STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP270-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIEUTA Z. PERRY, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE T. CHRISTOPHER DEE PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Statutes

Other Authorities

ISSUE PRESENTED

During Kieuta Z. Perry's trial, one of his victims blurted out this comment in cross-examination: "Didn't [Perry] shoot somebody in the head before he shot me? That's what I heard."

Did the circuit court properly exercise its discretion in denying Perry's subsequent mistrial motion?

The circuit court implicitly answered "yes."

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument would add little to the arguments as briefed. This Court's opinion is unlikely to warrant publication.

INTRODUCTION

Circuit courts guard against trial errors as best they can. But they must guard against overreaction to errors as well.

A mistrial is an extreme remedy, reserved for a narrow class of highly prejudicial, otherwise incurable errors that occur during the trial process.

The error in this case doesn't qualify. The victim's single, isolated, *non sequitur* comment—a blurt, really—was improper, but easily and satisfactorily corrected short of mistrial. Perry's trial counsel immediately objected to the comment and asked the circuit court to strike it. The court immediately sustained the objection, struck the comment, and told the jury to disregard it. And when Perry later moved for a mistrial, the circuit court denied the motion but decided to give another curative instruction—Wis. JI–Criminal 150—at the close of trial. The combined instructions protected Perry from any prejudice.

STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

The crimes.

Perry does not challenge the sufficiency of the evidence supporting his convictions. The State proved to the jury's satisfaction that Perry was guilty of armed robbery and first-degree recklessly endangering safety, both as a party to the crime. (R. 44; 54.)

The criminal complaint alleged that on May 25, 2016, Perry and an unknown second man robbed a woman, Mary,[1] of her purse at gunpoint while she unloaded groceries from her car at 1560 South 21st Street in Milwaukee. (R. 2:1–2.) Mary's adult son, Ivan,[2] confronted the two men as they fled with the purse. The man with the gun fired multiple shots at Ivan; the two men escaped. (*Id.* at 2.)

At trial, Mary described the armed robbery and the shooting. (R. 71:25–36.) A friend of Mary's present at the crime scene also described the armed robbery and the shooting and identified Perry as the man who put the gun to Mary's head during the robbery. (*Id.* at 37–43.) Ivan also identified Perry as the shooter from a photo array. (R. 70:49-51, 66–77.)

The prosecution also linked the pistol used in the shooting to Perry. Shell casings recovered at the crime scene were fired from a pistol recovered from a Milwaukee home where a friend of Perry's lived and where Perry had visited since the armed robbery and shooting. (R. 71:9, 14–16, 47–57; 72:8–19, 20, 35–40.)

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[1] A gender-specific pseudonym.

[2] A gender-specific pseudonym.

Ivan's blurted comment.

Ivan made his comment during cross-examination:

> Q. Now, when you did the photo array, what -- Was the entire face or that that helped you identify the defendant? Or was it some feature of his?
>
> A. It was just his face, his height. Didn't he shoot somebody in the head before he shot me? That's what I heard.
>
> ATTORNEY TISHBERG: I object. I'd ask that that be stricken.
>
> THE COURT: That's stricken from the record. There's no question posed. The jury is to disregard that comment.

(R. 70:62–63.)[3] Counsel resumed his questioning. (*Id*. at 63–65.) Shortly thereafter, the circuit court adjourned for lunch. (*Id*. at 77–78.)

The mistrial motion.

When court readjourned, Perry's counsel moved for a mistrial. (R. 71:3.) Counsel claimed he could not "remedy" the situation "even though we told the jury to disregard it. They heard it. You cannot disregard something you hear, even though the court says to." (*Id*. at 3–4.)

The prosecutor opposed the motion and suggested a curative instruction to the jury to disregard Ivan's comment. (*Id*. at 4.)

When Perry's counsel said a curative instruction would just highlight the comment, the prosecutor further explained his opposition to a mistrial:

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[3] The prosecutor later described Ivan as angry during his testimony because he believed he failed to protect his mother from the armed robbery. (R. 73:30–31.)

