

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1080-CR

Cir. Ct. No. 2006CF564

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. WARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William Ward appeals from a judgment of conviction for armed robbery and intentionally pointing a firearm at a person, both as repeaters. Ward claims the circuit court erroneously exercised its discretion when it denied his motion for a mistrial. We affirm.

¶2 At Ward’s trial, Alexandria Micke testified that while at home with her two-year-old sister on July 2, 2006, she heard a knock on the front door late at night. She allowed two individuals to enter the house believing they were there to purchase marijuana from her boyfriend.¹ Subsequently, two other males entered the residence. One of the males pointed a silver handgun at her head and stated, “Where’s the shit?” One of the other males had a “big butcher knife.” The two armed males then “basically ripped the house apart” looking for drugs and money. During the robbery, the male with the handgun also pointed it at the two-year-old child and threatened to kill her if they didn’t find anything. At some point, a neighbor came to the back door, and two of the individuals ran out stating, “[T]here’s somebody with a gun.” Shortly thereafter, the males with the handgun and the knife also ran out the back door.

¶3 Under a grant of immunity, Dieshon Manka-Moore testified he, Ward and the two other individuals drove to Micke’s house in a “[t]wo door silver car” driven by Ward after a party. Manka-Moore and another individual were “supposed to get dropped off. We were there. Me and Travis went in the house. Then we were smoking, and then a little while later, Rob and Frosty came in the house.” Frosty was identified as a nickname for Ward. Manka-Moore testified Ward “pulled out” a silver handgun at the residence, which Ward pointed at Manka-Moore, Micke, and another individual.

¶4 On July 5, 2006, Ward was taken into custody on a different charge. Officers received a dispatch indicating the victim of a drive-by shooting from the

¹ Her boyfriend was not home at the time. Further, Micke testified at trial her mother was “at a concert with her boyfriend, and my dad, he doesn’t live around here, so.”

previous day had called stating the suspect vehicle had just driven by her house. A traffic stop revealed Ward was the driver of that vehicle and a silver handgun was recovered from under the seat.

¶5 Retired Appleton police detective Thomas Janda briefly referred to the drive-by shooting in his testimony:

Q: Did you have contact with Mr. Ward on July 5, 2006?

A: Yes.

Q: How did that contact come about?

A: We were investigating a driveby shooting that had occurred on July 4, and we had officers looking for a silver Sunfire which was operated by Mr. Ward [and] owned by a Jason Masterson. The victim of the driveby shooting saw the vehicle go past her house, turn around –

MR. FULLEYLOVE-KRAUSE: I'm going to object to this. I'd ask—I have a motion that has to be heard outside the presence of the jury.

THE COURT: I agree. Ladies and gentlemen, you may be, you may be excused for a few minutes.

¶6 The circuit court denied a mistrial motion after hearing arguments, but stated it would direct the jury to disregard the answer. After the jury returned to the courtroom, the court admonished the jury:

Ladies and gentlemen, I just want to inform you that the entire answer that was just said by this witness should be stricken from the record. I have stricken it from the record. It should be entirely disregarded, shouldn't use it, can't rely upon it. You need to absolutely [forget] it, and I want to inform you that that answer by this witness was entirely inappropriate. It shouldn't have happened.

¶7 After the curative instruction, Janda proceeded to testify that he was involved in a traffic stop with Ward on July 5, 2006, and he saw a silver Ruger handgun partially concealed under the driver's seat. Janda then stated the gun

identified as exhibit 6 at trial was “the same type or is the same handgun.” Janda also identified the vehicle involved in the traffic stop as a silver Pontiac Sunfire. Detective Cary Meyer then testified that Ward said he owned the gun found in the silver Pontiac Sunbird.

¶8 As indicated, Ward was found guilty of armed robbery and intentionally pointing a firearm at a person. The circuit court imposed a sentence of fourteen years’ initial confinement and nine years’ extended supervision on the armed robbery count and one year of initial incarceration and one year of extended supervision on the firearm count, concurrently.

¶9 On appeal, Ward argues Janda’s stricken testimony was irrelevant and unfairly prejudicial. Ward contends the testimony of Ward’s involvement in a drive-by shooting “would tend to cause the jury to base its decision on that irrelevant consideration, increase their desire to punish him and improperly form a belief as to his character.” As a result, Ward insists it was insufficient to merely strike the testimony and the court was required to grant the motion for a mistrial.

¶10 The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 317, 659 N.W.2d 122. The circuit court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. *Id.* Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). On appeal, this court will not reverse the denial of a motion for mistrial absent a clear showing of an erroneous exercise of discretion. *See State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). A circuit 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).

¶11 We conclude the brief reference to the drive-by shooting did not reasonably contribute to the convictions. Here, the evidence against Ward was overwhelming. Moreover, Ward’s case depended upon discrediting Micke and Manka-Moore. In closing arguments, Ward’s trial attorney challenged Micke’s and Manka-Moore’s description of the gun and presented the jury with detailed challenges to their credibility. Ward’s attorney argued, “[Micke]’s a liar basically” and that Manka-Moore had motives for falsifying his testimony “in order to get this deal.” Janda’s stricken testimony did not have any impact on this strategy. A reasonable jury could easily find guilt beyond a reasonable doubt from the evidence.

¶12 In light of the overwhelming evidence introduced throughout the course of the trial, it is also reasonable to conclude any prejudicial effect that could possibly have flowed from the inadmissible testimony was cured by the court’s stern, no-nonsense curative instruction. The record does not contain a scintilla of a suggestion that the jury disregarded the circuit court’s curative instruction to ignore the stricken reference to the drive-by shooting. *See State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894. The court properly denied Ward’s motion for a mistrial.

By the Court.—Judgment affirmed.

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

