COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0564-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES EVANS,

DEFENDANT-APPELLANT,

DEREK MONROE WILLIAMS AND
LAWRENCE WILLIAMS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Evans appeals from a judgment of conviction after a jury found him guilty of twelve counts of armed robbery, party to a crime. Evans claims that the trial court erroneously exercised its discretion when it: (1) denied his motions for severance and mistrial; (2) admitted both his statement and the statement of his co-defendant; and (3) failed to declare a mistrial following improper closing argument by the prosecutor. Because the trial court did not erroneously exercise its discretion in any respect, we affirm.

I. BACKGROUND

¶2 The State charged Evans and his co-defendant, Derek Monroe Williams, with twelve counts of armed robbery, party to a crime, stemming from a series of robberies that occurred in September 1995. Both defendants filed motions to dismiss, alleging that the counts charged violated rules of multiplicity. In addition, both defendants filed motions to sever, alleging antagonistic defenses. The trial court denied the motions. During closing argument, Evans again moved for a mistrial. The trial court also denied that motion. A jury found Evans and Williams guilty on all twelve counts. Evans now appeals.

II. ANALYSIS

A. Motion to Sever.

¶3 Evans first claims that the trial court erroneously exercised its discretion when it denied his motion for severance, which alleged that his defense, and that of Williams, were antagonistic.

¶4 Joinder and severance of defendants in a criminal case is governed by WIS. STAT. § 971.12(2), (3) and (4) (1997-98). A trial court has the power to try defendants together when they are charged with the same offenses, arising out

of the same transaction, and provable by the same evidence. *See* ***State v. DiMaggio***, 49 Wis. 2d 565, 576, 182 N.W.2d 466 (1971); ***Jung v. State***, 32 Wis. 2d 541, 545, 145 N.W.2d 684 (1966). Questions of consolidation or severance are within the discretion of the trial court. *See* ***State v. Doyle***, 40 Wis. 2d 461, 469, 162 N.W.2d 60 (1968). On review, the decision of the trial court will not be reversed unless there is an erroneous exercise of discretion. *See* ***id.***

¶5 "Consolidation is a procedural mechanism which avoids repetitious litigation and facilitates the speedy administration of justice." ***Lampkins v. State***, 51 Wis. 2d 564, 572, 187 N.W.2d 164 (1971). There may, however, be circumstances that arise where a joint trial would be unduly prejudicial to the interests of either or both defendants. In such instances, the interests of administrative efficiency must yield to the mandates of due process. Such circumstances are found where the defendants intend to advance conflicting or antagonistic defenses. *See* ***id.*** Severance may also be granted where the danger that an entire line of evidence relevant to the liability of only one defendant may be treated as evidence against all defendants by the trier of fact, simply because they are tried jointly. *See* ***State v. Nutley***, 24 Wis. 2d 527, 543, 129 N.W.2d 155 (1964), *overruled on other grounds by* ***State v. Stevens***, 26 Wis. 2d 451, 463-64, 132 N.W.2d 502 (1965).

¶6 A review of our case law relating to severance due to conflicting defenses reveals a reluctance to find grounds for a reversal on this basis. Of note is ***State v. Shears***, 68 Wis. 2d 217, 229 N.W.2d 103 (1975), where our supreme court found no basis for severance on the grounds of conflicting defenses, when the allegedly conflicting testimony of one co-defendant was merely cumulative to evidence given by the State's witnesses. *See* ***id.*** at 237. "The question must be looked at in the context of the entire trial and the relative importance of [the co-

defendant's] testimony to the state's case." ***Haldane v. State***, 85 Wis. 2d 182, 193, 270 N.W.2d 75 (1978). With these precepts in mind, we review what we believe were salient features of this trial, and we ultimately reject Evans's claims.

¶7 During trial, Evans made frequent objection to the efforts of Williams to cast himself in a better light than Evans. According to Evans, Williams denied involvement in the robberies, claimed confusion when he made inculpatory statements to police, and claimed that Evans's statements were attempts to place blame on Williams. Evans further argues that Williams's cross-examination efforts at trial to explore the details of the police search of Evans's apartment, and the circumstances of the "on the scene show-up," provided additional evidence that their respective defenses were antagonistic.

¶8 In context, the record reflects that every time Evans objected to the trial tactics of Williams, the trial court properly addressed the reason for the objection. It either stated an acceptable reason for denying a motion to sever or grant a mistrial, or it sustained the objection, striking the improper question or answer or refusing Williams the opportunity of proceeding further. On one occasion, it even offered Evans the opportunity to submit a curative instruction. No submission was forthcoming. Finally, at the end of the case, the trial court instructed the jury that the remarks of counsel are not evidence, and the jurors should disregard any implication of facts not in evidence.

