COURT OF APPEALS
DECISION
DATED AND RELEASED

July 25, 1995

No. 94-1193-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

L. C. CLAY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

WEDEMEYER, P.J. L. C. Clay appeals from a judgment of conviction after a jury found him guilty of nine counts of armed robbery, contrary to § 943.32(1) and (2), STATS., one count of attempted armed robbery, contrary to §§ 943.32(1)(b), 943.32(2) and 939.32, STATS., and five counts of first-degree sexual assault, contrary to § 940.225(1)(b), STATS.

Clay asserts four instances of trial court error: (1) the admission into evidence of his custodial statements which were the fruit of an illegal arrest; (2) improper joinder of four counts of alleged criminal activity occurring at St. Joseph's Hospital; (3) the erroneous exercise of discretion in not striking a juror for cause; and (4) an erroneous exercise of discretion in failing to compel discovery and in denying a motion for a mistrial.

Because probable cause for arrest existed; because failure to sever the alleged counts of criminal activity occurring at St. Joseph's Hospital was harmless error; and because failure to strike a prospective juror for cause, failure to compel the production of certain photographs in the prosecution's possession, and failure to grant a mistrial was not an erroneous exercise of discretion, we affirm.

I. BACKGROUND

This appeal has its genesis in Clay's arrest for disorderly conduct in the late evening hours of August 21, 1991, at 2714 North 44th Street in the City of Milwaukee. When police were in the process of placing Clay in a police vehicle for conveyance to the city jail pursuant to a disorderly conduct arrest, a citizen who observed the process, informed a police officer that he thought Clay might be the person who committed a sexual assault at St. Joseph's Hospital. The basis for the citizen's report was a description appearing on a television program. The next morning a detective interviewed Clay after advising him of his constitutional rights. Clay waived his rights, but refused to sign the waiver form and denied being involved in the St. Joseph's incident. In the meantime, police were informed that Clay might be involved in seventeen or eighteen unsolved robberies. Police compared Clay's fingerprints with a latent print lifted at the scene of one of the unsolved robberies. Clay's print matched a print at the robbery scene which allowed police to arrest him for robbery. A detective then interviewed Clay about the rest of the robberies. The interview lasted four and one-half hours. Clay was advised of his constitutional rights, waived them, and then confessed to seventeen robberies and five sexual assaults.

As pertinent to this appeal, Clay faced eleven counts of armed robbery, one count of attempted armed robbery and five counts of first-degree

sexual assault. Three of the sexual assaults occurred at St. Joseph's Hospital and two occurred at Moods for Moderns beauty salon.

Prior to trial, Clay moved to suppress statements given to the police as fruits of an illegal arrest. The trial court denied this motion, ruling that there was probable cause for an arrest for disorderly conduct. Clay next moved to sever the three counts of sexual assault and one count of attempted armed robbery which occurred on August 8, 1991, at St. Joseph's Hospital from the remaining counts. The trial court denied the motion holding that all of the counts were properly joined under § 971.12(1), STATS. Clay additionally moved the trial court to compel the State to produce photographs of a number of people who, prior to Clay's arrest, had been identified as potential suspects in the unsolved incidents of robbery. The trial court denied this motion on the basis that the photographs were not exculpatory.

A jury was impaneled. During the voir dire, Clay's counsel asked the trial court to strike a juror for cause on the grounds that the juror had expressed a bias against Clay. The trial court denied the motion. During trial, it became evident that a certain police offense report had not been turned over to Clay in spite of a discovery demand. Clay moved for a mistrial, but the motion was denied because the contents of the report were not exculpatory and no manifest injustice had occurred.

The jury found Clay guilty of nine counts of armed robbery, one count of attempted armed robbery, and all five counts of first-degree sexual assault. He was absolved of two counts of armed robbery. He now appeals.

II. DISCUSSION

A. Probable Cause to Arrest.

Clay first contends that his custodial statements should have been suppressed because they were the fruit of an illegal arrest. ***Wong Sun v. United States***, 371 U.S. 471 (1963) (a warrantless arrest made without the requisite probable cause). We are not persuaded.

The factual content of Clay's arrest is undisputed. Two City of Milwaukee police officers were dispatched to a duplex located at 2712 North 44th Street at 10:35 p.m. on August 21, 1991, to investigate a reported burglary in progress. The officers discovered a broken basement window at the rear of the residence and saw someone in an upstairs window. One of the building tenants, Dolores Ray, told police that when she heard the sound of breaking glass, she fled the building with her child. She told police she believed that the intruder might be a person who had been arrested earlier that day for battery to another female resident and after his release, had returned to the premises. After examining the circumstances, the officers believed there was a burglar in the building and radioed for assistance. Ten additional officers came to the scene to help secure the building. One of the officers knocked on the door several times, but received no response. Twenty-five minutes after they arrived on the scene, police gained entrance to the building by the use of a key provided by Ray. Police found Clay on an unlighted stairwell leading to the basement. Clay identified himself and correctly informed police that he lived in the residence. The officers learned that Clay had been arrested earlier relating to domestic trouble, but no charges and no restraining order had been issued as a result of the arrest. Clay told police that he had come to remove his belongings. Since he did not have a key, and because of a dispute with his girlfriend, he broke the window to gain entry. The police arrested Clay for disorderly conduct. No complaint, however, was ever issued for such a charge.

Probable cause to arrest requires that at the moment of arrest, the arresting officer knew of facts and circumstances which were sufficient to warrant a prudent person to believe that the person arrested had committed or was committing an offense. This requirement concerns only "probabilities" and is fulfilled if the totality of the circumstances leads a reasonable officer to believe that guilt is more than a possibility. *See* ***State v. Paszek***, 50 Wis.2d 619, 625, 184 N.W.2d 836, 840 (1971).

