

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 26, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 94-1844-CR
94-2506-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID L. KONS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. David L. Kons appeals from a judgment of conviction of seven counts of delivery of a controlled substance and four counts of failure to purchase tax stamps. He also appeals from an order denying his motion for postconviction relief. He argues that the jury was improperly exposed to inadmissible evidence when video testimony was presented, that audio tapes were improperly admitted into evidence and that the trial court interfered with his right to substitute counsel.¹ We review Kons' arguments in

¹ Kons also argues that he was denied his right to the effective assistance of counsel. By an

the context of whether the trial court properly denied a new trial in the interest of justice. We conclude that there were no errors supporting a new trial and affirm the judgment and the order.

Kons was convicted for making sales of cocaine, either directly or as a party to a crime, to police informants. The controlled buys were contemporaneously monitored and recorded on audio tapes by virtue of a "body wire" worn by the informants.

The case went to trial on June 29, 1993. At the pretrial conference held June 22, 1993, Kons raised the possibility of retaining substitute trial counsel. In fact, substitute counsel appeared and indicated his willingness to represent Kons if the trial court granted a continuance to give substitute counsel time to prepare for trial. The trial court refused to adjourn the trial date.

On June 24, 1993, testimony by three state crime lab experts was videotaped. At the start of that proceeding, there was discussion about whether a substitution of counsel would be made. Trial counsel indicated that the substitution would not occur. Trial counsel also requested that the trial court require Kons to pay additional fees incurred by counsel and some discussion was had on that point. In an effort to produce a video of the testimony which would not require editing or interruption as it played to the jury, there was discussion about potential objections to the experts' testimony. The proposed testimony of Leonard Hoehne was mentioned as a source of other acts evidence.² The parties agreed to avoid reference to the other acts evidence and

(..continued)

order of December 21, 1994, that portion of his brief arguing ineffective counsel was struck because trial counsel did not testify at the postconviction motion hearing. A prerequisite to appellate consideration of a claim of ineffective assistance of trial counsel is the preservation of the testimony of trial counsel. *State v. Machner*, 92 Wis.2d 797, 803-04, 285 N.W.2d 905, 908 (Ct. App. 1979). Therefore, we do not consider any arguments that fall under a claim of ineffective assistance of counsel.

² One of the state crime lab experts was to identify cocaine recovered from Hoehne which was not part of the charged offenses. The prosecutor indicated that Hoehne would testify that he obtained the cocaine from Kons and that it would seek to admit the evidence as other acts evidence.

stipulated that the two exhibits regarding that evidence would be admissible if the trial court ruled the other acts evidence admissible.

Day three of the trial transcript includes the entire text of the June 24 hearing. Kons submits that the entire video was played for the jury, including the nontestimonial portions. Kons argues that the jury's exposure to the unedited video subverts the fairness of his trial because the jury heard discussion about other acts evidence which ultimately was not admitted by the trial court.

We first note that no specific objection was made at trial to the manner in which the video testimony was shown to the jury. Also, Kons concedes that his appellate challenges to the admissibility of the audio tapes—that the trial court did not personally listen to the tapes prior to ruling on their admissibility, that the trial court failed to rule on whether the tapes should be excluded because of their highly prejudicial nature, and that the tapes are of poor quality and not self-authenticating—were not raised before the trial court. These claims are deemed waived. See *State v. Salter*, 118 Wis.2d 67, 79, 346 N.W.2d 318, 324 (Ct. App. 1984) (we properly decline to review an issue on appeal when the appellant has failed to give the trial court fair notice that it is raising a particular issue and seeks a particular ruling). Therefore, we review these claims under Kons' argument that he was entitled to a new trial in the interest of justice.

We review a trial court's order denying a postconviction motion for a new trial in the interest of justice for an erroneous exercise of discretion. See *State v. Harp*, 150 Wis.2d 861, 873, 443 N.W.2d 38, 43 (Ct. App. 1989) (*Harp I*), overruled on other grounds by *State v. Camacho*, 176 Wis.2d 860, 501 N.W.2d (1993). Discretion is properly exercised when the trial court employs a logical rationale based on appropriate legal principles and facts of record. *Id.*

Where a defendant has waived the right to review by failing to make a proper objection, the trial court's authority to grant a new trial is comparable to our authority to grant discretionary reversal under § 752.35, STATS. *State v. Harp*, 161 Wis.2d 773, 776, 469 N.W.2d 210, 211 (Ct. App. 1991) (*Harp II*). Thus, the trial court may grant a new trial where the real controversy

has not been fully tried or it is probable that justice has for any reason miscarried. A claim that the jury had before it testimony or evidence which had been improperly admitted and that this material obscured a crucial issue tends to fall under the "real controversy not fully tried" category. See *State v. Schumacher*, 144 Wis.2d 388, 400, 424 N.W.2d 672, 676 (1988). The trial court need not find a substantial likelihood of a different result on retrial when it orders a new trial on the ground that the real controversy was not fully tried. *Harp II*, 161 Wis.2d at 775, 469 N.W.2d at 211. However, in order to reverse under the miscarriage of justice category, the trial court must conclude that there would be a substantial probability that a different result would be likely on retrial. *Schumacher*, 144 Wis.2d at 400-01, 424 N.W.2d at 676-77.

