COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0090-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY L. HOOVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gregory L. Hoover appeals from a judgment entered after a jury found him guilty of three counts of armed robbery, one count of second-degree recklessly endangering safety, one count of first-degree sexual assault, and two counts of battery. He also appeals from an order denying his

postconviction motion. Hoover claims: (1) the trial court violated several statutes when it allowed the deliberating jury to go home for the weekend, particularly because the bailiff was instructed to dismiss the jury; (2) his constitutional right to be present at trial was violated when the bailiff communicated with the jury outside of his presence; (3) the errors were "structural" and therefore not subject to a harmless error analysis; and (4) trial counsel was ineffective for failing to move for a mistrial regarding the manner in which the deliberating jury was dismissed. Because we resolve each contention in favor of upholding the judgment and order, we affirm.

BACKGROUND

¶2 On Monday, May 17, 1999, Hoover's jury trial began. The testimony concluded on Friday, May 21, 1999, and the jury began deliberations at about 12:20 p.m. After almost three hours, the jury asked the bailiff to tell the trial court that the jurors were deadlocked. The trial court brought the jury back into court and instructed them to retire to the jury room and to try to reach a verdict.

¶3 The trial court then announced that it intended to wait an hour and then bring the jury back to determine if they were making progress. A short time later, the bailiff reported that the jury had three questions: (1) "Are we allowed to use our common sense and life experiences to connect something to reach a conclusion?" (2) "Can we make assumptions to draw conclusions?" and (3) "Do we only have to use facts?" The trial court brought the jury back into the courtroom and answered the questions by reading WIS JI—CRIMINAL 195, 160 and 100. The jury retired to deliberate.

¶4 At this point, the trial court indicated it had some personal matters to attend to outside the courthouse, and indicated it would check in periodically to

see if the jury had reached a verdict. Shortly before 5:00 p.m., however, the trial court decided to dismiss the jurors for the weekend and recommence deliberations on Monday morning. The trial court phoned the bailiff and told him to release the jury for the weekend with the instruction that they should not discuss the case until deliberations resumed on Monday morning.

¶5 On Monday morning, the trial court put the following on the record:

> We then had a discussion about whether the jury would be allowed to go home or whether we'd keep them here until they reached a verdict. And initially I made the decision I would keep them here possibly until 9:00 o'clock, but that the lawyers could leave. I had to leave because I had a family commitment, but we could always reconvene.
>
> Then about 45 minutes later, as I was on my first of about three stops, it dawned on me it would be next to impossible to really in a timely fashion get back to this courtroom and take a verdict, considering I was gone and the lawyers were allowed to leave the courtroom, as was the court reporter. It also dawned on me that by keeping the jury here, that I had a fear that they actually might reach a verdict based on time constraints and not based on the evidence.
>
> And so at about quarter to 5:00, I spoke with Deputy Applegate, and I advised him that it was my intention to have him go into the jury room and tell the jury that they were being released for the evening. They should go home. They should not discuss the case until all twelve of them are back in the jury room on Monday morning at 8:30 a.m.
>
> I know [defense counsel] was sitting in the courtroom and was advised of that fact. [The prosecutor], I believe, was notified by phone.
>
> And so Deputy Applegate, I just wanted to know, did you in fact advise the jury that they should cease and desist their deliberations after the phone call I had with you? Did you tell them to go home, come back at 8:30 this morning, and in the interim not to discuss the case with anyone?
>
> THE BAILIFF: Yes.

¶6 The jury returned a verdict shortly after re-convening on Monday, finding Hoover guilty on all counts. Hoover's counsel objected to the procedure in which the jury was dismissed on Friday evening, indicating he would also be objecting in writing. Postconviction motions were denied. Hoover now appeals.

DISCUSSION

A. Statutory Violations.

¶7 Hoover contends that the trial court violated WIS. STAT. §§ 972.12, 971.04(1)(b), 805.13(1) and 756.08(2) (1997-98)[1] when the jury was released on Friday evening. We disagree.

¶8 First, Hoover contends that the trial court violated the mandate and intent of WIS. STAT. § 972.12, which provides: "The court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others." Hoover argues that when the trial court delegated the bailiff to instruct and dismiss the jury on Friday evening, the intent of § 972.12 was violated. He further contends that the instructions given by the bailiff were incomplete.

¶9 The legislature gave the trial court the discretion to determine whether a jury should be kept together or be allowed to separate. Here, after reviewing the record, we conclude that the trial court did not erroneously exercise its discretion when it decided to allow the jury to go home on Friday evening.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶10 The trial court stated a valid reason for dismissing the jury. It was concerned that a previously deadlocked jury would rush to a verdict based solely on time constraints rather than on the evidence. Therefore, the decision to dismiss the jury was reasonable. Moreover, although concededly it would have been preferable for the trial court to directly instruct and dismiss the jury, delegating this responsibility to the bailiff, under the circumstances here, does not warrant a new trial.

¶11 A bailiff's communication with a jury at the trial court's direction is not *per se* reversible error. *See* ***Wegner v. Chicago & N.W. Ry. Co.***, 262 Wis. 402, 406, 55 N.W. 420 (1952). Here, the bailiff's communication with the jury was at the direction of the trial court and involved administrative close-of-day matters. *See* ***State v. Burton***, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983) (when communication with jury did not involve substance of the case, error was harmless). When the trial court put the instruction on the record the following Monday, the bailiff confirmed that he had followed the trial court's instructions. Moreover, this was a week-long trial wherein the jury had been instructed multiple times about not discussing the case with others, etc. Accordingly, we cannot conclude that the trial court's action here constitutes reversible error.