Whether historical facts constitute probable cause for arrest is in itself a question of "constitutional fact" involving the application of federal constitutional principles which we review independent of the conclusions of the trial court. ***State v. Mitchell***, 167 Wis.2d 672, 684, 482 N.W.2d 364, 368 (1992). This review process requires objectively analyzing the facts and circumstances of Clay's arrest regardless of the officer's intent, motivation or belief. As long as there are objective facts that would have supported a correct legal theory for the arrest, it is valid regardless of the police officer's personal opinion of the legal

basis for the arrest. ***State v. Baudhuin***, 141 Wis.2d 642, 648-51, 416 N.W.2d 60, 62-63 (1987). Upon review, we are concerned with whether a trial court is correct rather than with the process by which it achieved rectitude. ***Id.***

The trial court, in concluding that there was probable cause for the arrest, was somewhat ambivalent in stating its reasons for reaching its conclusion. It alluded to three bases for the arrest: (1) violation of a no contact order; (2) criminal damage to property; and (3) disorderly conduct. Indeed, the factual context of Clay's actions might very well have supported an arrest for any one of the three alternate legal theories. We, however, shall only examine whether Clay's conduct satisfied a probable cause finding for disorderly conduct.

Section 947.01, STATS., defines disorderly conduct. Since the facts leading up to Clay's arrest are not in dispute, we direct our attention to that portion of the statute which reads: "or otherwise disorderly conduct on the circumstances in which the conduct tends to cause or provoke a disturbance." This part of the statute generally denominated as the "catchall clause" proscribes otherwise disorderly conduct which tends to disrupt good order and to provoke a disturbance. ***City of Oak Creek v. King***, 148 Wis.2d 532, 541, 436 N.W.2d 285, 288 (1989). In determining whether conduct is "otherwise disorderly," it is crucial to examine the context in which the conduct occurred.

The police who were involved in Clay's arrest were dispatched to a reported burglary in progress at 2712 North 44th Street in the City of Milwaukee at 10:45 p.m. They discovered a broken basement window at the rear of the two-family duplex. Contemporaneously, one officer observed, through an upstairs window, the movement of an unidentified person. Several attempts were made to get someone to come to the door, but no response occurred. One of the officers heard footsteps on some interior steps. A resident of the duplex informed the officers that she had fled the building with her child and ran across the street to call police when she heard the sound of breaking glass. She feared that the breaking glass was caused by a person who was arrested earlier that day for battery to a female resident. It was the belief of the officer that there was possibly a burglar inside the building.

The resident who had fled the building provided the police with a key to open one of the doors to the residence. In the meantime, ten additional police officers came to the site of the incident to help secure the building. Approximately twenty-five minutes after the police arrived at the scene, they gained entry to the building and found Clay in an unlighted stairwell leading to the basement. The episode provoked the attention of residents from the neighborhood, who congregated to observe the occurrence. From their investigation, the police learned that Clay was a resident of the building, that he had been arrested earlier for a domestic disturbance, and that he had returned to pick up his belongings, but that he had not opened the door when the police first arrived because he did not want to go to jail. When the circumstances of this incident are viewed *in toto*, we conclude that there existed that quantum of evidence which would lead a reasonable police officer to believe that Clay probably committed disorderly conduct. Our analysis allows no other conclusion but that probable cause existed for disorderly conduct. Consequently, the trial court did not err in denying Clay's motion to suppress.

B. Motion to Sever.

Clay's second claim of error is that the trial court erroneously exercised its discretion in refusing to sever three counts of first-degree sexual assault and one count of armed robbery which occurred on August 8, 1991, at St. Joseph's Hospital in the City of Milwaukee.

Section 971.12(1), STATS., permits joinder of multiple crimes when those crimes are of a same or similar character or are based on the same act or transaction. Whether joinder of crimes is proper is a question of law which we review *de novo*. ***State v. Locke***, 177 Wis.2d 590, 596, 502 N.W.2d 891, 894 (Ct. App. 1993).

Section 971.12(3), STATS., provides that the trial court may order separate trials of properly joined charges if it appears that a defendant is prejudiced by the joinder of the counts. A trial court's refusal to grant a motion for severance will not be disturbed on appeal absent a finding that the trial court erroneously exercised its discretion. ***State v. Hall***, 103 Wis.2d 125, 140, 307 N.W.2d 289, 296 (1981).

If offenses do not fulfill the proper condition for joinder, it is presumed that the accused will be prejudiced by a joint trial. ***State v. Leach***, 124 Wis.2d 648, 671, 370 N.W.2d 240, 253 (1985), *cert. denied*, 498 U.S. 972 (1990). The state may rebut the presumption on appeal by demonstrating the accused has not been prejudiced by a joint trial. ***Id.*** It is only when it is determined prior to trial that joinder is proper but it becomes apparent on appeal the offenses were misjoined, that the state has any opportunity to demonstrate lack of prejudice. ***Id.*** In limited circumstances when this phenomenon occurs, the misjoinder of offenses may be harmless. ***Id.*** We conclude this case fulfills those limited circumstances when misjoinder constitutes harmless error.

The charges confronting Clay consisted of eleven counts of armed robbery, five counts of first-degree sexual assault and one count of attempted armed robbery. Ten of the incidents of armed robbery and the one incident of attempted armed robbery occurred at small retail establishments. With the exceptions of the three counts of sexual assault and one count of armed robbery which occurred at St. Joseph's Hospital, all of these alleged incidents commenced initially by the forceful obtaining of money.[1] As the evidence at trial developed, although all of the incidents of criminality occurred within a six-month period from February 1991, to August 1991, the sexual assaults and subsequent armed robbery which took place at St. Joseph's were not of the same or similar character nor because of locale connected together, nor by execution, part of a common scheme or plan. The common scheme, if there was one, that ran through all of the alleged criminal acts was the isolation of the victim for however brief a period of time, and the subsequent use or threat to use a weapon capable of cutting or stabbing a victim for the purposes of gaining submission to the perpetrator's demands. But countless armed robberies are committed in the same fashion. Without the presence of some other recognizable associating characteristics, the general *modus operandi*

[1] In denying Clay's motion to sever the counts emanating from the St. Joseph's incident, the trial court reflected that the "common thread" in all the counts is "the armed robbery. And the armed robberies, that thread goes to the sexual assaults too based on the facts as alleged, the facts as represented by both counsel because armed robbery in fact, took place."