Having established the applicable standard of review, we revisit Kons' claim that a new trial is warranted because the nontestimonial portions of the June 24 video testimony was not edited out when the video was played to the jury. The trial court found that the nontestimonial portions were not played to the jury. Kons does not contend that the trial court's finding is clearly erroneous. Section 805.17(2), STATS. He submits that because the trial transcript contains the nontestimonial portion of the hearing, it is obvious that the jury heard those discussions. He argues that there was no offer of proof to the contrary at the postconviction hearing. However, at the postconviction hearing there was no challenge to the prosecution's assertion that only the testimonial portion of the video was shown to the jury. The trial court also noted that it would be highly unusual for the discussion of counsel to have been shown to the jury. We note that the trial court was acutely aware that the jury was not to hear extraneous matter and took precautions to that effect at the June 24 proceeding. The trial court's finding is not clearly erroneous and we need not address the issue further. No prejudicial portions of the video were displayed to the jury and there is no risk that the real controversy was not tried.

Kons argues that a new trial is warranted by the trial court's admission of the audio tapes of the drug buys. He claims that the trial court was obligated to conduct an in camera review of the audio tapes before ruling on their admissibility and that its failure to do so resulted in the failure to discover the poor quality of the tapes and the fact that they were not self-authenticating with respect to the date, identity of voices and nature of events recorded. He contends that the trial court failed to consider whether the probative value of the tapes was substantially outweighed by prejudice.

Although *Wilson v. State*, 59 Wis.2d 269, 289, 208 N.W.2d 134, 145 (1973), holds that "[a]s a matter of authentication, laying the foundation, and determining relevancy, the court should always listen to the tapes to determine their admissibility," that holding is limited to situations where a relevancy objection is made. Before trial, Kons objected to admission of the tapes during the prosecution's case-in-chief because the requirements of § 968.30, STATS., requiring court authorization, had not been complied with. Kons concedes that the one party consent tapes were admissible under § 968.29(3)(b), STATS. During trial, Kons objected to admission of certain tapes for lack of adequate foundation. The trial court found that a sufficient foundation had been laid and Kons does not challenge that finding on appeal. Thus, there was never a relevancy objection to the tapes which might have required the trial court to listen to the tapes before ruling on their admissibility.

Further, the trial court was not obligated to review the tapes where it was not requested to do so. The same is true with respect to Kons' contention that the trial court was required to determine if the prejudicial effect of the tapes outweighed their probative value. Kons did not make an objection on that ground.

The quality of the tapes goes to the weight of the evidence rather than their admissibility. Although Kons submits that the tapes are inaudible in some parts, the appellate record does not support that conclusion. There was no mention at trial regarding inaudible portions. The tapes are not part of the appellate record and Kons' claim of error fails. See *State v. Smith*, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972) (it is the appellant's duty to see that evidence material to the appeal is in the record).

In short, any claim of error with respect to the admission of the audio tapes is without merit. The tapes were authenticated through the testimony of witnesses. Nothing prevented Kons from making a transcript of the tapes even though the trial court chose not to have the tapes transcribed as they were played at trial. Admission of the tapes does not provide any grounds to believe that justice has miscarried such that a new trial is warranted.

Finally, we address Kons' claim that the trial court interfered with his right to have counsel of his choice. He contends that under *State v. Lomax*, 146 Wis.2d 356, 361, 432 N.W.2d 89, 91 (1988), and *State v. Kazee*, 146 Wis.2d 366, 371, 432 N.W.2d 93, 95 (1988), the trial court was required to inquire of Kons the reasons for wanting substitute counsel. We reject the notion that because Kons sought to retain a different attorney, the trial court was required to explore Kons' reasons. This was not an instance like *Lomax* or *Kazee* where the defendant expressed complaints about trial counsel and requested that trial counsel be discharged. There was no suggestion by Kons that his attorney was unable or unwilling to proceed or that the attorney-client relationship had broken down. Here, Kons simply preferred to retain a new attorney and make a substitution of counsel. The new attorney would take Kons' case only if a continuance was available. The trial court did not deny Kons the right to substitute counsel; in fact, it indicated that it would allow substitute counsel. The trial court denied the informal request for a continuance.

The granting or denial of a continuance is within the discretion of the trial court. *Phifer v. State*, 64 Wis.2d 24, 30, 218 N.W.2d 354, 357 (1974). Where a request for a continuance is associated with a request for the substitution of trial counsel, the trial court should balance the following factors: the length of delay requested; whether there is competent counsel presently available to try the case; whether other continuances had been requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; whether the delay seems to be for legitimate or dilatory purposes; and other relevant factors. *Id.* at 31-32, 218 N.W.2d at 358. Kons does not argue that the trial court erroneously exercised its discretion in light of these factors.

At the pretrial conference at which the continuance was requested, the trial court stated that the trial was only one week away and that it would be difficult for the court to schedule a new trial date. It also noted that arrangements had been made for the taking of the video testimony of the experts. Later the court considered the fact that Kons' attorney was prepared to proceed. Supporting the trial court's decision is the fact that Kons did not refuse to go forward with his presently retained attorney and he did not appear to question that attorney's professional skills. *See Phifer*, 64 Wis.2d at 32, 218 N.W.2d at 358. We conclude that the trial court properly exercised its discretion in denying the continuance.

By the Court.—Judgment and order affirmed.

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