COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
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. 2006AP806-CR **Cir. Ct. No. 2004CF70**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM TROY FORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. William Ford appeals his judgment of conviction for battery, bail jumping, and conspiracy to bribe a witness, all as a repeater, alleging four errors at trial. Ford contends recordings of his jailhouse phone calls should not have been admitted, he should have been allowed to reserve his

opening statement until after the State rested, the bailiff's contact with the victim warranted a mistrial, and witnesses should not have been allowed to testify about the contents of a surveillance video. We discern no errors and affirm the judgment.

Background

¶2 In the early morning hours of August 17, 2004, Ford and a female companion entered a gas station in Ashland. While the woman was at the counter to pay for her merchandise, Ford struck the clerk from behind with a beverage bottle. Ford then hit the clerk in the face and allegedly threatened him with a stapler before demanding the clerk's car. When the clerk refused, Ford stepped away. The woman paid for her items, and she and Ford left. The clerk did not call the police immediately, but called a few hours after the incident.

¶3 Ford was arrested and charged with attempted armed robbery with the threat of force, misdemeanor battery, and misdemeanor bail jumping, all as a repeater. While in jail, Ford made two phone calls on August 26 and 27, asking third parties to offer the victim $1,000 before Ford's preliminary hearing. Accordingly, when the State filed an Information, it added a felony charge of conspiracy to commit bribery of a witness with a repeater enhancer.

¶4 Ultimately, a jury acquitted Ford of the attempted robbery and convicted him on the other counts. On the battery and bail jumping charges, Ford was sentenced to eighteen months' initial confinement and six months' extended supervision for each count, to be served concurrently. For the conspiracy charge, the court sentenced Ford to four and one-half years' initial confinement and three years' extended supervision, to be served consecutively. Additional facts will be incorporated in the analysis as necessary.

Discussion

¶5 Ford complains of four errors in the trial court. First, he alleges that the audio tapes of his outgoing phone calls were inadmissible because he did not consent to the recordings. Second, Ford contends the trial court may have compromised his defense strategy by forcing his attorney to give an opening statement at the beginning of trial, rather than honoring the attorney's request to reserve the statement until the close of the State's case. Third, during trial, it came to light that it was the original bailiff who, within hours of the incident, advised the clerk to report it to police. This came as surprise to both parties, and Ford moved for mistrial, as he was concerned about improper influence on the jury and his inability to call the bailiff as a witness. Finally, Ford argues the trial court erred by allowing witnesses to testify about the contents of a surveillance tape.

I. Admission of Audio Recordings

¶6 Recordings of Ford's outgoing phone calls provided the State with evidence to add the conspiracy to bribe a witness charge in the Information. Ford brought a motion in limine to exclude the tapes, arguing a violation of the Wisconsin Electronic Surveillance Control Law (WESCL). Specifically, Ford argued the State failed to get a court order under WIS. STAT. § 968.30 authorizing interception of his calls.[1] The State responds that Ford consented to the recordings, making them admissible under WIS. STAT. § 968.31(2)(b).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶7 When we review a motion to suppress evidence, we uphold the trial court's factual findings unless clearly erroneous. *See* WIS. STAT. § 805.17(2); ***State v. Riley***, 2005 WI App 203, ¶6, 287 Wis. 2d 244, 704 N.W.2d 635. Whether some portion of the WESCL authorizes interception and use of Ford's jailhouse calls involves application of a statute to a set of facts. This presents a question of law we review de novo. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶8, 251 Wis. 2d 45, 640 N.W.2d 764.

¶8 WISCONSIN STAT. § 968.31 prohibits interception and disclosure of wire, electronic, and oral communications, subject to certain exceptions. As applicable here, it is not unlawful "[f]or a person acting under color of law to intercept a wire, electronic or oral communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception." WIS. STAT. § 968.31(2)(b). The sole question on appeal is whether Ford consented to the recordings. Ford argues the State failed to carry its burden. We disagree.

¶9 The State offered into evidence a copy of the jail's handbook, which is given to every inmate and advises that calls made through the jail's telephone service "may be monitored or recorded." The State also provided a letter from the jail's telephone service provider, SBC Communications, explaining that inmates hear a recorded message with each outgoing call, advising that the call "may be recorded or monitored." Finally, the State provided a tape of a call Ford made on August 22, predating the conspiratorial calls by four and five days, where Ford indicated to his recipient that the call was being recorded.

