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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2023AP000450-CR

v.

MARQUS G. PHILLIPS
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM THE CIRCUIT COURT FOR
WINNEBAGO COUNTY, THE HONORABLE BARBARA H. KEY,
PRESIDING

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I. Statement of Issue Presented for Review

- 1) Whether the circuit court erred in finding the defendant suffered no prejudice from a violation of its sequestration order.**

The circuit court properly found the defendant suffered no prejudice from the sequestration order violation in this case.

II. Statement on Oral Argument and Publication

The State does not request oral argument, as this matter involves only the application of well-settled law to the facts of the case. Wis. Stat. 809.23(1)(b)1.

III. Statement of the Case

The State believes Mr. Phillips' recitation of the facts of the case is sufficient, and pursuant to Wis. Stat. 809.19(3)(a)(2), omits a repetitive statement of the case.

IV. Argument

The State concedes the Circuit Court was correct in finding there was a violation of its sequestration order. R82:P23. The State concedes I made a boneheaded argument that my failure to relay the Court's sequestration order to the witnesses was anyone's responsibility but mine. R68:P148. This passage is embarrassing to review, and I apologize to Mr. Phillips, the citizens I serve, and this reviewing Court for my failure to

relay the Court's sequestration order to the witnesses, and for making a claim this mistake was not my sole responsibility.

What the State **does** contest on review is that Mr. Phillips' claim he was prejudiced in any way by the violation of the sequestration order. The trial court correctly found the violation did not prejudice Mr. Phillips, and the conviction should be affirmed.

Untainted by any violation of the Court's sequestration order, Officer Schwartz testified he watched the defendant's car pull into Kwik Trip. R68:P75. He watched the car park, and nobody enter or exit the car. *Id.* Police body-worn camera catches Officer Schwartz' approach to Mr. Phillips' car, and shows Mr. Phillips in the driver's seat of the car when first contacted by Officer Schwartz. R131 (flash drive)/Schwartz at KT/time stamp 00:20-28. This is the "overwhelming video evidence" the trial court found supporting the conviction, and that this Court should affirm.

Moreover the sequestration violation occurred AFTER Officer Schwartz testified about what he saw when Mr. Phillips entered the Kwik Trip parking lot. As such Mr. Phillips was not prejudiced by the sequestration order violation.

1) Law on Sequestration Order Violations

The State agrees with Mr. Phillips' statement of the law of sequestration. 18-19 *Br. of Defendant Appellant*. The Circuit Court has

authority under Wis. Stat. 906.15 to sequester witnesses, and that the remedies for violations span from a curative instruction to declaring a mistrial. State v. Bembenek, 111 Wis. 2d 617, 637, 331 N.W.2d 616, 626 (Ct. App. 1983). If there is no prejudice to the defendant, there is no error to allow a witness to testify even if the party calling the witness participated in the violation. *Id.*

While Mr. Phillips asked for a “mistrial” after the sequestration violation was discovered, R68:P149, and on review Mr. Phillips cites the standard of review for mistrial, 18 *Br. of Defendant Appellant*, a judgment of conviction was entered before the violation was discovered. The State believes procedurally, Mr. Phillips was asking for a new trial. “Mistrial” is not defined in Wisconsin case law, but my review of many mistrial cases (but not all of the 2177 Westlaw returns) showed that all were declared **before** verdict. See e.g. State v. Copenig, 100 Wis.2d 700, 303 N.W.2d 821 (1981); State v. Seefeldt, 261 Wis.2d 383, 661 N.W.2d 822, 2003 WI 47; State v. Hill, 240 Wis.2d 1,622 N.W.2d 34, 2000 WI App 259.

Regardless of whether this Court is reviewing a motion for a new trial, or a motion for a mistrial, the standard of review is the same: erroneous exercise of discretion. “A circuit court invokes its discretion in resolving a defendant's motion for a new trial. An appellate court will not overturn the circuit court's decision unless the circuit court erroneously exercised its

discretion. A circuit court's erroneous view of the facts or the law constitutes an erroneous exercise of discretion. An appellate court will affirm a circuit court's decision when the record shows that the circuit court looked to and considered the facts of the case and arrived at a conclusion consistent with applicable law. State v. Eison, 194 Wis. 2d 160, 171, 533 N.W.2d 738, 742 (1995)

2) Application of this law to Mr. Phillips' case

As noted above, untainted by any violation of the Court's sequestration order, Officer Schwartz testified he watched the defendant's car pull into Kwik Trip. R68:P75. Officer Schwartz watched the car park, and nobody enter or exit the car. *Id.* Police body-worn camera catches Officer Schwartz' approach to Mr. Phillips' car, and shows Mr. Phillips in the driver's seat of the car when first contacted by Officer Schwartz. R131 (flash drive)/Schwartz at KT/time stamp 00:20-28. Regardless of Officer Pauer's testimony, there is no reasonable sequence of events that puts Mr. Phillips in the driver's seat other than he was the driver when the car entered the parking lot.