Crimes, however, are not of the same character simply because they constitute violations of the same statute. "Crimes are of the same or similar character if they are 'the same type of offenses occurring over a relatively short period of time, and the evidence as to each count overlaps.'" ***State v. Hoffman***, 106 Wis.2d 185, 208, 316 N.W.2d 143, 156 (Ct. App. 1982) (citation omitted).

acknowledged herein does not make the St. Joseph incidents fit candidates for proper joinder with the other counts.

The overriding evil to be avoided by improper joinder is that the jury may be incapable of separating the evidence relevant to each offense and the jury may perceive that a defendant accused of several crimes is predisposed to committing criminal acts—thus, resulting in prejudice to the accused. ***State v. Bettinger***, 100 Wis.2d 691, 696, 303 N.W.2d 585, 588 (1981). However, if the joined counts are and can be kept logically, factually, and legally distinct so that the jury does not become confused about which evidence relates to which crime, and if the jury considered each count separately, no prejudice results from misjoinder.

We have reviewed the entire record and, more specifically, the organized manner in which the State's case was presented to the jury. In its opening statement, the State, in painstaking fashion, methodically set forth the essential elements of each charge it intended to prove. Each incident was factually distinct from all the others and was tried in serial fashion. Clay pleaded not guilty to each charge thereby challenging the sufficiency of the State's evidence for each charge. The jury only had to consider three different types of charges: armed robbery, attempted armed robbery, and first-degree sexual assault. The evidence presented by the State for each charge was short in form and simple in nature. Clay offered no evidence in defense of the individual charges. Rather, his defense consisted mainly of impeaching the direct and circumstantial identification made of him and the weight and credibility given to the lengthy seven-page incriminating statement he gave to investigating officers.

The jury was expressly instructed to consider each count separately and not to allow the accused's guilt or innocence on any count affect its verdict on any other count. The jury received verdict forms individually formulated for each count and each victim. In spite of the overwhelming admission and identification evidence, the jury found it appropriate to acquit Clay of two separate counts of armed robbery. This net result, in our judgment, demonstrates that the jury was able to keep the charges distinctly in mind, follow the trial court's instructions, properly evaluate the evidence as it related to each charge, and arrive at a verdict that was free of any unwarranted substantial prejudice to Clay. We therefore conclude that any error in joining

the charges emanating from St. Joseph's Hospital with the other charges was harmless.

C. Failure to Strike Juror.

Clay next claims the trial court erroneously exercised its discretion in failing to strike a proposed juror for cause, thereby denying him his constitutional right to due process. Clay contends that the trial court, by failing to comply with § 805.08(1), STATS., denied him his right to the preemptory challenges accorded him by § 972.03, STATS.[2]

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[2] Section 805.08(1), STATS., provides:

> QUALIFICATIONS, EXAMINATION. The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood or marriage to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Any party objecting for cause to a juror may introduce evidence in support of the objection. This section shall not be construed as abridging in any manner the right of either party to supplement the court's examination of any person as to qualifications, but such examination shall not be repetitious or based upon hypothetical questions.

Section 972.03, STATS., provides:

> **Peremptory challenges.** Each side is entitled to only 4 peremptory challenges except as otherwise provided in this section. When the crime charged is punishable by life imprisonment the state is entitled to 6 peremptory challenges and the defendant is entitled to 6 peremptory challenges. If there is more than one defendant, the court shall divide the challenges as equally as practicable among them; and if their defenses are adverse and the court is satisfied that the protection of their rights so requires, the court may allow the defendants additional challenges. If the crime is punishable by life imprisonment, the total peremptory challenges allowed the defense shall not exceed 12 if there are only 2 defendants and 18 if there are more than 2 defendants; in other cases 6 challenges if

To address Clay's due process claim, we must first ascertain whether the trial court failed to comply with § 805.08(1), STATS., the jury qualification statute. In essence, the statute sets forth circumstances to determine whether a juror ought to be excused for cause from judging the case. Among the properly disqualifying circumstances is when a prospective juror has "expressed or formed any opinion or is aware of any bias or prejudice in the case."

Whether to dismiss a proposed juror for cause lies within the discretion of the trial court. ***State v. Zurfluh***, 134 Wis.2d 436, 438, 397 N.W.2d 154, 154 (Ct. App. 1986). Where the record shows that the court considered the facts of the case and reasoned its way to a conclusion, that is, (1) one a reasonable judge could reach, and (2) consistent with applicable law, we will affirm the decision even if it is not a conclusion which we ourselves would make. This court will uphold the trial court's discretionary decision unless the use of discretion is wholly unreasonable. ***State v. Johnson***, 118 Wis.2d 472, 481, 348 N.W.2d 196, 201 (Ct. App. 1984). When the partiality of an individual juror is placed in issue the question is one of historical fact, ***Patton v. Yount***, 467 U.S. 1025, 1036, (1984), i.e., did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence and should the jurors' protestations of impartiality be believed. ***Id.*** The fact determination in this context is essentially one of credibility influenced highly by demeanor. As observed by the ***Patton*** court:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed .... Prospective jurors represent a cross-section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands

(..continued)

there are only 2 defendants and 9 challenges if there are more than 2. Each side shall be allowed one additional peremptory challenge if additional jurors are to be impaneled under s. 972.04(1).

> this. The trial judge properly may choose to believe those statements that were the most fully articulated or that appear to have been least influenced by leading.

Id. at 1039.

Clay argues the record reflects clear, explicit and unequivocal evidence of actual bias on the part of the prospective juror which substantiates the erroneous exercise of discretion by the trial court in failing to strike the juror for cause. We are not convinced.

During the jurors general voir dire, a juror indicated that his daughter had been sexually assaulted and this experience might influence his ability to sit as an impartial juror. The trial court retired to chambers to continue the juror's voir dire. In response to Clay's counsel's questions, the juror indicated the following: that Clay had the burden to prove his non-guilt and, hence, was not "starting off on a level playing field;" that if Clay did not adduce evidence and did not testify, the juror would consider this as an "indication of guilt"; that if the judge instructed to the contrary, the juror would not let himself be put in the "middle"; that if the judge instructed that Clay's guilt could not be assumed from his failure to testify the juror replied that nevertheless "he would have to prove to me that he was not involved in it"; and that he, the juror, would not be a good juror and should not be a juror. He also indicated that he would expect Clay to prove his innocence if the State failed in its proof. The juror further stated "if the State can't prove that he's guilty, you don't have to do anything. Same thing the judge said. If he [Clay] can't prove anything he's guilty. The State doesn't have to do anything."