¶10 Ford averred that when he made the challenged phone calls, he did not hear the SBC warning and, in fact, it does not appear on the recordings of

Ford's calls.[2] Nevertheless, the trial court found that Ford had been advised by the handbook of the possibility the jail would record his calls. The court also found that callers are advised electronically by SBC about potential recordings and that Ford clearly knew, based on his own recorded statements, that his calls could be recorded. These findings are not clearly erroneous.

¶11 Ford had adequate and meaningful notice his outgoing calls could be recorded. Nevertheless, he proceeded to make outgoing calls. Under these circumstances, we conclude the evidence supports the trial court's ultimate conclusion that Ford consented to monitoring and interception of his phone calls. *See* ***Riley***, 287 Wis. 2d 244, ¶16. The tapes were properly admitted.[3]

II. Opening Statement

¶12 Ford asked to reserve his opening statement until the close of the State's case. The court told him to give his opening after the State's opening or he would forfeit the opportunity. Ford complains this is reversible error, arguing it forced him to commit to a defense and that he was somehow deprived of the presumption of innocence.

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[2] There is some suggestion that the SBC warning often does not appear on recordings of outgoing jailhouse calls.

[3] Admission of the recordings is subject to their authentication. *See* WIS. STAT. § 968.29(3)(b). It appears, however, that the authentication requirement was satisfied and, in any event, Ford has not challenged the recordings' authenticity.

Also, the State argued a second exception, that monitoring jailhouse calls is entirely outside the scope of the WESCL, based on a definition. *See* WIS. STAT. § 968.27(7)(a)2. As in ***State v. Riley***, 2005 WI App 203, ¶7 n.2, 287 Wis. 2d 244, 704 N.W.2d 635, because we conclude there was consent to the interception, we need not reach this issue.

¶13 First, Ford did not raise a contemporaneous objection to the court's decision. "[F]ailure to object to an error at trial generally precludes a defendant from raising the issue on appeal." ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (citation omitted). Ford argues there was no reason to object because the trial court "obviously made its ruling known," suggesting the court was immovable in its decision. However, if nothing else, preservation of an issue for appeal is a reason to object.[4]

¶14 Further, there is no merit to Ford's assertion the State offered no precedent allowing the court to force him to make his opening. As the appellant, it is Ford's duty to show the court erred. *See* ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997). It is not the State's burden to show the court was correct. Ford has not presented any case law or statutory law that sets forth a right to reserve the opening statement. He cites cases where reservation has been allowed or even encouraged, but that is not akin to having a right of reservation, a violation of which mandates reversal.[5]

¶15 Ultimately, the trial court has inherent authority over the "orderly and efficient exercise of its jurisdiction." *See* ***Jacobson v. Avestruz***, 81 Wis. 2d

[4] Ford further neglected to challenge the court's ruling in a postconviction motion. *See* WIS. STAT. § 809.30(2)(h).

[5] Ford cites a portion of ***State v. Sarinske***, 91 Wis. 2d 14, 38, 280 N.W.2d 725 (1979), which stated, "The trial court instructed the jury that defense counsel had a right to reserve his opening statement and make it at the conclusion of the [S]tate's case as 'a matter of his choice.'" The prosecutor had stated, in his opening, that it was customary for both sides to give an opening statement at the commencement of trial. Sarinske complained that the State's comment was improper and possibly prejudicial because he had been permitted to reserve his opening statement. He was concerned about how the jury would interpret his deviation from the "custom" the State identified. Thus, the court gave a cautionary instruction to the jury that Sarinske was entitled to make the reservation. But this corrective instruction does not establish an absolute right upon which Ford may rely here.

240, 247, 260 N.W.2d 267 (1977). This includes some degree of control over the presentation of a case, which necessarily encompasses the order of the parties' arguments. In any event, Ford has not shown any prejudice. He speculates that the opening statement could have been improved upon, but nonetheless concedes counsel gave an adequate opening statement.

III. Whether the Bailiff's Contact With the Victim Warrants a Mistrial

¶16 After Ford assaulted him, the gas station clerk did not immediately call the police. Until trial, both Ford and the State were under the impression that the clerk called the police after speaking to his manager. When the clerk testified, he pointed to the bailiff and said it was the bailiff who advised him to call the police.

