COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2008

David R. Schanker
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. 2006AP2471-CR **Cir. Ct. No. 2005CF250**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN TYDAL SMITH,

DEFENDANT-APPELLANT.

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

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Steven Smith appeals a judgment convicting him of one count of second-degree recklessly endangering safety, one count of maintaining a drug trafficking place, one count of possession of cocaine with

intent to deliver between 5 and 15 grams, and one count of possession of cocaine with intent to deliver between 15 and 40 grams. He also appeals an order denying his motion for postconviction relief. We affirm.

¶2 Smith contends that the circuit court compromised his right to a unanimous verdict and denied him due process by failing to instruct the jury that each of the four counts that he was charged with constituted a separate crime.

¶3 There is no dispute that the circuit court failed to read the proper jury instruction due to confusion that arose during the jury instruction conference with the attorneys. The following exchange took place:

> THE COURT: All right. Now, as to the jury instructions, the Court has before it the following instructions: Instruction 100, the opening instructions.
>
> Any objection to that?
>
> DEFENSE COUNSEL: No.
>
> THE COURT: All right. I am going to mention these instructions, and once I hear–unless I hear an objection, I'll continue ….; 482, verdict submitted for one defendant, four counts, separate verdict; 484, verdict submitted for one defendant, four counts, separate verdict on each count.
>
> PROSECUTOR: That may be a duplicate, Judge.
>
> THE COURT: That is a duplicate. All right. Then the verdict forms—there's eight different forms—one for guilty and not guilty for each count. However, there has to be a second question on the amount of the drugs in each count. So you'll provide that after lunch?
>
> PROSECUTOR: Yes, I will, Judge.
>
> THE COURT: All right. Are there any objections to any of those instructions?
>
> DEFENSE COUNSEL: No.
>
> PROSECUTOR: No.

Contrary to what the circuit court believed, however, WIS JI—CRIMINAL 482 is not a duplicate of WIS JI—CRIMINAL 484. The former is entitled "Verdicts Submitted for One Defendant: Single Count: Included Offense." The latter is entitled "Verdicts Submitted for One Defendant: Two Counts: Separate Verdict on Each Count Required." Because the circuit court thought the two jury instructions were duplicative, the circuit court inadvertently failed to give WIS JI—CRIMINAL 484, the instruction that informs the jury that it must return a separate verdict on each count.

¶4 As a preliminary matter we address the State's argument that Smith has waived his right to raise this error because his attorney did not object when the jury instructions were given. "Failure to object at the [jury instruction] conference constitutes a waiver of any error in the proposed instructions or verdict." *See* WIS. STAT. § 805.13(3) (2005-06).[1] Although we may choose to review waived issues in some circumstances, *see* ***State v. Gaulke***, 177 Wis. 2d 789, 794, 503 N.W.2d 330 (Ct. App. 1993), the supreme court has explained that WIS. STAT. § 805.13(3) prohibits the court of appeals from reviewing unobjected-to jury instructions. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶5 In this case, however, the circuit court stated at the instruction conference that it intended to give the "separate verdict" jury instruction, although it mistakenly referred to WIS JI—CRIMINAL 482, which the court wrongly believed to be a duplicate of WIS JI—CRIMINAL 484. Because the court had said that it intended to give the separate verdict instruction, which Smith's counsel had

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

previously requested, Smith's counsel had no reason to object. Although the court subsequently omitted the proposed separate verdict instruction while instructing the jury, Smith's counsel's failure to object at that point does not preclude appellate review because the statutes specifically state that "[f]ailure to object to a material variance or omission between the instructions given and the instructions proposed does not constitute a waiver of error." WIS. STAT. § 805.13(4). Therefore, we reject the State's argument that the error is waived.

¶6 The State argues in the alternative that any error is harmless. "A constitutional or other error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. Smith counters that the error here is "structural," so we should not apply a harmless error analysis. The United States Supreme Court has found "an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" ***Id.***, ¶37 (citing ***Johnson v. United States***, 520 U.S. 461, 468 (1997)); *see, e.g.*, ***Gideon v. Wainwright***, 372 U.S. 335 (1963) (complete denial of counsel), and ***Waller v. Georgia***, 467 U.S. 39 (1984) (denial of public trial). The United States Supreme Court has explained that cases that defy harmless error analysis are those that contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." ***Neder v. United States***, 527 U.S. 1, 8 (1999) (citation omitted). In ***Neder***, the court held that a jury instruction error that omitted an element of the offense was not structural, and thus was subject to a harmless error analysis. ***Id.*** If a failure to instruct on an element of a crime is not a structural error, we see no basis for concluding that the omitted instruction here was a structural error.

¶7 Returning to the question of whether the error here was harmless, we conclude that it was. The State presented overwhelming evidence that Smith committed the four crimes by introducing both incriminating physical evidence and the testimony of the four police officers involved in the investigation and arrest of Smith: David Lopez, Jeffrey Sullivan, Rachel Szedziewski, and Dereck Harris. In addition, the court separately listed the charges for the jury and, after reading each charge, told the jury: "To this charge the defendant has entered a plea of not guilty, which means the state must prove every element of the offense charged beyond a reasonable doubt." Based on the evidence presented and the instructions that were given—even absent the separate verdict instruction that should have been given—it is clear beyond a reasonable doubt that the court's failure to provide the separate verdict instruction did not affect the jury's verdict.

¶8 Smith also argues that we should reverse based on our discretionary authority under WIS. STAT. § 752.35 because the circuit court's instructional error prevented the real controversy from being fully tried. Even though the jury was not reminded by the separate verdict jury instruction that it should consider each count separately, the circuit court presented each count separately when it instructed the jury and told them in each case: "To this charge the defendant has entered a plea of not guilty, which means the state must prove every element of the offense charged beyond a reasonable doubt." Viewing the instructions provided the jury as a whole, we conclude that the real controversy was fully tried.

By the Court.—Judgment and order affirmed.

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