> [BY THE PROSECUTOR:] Well, I think that it could be done, first, you can come head on, saying this is what the witness said, you're to disregard that.
>
> It can be done in other ways too, saying that that particular witness made a statement regarding matters that are outside the scope the jury, and outside the scope of this incident.
>
> And you're to give it no weight whatsoever, and disregard it. Or anything in between, that the parties can provide that. It's not that one slip of the, by the witness, and you know, the witness is mad about what happened here.
>
> I mean his mother was robbed at gun point, he was shot at, his disabled girl was in the back seat, that he knew his mother's friend's child. The whole thing brings a lot of emotion out.
>
> During cross examination, sometimes people blurt that out. I'm not sure what he means by that. And it certainly is not sufficient to declare a mistrial and to declare a mistrial would call into question whether or not this case could be retried.
>
> If defense doesn't want a direct instruction to disregard, that's on the defense. But as I indicated, it may -- The jurors are presumed to follow the court's instructions.
>
> And if the defense wants a clear instruction, that, and it could be anywhere on the spectrum, that this witness said X, Y and Z, you are to disregard X, Y, and Z, and put it out of your minds.
>
> Defense can fashion something they don't think calls as much attention to it. So, it should not be grounds for mistrial.

(*Id*. at 5–7.)

The circuit court placed Ivan's comment in present perspective: "At this point, it's one stray comment by one witness, very brief, didn't go into any details or long winded narrative." (*Id*. at 7.) The court said it would give a curative

instruction at the close of trial but would reconsider a mistrial if circumstances warranted it:

> I will give an instruction, and jurors will be commanded to put that out of their minds.
>
> Even now, I may change my mind if something like that happens again, I realize the state did not elicit that response, no one elicited that response, he just blurted it out on his own.
>
> With the one stray, short comment from one witness, I think we're fine for now.
>
> I will give an instruction, we'll talk about a proper instruction, when the time comes, for now we'll continue on.

(*Id.*)

The jury instruction conference.

During the conference, Perry's counsel asked the circuit court "[w]hat instruction do you plan on covering the statement of [Ivan] where he made a statement that I still believe leads to a mistrial"? (R. 73:6.)

The circuit court answered: "Well, I just have [Wis JI–Criminal] 150. I ordered it struck. So I'll remind them you can't consider any testimony ordered stricken. I didn't want to say a whole lot about it." (*Id.*)

The circuit court also reminded the parties of its willingness to consider different instructional language: "If there was something special, that's why I said if anyone wanted something special, prepare it and give it to me." (*Id.*) No one did.

The prosecutor asked the circuit court to "just read [Wis. JI-Criminal] 150. It does cover what the jury is supposed to deliberate on and not deliberate on; and I think the more specific you get the more, number one, it goes outside of what instructions are about it. But also it just calls attention to what was a brief statement by the victim." (*Id.*) Perry's

counsel agreed: "I agree we don't need to get specific. Just for the record, I still am not sure that that covers sufficiently what transpired. But I guess that instruction is the only one really available without causing more harm." (*Id*. at 6–7.)

The trial court concurred. (*Id*. at 7.) It instructed the jury that "[d]uring the trial the court ordered certain testimony to be stricken. Disregard all stricken testimony. It is not to be considered in your deliberations." (*Id*. at 12.)

Perry's conviction.

The jury convicted Perry of armed robbery and first-degree recklessly endangering safety, both as a party to the crime. (R. 44; 54.) The jury also found Perry not guilty of being a felon in possession of a firearm and declined to apply the dangerous weapon enhancer to the recklessly endangering safety charge. (R. 44:2–3.)

The second mistrial motion and sentencing.

Perry made a second mistrial motion after trial, but before sentencing. He claimed that inconsistent jury verdicts—coupled with a posttrial letter to the circuit court from an anonymous juror complaining about the trial and the deliberations—warranted a mistrial. (R. 48; 49; 76; 83:2–3.) The circuit court denied the motion. (R. 77:2–16.)

While the correctness of the circuit court's denial is not the subject of this appeal, the State includes it in this fact narrative because of how Perry tries to use the verdicts and the letter to bolster his arguments in this Court.