Contrariwise, in answer to other questions of Clay's counsel, the State and the court, the juror acknowledged the following: that the burden of proof is on the State; that the defense does not have to do a thing because of the burden of proof; that he would follow the instructions of the court, put aside feelings of prejudice and bias and come to a fair and just result; that he would weigh everything as the judge told him; that he would expect the State to prove its case one hundred percent; that he would listen to the court's instructions with regard to the district attorney's responsibilities in putting in the evidence

regardless of his feelings; that he would try to separate his feelings; and that he understands that the burden was completely on the State.

We also note from the record that during the in-chambers voir dire, the prospective juror uttered many "aha's", "ya's", and "yes's" in response to leading questions. Some of these utterances could be interpreted as expressing bias and prejudice, while others could be interpreted as demonstrating an open-mindedness, an understanding of a juror's responsibilities and a desire to follow the judge's instructions.

From this summary, it is obvious that the trial court had to decide to which responses of the prospective juror it would give more weight based on what it had heard and observed. Just as a jury is at liberty to make findings of credibility without reasoned explication, so may a judge sitting as a finder of fact. ***United States v. Harris***, 507 F.2d 197, 198 (3d Cir. 1975). A reviewing court cannot replicate the singularity of the occasion and hence, we must recognize this special deference given to the discretionary acts of the trial court when in its fact-finding posture.

Clay moved to strike the juror for cause. The trial court, in denying the motion, ruled:

> I've heard what he said. I've heard the question. I've heard the argument and the court believes that this juror's answer to the question -- questions to the extent which would indicate to the court that he would, regardless of his personal feelings, I think he can separate those feelings and be fair and impartial based upon the representations that were made to the court's questions so far as the burden of proof, the responsibility of following the instructions of the court so the court's not going to strike this juror for cause ....

Doubtless, the trial court, with able assistance of counsel, properly examined the prospective juror as prescribed by § 805.08(1), STATS. It

determined the prospective juror could separate his feelings about the sexual assaults, be fair and impartial, and would follow the instructions of the court. In succinct terms, the juror's protestations of impartiality were believed. We cannot conclude that the trial court's findings of fact in this regard are clearly erroneous nor that the trial court erroneously exercised its discretion in refusing to dismiss the prospective juror for cause.

Since the trial court did not erroneously exercise its discretion, and thus did not improperly interfere with Clay's right to exercise his peremptory strikes, we find no need to address Clay's claimed due process violation. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

D. Discovery Motion and Mistrial Motion.

Lastly, Clay claims the trial court erroneously exercised its discretion by denying its pretrial motion to compel discovery of certain photographs and its motion for a mistrial for failure to timely provide certain police investigative reports. Since this claim of error has two parts, we shall consider each separately. We first shall examine the pretrial discovery request for photographs.

The State, pursuant to Clay's discovery demand, turned over to Clay three photographs of three individuals who were identified by some of the victims as being their assailants. A remaining total of nine photographs of persons who had not been identified are the subject matter of Clay's claim of error. Section 971.23, STATS., sets forth criminal discovery procedure and subsection (7)[3] details the sanctions available for noncompliance. Prosecutorial

[3] Section 971.23(7), STATS., provides:

> CONTINUING DUTY TO DISCLOSE; FAILURE TO COMPLY. If, subsequent to compliance with a requirement of this section, and prior to or during trial, a party discovers additional material or the names of additional witnesses requested which are subject to discovery, inspection or production hereunder, the party shall promptly notify the other party of the existence of the additional material or names. The court shall exclude any witness not listed or evidence

misconduct as to discovery is generally remedied by exclusion or the granting of a continuance or recess—the granting of a mistrial being regarded as a drastic alternative. ***State v. Ruiz***, 118 Wis.2d 177, 201-02, 347 N.W.2d 352, 363-64 (1984). Further, "the State is under no constitutional obligation to provide the defense with discovery of helpful but non-exculpatory evidence." ***State v. Denny***, 120 Wis.2d 614, 628, 357 N.W.2d 12, 19 (Ct. App. 1984).

Because a trial court's ruling on a discovery motion is generally a proceeding of a procedural oriented determination, great deference is given to the trial court. Because, however, such a ruling may deny an accused of his constitutional due process rights to a fair trial, review is *de novo*. In such context, we shall not reverse a trial court's evidentiary findings unless they are clearly erroneous. But we shall "independently review the trial court's finding of the constitutional facts and independently apply the constitutional principles involved to the fact[s] as found by the trial court." ***State v. Maday***, 179 Wis.2d 346, 353, 507 N.W.2d 365, 369 (Ct. App. 1993).

We conclude the trial court did not erroneously exercise its discretion in refusing to compel the State to produce the requested photographs and such refusal did not violate Clay's due process rights.

It is uncontroverted from a reading of the record that none of the persons in the photographs shown to the victims were identified as the perpetrators of the investigated robberies or sexual assaults. Indeed, Clay desired the photographs to generate misidentification. Additionally, Clay made no showing that the disclosure of the photographs would be helpful to the defense, not to mention contribute to his acquittal. In ***United States v. Bagley***, 473 U.S. 667 (1985), the Supreme Court declared:

> The holding in ***Brady v. Maryland*** requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." ... "A fair
>
> (..continued)
>
> not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

> analysis of the holding in ***Brady*** indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

Id. at 674-75 (citations omitted).

Clay's motion satisfies neither prong of ***Brady***.

