

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2001

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.

No. 00-3446-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY WOODROW MYARTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Larry Woodrow Myartt appeals from a judgment entered after a jury found him guilty of one count of robbery with use of force, contrary to WIS. STAT. § 943.32(1)(a) (1997-98).¹ He claims that the trial court

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

erred when it denied his motion to suppress based on an illegal stop, and the trial court erred when it denied his motion for a mistrial based on a dissenting juror. Because the trial court did not err when it denied the suppression motion or erroneously exercise its discretion when it denied the mistrial motion, we affirm.

I. BACKGROUND

¶2 At 2:50 p.m., on March 12, 1998, Geraldine Bussey's dry cleaning business, located at 1214 East Wells Street, Milwaukee, Wisconsin, was robbed by a black male. The man stood next to Bussey at the cash register with his hand in his pocket. Bussey did not see a gun, but saw "shiny, shiny, shiny silver" which she believed to be a gun. Bussey called the police to report the robbery. She described the suspect as a black male with a grayish beard, in his forties, six-foot tall, 170 pounds, thin build, wearing a black knit cap and a red and black nylon winter jacket with white trim. She told the police that she believed he was armed with a silver handgun.

¶3 Twenty-five minutes later, five blocks away, the police spotted Myartt. He fit the race, age, height, and weight description of the suspect. He was wearing a Chicago Bulls leather jacket, which was predominantly black with red and white trim and he was also wearing a Chicago Bull's baseball cap. When the police stopped to question him, Myartt refused to take his hands out of his pockets. The police frisked Myartt and located a silver toy handgun. They also discovered several items which had been stolen from the dry cleaning store.

¶4 Myartt was charged with robbery by use of force. He filed a motion to suppress the evidence found incident to the search, arguing the investigatory stop was unconstitutional. The trial court denied the motion, and the case was tried to a jury. The jury returned with a guilty verdict; however, during the

individual juror polling, one of the jurors stated that this was not her verdict. The trial court conducted an individual *voir dire* of the juror and learned that she had changed her mind between the time the jury had reached its verdict and the individual polling. As a result, the trial court sent the jury back to re-deliberate. Subsequently, the jury reached a unanimous guilty verdict, and judgment was entered. Myartt now appeals.

II. DISCUSSION

A. *Suppression Motion.*

¶5 Myartt argues that his Fourth Amendment rights were violated when the police stopped and searched him because the suspect's description only generally matched his appearance. Myartt suggests that the investigatory stop was illegal and, therefore, the evidence discovered during the search should have been suppressed by the trial court. We reject his argument.

¶6 Both the Fourth Amendment of the United States Constitution and Article I, Section 11, of the Wisconsin Constitution guarantee all citizens the right to be free from unreasonable searches and seizures. Because an investigatory stop is a "seizure" within the meaning of the Constitution, a law enforcement officer, before stopping an individual, must reasonably suspect, in light of his or her training and experience, that the individual is, or has been, involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).

¶7 For a stop to be constitutionally valid, the officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the intrusion on a citizen's liberty. *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990)

(citation omitted). It is a common-sense test: what is reasonable in a given situation depends upon the totality of the circumstances. *State v. Anderson*, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990). The test is designed to balance the personal intrusion into the suspect's privacy occasioned by the stop against the societal interests in solving crime and bringing offenders to justice. *State v. Guzy*, 139 Wis. 2d 663, 680, 407 N.W.2d 548 (1987).

¶8 In reviewing the denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). However, whether a stop passes constitutional muster is a question of law, which we review independently. *Richardson*, 156 Wis. 2d at 137-38.

¶9 The trial court reviewed the totality of the circumstances here when it ruled on the suppression motion. The trial court compared the description of the suspect to the actual appearance of Myartt when the police stopped him. In doing so, the trial court found that out of ten facts describing the suspect, four of the facts matched Myartt exactly. These included race, age, height and weight. The trial court found that seven out of ten closely matched Myartt's appearance. These included the description of the suspect's clothing; i.e., his hat and jacket. Although Bussey did not describe the hat and jacket exactly, she did describe the correct colors and type of clothing. The trial court found that only three of the ten descriptive facts did not match at all. The trial court reasoned that the description was close enough to give the police officers "specific and articulable" suspicion to conduct a *Terry* stop.

¶10 In addition, the trial court also considered that Myartt was located in the vicinity of the robbery shortly after it occurred. When the officers approached Myartt and asked him to take his hands out of his pockets, he refused.

¶11 Based on all of these factors, we agree with the trial court that the officers here had a reasonable suspicion that Myartt was the individual who had robbed the dry cleaning store. As a result of the investigatory stop, the officers discovered the silver toy gun and items that were stolen from Bussey's store. Under the totality of the circumstances, the officers were justified to conduct an investigatory stop and, therefore, the trial court did not err when it denied Myartt's motion to suppress the evidence.

B. Motion for Mistrial.

¶12 Myartt also claims that the trial court erred when it refused to grant his motion for mistrial. He contends that when the verdict was read in open court, the trial court accepted it. When the female juror changed her mind during individual polling, Myartt argues that the trial court should have granted a mistrial. We reject his argument.

¶13 Whether to grant a motion for mistrial is a decision that is committed to the sound discretion of the trial court. *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). The trial court must review the entire proceeding to determine “whether the claimed error is sufficiently prejudicial as to warrant a mistrial.” *Id.* We will not reverse the trial court's decision regarding a motion for mistrial unless the trial court has erroneously exercised its discretion. *Id.* “A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational

decision-making process.” *State v. Bunch*, 191 Wis. 2d 501, 506-07, 529 N.W.2d 923 (Ct. App. 1995).

¶14 Myartt claims that the trial court cannot send the jury back to deliberate under the circumstances presented in this case. He sets forth two reasons for his position: (1) when the verdict was read in open court, it was accepted by the trial court and the jury cannot re-deliberate; and (2) his right to an impartial jury was violated because the trial court individually *voir dired* the dissenting juror, which sent the message to that juror that she had done something wrong. We disagree with both contentions.

¶15 First, a jury’s verdict is not accepted until it is received in open court, the verdict is announced, the jury has been individually polled, and judgment has been entered. *State v. Reid*, 166 Wis. 2d 139, 144, 479 N.W.2d 572 (Ct. App. 1991). Here, the verdict was received in open court and announced, but polling had not been completed and judgment had not been entered. Therefore, the verdict had not been accepted by the trial court. When the trial court discovered a dissent during the polling, it was within its discretion to direct the jury to re-deliberate. *Id.*

¶16 Second, Myartt’s claim that the jury that convicted him was not impartial has not been proven. Myartt is entitled to a fair and impartial jury, one that has not been exposed to extraneous or improper influence. *State v. Alfonsi*, 33 Wis. 2d 469, 480-81, 147 N.W.2d 550 (1967). He claims that the individual *voir dire* of the dissenting juror violated his right to a fair and impartial jury. We cannot agree. The individual *voir dire* was recorded and consisted solely of the trial court asking the juror whether she voted guilty back in the deliberation room. She said that she did vote guilty, but changed her mind when she was individually

polled. The trial court's response was, "Okay, fine. You return and deliberate with the other jurors. Thank you." This is not an extraneous or improper influence. The trial court did not erroneously exercise its discretion when it denied the motion for a mistrial.

By the Court.—Judgment affirmed.

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