The circuit court eventually imposed sentences providing for 11 years of initial confinement followed by 11 years of extended supervision. (77:38.)

STANDARD OF REVIEW

The decision whether to grant a mistrial is discretionary, reversible only for a clear showing of an erroneous exercise thereof. *State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150; *State v. Moeck,* 2005 WI 57, ¶¶ 40–43, 280 Wis. 2d 277, 695 N.W.2d 783. This Court will uphold a discretionary decision "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

ARGUMENT

The circuit court properly exercised its discretion in denying Perry's mistrial motion, choosing instead to instruct the jury to disregard all stricken testimony and not to consider it in deliberations.

A. Controlling principles of law.

Not all trial errors warrant the extreme remedy of a mistrial. A mistrial is appropriate only if the circuit court "determine[s], in light of the whole proceeding, [that] the claimed error was sufficiently prejudicial to warrant a new trial." *Doss*, 312 Wis. 2d 570, ¶ 69 (citation omitted).

A mistrial in a criminal case is a drastic remedy. *See State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). A circuit court must consider alternatives to a mistrial, such as a curative jury instruction. *Moeck,* 280 Wis. 2d 277, ¶ 72.

Errors addressed by curative jury instructions are presumed harmless because this Court presumes juries follow such instructions. *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780; *State v. Lukensmeyer*, 140 Wis. 2d 92, 110, 409 N.W.2d 395 (Ct. App. 1987). "[T]his court may conclude that such instruction erased any possible

prejudice, unless the record supports a conclusion that the jury disregarded the trial court's admonition." *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894.

A circuit court "is in the best position to determine the seriousness of the incident in question, particularly as it relates to what has transpired in the course of the trial." *United States v. Clarke,* 227 F.3d 874, 881 (7th Cir. 2000); *see also State v. Seefeldt,* 2003 WI 47, ¶ 29, 261 Wis. 2d 383, 661 N.W.2d 822. The circuit court has heard the entire case and can best decide whether the drastic remedy of mistrial is suited to the trial error.

Considering Perry's appellate argument, two additional principles of law require special mention.

First, Perry devotes much of his argument to how, in retrospect, he believes the circuit court should have exercised its discretion regarding the mistrial motion. (Perry's Br. 14–19.) But Perry provides no record citations showing where the defense asked the court to exercise its discretion in the manner he now favors on appeal. They don't exist because Perry never asked the court to exercise its discretion in that particular manner.

A defendant must ask the circuit court for what he wants before he can complain to this Court about not getting it. A circuit court cannot erroneously exercise its discretion by failing to do something the defendant never asked the court to do. *McClelland v. State*, 84 Wis. 2d 145, 157–58, 267 N.W.2d 843 (1978); *Laster v. State*, 60 Wis. 2d 525, 538-39, 211 N.W.2d 13 (1973).

Perry could have challenged his counsel's effectiveness in arguing for the mistrial, but he did not do so. This Court cannot conduct such an inquiry now. "This court need not address arguments that are raised for the first time on appeal . . . ." *State v. Reese*, 2014 WI App 27, ¶ 14 n.2,

353 Wis. 2d 266, 844 N.W.2d 396. And "[a] *Machner* hearing is a prerequisite for consideration of an ineffective assistance claim." *State v. Sholar*, 2018 WI 53, ¶¶ 50, 53, 381 Wis. 2d 560, 912 N.W.2d 89 (*citing State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)).

Second, Perry makes impermissible evidentiary use of the posttrial letter to the circuit court from an anonymous juror complaining about the trial and the deliberations. (R. 83:2–3.) At pages 21–22 of his brief, he calls the juror's letter "suggestive evidence" that the jury disregarded the circuit court's curative instructions regarding Ivan's blurted comment.

Perry ignores the incompetency of that evidence under Wis. Stat. § 906.06(2) and *State v. Shillcutt*, 119 Wis. 2d 788, 793–806, 350 N.W.2d 686 (1984). They prohibit use of juror testimony and statements to impeach a verdict except as to "outside prejudicial information" or "outside influence."

