COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1741-CR **Cir. Ct. No. 2005CF1518**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERENCE ANTHONY LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Terence Anthony Lee appeals from the judgment of conviction entered against him. He argues that the trial court committed

reversible error during the jury's deliberations. Because we conclude that any error committed by the trial court was harmless, we affirm.

¶2 Lee was convicted after a jury trial of one count of repeated acts of sexual assault of a child. During the jury's deliberations, the trial court received a note from the jury asking: "If we can't come to a unanimous decision, what do we do?" The parties agreed that the court should read to the jury the Supplemental Instruction on Agreement, WIS JI—CRIMINAL 520.[1] The trial court called the jury into the courtroom and read the instruction. The jury then returned to the jury room to continue deliberating. The jury did not reach a verdict that day, and the trial court dismissed them.

¶3 The deliberations continued the next day. Shortly after lunch that day, the judge informed the parties that just before lunch, he had asked his clerk "to go to the jury and ask the state of their deliberations." When he reported this to the parties, he asked the clerk; "Is that what you asked?" to which the clerk responded: "That's exactly what I asked." The judge said that he had asked the clerk to check with the jury because he wanted to know "whether it made any

[1] WISCONSIN JI—CRIMINAL 520, the Supplemental Instruction on Agreement, states:

> You jurors are as competent to decide the disputed issues of fact in this case as the next jury that may be called to determine such issues.
>
> You are not going to be made to agree, nor are you going to be kept out until you do agree. It is your duty to make an honest and sincere attempt to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others, and talk matters over freely and fairly, and make an honest effort to come to a conclusion on all of the issues presented to them.
>
> You will please retire again to the jury room.

sense to take them to lunch and bring them back this afternoon as the snow continues to fall throughout our community."

¶4 The judge then explained that the response from the jury was a note that said "how many were voting guilty and how many were voting not guilty." The trial court and the parties then discussed whether the judge should disclose to them the exact number of votes for each position. Defense counsel stated at one point: "Well, I guess there has been communication with the jury. It was done without consulting with counsel. Information has been passed from the jury to other individuals. We don't have that information."

¶5 The court eventually disclosed to the parties that "eight people were voting for guilty and four people for not guilty." The trial court then sent a note to the jury asking if the jury required additional time to deliberate. The foreperson sent a note back that said "no." The jury was called back into the courtroom. The jury informed the trial court that it did need more time to consider the case. The trial court sent the jury back to deliberate. Defense counsel then moved for a mistrial, stating that the jury "indicated on two occasions that they are deadlocked." The trial court denied the motion.

¶6 Later that afternoon, the trial court and the parties discussed telling the jury that deliberations would be ended, when the court was informed that the jury had reached a verdict. The jury found the defendant guilty. After the jury was dismissed, defense counsel renewed his motion for a mistrial. Counsel stated:

> Well, your Honor, I would renew the grounds I had regarding mistrial. I have certain questions as to the manner in which this protracted deliberation occurred. I think it is certainly from the defendant's standpoint frustrating. But given the time that they came back knowing that they probably would not be coming back much longer, I'm not sure what pressure was put upon

> those who were standing for a verdict of not guilty given the information we had earlier in the day.
>
> Other than that, your Honor, I would like to reserve for appellate purposes, conviction purposes any other grounds that may occur that I'm not thinking of at this time.

The trial court again denied the motion for a mistrial.

¶7 Lee argues that the trial court erred when it responded to the question presented by the jury, when it read the jury WIS JI—CRIMINAL 520, and when it sent the clerk to communicate with the jury outside the presence of the parties. Lee further argues that the error was not harmless. We conclude that Lee waived any objection to the reading of the jury instruction, that the trial court did err when it communicated with the jury, but that the error was harmless.

¶8 First, Lee argues that the trial court erred when it read WIS JI—CRIMINAL 520 too early in the proceedings. The record discloses, however, that Lee's counsel stated that he did not have any objection to the court reading the jury instruction. Since defense counsel agreed to it, Lee cannot now challenge it on appeal. *See* ***State v. Zelenka***, 130 Wis. 2d 34, 44, 387 N.W.2d 55 (1986). Lee responds that this error may be considered, *see* ***id.*** at 44-45, and combined with the court's "*sua sponte* violation of the sanctity of the jury's deliberations" is one of the factors that improperly put pressure on the jury to reach a verdict. For the reasons discussed below, however, we conclude that if there was error, it was harmless.

¶9 Lee next argues that the trial court erred because of the *ex parte* communication it had with the jury through its clerk. The State responds that Lee waived any argument he has on this issue because his counsel did not object at trial to this specific error. We do not agree. The record discloses that defense

counsel stated an objection to the way "this protracted deliberation occurred." We conclude that this statement was sufficient to preserve this issue for appellate review.

¶10 We further conclude that the trial court erred when it communicated with the jury through its clerk. A criminal defendant is entitled to be present at his or her trial, and have counsel present at every stage. ***State v. Anderson***, 2006 WI 77, ¶40, 291 Wis. 2d 673, 717 N.W.2d 74. A trial lasts from the start of jury selection to dismissal of the jury, and a defendant has a right to be present "whenever any substantive step is taken in the case." ***Id.***, ¶42. This includes the trial court's communications with the jury during deliberations. ***Id.***, ¶43. In this case, the trial court erred when it sent the clerk to the jury room to inquire about the status of the jury's deliberations outside of the presence of the defendant. We conclude, however, that this error was harmless. *See* ***id.***, ¶76.

¶11 An error is harmless "if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" or "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶¶114-15 (citations omitted). The test, however, is not a sufficiency of the evidence test. ***Id.***, ¶125. An error will not be harmless when "the circuit court created a situation of undue emphasis on the State's portion of the case, which contributed to the verdict obtained." ***Id.***

¶12 In this case, the trial court's error was inquiring into the status of the jury's deliberations *ex parte*. The question did not concern the substance of the case, and was based at least in part, on the court's concern about the weather conditions. This is far different from the errors in ***Anderson*** when the trial court

communicated with the jury about reading portions of the trial transcript. *See* ***id.***, ¶117. In that case, the jury asked the trial court to be allowed to read the defendant's and victim's in-court testimony. ***Id.***, ¶13. The trial court responded that it would be too "'cumbersome' to read the entire testimony to the jury," and asked the jury to be more specific. ***Id.*** The jury sent another note to the trial court saying that "it did not understand the defendant's testimony." ***Id.***, ¶14. The court responded again asking the jury to be more specific, but the jury did not respond to this note. ***Id.***

¶13 The supreme court concluded that the communications suggested that "the jury was obviously having difficulty sorting [the testimony] all out and wanted to be able to re-examine the evidence." ***Id.***, ¶121. "In other words, the jury may have doubted the verdict that it eventually reached, but was not permitted to have testimony read, upon request, that might have been contrary to that verdict." ***Id.***, ¶122.

¶14 This is in sharp contrast to this case and the question the trial court sent its clerk to ask. The potential prejudice Lee suggests the court's question may have caused is that the members of the jury who were for acquittal may have felt pressured to join the majority. The events that followed, however, contradict this theory. After the question was asked and answered, the jury first said it did not need more time to deliberate, but then soon after said that it did. The court then sent the jury back to deliberate. The jury deliberated for an entire afternoon after the improper communication took place. In light of this sequence of events, as well as the evidence presented at the trial, we conclude that the State has

demonstrated that the error complained of did not contribute to the verdict obtained. Because the error was harmless, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2005-06).