the comments might have been prejudicial. See *id.* at 728, 162 N.W.2d at 636. The defense, not wanting to have the trial delayed, did not ask for a mistrial. See *id.* at 733-34, 162 N.W.2d at 639. After the verdict, the defense moved for a mistrial based on the comments. The court denied the motion for the mistrial, stating that it had invited the defendant to move for a mistrial when the comments were made. See *id.* Therefore, the court held that the defendant waived the error. See *id.* The supreme court agreed and affirmed the conviction. See *id.* at 735, 162 N.W.2d at 640. In this case, Moeck preserved his objection; waiver is not an issue.

⁴ Defense counsel objected immediately after the jury was dismissed from the courtroom, and the motion for a mistrial was argued and ruled upon before any further proceedings were had in the trial. See *Mulkovich v. State*, 73 Wis.2d 464, 470, 243 N.W.2d 198, 201 (1976).

⁵ Because Moeck had testified in a previous trial on these same charges, which trial ended in a mistrial, the circuit court assumed that Moeck would testify.

was a repeater, we are unpersuaded that the error did not prejudice Moeck's right to a fair trial.

¶10 In regard to the circuit court's subsequent instruction, when weighed against the facts of this case, we conclude it was insufficient to overcome the prejudice of the court's statements. First, the reference to Moeck's repeater status was made almost immediately after empanelling the jury. No testimony had been taken. Second, the court stated that Moeck was a repeater, not once, but three times, in some of the first words it spoke to the jury. Then, when it recognized its mistake, it compounded it by stating "I did it again, didn't I?" from which the jury could have concluded that Moeck had been the subject of other trials. Words spoken to a jury by the trial judge take on a different tone than other narrations at trial because the jury views the judge as an authority figure, with superior knowledge about what is important in the course of a trial. And finally, the court informed the jury that it should not have told the jury that Moeck was a repeater and stated that it would instruct the jury later about how prior convictions could be considered in regard to credibility. This may have drawn additional attention to the error because a jury that is told it may consider the information at a later time, may pay particular attention to it. Therefore, we conclude that in this situation, the subsequent instruction was not sufficient to cure the error.

¶11 In regard to the State's second contention, that the error was not prejudicial because both the prosecutor and Moeck knew he would testify, and when he did so, the convictions would have been placed before the jury, we are also unpersuaded. We can never presume that a defendant will or will not testify. A defendant's right to testify on his or her own behalf is both constitutional and fundamental. *See State v. Hereford*, 224 Wis.2d 605, 614, 592 N.W.2d 247, 251 (Ct. App. 1999), *review denied*, 225 Wis.2d 490, 594 N.W.2d 384 (1999). That

decision belongs solely to the defendant. *See id.* We cannot know whether the testimony at trial was such that, but for the circuit court’s error, Moeck would have chosen not to testify. Additionally, we agree with the reasoning in *Mulkovich* that once the repeater information has been read to the jury, “the cat was out of the bag,” *see Mulkovich*, 73 Wis.2d at 470, 243 N.W.2d at 202, and as a result, Moeck lost the opportunity, even if he had been planning to testify, to reveal his prior convictions on his own terms, rather than as the court announced them.

¶12 Therefore, given the totality of circumstances—that the court repeatedly told the jury of Moeck’s repeater status; that his status as a repeater was given to the jury shortly after it was empanelled; and that defense counsel immediately objected and brought a motion for a mistrial, thereby preserving the issue for review—we conclude that the circuit court should have granted Moeck’s motion for a mistrial because Moeck’s right to a fair trial was prejudiced by the circuit court’s statements, which prejudice was not overcome by the court’s subsequent instruction.

CONCLUSION

¶13 We conclude that the circuit court erroneously exercised its discretion in not granting Moeck a mistrial after the court improperly instructed the jury that he was charged as a repeater. Accordingly, we reverse Moeck’s judgment of conviction.

By the Court.—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