Those permissible uses are not in play here. The incompetency rule fully applies to Perry's case.

As Professor Blinka notes:

> The juror incompetency rule puts beyond formal scrutiny any inquiry into whether the jury reached a compromise verdict, conspired to arrive at a quotient verdict, speculated about the existence of insurance coverage, *misinterpreted or even ignored the judge's instructions,* based its decision on sympathy, or improperly used certain evidence.

7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 606.2, at 491 (4th ed. 2017) (emphasis added). While the record contains the letter, this Court cannot use it as Perry requests.

B. The circuit court properly decided against declaring a mistrial, opting for the less drastic remedy of immediately striking Ivan's blurted comment, instructing the jury to disregard it and, at the close of trial, reinstructing the jurors to disregard all stricken testimony and not to consider it in their deliberations.

Rather than declare a mistrial, the circuit court chose the wiser course of instructing the jury what it should and should not consider in deciding Perry's guilt. The court acted well within the scope of its discretion.

Recall how the circuit court responded to Ivan's blurted comment. Perry's counsel immediately objected and asked the court to strike the comment from the record. (R. 70:63.) The court immediately did so: "That's stricken from the record. There's no question posed. The jury is to disregard that comment." (*Id.*)

And at the end of trial, the court instructed the jury using the standard jury instruction for stricken testimony, directing them to "[d]isregard all stricken testimony. It is not to be considered in your deliberations." (R. 73:12); *see* Wis. JI–Criminal 150 (2000). This closing instruction did not directly mention Ivan's comment, but still had the effect of presumptively eliminating it from the jury's consideration.

The circuit court responded reasonably. Direct, explicit, and timely curative instructions purge the taint of a potentially prejudicial remark because this Court presumes the jury follows its instructions. "When a court gives a direct and explicit curative instruction regarding improper testimony, it supports the court's decision not to grant a mistrial by decreasing the possibility of undue influence."

United States v. Perez, 30 F.3d 1407, 1411 (11th Cir. 1994). "The jury is presumed to follow all instructions given." *State v. Grande*, 169 Wis. 2d 422, 436, 485 N.W.2d 282 (Ct. App. 1992).

Circumstances simply did not warrant a mistrial. Ivan's single, blurted comment had low prejudicial effect. It occurred early on in a four-day trial. Ivan did not repeat it and no one else gave similar testimony. The comment itself did not relate to any of the other testimony presented at trial and did not provide details of the armed robbery or the recklessly endangering safety charges. And the prosecutor did not solicit Ivan's comment or use it against Perry.

Further, the totality of the evidence also strongly supported Perry's guilt. Before the blurt, the jury had already heard Ivan testify that Perry and another man had robbed his mother at gunpoint and fired multiple shots at him when he tried to intervene. (R. 70:42–51, 60–62.) The jury would also hear testimony from Mary describing the armed robbery and the shooting. (R. 71:25–36.) A friend of Mary's present during the crime would also describe the armed robbery and the shooting and identify Perry as the man who put the gun to Mary's head during the robbery. (*Id*. at 37–43.)

The jury would also hear evidence from the prosecution linking the pistol used in the shooting to Perry. Shell casings recovered at the crime scene were fired from a pistol recovered from a Milwaukee home where a friend of Perry's lived and where Perry had visited since the armed robbery and shooting. (R. 71:9, 14–16, 47–57; 72:8–19, 20, 35–40.)

Under the circumstances here, this Court cannot say "that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion" as the circuit court did. *Jeske*, 197 Wis. 2d at 913.

The circuit court properly decided against ordering a mistrial. Perry's appellate argument does not support a contrary conclusion.

Perry begins by pointing out various factors he believes the circuit court should have considered in deciding whether to grant his mistrial motion. (Perry's Br. 14–19.)

But all that does is show how another circuit court might have exercised its discretion in a different way, had it been asked to do so. It does not establish that "no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Jeske*, 197 Wis. 2d at 913.

