COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0463-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEON R. STEINLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOHN F. FOLEY, Reserve Judge, and ROBERT G. MAWDSLEY, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Leon R. Steinle appeals from a judgment of conviction of conspiracy to deliver cocaine and from an order denying his

postconviction motion for a new trial.[1] We conclude that a new trial is warranted in the interest of justice. *See* WIS. STAT. § 752.35 (1997-98).[2] We reverse the judgment and order and remand for a new trial.

¶2 Through telephone contacts, an undercover police officer arranged to buy cocaine from Susan Gault, Steinle's girlfriend. A meeting place was arranged. When making the arrangements, Gault remarked to the officer something like, "I'm bringing my boyfriend, Leon, with me. Leon's cool, he's not a problem." When Gault failed to appear on time at the meeting place, the officer called her on her cell phone. Gault indicated that she was running late because she had forgotten "the stuff" and had to go back to get it.[3] About twenty minutes later the officer had another conversation with Gault on her cell phone which revealed that she was close to the meeting location. About five minutes later, Gault called the officer and changed the meeting location, expressing her concern over the possibility that he was a cop and she would get "nailed." She placed another call soon after that to find out where he was. Officers arrested Gault and Steinle. Steinle had been driving the vehicle. Gault had the cocaine in a canister in her hand.

¶3 Steinle's conviction is premised solely on his presence in the car while Gault spoke with her potential buyer on her cell phone. At issue was

[1] Reserve Judge John F. Foley presided over Steinle's trial and sentencing. Judge Foley entered the judgment of conviction. Judge Robert G. Mawdsley heard Steinle's motion for a new trial and entered the order denying postconviction relief.

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

[3] Gault later admitted that this had been a false representation and that she did not return home to pick up the drugs.

whether Steinle could hear the conversations and therefore had knowledge of what was going on. On redirect examination, the officer was asked whether he considered Steinle a nonparticipating party in the drug deal. The defense objected on the ground of speculation.[4] The following exchange occurred:

> THE COURT: And what is your question to the agent now?
>
> [PROSECUTOR]: My question was did you have any cause to believe that Mr. Steinle was a non-participating party in this drug transaction?
>
> A. No, I believe he knew what was going on.
>
> THE COURT: Okay. That answer may stand.

¶4 Gault testified that Steinle was hard of hearing and he was not wearing his hearing aids at the time of the arrest. She had not told him they were going to deliver cocaine but had suggested that they go out to dinner. She indicated that while talking on her cell phone she was "hanging halfway out of the window" because she did not want Steinle to know anything. The radio was playing country music when the officers approached the vehicle.

¶5 Steinle testified that Gault wanted to go see someone about a house cleaning job and then go out for dinner. As he drove, his window was down and he thought the passenger window by Gault was also down. He was listening to the radio and with the wind blowing in the open window did not hear Gault's cell phone conversations. He was not aware of Gault's involvement in illegal activity.

¶6 In his postconviction motion, Steinle sought a new trial on the ground that the real controversy had not been tried due to a lack of expert

[4] The prosecutor's response was that defense counsel had opened the door to such a question when he had asked the officer about nonparticipating parties present at other drug deals.

testimony on his hearing disability and how his disability would have affected his ability to hear Gault's phone conversations under those conditions.[5] At the hearing, Steinle presented the testimony of Dr. Douglas Wermuth. Dr. Wermuth confirmed Steinle's hearing disability and that without his hearing aids Steinle would have had difficulty hearing the phone conversation in the car with the windows open and the radio on. Steinle also claimed that it was error to permit the officer to testify as to his belief that Steinle knew what was going on.

¶7 WISCONSIN STAT. § 752.35 permits this court, independently of the trial court's ruling, to grant a new trial if convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried ...." The real controversy has not been fully tried if we conclude "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543, *review denied*, ___ Wis. 2d ___, ___ N.W.2d ___ (Wis. Oct. 17, 2000) (No. 99-2682-CR) (citations omitted).

¶8 Steinle's ability to hear and understand Gault's phone conversations setting up the drug deal was at issue. While evidence established that he had a hearing disability, the real nature of the impairment is beyond the common knowledge of a juror. Moreover, the evidence establishing Steinle's disability was

[5] Steinle also argued that trial counsel was ineffective for not consulting with an expert and presenting expert testimony about Steinle's hearing disability. Trial counsel testified that he had no tactical reason for not consulting an expert and that limited funds prevented the retention of an expert. We need not address this claim.

subject to impeachment.[6] So not only would expert testimony about Steinle's disability have made its effect real for the jury, it would have also served, as an independent source, to corroborate other testimony and make the defense more believable. It was evidence bearing on the jury's assessment of credibility. Thus, the jury was precluded from hearing important testimony bearing on an important issue.

¶9 In considering the police officer's testimony that he believed Steinle to be a participant in the drug deal, we first acknowledge that the evidence is inadmissible. *See* ***State v. Borrell***, 167 Wis. 2d 749, 784, 482 N.W.2d 883 (1992); ***Steele v. State***, 97 Wis. 2d 72, 98, 294 N.W.2d 2 (1979). However, even inadmissible evidence may be permitted if the door has been opened. *See* ***State v. Keith***, 216 Wis. 2d 61, 82, 573 N.W.2d 888 (Ct. App. 1997). We need not decide whether the door was opened far enough to permit the otherwise inadmissible evidence. We conclude that the form of the question permitted the officer to render an opinion on the ultimate issue of fact—whether Steinle was a knowing participant in the drug deal. The officer's opinion went to the very core of the defense and usurped the jury's function to determine Steinle's ability to hear the drug-related phone conversations. Thus, the officer's opinion clouded a crucial issue in the case—credibility.

¶10 Neither the absence of expert testimony nor the police officer's ultimate fact opinion, standing alone, convinces us to order a new trial. However,

[6] For example, Gault's testimony that she hung out the window when talking on her cell phone was impeached by the officer's testimony that he did not hear excessive wind noise during the conversation. An audio tape of the conversations did not reflect radio noise. Other officers testified that they spoke with Steinle after the arrest and he appeared able to hear and understand what they were saying.

the combined effect, with each bearing on credibility, compels a discretionary reversal and a new trial. Even though we order a new trial on other grounds, double jeopardy considerations require that we address Steinle's sufficiency of the evidence claim. *See* ***State v. Johnson***, 184 Wis. 2d 324, 345 n.7, 516 N.W.2d 463 (Ct. App. 1994). It is sufficient to summarily state that the State presented evidence that, if believed, established each of the elements required by law to the degree of proof necessary.

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

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