COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2428-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RAPHAEL C. CALHOUN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

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

¶1 PER CURIAM. Raphael C. Calhoun appeals his conviction for possession of cocaine, second or subsequent offense, following a jury trial. He argues: (1) that the trial court erred in denying his motion to strike testimony of a police officer who allegedly violated a witness sequestration order; (2) that the

trial court erred in denying his motion for a mistrial which, he contends, was required because of an improper reference to his revocation hearing; and (3) that the evidence was insufficient to sustain his conviction. We affirm.

BACKGROUND

¶2 On March 28, 1999, several uniformed police officers, accompanied by an undercover detective, went to 3288 North 25th Street in Milwaukee in search of a man who had just sold cocaine to a different undercover detective at that address. Officers Ward and Marlock covered the front door while other police went to the rear of the residence. In response to Detective Pierce's knock on the back door, the man, who was later identified as the one who had sold cocaine to the undercover detective, opened the door but then attempted to close it after Detective Pierce identified himself as a police officer. The police forced the back door open, followed the man into the residence, and arrested him.

¶3 At about the same time, Calhoun opened the front door in response to Officer Marlock's knocking. Upon entering the residence through the front door, the police saw, in plain view on the living room floor, a "corner cut" plastic bag.[1] Also in plain view, on a table in the living room, were a cellular telephone, a spoon containing white residue, a pager, a razor blade, a box of plastic sandwich bags, and a set of keys. Calhoun admitted that the keys belonged to him. The police then searched him, found $2553 on his person, and arrested him. Based on this evidence, the State initially charged Calhoun with possession of cocaine with intent to deliver, later amending the charge to reflect second or subsequent offense.

[1] The "corner cut" field-tested positive for cocaine base.

¶4 Following jury selection, defense counsel moved to exclude and sequester the witnesses. The trial court granted the motion, stating: "All witnesses in this case are to remain outside of the courtroom. They are not to discuss any aspect of the case or any testimony in the case." The jurors were then sworn, opening statements were presented, and the State called Detective Pierce as its first witness. Detective Pierce testified that he did not recall seeing Calhoun sell any drugs, and that he had not seen Calhoun drop or throw anything to the floor.

¶5 Officer Ward testified next. On direct examination, he stated that he had been standing on the staircase adjacent to the porch with his face "directly up to" a window while Officer Marlock was knocking on the front door. Through an opening in a "disheveled blind," he looked directly into the living room and saw Calhoun "seated on a couch" about three feet away from him. While police were knocking on both the front and back doors, Officer Ward saw Calhoun reach into his jacket with his right hand, pull out a "corner cut" bag, "drop[] it immediately to his right," and walk toward the front door. Calhoun then opened the front door and allowed Officers Ward and Marlock to enter. Officer Ward retrieved the "corner cut" bag, took Calhoun into custody, recovered $2553 while searching his person, and arrested him.

¶6 During cross-examination the next morning, when asked if he had reviewed any photographs prior to testifying the previous day, Officer Ward replied: "At a revocation hearing regarding Mr. Calhoun, I was shown photographs taken by his defense attorney at that time or [by an] investigator hired by the defense attorney." Defense counsel then asked Officer Ward if he had discussed the facts of the case with anyone since his testimony the previous day; Officer Ward replied that he had not. Defense counsel continued: "Did Detective Pierce point out anything to you in any portion of his reports or anybody else's

reports following your testimony yesterday?" The prosecutor objected to the relevancy of the question, the court overruled the objection, and the following colloquy occurred:

> [OFFICER WARD]: I had reviewed the narrative report that Detective Pierce had dictated prior to yesterday.
>
> [DEFENSE COUNSEL]: My question was, after your testimony yesterday, did Detective Pierce point out any portion of his report or any other report in conjunction with this matter?
>
> [OFFICER WARD]: Yes.
>
> [DEFENSE COUNSEL]: And was that on his narrative?
>
> [OFFICER WARD]: Yes.

Defense counsel then requested a side-bar conference.

¶7 Following the side-bar, which was not recorded, the trial court excused the jury and allowed defense counsel to voice its concerns, on the record. Defense counsel stated:

> I'm obviously greatly troubled by that, that violation, which I actually saw yesterday. The purpose of a sequestration order is so that witnesses don't communicate with each other about things, and Detective Pierce, being as experienced as he is, knows the significance of a sequestration order, and for him to communicate with this officer by pointing out something in his report, prior to cross-examination, is completely inappropriate, and I move to strike all of Officer Ward's testimony, both on direct and cross.

The prosecutor then suggested that Officer Ward, and perhaps Detective Pierce, should undergo additional questioning "as to exactly what the incident entailed and whether or not this is a violation."

