

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP2140-CR

Cir. Ct. No. 2014CF2549

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES MELVIN LEWIS, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. James Lewis, Jr., appeals a judgment, entered upon a jury's verdicts, convicting him of attempted first-degree intentional homicide

with use of a dangerous weapon; false imprisonment with use of a dangerous weapon; battery in the course of a burglary with use of a dangerous weapon; and two counts of armed robbery with use of force. Lewis also appeals the order denying his postconviction motion for a new trial. Lewis argues the circuit court erroneously exercised its discretion by (1) denying Lewis's motion to disqualify a witness, and (2) permitting the State to introduce evidence of a restraining order against Lewis. We reject Lewis's arguments and affirm the judgment and order.

BACKGROUND

¶2 Lewis and Jillian¹ dated briefly in May 2014. Jillian ended the relationship and, ultimately, obtained a temporary restraining order against Lewis. The State alleged that some time after 4:00 a.m. on June 13, 2014, Lewis entered the home Jillian and her two young sons shared with her grandmother, Mary. Lewis threatened Mary with a butcher knife, tied Mary to her bed, and took a debit card, cash, and rings. Lewis then proceeded to Jillian's bedroom where he stabbed her multiple times, including in the back, abdomen, face and across the throat, nearly killing her. Lewis also took Jillian's debit card and ultimately fled the scene. Lewis was arrested later that day when police were called to assist in the recovery of a car that Lewis was accused of stealing. Lewis was located in an alley one block away from the crashed car, and Jillian's debit card was discovered in the car.

¹ This matter involves two victims. Pursuant to WIS. STAT. RULE 809.86(4) (2015-16), we use pseudonyms instead of the victims' names. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 At trial, Jillian and Mary testified about the crimes, both identifying Lewis as the perpetrator. The jury heard that at the time of his arrest, Lewis possessed a receipt from an ATM in a Wal-Mart showing a failed attempt to withdraw cash using Jillian's debit card hours after the attack against her. The State also introduced images taken from store cameras showing that Lewis was at the relevant Wal-Mart ATM at that time.

¶4 Lewis testified at trial that he did not commit the crimes and had not been at Jillian and Mary's home on June 13. Lewis further testified that he had Jillian's permission to use her debit card, with the understanding that he needed to repay her. The jury found Lewis guilty of the crimes charged. Out of a maximum possible 176-year sentence, the circuit court imposed concurrent and consecutive sentences resulting in an eighty-five-year term, consisting of fifty-five years' initial confinement and thirty years' extended supervision. Lewis filed a postconviction motion for a new trial claiming he was denied the effective assistance of counsel with respect to a purported plea offer. That motion was denied, and this appeal follows.²

DISCUSSION

¶5 Lewis challenges the circuit court's decision to allow a witness to testify in violation of its sequestration order. WISCONSIN STAT. § 906.15 authorizes a court to exclude witnesses from a courtroom so they cannot hear other witnesses' testimony. When a witness violates a sequestration order, the decision

² On appeal, Lewis does not pursue the arguments raised in his postconviction motion. We therefore deem those arguments abandoned. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.”).

whether that witness should be allowed to testify is generally left to the sound discretion of the circuit court. *State v. Bembenek*, 111 Wis. 2d 617, 637, 331 N.W.2d 616 (Ct. App. 1983). To uphold a circuit court’s exercise of discretion, this court deferentially examines the record to assess “whether the circuit court reached a reasonable conclusion based on proper legal standards and a logical interpretation of the facts.” *State v. Evans*, 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220.

¶6 The purpose of a sequestration order is to assure a fair trial and, more specifically, to prevent the shaping of testimony by one witness to match that given by other witnesses. *Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). If there is no prejudice to the defendant, it is not error to allow a witness to testify even if the party calling the witness participated in the violation. *Bembenek*, 111 Wis. 2d at 637.

¶7 Here, one of the State’s witnesses, Sarah Jones, was in the courtroom during Jillian’s trial testimony.³ When Jones’s presence became known, Lewis sought to disqualify her from testifying. Jones and Lewis had been in a long-term relationship that ended in April 2014; the couple had three young children together. Jones, who lived approximately eight blocks from Jillian’s home, would testify that at approximately 3:30 a.m. on June 13, 2014, Lewis arrived at Jones’s home, knocked on her door, and asked to see their children.

³ Jones was also present for Virgie Earl’s testimony. Earl testified regarding circumstances involving the vehicle Lewis was accused of stealing before his arrest. Lewis raises no claim that Jones’s testimony was impacted by hearing Earl’s testimony.