Further, Clay was not denied his constitutional right to due process by the court's refusal to compel production of the additional photographs because the trial court's refusal did not offend objective notions of fundamental fairness. ***Lisenba v. California***, 314 U.S. 219, 236 (1941); ***Breithaupt v. Abram***, 352 U.S. 432, 436 (1957). As reflected by the record, Clay had available to him the complete panoply of procedural process which guaranteed him the fair opportunity to defend himself against the allegations lodged by the State.[4]

We now consider the effect of the late production of Milwaukee Police Department offense report relating to the February 22, 1991, Yaeger Bakery robbery as charged in Count 1 of the Information. Clay asserts he is entitled to a mistrial because of this delayed disclosure which occurred during the middle of the trial. To support this claim of error, Clay does not contend that the State intentionally failed to provide him the offense report. Rather, he argues that the trial court improperly applied the ***Denny*** standards to material requiring the investigation of several suspects. He further argues that the trial court failed to take into account the impossibility of conducting an investigation sufficient to meet the relevant standards when material necessary to conduct the investigation was in the exclusive possession of the State. The record belies Clay's protestations. When the trial court was alerted to the delayed disclosure of the offense report, recognizing that the issue of available exculpatory material was central to its determination, it took the following precautionary steps: (1) it

[4] The State in its brief directs our attention to ***State v. Kuntsman***, 643 So.2d 1172, 1174 (Fla. App. 1994), to additionally support its argument that Clay has no right to discovery for the purposes of creating evidence. Although not precedential for us, the Florida court does supply added persuasive rationale to deny Clay's motion.

afforded Clay time to properly examine the report; (2) it ordered that the State witness who was offering the evidence would be subject to recall; and (3) the State was to assist Clay in determining whether any information was exculpatory. At the conclusion of all of the evidence, again, the trial court considered the effect of the tardily disclosed report. The documents were reviewed page by page. Counsels were permitted to share their views on the nature of the report's contents. The trial court observed that it had granted Clay two days to review and investigate the contents of the report. Yet, Clay had expressed no intention to call additional witnesses. That being the case, the trial court then determined:

> So, the court's had the opportunity to -- to view the record as a whole, and the entire trial, so to speak, and the court believes based upon the entire record, and based upon what's been represented by both counsel, and the totality of the circumstances, that none of the item-by-item State's exhibit -- what's contained in exhibit 47 is exculpatory in nature. Even if it had some impeachment value, and that's stretching it, based upon the entire record in this case, the court does not believe that it lays a sufficient -- sufficient reasonable doubt for the accused that didn't otherwise exist. I don't believe it was an intentional act by -- by the State. I believe to the contrary.
>
> Be that as it may, based upon the record, the court based upon what I've stated does not and cannot find a manifest injustice that would warrant a mistrial in this case based upon what I have already stated.

Based on the foregoing, we conclude that the trial court properly exercised its discretion in denying the motion for mistrial.

In summary, we reject each of Clay's claims and affirm the judgment.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). "A determination by the circuit court that a prospective juror can be impartial should be overturned only where bias is 'manifest.'" ***State v. Louis***, 156 Wis.2d 470, 478-479, 457 N.W.2d 484, 488 (1990), *cert. denied*, 498 U.S. 1122 (1991). In this case, bias is manifest, the State does not argue otherwise and, under ***State v. Gesch***, 167 Wis.2d 660, 482 N.W.2d 99 (1992), the State's harmless error theory is unsupportable.

To appraise the bias in this case, a review of the entire voir dire of the juror is essential. When asked by the assistant district attorney if any of the jurors had any experiences that would "impact in any way" their ability "to be fair and impartial," the following exchange occurred:

> JUROR [ ][5]: The assault was on my daughter. And I think I will be.
>
> THE COURT: Let's -- why don't we do the rest of Mr. [ ] in chambers for a second, okay.
>
> [The assistant district attorney]: Okay.
>
> (The following was had in chambers with Juror [ ] present:)
>
> THE COURT: Okay. The record should reflect we're in chambers with Mr. [ ]. And what was the -- what was the circumstances with the sexual assault?
>
> JUROR [ ]: My daughter's freshman [sic] at [ ] in college and some boys broke into her dorm and assaulted her.
>
> THE COURT: Was she sexually assaulted?
>
> JUROR [ ]: Yes.

[5] Because this juror's daughter had been the victim of a sensitive crime, the juror's name and other identifying information have been redacted from this opinion to protect his daughter's privacy.

THE COURT: I assume that she was sexually assaulted based on what you said.

JUROR [ ]: And it breathes [sic] a lot of trouble for her and the family in terms of [costing] thousands of dollars for psychiatric treatment and stuff. And in fact still effects her. So anything I hear of [a] person being assaulted, my feelings go toward that person. Whoever did it should be punished.

THE COURT: Do you understand that these are allegations that are --

JUROR [ ]: I understand.

THE COURT: -- in the information. And, and right now there's no evidence against the defendant in that way. They're allegations that are contained in the Information, doesn't constitute evidence against the defendant in any way. And right now as he stands before you -- and if you are on this jury what would your verdict be?

JUROR [ ]: Well -- well when the incident first happened I read about it in the paper. And my feeling went for the victim. If I -- you know, you know, it's -- it's just really hit a real tender spot in my heart for the victim.

THE COURT: I know.

JUROR [ ]: And I would say -- I would say I would rule that he would have to do the time.

THE COURT: But you haven't heard any of the evidence though?

JUROR [ ]: Well, Your Honor, I can't help what I feel.

THE COURT: I understand that. I understand. Does anybody else have any other questions?

[Clay's attorney]: Are you inclined to do something with Mr. [ ] or do you want me to ask questions?

THE COURT: Unless there's a stipulation.

[Clay's attorney]: I'll ask Mr. [ ] some questions. Mr. [ ], I'm representing L. C. Clay.

JUROR [ ]: Okay.

[Clay's attorney]: And the purpose -- you haven't heard from me all morning, but the purpose of this jury selection is to make sure that both the State and the defense get a fair shake. And basically what's happening here is we want to make sure that each juror comes in and doesn't have feelings that are so deep-rooted that they're really not going to objectively and independently review the evidence when you hear -- when you hear witnesses testify, you aren't so overwhelmed by things which happened in their own personal experience that you wouldn't be fair to the defendant. That's what we're concerned about. And what I'm asking you is -- I understand that you had a terrible tragedy in your

family specifically and your daughter and I understand it impacted on the whole family very terribly. My question is irrespective of what happens in this courtroom, is it your position that your feelings are so deep-seated that you just don't think you can be fair to my client?