¶8 The trial court then asked Officer Ward if he had been in court when the sequestration order was issued; Officer Ward answered affirmatively. The questioning continued:

> THE COURT: And what's being alleged at this point is that after you left court yesterday, that you had a discussion regarding the testimony or something regarding aspects of this case with [Detective] Pierce?
>
> [OFFICER WARD]: We did not have a discussion.
>
> THE COURT: What occurred?
>
> [OFFICER WARD]: He handed me the reports, that whole package, the reports.
>
> ….
>
> THE COURT: All right. And during this exchange, are you saying that you did not discuss any testimony involved in the case?
>
> [OFFICER WARD]: No.
>
> THE COURT: Did you discuss any aspect of the case?
>
> [OFFICER WARD]: No.

¶9 Following additional discussion among the trial court, defense counsel, the prosecutor, and Officer Ward, the court researched case law during a brief recess. Finding no pertinent case law, the court resumed proceedings outside the presence of the jury:

> THE COURT: All right. And, Detective Pierce, you were present in court at the time that the Court gave the sequestration order?…
>
> DETECTIVE PIERCE: Yes, I was. I took that to mean any communication regarding the case. I knew that Officer Ward had not seen the reports and wanted to give him an opportunity to see them. I knew that he had seen them in the past and he had requested earlier in the day that he see them. They were being used by the prosecutor and myself prior to that.
>
> ….
>
> THE COURT: … [W]hat is the difference between the District Attorney giving the witness reports to review in this case and the officer who's been designated to assist the State in giving those reports?
>
> [DEFENSE COUNSEL]: Well, the problem isn't that somebody was given reports. It's that he was given reports after direct and before cross. I mean, among other things, I am entitled to interrupt counsel. I would be concerned if counsel had met with Officer Ward. You just can't do that.

¶10 After hearing arguments of both defense counsel and the prosecutor, the trial court decided to take sworn testimony from Detective Pierce, still outside the jury's presence. Detective Pierce testified that after court had been adjourned the previous day, he handed the entire packet of discovery materials (opened to the green-paged narrative report) to Officer Marlock, who was seated between Officer Ward and him, and asked Officer Marlock to hand it to Officer Ward, which Officer Marlock did. Detective Pierce explained:

> Basically the only reports we had been looking at throughout the whole day was the green pages. [sic] That's the only narrative of what occurred there, and I knew that Officer Ward hadn't had an opportunity to look at it, and I just gave it to him. I didn't tell Officer Marlock anything, and I didn't tell Officer Ward anything.

¶11 The trial court, acknowledging that it was "very perturbed at the suggestion that there ha[d] been a violation of the sequestration order," stated that "if taken at first blush," a violation seemed to have taken place. Ultimately concluding, however, that the sequestration order had not been violated, the court denied the motion to strike Officer Ward's testimony.

¶12 Then the trial court, noting that defense counsel also had moved for a mistrial (related to Officer Ward's reference to a revocation hearing), denied the motion. After hearing arguments of defense counsel and the prosecutor, the court announced:

> I'm going to instruct the jury that the officers were under a sequestration order and told not to discuss any aspect of the case and their testimony and concerning this case. I'm going to instruct the jury that they are to disregard the statements of Officer Ward with respect to any revocation hearing or any other proceedings that were outside of this trial and not before this court.

Defense counsel replied: "I don't want the Court highlighting this. As a matter of strategy, I think it's more problematic for the defendant, and I have discussed it with him, so just the first part would be fine."

¶13 The court recalled the jury and stated:

> I have a brief instruction to give you, and that is that prior to the matter starting, the witnesses in this case were instructed that they were under a sequestration order; that they were told not to discuss any aspects of the case or any testimony of the case with any other witness in this case, and that's one of the issues that we addressed.

Defense counsel then resumed its cross-examination of Officer Ward, eliciting his testimony that he had never seen Calhoun selling drugs to anyone. On recross-examination, Officer Ward testified that when the discovery materials were handed to him the previous day, "[t]he reports were flipped to the first page of the narrative that [Detective Pierce] had prepared," and that Detective Pierce had neither said anything to him nor pointed to any portion of the report.

¶14 The trial continued with testimony from other police officers and detectives, the man who had sold cocaine to the undercover detective, and an expert witness concerning fingerprint identification. The jury found Calhoun guilty of the lesser-included offense of possession of cocaine.