Jones spoke to Lewis through the door and, according to Jones, Lewis left angry after he was denied entry.

¶8 In denying Lewis’s request to disqualify Jones as a witness, the circuit court noted that the purpose of a sequestration order is to prevent witnesses from aligning their stories to similar facts or circumstances. Here, Jones was not a witness to the crimes against Jillian and Mary—her testimony was offered only to place Lewis in the vicinity of Jillian’s home shortly before the crimes. Because Jones was testifying about a distinct set of facts, the court properly determined her testimony would not be affected by any testimony she may have heard.

¶9 Lewis concedes that any testimony Jones heard in violation of the sequestration order would not have prompted an alignment of stories between witnesses. Lewis nevertheless contends that Jones’s knowledge of Jillian’s testimony prejudiced him in two ways: (1) by strengthening Jones’s conviction that it was Lewis who was at her door that morning; and (2) by prompting Jones to testify “in a more certain and emphatic manner than she might have otherwise.”

¶10 With respect to Lewis’s identity, the record does not support the suggestion that Jones had reason to doubt she spoke to Lewis through her closed door. She and Lewis had been together for several years and had three children together—children Lewis was asking to see that night. Moreover, Lewis himself admitted at trial that he went to Jones’s home at 3:30 a.m., asked to see their children, and left “upset” when Jones refused his request. With respect to Lewis’s alternative claim, he fails to establish how Jones’s testimony regarding her early-morning interaction with Lewis was more “emphatic” after hearing Jillian’s testimony. Further, Lewis provides no authority for his assertion that a sequester-violating witness’s emphatic delivery of testimony warrants disqualification.

Ultimately, we are not persuaded by Lewis's speculation about the impact Jillian's testimony may have had on Jones. The circuit court reasonably exercised its discretion when denying Lewis's request to disqualify Jones as a witness.

¶11 Next, Lewis claims the circuit court erred by permitting the State to introduce evidence regarding a restraining order Jillian sought against Lewis. The admissibility of evidence lies within the circuit court's sound discretion. *State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Evidence is not admissible unless it is relevant. WIS. STAT. § 904.02. Relevant evidence is defined as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. Further, evidence that has some relevance may still be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶12 Where, as here, a defendant testifies at trial, the defendant's credibility becomes a jury issue. *State v. Coleman*, 2015 WI App 38, ¶27, 362 Wis. 2d 447, 865 N.W.2d 190. Therefore, the State may cross-examine the defendant on any "material or relevant matters," even if not explored in the direct examination. *McClelland v. State*, 84 Wis. 2d 145, 155, 267 N.W.2d 843 (1978). Moreover, WIS. STAT. § 906.08(2) provides that a witness may be cross-examined about specific instances of conduct, "if probative of truthfulness or untruthfulness and not remote in time."

¶13 Lewis filed a pretrial motion in limine to prohibit the State from introducing evidence that Lewis had received notice of Jillian's application for a

restraining order against him the day before he committed the crimes. After a hearing, the circuit court precluded the State from using evidence of the restraining order application in its case-in-chief, but added that “if the defense raises issues that call into question these items,” the court “would likely allow [the State] to use it on re-direct.” During his direct examination, Lewis testified that he believed he had Jillian’s consent to possess and use her debit card. The State, therefore, permissibly tested the credibility of that testimony pursuant to WIS. STAT. § 906.08(2) by asking Lewis whether he had received notice of Jillian’s restraining order application the day before he tried to use the card, and how receipt of that notice impacted his stated belief that he had tacit permission to use the card. Relatedly, the evidence was admissible to prove nonconsent with respect to the robbery of Jillian’s debit card.

¶14 Additionally, Lewis’s knowledge of the restraining order application was admissible to prove motive for the crimes. Lewis’s anger and feelings of rejection upon receiving notice that Jillian sought a restraining order against him could have motivated Lewis to commit the crimes against her. To the extent Lewis intimates the danger of unfair prejudice outweighed any probative value of the evidence, we are not persuaded. The State used only the fact of the restraining order application without addressing any details underlying it. The record supports the circuit court’s discretionary decision to admit evidence of the restraining order.⁴

⁴ Because we conclude the circuit court properly exercised its discretion when denying the motion to disqualify Jones and when admitting evidence of the restraining order, we need not reach the State’s harmless error argument. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (appellate court should decide cases on narrowest possible grounds).

By the Court.—Judgment and order affirmed.

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