¶17 With the jury removed, the court and the parties questioned the bailiff about what had happened at the station and whether the bailiff had said anything to the jury. The bailiff testified he had not told the jury about his contact with the victim. As to what transpired at the gas station, the bailiff testified that he had stopped at the station approximately two hours after the assault. He had spoken with the victim many times before and, on that morning, the clerk told him about what had happened and wondered if he should call and wake his manager or call the police. The bailiff advised him to call the police but did not stay until the police arrived. The bailiff later returned for coffee and police were there. The bailiff did not speak with police. As to why he had not mentioned knowing the victim previously, the bailiff testified that he was not completely certain what the trial was about until it started and the victim testified. Ford moved for a mistrial, claiming the bailiff could be an important defense witness if the clerk had not said anything about an attempted robbery. He also argued the jury could have been

improperly influenced because jurors "would likely want to know" what the bailiff "might have to say about the case."

¶18 The court ultimately concluded there was no appearance of impropriety. It noted that although the defense might call the bailiff, he was not scheduled as a State witness. In any event, the bailiff did not seem to be a critical witness and it appeared there would be a hearsay problem if the bailiff was called to testify about what the clerk said. The court further found that nothing had been said to the jurors about the bailiff's contact with the victim.

¶19 The court declined to grant a mistrial. However, it replaced the bailiff in the courtroom. It also treated the bailiff as a potential witness, excluding him from the courtroom and instructing him not to discuss his testimony with other witnesses. The court then questioned the jurors to find if any of them had a relationship with the bailiff that might prevent them from impartially deciding Ford's case. One juror indicated that she knew the bailiff because she thought he was a cousin of someone she was related to by marriage. However, that juror indicated that such a relationship would not interfere with her ability to decide the case fairly. The remaining jurors indicated they could remain impartial.

¶20 The decision to grant a mistrial is committed to the trial court's discretion. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. The trial court must determine whether, in the light of the entire proceeding, the claimed error was sufficiently prejudicial to warrant a new trial. ***Id.*** When the court denies a motion for a mistrial, we will reverse only if the court erroneously exercised its discretion. ***Id.***

¶21 On appeal, Ford faults the court's substitution of the bailiff because the bailiff

> had already become something of an advocate for the jurors in asking for restroom breaks, etc.
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> Clearly, a bailiff is looked to by many jurors as the one person who will help them through the unfamiliar and tense environment of a trial at the local courthouse. … [I]t is predictable that his presence was appreciated by the jurors. Furthermore, the change in the bailiff … was certainly a disruption, if not a shock, to them.

This argument is a nonstarter. Ford offers no record citation for the proposition that the jury was "attached" to the bailiff or even that they expected the bailiff would remain unchanged for the entire trial. Assuming that an emotional connection is real and not a product of appellate counsel's imagination, Ford fails to offer any evidence the jury could not or did not develop the same emotional bond with the next bailiff assigned to the case.

¶22 Ford also complains that this "surprise" revelation meant his attorney was not given notice the bailiff would be a potential witness. However, Ford had the court subpoena the bailiff and the bailiff appeared the following day. But Ford ultimately declined to call the bailiff, asking the court to release him from the subpoena and specifically putting the release request on the record. And, while Ford asserted the bailiff might be an important witness if he testified that the clerk said nothing about an armed robbery, Ford was ultimately acquitted of that charge without the bailiff's testimony.

¶23 The court did not erroneously exercise its discretion when it denied Ford's motion for the mistrial. It allowed the parties to question the bailiff and it questioned him itself. The jury confirmed its impartiality. The bailiff was taken off jury supervision and replaced. He was treated as a potential witness and given the same cautionary instructions from the court as any other witness. He was put under subpoena at Ford's request, although Ford eventually declined to call him.

Ford was acquitted of the charge for which he thought the bailiff's testimony might be beneficial. We discern no error.

IV. Testimony Regarding the Security Tape

¶24 The gas station had a "multiplexor" security system, which put images from four cameras onto a single videotape. The system recorded Ford in the station, showing him with something in his hand, swinging it toward the clerk's head, then punching the clerk in the face. The multiplexor format prevented the tape from being played on a regular VCR. During the investigation, one officer viewed the tape with the station manager, using the station's equipment.