JUROR [ ]: I would say you would have to change my mind. The evidence that you would have to present would have to be concrete that he didn't do it.

THE COURT: See, in a criminal case the burden of proof is on the State.

JUROR [ ]: Yeah.

THE COURT: They got to prove beyond a reasonable doubt as every single element of all those offenses that are alleged in the Information?

JUROR [ ]: Uh-huh.

THE COURT: The defense in a criminal case, they don't have to do a thing because of the burden of proof on the State.

JUROR [ ]: Okay.

THE COURT: So evidence in a case may come in various forms and that's usually by witnesses who take the witness stand and testify under oath on the witness stand.

JUROR [ ]: Uh-huh.

THE COURT: Exhibits that are marked and received in the Court's record, that's physical type of evidence if there is any in this case. I don't know if there is. But defense doesn't have to prove a thing.

JUROR [ ]: Okay.

THE COURT: It's completely up to the State. Those are instructions that the Court's going to give you.

JUROR [ ]: All right.

THE COURT: Question I guess would be would you follow those instructions by the Court? And then after listening to everything, putting -- of course the Court's going to tell you to put aside your feelings of prejudice and bias and whatever. That's an instruction. Would you be able to do that and listen and come to a fair and just result in this matter?

JUROR [ ]: I believe so.

THE COURT: Okay.

JUROR [ ]: I never had my feelings that way but I think I would be able to.

THE COURT: Okay. Any additional questions?

[Clay's attorney]: Yeah. Mr. [ ], there are situations which you're involved in. We're all supposed to start off -- both sides in this case are sort of a level playing field. And you correct me if I'm wrong. You're telling me that at this juncture based on your experience and your own family that my client is not starting off on the level playing, is that right?

JUROR [ ]: I would say yes, you're right.

[Clay's attorney]: All right. Are you telling me that -- Judge is going to tell you that my client doesn't have to prove anything. I don't have to prove a thing, whether he was there, whether he was not there, whether he did something, whether he didn't do something. Irrespective of that do you still expect that he would have to prove his innocence? I mean based on your mind-set right now?

JUROR [ ]: I would say he would have to prove his innocence. I mean that's the way I feel.

[Clay's attorney]: All right. And even if the Judge tells you he doesn't have to prove his innocence?

JUROR [ ]: Well the Judge told me to weigh everything and that's what I would do. But my feeling is still I hate -- I would like to be in the middle. But I can't -- I can't be in the middle right now.

[Clay's attorney]: Let me ask you this, Mr. [ ]. If you had a loved one who was sitting in judgment and

was sitting in the dock as Mr. Clay is and someone in the jury was composed of people with your mind-set, do you thing that person would be getting a fair shake?

JUROR [ ]: Well knowing me I think he would get a fair shake.

[Clay's attorney]: Knowing how -- let's say -- let me give you this example. Let's assume that you have a loved one who's on trial. Okay?

JUROR [ ]: Yeah.

[Clay's attorney]: For sexual assault. And you got twelve people with the way you feel right now, okay, the way you feel about sexual assaults. Do you think that that person would get a fair shake?

JUROR [ ]: Well[,] be hard to say.

[Clay's attorney]: Well what I'm asking you -- you told me that you feel very strongly about sexual assaults, right?

JUROR [ ]: Right.

[Clay's attorney]: And you feel that nobody likes sexual assaults. There's no question about that. But you had a personal tragedy in your family. What I'm asking you is do you believe it is fair to my client, who's supposed to be given the benefit of the doubt,

to have a person with your mind-set sitting in judgment? Do you think that's fair?

JUROR [ ]: I don't think it would be fair to him. But I don't know how other people would feel.

[Clay's attorney]: Let me ask you this. Knowing how you feel about sexual assaults and knowing how you feel about what happened to your family, are you asking to be excused and not sit in judgment of somebody who's charged for that type of offense?

JUROR [ ]: No, I won't ask to be excused. If you feel that I'm not fit, fine, but I won't ask to be excused.

[Clay's attorney]: Let me ask you this. Do you -- you told me that you don't think it's fair that somebody with your mind-set is sitting on a jury where a person is charged with sexual assault, is that right? That would not be fair to him, is that correct?

JUROR [ ]: It might not be fair to him.

[Clay's attorney]: All right. If we're trying to -- if we're trying to have fairness in this particular trial, would you agree with me that somebody with your mind-set shouldn't be standing in judgment of a person charged with sexual assault if we're trying to be fair?

JUROR [ ]: Well I would say yes. I don't think I would make a good juror for him.

[Clay's attorney]: All right. Knowing how you feel, is what I'm saying, knowing that you feel that in effect you can't be fair, do you think it's right that you should be standing -- that you should be passing judgment on him?

JUROR [ ]: No, not at this point.

[The assistant district attorney]: All right. Knowing how you feel, would you then -- based on those reasons alone would you ask to be excused for no other reason other than the way you feel?

JUROR [ ]: No, I won't ask to be excused. I let the Judge and the attorneys decide if my feelings would affect outcome of the trial.

[Clay's attorney]: All right.

[The assistant district attorney]: I have a few questions, if I may. Are you --

[Clay's attorney]: No. Let me just --

[The assistant district attorney]: Okay.

[Clay's attorney]: Mr. [ ], the Judge is also going to tell you that my client doesn't have to testify in this case, okay. He's going to say the law says he doesn't have to testify.

JUROR [ ]: Okay.

[Clay's attorney]: Not only the law says he doesn't have to testify but the law says if we chose to do this we could literally sit on our hands and not do anything. I'm talking about the defense.

JUROR [ ]: Uh-huh.

[Clay's attorney]: If we chose not to do that and in other words we chose not to have my client testify and we chose not to put on evidence, do you think that you would hold that against him? Do you think that that would be indication of guilt to you?

JUROR [ ]: I would think so.

[Clay's attorney]: Even though the Judge would instruct you that you can't assume guilt from defendant not testifying?

JUROR [ ]: Well I say like I said before, he had to prove to me that he wasn't involved in it. That's -- that's my feelings.

[Clay's attorney]: Okay. I have no further questions of this witness.

[The assistant district attorney]: Mr. [ ], if this Court were to instruct you and tell you that the State has to prove to whatever evidence and what witnesses we produce to -- if we have to prove this case beyond a reasonable doubt?