Significantly, Perry never asked the circuit court to exercise its discretion in the way he now favors on appeal. He did not ask the court to consider Ivan's blurted comment inadmissible propensity evidence. (Perry's Br. 14–16.) He did not ask the court to consider the comment about the State's burden to prove that he acted with utter disregard for human life. (*Id*. at 16–17.) He did not ask the court to consider the comment about the felon-in-possession charge. (*Id*. at 17–18.) And he did not ask the court to consider the comment about the "evidentiary picture at the time the impermissible utterance occurred." (*Id*. at 18–19.)

A defendant must ask for what he wants from a circuit court before he can complain to this Court about not getting it. A circuit court cannot erroneously exercise its discretion by failing to do something the defendant never asked that court to do. Perry never asked the circuit court to exercise its discretion and grant the mistrial motion for the reasons he now states in his brief. Nor does he cite any cases suggesting that the circuit court had any obligation to consider, *sua sponte*, the factors he discusses in his brief. He has forfeited the ability to complain about the circuit court's failure to consider the factors he now urges on appeal. *McClelland*, 84 Wis. 2d at 157–58; *Laster*, 60 Wis. 2d at 538–39.

And while Perry could have challenged trial counsel's effectiveness in not making the arguments Perry now prefers, he has not pursued this remedy.

Indeed, Perry proceeds in this Court as though his motion for mistrial is here for a de novo merits determination, based on what Perry now considers new and better arguments. But this Court generally looks for reasons to sustain a circuit court's ruling, not to reverse it. *See State v. Mainiero*, 189 Wis. 2d 80, 95, 525 N.W.2d 304 (Ct. App. 1994). As demonstrated above, an ample basis exists to uphold the ruling at issue in this case.

Next, Perry asserts that the curative instructions did not erase any possible prejudice from Ivan's blurted comment because the anonymous juror's posttrial letter to the circuit court is "suggestive evidence" that the jurors ignored the instructions. (Perry's Br. 21–22.)

As discussed earlier, Perry relies on incompetent, inadmissible evidence to support this assertion. After a jury reaches its verdict, section 906.06(2) provides that a juror may not testify concerning the deliberation process except "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Shillcutt,* 119 Wis. 2d at 794.

That statute renders incompetent not only testimony concerning what transpired during deliberations, "but also evidence of 'the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith.'" *State v. Marhal,* 172 Wis. 2d 491, 495, 493 N.W.2d 758 (Ct. App. 1992) (quoting section 906.06(2)). "The juror incompetency rule puts beyond formal scrutiny any inquiry into whether the jury reached a compromise verdict, conspired to arrive at a

quotient verdict, speculated about the existence of insurance coverage, misinterpreted or even ignored the judge's instructions, based its decision on sympathy, or improperly used certain evidence." Blinka, *supra* § 606.2, at 491.

Perry does not acknowledge or discuss the impact of section 906.06(2) in his brief, even though the prosecutor and the circuit court both brought it to his attention during the lower court proceedings. (R. 48:2–3; 77:15.)

Finally, Perry asserts that the jury's acquittal on the felon-in-possession charge and the "no" finding on the use of a dangerous weapon on the recklessly endangering safety charge somehow indicates the jurors considered Ivan's blurted comment as proof of Perry's criminal propensity. (Perry's Br. 22–23.) That is rank, partisan speculation. Logical consistency is not required in multi-count criminal verdicts. *See, e.g., Nabbefeld v. State*, 83 Wis. 2d 515, 529–30, 266 N.W.2d 292 (1978); *State v. Mills*, 62 Wis. 2d 186, 191, 214 N.W.2d 456 (1974). This Court should not indulge Perry's speculation as to what the jury's verdicts mean, insofar as Ivan's comment is concerned.

And section 906.06(2) applies here as well. *See State v. Thomas*, 161 Wis. 2d 616, 627–28, 468 N.W.2d 729 (Ct. App. 1991). This Court cannot properly consider the anonymous juror's letter in assessing the significance—if any—of Ivan's comment on the jury's deliberations.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated at Madison, Wisconsin this 20th day of June 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3788 words.

_____
GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of June 2019.

_____
GREGORY M. WEBER
Assistant Attorney General