¶25 Police did not immediately take the tape during their investigation. Rather, the manager offered to have the corporate office take the tape and make enlarged photo stills with their own equipment, as the station had done for police in other cases. Thus, the tape was left with the manager, but later seized at the State's request. Routine handling was applied in the tape's collection.

¶26 The tape was sent in a plain, unpadded manila envelope to the State Crime Lab so that it could be copied and made playable without special equipment. The forensic photography specialist assigned to the tape first had to remount the tape in a new shell, because the outer casing was cracked, apparently in transit. The specialist then discovered that he could only play about twenty-six minutes of tape before the tape stopped. The tape itself had a film deposited on it and the tape was crinkled. The specialist tried to remove the film deposit with distilled water but was unsuccessful.

¶27 Ford initially filed a motion to dismiss because of the damaged tape, asserting the tape should have been preserved by the prosecutor as exculpatory evidence. The court denied that motion, finding there was nothing patently exculpatory on the tape and the video was not the only source of the evidence the tape contained. The court also found there was no bad faith or negligence on the part of the police, noting the tape was still the gas station property; the police were not required to seize it, especially because the station was going to make photographic stills; and there was no evidence the police wanted the tape destroyed. Ford later filed a motion in limine to suppress testimony about the tape, which the court denied on the basis there was no bad faith.

¶28 The decision to admit or exclude evidence is a discretionary one. ***State v. Kimberly B.***, 2005 WI App 115, ¶38, 283 Wis. 2d 731, 699 N.W.2d 641. The test is not whether this court would have admitted the evidence in question. ***Id.*** If the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach," we will affirm the decision. ***State v. Veach***, 2002 WI 110, ¶55, 255 Wis. 2d 390, 648 N.W.2d 447.

¶29 The original of a photograph, which includes videotapes, is normally required. *See* WIS. STAT. §§ 910.01(2) and 910.02. If, however, the "originals are lost or have been destroyed," other evidence of the originals' content is admissible, provided the original was not destroyed in bad faith. WIS. STAT. § 910.04.

¶30 Ford suggests the original was not actually destroyed and that the State should have used "extraordinary methods to clean the tape…." It is unclear why Ford asserts the tape was not destroyed. Portions of the tape are unplayable,

unusable, and evidently unrepairable. As to cleaning, the technician replaced the casing and used a standard method to try to clean the tape, but declined more "extraordinary" efforts, fearing further deterioration of the source tape. The State offered the tape to one of Ford's attorneys, who returned it to the State after being discharged. The State nevertheless continued to be willing to give the tape to any expert Ford could find who wanted to try to clean the tape. Ford produced no such expert, nor did he offer any evidence the tape could, in fact, have been cleaned or repaired.

¶31 Ford also tries to have us review the tape's destruction under a negligence theory, suggesting that perhaps it was negligent of the State to allow the station manager or police officer to repeatedly view the tape, or to allow the tape to be sent through the mail stream in an unpadded envelope. The statute does not address a negligence standard. It speaks only of bad faith. The two standards are not synonymous.

¶32 The court concluded the original videotape was destroyed because parts were unplayable. It further held there was no evidence of bad faith on the State's part or on the part of the police; consequently, it was appropriate to allow the gas station manager and the police officer to testify about what they saw on the tape. In any event, the testimony merely corroborated both the clerk's and Ford's testimony that Ford had struck and punched the clerk. The original tape would have provided the same corroboration.

V. Cumulative Effects/Summary

¶33 Ford also complains that the cumulative effect of the four errors is sufficient to mandate reversal. However, because we hold that none of Ford's complaints amounts to an error, they can have no combined impact. The audio

tapes were properly admitted because Ford was on notice that outgoing calls could be recorded and, by making calls, he consented to their interception. There is no law giving Ford an absolute right to reserve his opening statement and he failed to contemporaneously object or raise the issue in the trial court. The bailiff's contact with the victim did not warrant a mistrial; the court took great pains to ensure there was no adverse effect on the jury. Finally, it was proper to allow witnesses to testify about the contents of a videotape because the original was destroyed, through no bad faith of the State.

By the Court.—Judgment affirmed.

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