JUROR [ ]: Right.

[The assistant district attorney]: All right. And that means that we have to go forward with evidence and we have to produce witnesses and testimony that convince you that this particular person is guilty?

JUROR [ ]: Uh-huh.

[The assistant district attorney]: Do you understand -- would you follow the instructions that this Court gave you in that regard, making me prove the case?

JUROR [ ]: Yeah.

[The assistant district attorney]: Yeah. And would you expect me to prove the case?

JUROR [ ]: I would expect you to prove it 100 percent.

[The assistant district attorney]: All right. And you would listen to this Court's instructions with regard to what my responsibilities are as a prosecutor and putting on the evidence in this case?

JUROR [ ]: Yes.

[The assistant district attorney]: All right.

THE COURT: Is that regardless of your feelings?

JUROR [ ]: That's regardless of my feelings. Above all things else I'm a Christian. And above all things I

believe in fair play but there are certain things in my life that touches a sore spot.

THE COURT: I understand that, and, and the question is would you be able to separate that from this case?

JUROR [ ]: It would be hard, Your Honor, but I would try.

[The assistant district attorney]: To be fair and impartial?

JUROR [ ]: Right. It's up to you. Whatever.

[Clay's attorney]: Mr. [ ]?

JUROR [ ]: Yes.

[Clay's attorney]: I understand that it would be -- that you would try and separate them but I guess the question is -- and this is an almost impossible task for on my part I'm asking you to do is look into the future. You told me that you expect the defendant to prove his innocence, right?

JUROR [ ]: Yeah.

[Clay's attorney]: You told me how you feel about your daughter and what went on. And the Judge is going to say that you are supposed to separate your -- basically your life's experiences in this regard away. The question becomes do you honestly believe that

when you hear this case that you can forget about what happened to your daughter and that you wouldn't be swayed by what happened in your family?

JUROR [ ]: I never can forget what happened to my daughter.

[Clay's attorney]: Do you think -- do you think that you would take that experience into the jury room and that would affect your decision making? See, that's really the question.

THE COURT: As to the case that's before the Court?

JUROR [ ]: Yeah, well, I don't know. I never had to really sit down decide that. I don't know, Your Honor. If you feel that I might do it wrong, dismiss me from the jury. But I, I mean never have been -- that's a lot to ask of a father to set aside what happened to your personal family.

THE COURT: No, I understand that. And as a father also I wouldn't, you know, that's something that that experience and that emotional trauma is going to live with you for the rest of your life, is going to live with your daughter, and I don't think there's anybody in this room that would disagree with that.

The question is though is that you understand the State's role. They got to prove this case beyond a reasonable doubt. Defense doesn't have to do a thing

pursuant to the law. That's our law in this country. And they have to -- the burden is completely on them.

JUROR [ ]: Uh-huh.

THE COURT: If they can't satisfy the burden of proof beyond a reasonable doubt as to each and every single one of those elements of the offenses, could you come back with a not guilty verdict?

JUROR [ ]: I don't know, Your Honor. I'd have to hear everything.

THE COURT: Well you are going to have to hear everything in order to make that decision.

JUROR [ ]: Right.

THE COURT: But if you don't think that they proved their case because they're missing elements or what have you, which the Court's going to instruct you as to what they've got to do, but after hearing all this, hearing all the testimony and what have you, if you don't think they can prove their case beyond a reasonable doubt, what would your verdict be?

JUROR [ ]: Well I would -- I would rule the way I see it. If he can't prove his case, I would say not guilty. If he prove it, he's guilty.

THE COURT: Okay.

[Clay's attorney]: Mr. [ ], are you -- let me ask you this. As you sit here right now do you feel that you're sort of in the prosecution's camp as opposed to the defense camp since the defendant's charged with sexual assault? In other words do you feel you are more on the side -- you are siding with the prosecution?

JUROR [ ]: That's a hard question to answer.

[Clay's attorney]: Well let me ask it a different way. There's two sides to this case obviously, prosecution and the defense?

JUROR [ ]: Oh, yeah.

[The assistant district attorney]: And right now based on your experience with your daughter do you think that you are more prone to pull for the prosecution?

JUROR [ ]: Still asking -- that's a lot to ask.

THE COURT: Or is it because that you don't know anything about the case?

JUROR [ ]: Well I read something about it in the paper when it first happened but whether this is the guy or whoever, I don't know. I don't ask.

THE COURT: And you won't know until after the testimony.

JUROR [ ]: Until I hear the testimony.

[Clay's attorney]: Let me ask you this. You read about the fact that he was arrested?

JUROR [ ]: No, I read about the assault case at Saint Joe's Hospital.

[Clay's attorney]: All right.

JUROR [ ]: And the robberies but they didn't name any person.

[Clay's attorney]: Okay. Let me focus in on the Saint Joe's just for a minute. L. C. Clay, my client, is sitting here and obviously he's been charged with all these offenses. Do you think that because he's been charged that that's an indication to you that he's probably guilty?

JUROR [ ]: Not necessarily so.

[Clay's attorney]: What do you think comes out of the fact that he was arrested?

JUROR [ ]: Well they have to have some evidence that he was somewhere in the vicinity or someplace to arrest him. I don't think Milwaukee Police Department would just do things out of the clear blue sky.

[Clay's attorney]: Well based on the fact that he's arrested by the Milwaukee Police Department, based

on the fact that he's sitting here and charged, and you or other people maybe sitting on part of the jury, do you think that that's an indication that he probably did it?

JUROR [ ]: Could be.

[Clay's attorney]: Do you think that that -- does that also add to your statement that I would have to prove him innocent?

JUROR [ ]: Yeah.

[Clay's attorney]: And knowing that you feel that I have to prove him innocent and even though the Judge says that I don't have to prove anything, the State has to prove him guilty if he can, do you think that -- do you think that I still have to prove that he's guilty -- or innocent? Excuse me. That was a long question. Let me --

[The assistant district attorney]: You know, Judge, we've gone over that issue over and over now.