This is the "overwhelming video evidence" the trial court found supporting the conviction, and that this Court should affirm. The trial court "looked to and considered the facts of the case and arrived at a conclusion

consistent with applicable law.” State v. Eison, 194 Wis. 2d 160, 171, 533 N.W.2d 738, 742 (1995).

The relevant part of Officer Pauer’s testimony for purpose of this review is 10 lines found at R68:P95.

LEVIN: Q And did -- can you tell the jury how the defendant arrived at the Kwik Trip?

PAUER: A I observed the vehicle that had previously been parked on Prospect Avenue pulling into Kwik Trip just before I did.

Q Okay. And did you keep eyes on the vehicle, between the time that it parked and the time that you walked up to it?

A Yes.

Q Did anybody get in it or out?

A No.

The corresponding testimony by Officer Schwartz was well before Officer Pauer had her head to the courtroom door.

SCHWARTZ A: I observed the vehicle that had previously been parked on Prospect Avenue pulling into Kwik Trip just before I did.

LEVIN Q Okay. And did you keep eyes on the vehicle, between the time that it parked and the time that you walked up to it?

A Yes.

Q Did anybody get in it or out?

A No.

R68:P75

The Court noted that cross examination of Officer Schwartz began at 11:00 a.m. R82:P24. The timestamp of the video showing Officer Pauer leaning onto the courtroom door begins at 11:01:09. Officer Pauer’s violation of the sequestration order was AFTER the only testimony

by Officer Schwartz about observing Mr. Phillips' car enter the lot, nobody enter or exit, and Mr. Phillips being in the driver's seat when contacted.

The timing of Officer Pauer's leaning against the door clearly resulted in no relevant information for the issue on review. It was this conduct that the trial court found as the sequestration violation, R82:P23, and this conduct caused no possible prejudice to Mr. Phillips.

In examining the timeline of the sequestration order violation, finding it AFTER the crucial relevant testimony in this case, the trial court "looked to and considered the facts of the case and arrived at a conclusion consistent with applicable law." State v. Eison, 194 Wis. 2d 160, 171, 533 N.W.2d 738, 742 (1995).

Mr. Phillips argues that the general ability of the witnesses to hear proceedings while in the hallway was a violation of the sequestration order, and the trial court's failure to find this violation was "clearly erroneous." 22 *Br. of Defendant Appellant*.

Officer Pauer's ability to hear some courtroom proceedings did not prejudice Mr. Phillips. Pauer testified that in the hallway she could hear "body worn camera [audio] footage that was played on the screen. I could hear all of the prosecution's questions, and all of the defense's questions. I could hear Officer Schwartz talking, but I couldn't hear the exact answers that he was saying." R82:P5.

The trial court correctly characterized what Officer Pauer could hear as “white noise,” R82:P23, other than when she put her ear to the door.

The record establishes that Officer Schwartz’ “exact answers” about the observed driving was inaudible to Officer Pauer as she waited in the hallway to testify. As such there could be no possible prejudice to Mr. Phillips from the sequestration order violation (“witnesses [shall be] excluded so that they cannot hear the testimony of other witnesses.” Wis. Stat. 906.15(1)) committed by Officer Pauer simply sitting in a hallway where portions of the trial proceeding were audible.

V. Conclusion

The trial court correctly affirmed the conviction in this case, even in light of a sequestration order violation. There was, as the court found, “overwhelming video evidence” that Mr. Phillips was the driver. The sequestration order violation caused Mr. Phillips no prejudice, and the conviction should be affirmed.

Dated August 7, 2023

Electronically signed by:

Adam J Levin 8/7/2023

Adam J. Levin
WSBA No. 1045816
Assistant District Attorney
Winnebago County, Wisconsin
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 1474 words.

Dated at Oshkosh, Wisconsin this August 7, 2023

Electronically signed by:

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