¶9 More importantly, as per ***Shears***, the presentation of the State's witnesses was so overwhelming in assigning guilt to Evans, that any measure of antagonistic proof was merely cumulative. In his confession, Evans implicated himself in each of the twelve robberies. The robberies took place on September 12 and 16, 1995. The confession was read to the jury. Lawrence

Williams, one of the robbery participants who had earlier pled guilty, corroborated Evans's involvement in the robberies that occurred on September 16, 1995. Two citizen witnesses who were present at the Sentry food store robbery in Glendale, identified Evans both at a show-up and in court. The jury also heard that, in the aftermath of the Sentry robbery, a high-speed chase occurred. The fleeing van in which Evans was riding crashed. Shortly thereafter, Evans was apprehended while hiding in a nearby tree. For these reasons, the trial court did not erroneously exercise its discretion when it denied Evans's motions for severance and mistrial based on a claim of antagonistic defenses.

B. Admission of Statements.

¶10 Evans next claims that the trial court erroneously exercised its discretion when it admitted into evidence at the joint trial, both his statement and that of co-defendant Williams, which were given to police. We are not convinced.

¶11 Evans relies upon ***State v. Denny***, 163 Wis. 2d 352, 471 N.W.2d 606 (Ct. App. 1991), and ***Gray v. Maryland***, 523 U.S. 185 (1998). Evans's reliance is misplaced. It appears that the trial court admitted the statements on the basis of an "interlocking confessions" analysis, which we addressed in ***Denny***. *See* ***id.*** at 356. We, however, need not adopt the trial court's rationale in order to sustain its ruling. *See* ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). ***Denny*** and ***Gray*** are based upon the Confrontation Clause, pursuant to which the United States Supreme Court has disapproved using a co-defendant's confession where the co-defendant did not testify, and was not available for cross-examination. *See* ***Bruton v. United States***, 391 U.S. 123, 135-36 (1968); *accord* ***Cruz v. New York***, 481 U.S. 186 (1987). Here, Williams did indeed testify and

was subject to cross-examination. As Evans's reliance on this authority fails, so does his claim of error.

C. Mistrial.

¶12 Last, Evans claims that the trial court erroneously exercised its discretion when it refused to declare a mistrial after the prosecutor made two allegedly improper statements during closing argument.

¶13 A motion for a mistrial for improper prosecutorial conduct in closing argument is addressed to the sound discretion of the trial court and will not be reversed unless there is evidence that the court erroneously exercised its discretion and the accused is prejudiced. *See* ***State v. Camacho***, 176 Wis. 2d 860, 886, 501 N.W.2d 380 (1993). The test we apply when a prosecutor is charged with misconduct for remarks made in argument to the jury, is whether those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted). Whether the prosecutor's comments affected the fairness of the trial is to be determined by reviewing the statements in context. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). In engaging in this exercise, the court must consider the character of the remarks in their proper context, any admonition by the court to the jury, the strength of the evidence apart from the contested remarks, and all other facts which may be relevant in determining the effect of the comments to the jury. *See* ***State v. Spring***, 48 Wis. 2d 333, 339-40, 179 N.W.2d 841 (1970).

¶14 Evans argues that twice during closing argument, the prosecutor made statements not based upon any evidence in the case. The first statement to which Evans objected involved the prosecutor telling the jury that the testimony of

Larry Williams was the same as he had given in a written statement to a detective two years before. We reject this claim of error for the following reason. As stated earlier in this opinion, prior to the commencement of closing arguments, the court instructed the jury that the remarks of counsel are not evidence, and it should disregard such remarks which imply the existence of certain facts not in evidence. When Evans objected, the trial court sustained the objection. It then admonished the jury to disregard the improper remarks. The trial court implemented its ruling by further instructing the jury that the referenced statement was not in evidence, and that the jury should only focus on the testimony Williams gave in court. Unless we are presented reasons to conclude otherwise, we presume that a jury acted in accord with a properly given admonitory instruction. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 645 n.8, 369 N.W.2d 711 (1985). The trial court denied the motion for mistrial and noted that the remarks were not so prejudicial as to warrant a mistrial. The trial court did not err.

¶15 The second statement involved the prosecutor telling the jury that the Milwaukee Police Department does not videotape confessions and that the confessions of Evans and Williams were taken by using proper police procedure. Williams, not Evans, made an objection. The objection was overruled. We reject this claim of error for three reasons.

¶16 During his closing argument, Williams attacked the police practice of not videotaping confessions in general and, more particularly, for not videotaping his own confession. The prosecutor merely responded to this criticism. This was well within the "invited reply" or "measured response" rule. ***Wolff***, 171 Wis. 2d at 168. Thus, it was not improper. Additionally, a Milwaukee police detective testified during the trial that the department had a policy of not videotaping confessions. The practice, therefore, was a fact in evidence upon

which comment could be made. Third, but not least, is the procedural fact that Evans did not object to the comment concerning the policy of no videotaping. Because he failed to object or move for a mistrial, he waived his right to complain on appeal. *See* ***Holt***, 128 Wis. 2d at 137.

¶17 For the reasons stated, we affirm.

By the Court.—Judgment affirmed.

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