¶12 Hoover also contends that the bailiff may have discussed other matters with the jury. This is pure speculation, and cannot constitute the basis to reverse the judgment. If Hoover wanted to, he was free to question the bailiff and the members of the jury as to whether any additional conversation occurred. No such offer of proof or any other evidence can be located in the record to support Hoover's allegation.

¶13 Next, Hoover contends that because the bailiff's communication with the jury was "off-the-record," a violation of WIS. STAT. § 805.13(1) occurred. Section 805.13(1) provides: "[a]fter the trial jury is sworn, all statements or comments by the judge to the jury or in their presence relating to the case shall be on the record." We reject Hoover's contention.

¶14 The trial court put the communication on the record as soon as practically possible. Although it may have been preferable to have the bailiff actually testify as to what occurred, a new trial is not warranted.

¶15 Hoover next asserts that WIS. STAT. § 971.04(1)(b) was violated. Section 971.04(1)(b) requires the defendant to be present at trial. Hoover contends that he is entitled to a new trial because he was not present at that portion of the trial when the bailiff dismissed the jury for the weekend. We reject this contention. A defendant's statutory and constitutional right to be present at trial does not mean that he or she is entitled to automatic reversal if that right is violated. ***State v. Peterson***, 220 Wis. 2d 474, 488-89, 584 N.W.2d 144 (Ct. App. 1998). Here, Hoover was not present for the dismissal of the jury or for the instruction given to the jury by the bailiff not to discuss this case again until Monday. Hoover has failed to show how he was prejudiced by the communication at issue here. He speculates that the bailiff may have had further discussions with the jurors, and that the bailiff may not have given the jurors the proper instructions. This speculation, however, is not supported by the record. Hoover did not question the bailiff or the jurors, although he certainly had the opportunity to do so. Accordingly, we conclude that his failure to be present for the dismissal of the jury for the weekend was harmless error.

¶16 Hoover's last alleged statutory violation stems from WIS. STAT. § 756.08(2), which sets forth the oath of the bailiff to

> keep all jurors together in some private and convenient place until they have agreed on and rendered their verdict, are permitted to separate or are discharged by the court. While the jurors are under the supervision of the officer, he or she may not permit them to communicate with any person regarding their deliberations or the verdict that they have agreed upon, except as authorized by the court.

Hoover contends that the bailiff's communication with the jurors violated the oath, and that instructions are not a "ministerial" matter. We reject this contention.

¶17 As noted above, communication by the bailiff with the jury at the direction of the trial court is not prejudicial *per se*. ***Burton***, 112 Wis. 2d at 565. We have already concluded that the communication at issue here did not prejudice Hoover.[2]

B. Constitutional Right to be Present.

¶18 Hoover separately asserts that his constitutional right to be present at trial was violated when the bailiff, *ex parte*, dismissed the jury for the weekend. As noted above, we are not persuaded that the bailiff's contact with the jury outside of Hoover's presence constituted prejudicial error. Rather, as set forth, the communication, which was court-directed, administrative in nature, and did not involve the substance of the case, did not prejudice Hoover. Constitutional errors are generally subject to the harmless error analysis. ***State v. Flynn***, 190 Wis. 2d

[2] Moreover, the bailiff's oath does not prohibit the bailiff from communicating with the jurors. A bailiff's job necessarily requires certain incidental interaction with the jurors, such as directions from and to the deliberation room, taking meal orders where required, etc. This opinion should not be interpreted to prohibit a bailiff from such incidental, but necessary, interaction with a jury.

31, 54, 527 N.W.2d 343 (Ct. App. 1994). The error alleged here is not the type of fundamental error that warrants an automatic reversal. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673 (1986).

¶19 Further, Hoover's speculation that the communication "was not innocuous" is not supported by the record.

C. Structural Error.

¶20 Hoover contends that the sum of the errors set forth amounts to a "structural error," and is not subject to the harmless error analysis, warranting a new trial. We disagree.

¶21 Hoover cites several foreign cases in support of this contention. *See, e.g.,* ***Guam v. Marquez***, 963 F.2d 1311 (9th Cir. 1992) (involving trial court's failure to instruct on the elements of the crime); ***Riley v. Deeds***, 56 F.3d 1117 (9th Cir. 1995) (where judge's law clerk read part of the testimony back to the jury, without knowledge or authorization by the judge); ***United States v. Olano***, 62 F.3d 1180 (9th Cir. 1995) (where a juror was absent during part of the testimony). Because each of these cases is factually distinguishable from Hoover's case, they are not persuasive.

¶22 We conclude that the alleged error here, the bailiff's court-directed communication with the jury, does not amount to a structural error. In fact, Wisconsin decided long ago that such communication is not error *per se*. ***Giese v. Schultz***, 69 Wis. 521, 526, 34 N.W. 913 (1887). Having already concluded that any error here was harmless, we need not address Hoover's contention further.

D. Ineffective Assistance.

¶23 Hoover's final argument involves an allegation of ineffective assistance of trial counsel. Actually, the argument is anticipatory on the basis that the State would argue that Hoover's counsel waived his right to preserve the issues in this appeal by failing to move for a mistrial. The State responds that it is not arguing waiver and therefore, there is no ineffective assistance claim. Based on the State's response and our foregoing decision addressing the issues raised by Hoover, we need not assess whether trial counsel was ineffective for failing to move for a mistrial. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

By the Court.—Judgment and order affirmed.

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