JUROR [ ]: Let me say it this way. If the State can't prove him guilty, you don't have to prove him anything. But you know what I'm saying. Had to be some evidence against him to arrest him in the first place. So if you feel that I'm not fit for this jury, just tell the Judge you reject me.

[Clay's attorney]: All right. Are you saying that I still have to come forward with some evidence in your mind to show that he did do it?

THE COURT: With the understanding that the State has to prove the case beyond a reasonable doubt.

JUROR [ ]: Yeah.

[Clay's attorney]: Even though -- I guess what we're saying is even though the State has this obligation to put forth, okay?

JUROR [ ]: Yeah.

[Clay's attorney]: Do you still -- would you still require the defense to come forward and prove that he's innocent?

JUROR [ ]: No. If the State can't prove that he's guilty, you don't have to do anything. Same thing the Judge said. If he can't prove anything, he's guilty. State doesn't have to do anything.

THE COURT: Okay.

JUROR [ ]: But I'm saying you know, I miss -- I'm just speaking my personal feelings toward sexual assaults.

THE COURT: I understand that.

JUROR [ ]: And that's the way I am.

> THE COURT: Okay. Thanks very much. You can just have a seat back where you were.
>
> JUROR [ ]: Okay.
>
> (Juror [ ] returned to the courtroom.)

Thus, understandably, this juror emphasized that because of the sexual assault of his daughter, he could not assure his impartiality. He acknowledged that he would consider Clay's failure to testify an "indication of guilt" and he repeatedly declared that he would not acquit Clay unless Clay proved his innocence. Nevertheless, the trial court concluded:

> I've heard what he said.... I've heard the argument and Court believes that this juror's answer to the question -- questions to the extent which would indicate to the Court that he would, regardless of his personal feelings, I think he can separate those feelings and be fair and impartial based upon the representations that were made to the Court's questions as far as the burden of proof, the responsibility of following the instructions of the Court. So the Court's not going to strike this juror for cause and obviously you got your peremptory strikes.

Denying the defense motion to strike this juror, the trial court failed to apply or even refer to any legal standard under the statute or case law. Under these clear standards, the trial court erred.

What the majority terms the juror's "protestations of impartiality" in no way eclipsed his understandable and candid acknowledgement of partiality. Once before under somewhat similar circumstances, we concluded in ***State v. Zurfluh***, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986), that the trial court erred in failing to remove a juror for cause. Indeed, we reached that conclusion even though the juror's partiality was far less obvious than it is in the instant case.

Section 805.08(1), Stats., requires the trial court to determine whether a juror "is aware of any bias or prejudice in the case," and to excuse a juror who "is not indifferent in the case." A juror who believes he or she cannot decide the case fairly on the evidence should be excused.

> On voir dire, Hollander said she felt she "might not be able to be fair." When the court explained to her the duties of a juror, Hollander said she understood. The court then asked Hollander whether she would have a problem in making a fair and impartial determination of the evidence. She replied: "I don't know. I might. I'm afraid I might. I wouldn't want to have; but I'm afraid I might. I'm just being honest."
>
> The trial court nevertheless refused to excuse Hollander for cause, saying she had expressed only her distaste for the crime. In the court's opinion, Hollander's difficulties were simply a reflection of her awareness of the crime's seriousness and would not interfere with her ability to decide the case on the evidence.

> Whatever the trial court's opinion, apparently Hollander did not share the court's confidence in her ability to decide the case fairly and impartially.... Because the trial court failed to follow the statutory direction, it committed an error of law ....

Id. at 438-439, 397 N.W.2d at 155 (citation omitted).

Thus, in the instant case, although the trial court attempted to salvage Juror [ ] by tugging him toward an impartial harbor with leading questions, and although Juror [ ] intermittently acquiesced to the obvious directions that those questions implied, the full record establishes Juror [ ]'s partiality as a matter of law. As the United States Supreme Court explained in ***Patton v. Yount***, 467 U.S. 1025 (1984), "*[t]he trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading*." ***Id.*** at 1039 (emphasis added). The Supreme Court, however, did not offer the *opposite* proposition—the proposition that the majority adopts in this case: that the trial judge may choose to believe the statements most influenced by leading questions to the exclusion of statements that were clearly candid and spontaneous.

On appeal, the *State* confronts this extraordinary record and does *not* reach the majority's remarkable conclusion that the trial court did not err. Rather, the State argues only "harmless error" because Juror [ ] was removed from the jury by a peremptory challenge. Under ***Gesch***, however, such harmless error analysis is inapplicable.

In ***Gesch***, where the defense did not use a peremptory challenge to remove the objectionable juror, the Wisconsin Supreme Court explained:

> Lastly, the State argues that Gesch's defense counsel's failure to exercise a peremptory challenge to juror Wineke results in a waiver of his right to raise on appeal any issue regarding the circuit court's failure to strike juror Wineke for cause. We disagree. The State's position would leave the defendant in an unavoidable and extremely unfair "catch 22."
>
> The State conceded at oral argument that had the defendant struck juror Wineke and subsequently been convicted, the circuit court's refusal to strike for cause would have been harmless error. Thus, according to the State, if the defendant peremptorily strikes the contested juror, the defendant loses on appeal based on harmless error. If the defendant does not strike the juror, the defendant loses based on waiver. We will not force a defendant into such a "lose-lose" position. The peremptory challenge is one of the most important of the rights secured to the accused.

Id. at 671, 482 N.W.2d at 104. Thus, the trial court's final reassurance to Clay's counsel that he still could use a peremptory strike to remove Juror [ ], and the fact that defense counsel did so, provide no basis for invocation of harmless error doctrine. Under ***Gesch***, it simply cannot apply.

In ***Zurfluh***, we concluded that the trial court's failure to exclude the juror was an error of law in violation of the "statutory direction." ***Zurfluh***, 134 Wis.2d at 439, 397 N.W.2d at 155. That "statutory direction" is clear: "*If a juror is not indifferent in the case, the juror shall be excused.*" Section 805.08(1), STATS. (emphasis added). This record is astounding. Juror [ ] was "not indifferent." He knew it and, on appeal, the State does not argue otherwise. The majority, however, joins the trial court in attempting a salvage operation that the law does not permit. Accordingly, I respectfully dissent.