DISCUSSION

¶15 Calhoun argues that the trial court was incorrect in concluding that the witness sequestration order had not been violated.[2] On appeal, the parties

[2] Calhoun also contends: "The Court's holding that a sequestration order must be 'deliberately' violated to constitute the sanction of striking testimony was improper." While the record reveals that the trial court did, at one point, offer its opinion that there was "no deliberate attempt to violate the sequestration order," it also establishes that the trial court subsequently announced, at least three times, that there was *no violation* of the sequestration order.

interpret the record differently and present a fair debate on whether the police violated the sequestration order. On these facts, we cannot conclude that the trial court's finding that no violation occurred was clearly erroneous. Moreover, Calhoun has failed to establish that he suffered any prejudice from the alleged violation.

¶16 Witness sequestration is within the trial court's discretion. ***State v. Evans,*** 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220, *review denied*, 2001 WI 1, 239 Wis. 2d 773, 621 N.W.2d 629; WIS. STAT. § 906.15(3) (1999-2000).[3] As the supreme court stated in ***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), "[t]he 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." If a violation of a witness sequestration order does not result in prejudice to the defendant, "it is not error to deny a motion for mistrial or to allow the witness to testify." ***Id.***

¶17 Although Calhoun has alleged a violation of the sequestration order, he has not demonstrated any prejudice. The trial court instructed the jury regarding the sequestration order, and testimony resumed. Defense counsel was free to cross-examine, exposing the Pierce-Ward contact in an effort to undermine Officer Ward's credibility. Calhoun points to nothing, in either the testimony at trial or the testimony at the hearing on the alleged sequestration violation, to establish that any improper "shaping of testimony" took place. *See* ***Nyberg***, 75 Wis. 2d at 409. Accordingly, we conclude that the trial court did not erroneously

[3] All references to the Wisconsin Statutes are to the 1999-2000 version.

exercise discretion in allowing Officer Ward's testimony. *See* ***id.*** at 410 ("No actual prejudice was demonstrated, therefore the trial court did not err nor abuse its discretion in allowing testimony and not declaring a mistrial.").

¶18 Calhoun next argues that a mistrial was required because of Officer Ward's reference to a revocation hearing. He contends that "there can be no doubt that the state law enforcement witness purposely placed this inadmissible evidence before the jury." He further asserts: "The extremely biased nature of cleverly referencing the Defendant's inadmissible prior record by a state officer, combined with the weakness of the State's case, created a 'high degree' of necessity for a mistrial to be declared in fairness to the Defendant." We disagree.

¶19 In the absence of a "clear showing of an erroneous exercise of discretion," we will sustain a trial court's denial of a motion for a mistrial. ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). As we have explained:

> When the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights. In such a situation, a mistrial is allowed only if there is a "manifest necessity" for termination of the trial.

Id. at 507 (citations omitted). "The burden is on the defendant to establish that prosecutorial … conduct constitutes overreaching and that such conduct is intentional." ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). Calhoun has not demonstrated that the trial court's denial of his motion for a mistrial was an erroneous exercise of discretion.

¶20 The State concedes that the jury should not have heard any reference to Calhoun's revocation hearing, but contends that the error was harmless. The State is correct.

¶21 Under ***State v. Kourtidias***, 206 Wis. 2d 574, 557 N.W.2d 858 (Ct. App. 1996), Officer Ward's reference to Calhoun's revocation hearing would have necessitated a mistrial only if it had "affected the substantial rights" of Calhoun by creating a "reasonable possibility" that the information contributed to his conviction. *See* ***id.*** at 586. We are required to "weigh the effect of the inadmissible evidence against the totality of the credible evidence supporting the verdict." ***Id.***

¶22 The trial court offered to instruct the jury to disregard Officer Ward's reference to Calhoun's revocation hearing; defense counsel declined the offer. Calhoun points to no other testimony or argument even mentioning his revocation hearing. Other than contending that the evidence against him was "scant," he has failed to explain how this single, non-specific and apparently innocuous reference to "a revocation hearing regarding Mr. Calhoun" could have influenced the jury. The jury may have agreed that the evidence was "scant," finding him guilty of a lesser-included offense, but Calhoun has not established any "reasonable possibility" that the reference contributed to his conviction. Thus, we conclude, the reference to a revocation hearing was harmless error.

¶23 Finally, Calhoun argues that the evidence was insufficient to sustain his conviction. He submits that "[t]he only evidence, in any way, linking [him] to the possession of any cocaine was Officer Ward's testimony." But Officer Ward's testimony was enough. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). As the State responds, "To the extent other evidence might have contradicted Officer Ward's testimony, the jury showed by its verdict that it resolved those contradictions in the State's favor." Calhoun offers no reply to the State's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90

Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

By the Court.—Judgment affirmed.

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