STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2005AP001484

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMETRIUS GRAYSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF AUTHORITY

Cases

Statutes

TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is controlled by well-settled law and, therefore, the appellant recommends neither oral argument nor publication.

STATEMENT OF THE ISSUE

I. Whether the trial court abused its discretion in denying Grayson's motion for a mistrial after a police witness informed the jury that in an earlier unrelated 1998 incident he (the officer) had encountered Grayson, that Grayson lied about his name for forty-five minutes and was later arrested on a warrant when Grayson's true identity was discovered.

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

Grayson entered a not guilty plea to the charge of being a party to the crime of delivery of cocaine base. The matter was tried to a jury. Milwaukee Police Officer Lemuel Johnson was called as a witness at the trial. Prior to taking the stand Johnson was admonished by the prosecutor not to mention the details of a prior contact Johnson had with Grayson in 1998. Despite this admonition, during his direct examination Johnson blurted out that in the 1998 Grayson had maintained a false identity for forty-five minutes and, once his true identity was known, he was arrested on a warrant. At that point Grayson moved for a mistrial and the trial court denied the motion.

The trial court abused its discretion in denying the motion for a mistrial because the court failed to conduct a "***Sullivan***" other acts analysis; had the court conducted such an analysis it would have concluded that the "details" testified to by Johnson were not offered for a permissible purpose under the statute and were therefore not admissible; the evidence at issue here is *per se* unfairly prejudicial because it is pure character evidence; and, finally, Johnson's

deliberate misconduct from the witness stand poisoned the entire atmosphere of the trial requiring that the motion for mistrial be granted.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant-appellant, Demetrius Grayson ("Grayson") was charged with being a party to the crime of a delivery of crack cocaine contrary to Sec. 961.41(1)(cm)1g, STATS. Grayson entered a plea of not guilty.

The matter was tried to a jury. During trial one of the undercover officers involved, Lemuel Johnson, testified concerning an earlier 1998 incident that,

> We were in the area of 32nd and Center, me and my partner. We were working on what we call a special car, and we made contact with Mr. Grayson, and we wanted him to identify himself, and it —he identified himself after, probably, 45 minutes of giving us the wrong name; and he finally identified himself as who he is, and we ran his name, and he had a warrant for his arrest , so we arrested him.

(R:26-26). Grayson objected and moved to strike the evidence. The court called a conference. Thereafter, the court gave an instruction to the jury that the information may only be used insofar as it is relevant to the officer's identification of Grayson in the present case. (R:26-27) Significantly, though, the court did not strike the evidence.

Thereafter, Grayson moved for a mistrial arguing that the admission of the details of the 1998 incident was not proper other acts evidence and was unfairly prejudicial. (R:26-83) In his response to the motion the prosecutor told the court that he had warned Officer Johnson about "keeping the description very narrow or brief . . . and the response was more detailed than I had clearly asked for." (R:26-84, 85).

Nonetheless, the trial court denied the motion for mistrial

stating:

> Okay. Let me just say, we did discuss this at sidebar, and the—concern was that there was a statement that he had 45 minutes of contact with him and that it took a while or took that amount of time until they could get an --- correct I.D.
>
> And the other statement was that when they looked him up, they found out there was a warrant on him at that time.
>
> And I advised the jury that they could consider that only as to – only as relevant to the issue of identification, and that any other information—that they could not use it for any other purpose.
>
> And clearly, the fact that they've had prior contact is relevant to identification.
>
> The fact that the contact was not fleeting and lasted 45 minutes is relevant to identification.
>
> The fact that he describes the behavior as less than—than perfect or less than appropriate, or that there was a warrant, could have some negative impact or a prejudice against the defendant; and for that reason, I gave the curative instruction.
>
> It's unfortunate that the information came out in the manner it did, but I don't believe it rises to the level of a – of a mistrial.
>
> I'm going to deny your motion for a mistrial, but if you'd like the Court to give any further curative instruction when I give the instructions at the end of the case, I'll consider whatever instruction you want to propose.

(R:26-85, 86).

The jury returned a verdict finding Grayson guilty as charged. (R:27-5).

The court sentenced Grayson to six years in prison to be served as three years initial confinement and then three years of extended supervision. (R:17)

II. FACTUAL BACKGROUND

On July 12, 2004 Officer Johnson was on undercover duty attempting to buy drugs from persons on the street in the area of 23rd Street and Center Street in Milwaukee. (R:26-11). Johnson was merely "riding around" in an undercover vehicle when he asked man on the street for some "work" (drugs) (R:26-13). The man asked whether Johnson wanted "hard" (cocaine) or "green" (marijuana) and then got into the car with Johnson. (R:26-13).

The man directed Johnson to the curb where two men were standing. (R:26-15). Johnson then gave the man $20 and the man left for approximately ninety seconds and then returned with a small bag of marijuana which he handed to Johnson along with $10 change. (R:26). The man asked Johnson whether he still wanted the "hard" and Johnson said he did. The man then jogged away and Johnson saw him have contact with the defendant, Grayson, on the porch of a nearby house where the man and Grayson had a brief conversation. (R:26-19) Grayson then went to another nearby house and then approached Johnson's vehicle. (R:26-21). Grayson reached into the vehicle, made a comment that he thought Johnson was the police, and attempted to hand something to the passenger but Johnson quickly grabbed it. (R:26-22) Grayson then jogged away.

The substance was later determined to be cocaine base. (R:26-63)

Detective Graham testified that he was parked in an undercover car nearby and was able to observe Grayson go up to Johnson's car, reach in, and then Graham kept Grayson in sight until Grayson was arrested a short time later. (R:26-104)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING GRAYSON'S MOTION FOR A MISTRIAL.

During his direct examination Officer Johnson told the jury, not in direct response to the prosecutor's question and contrary to instructions given the witness by the prosecutor, that he had previously arrested Grayson in 1998- and, during this arrest Grayson had maintained a false identity for forty-five minutes and was later arrested on a warrant.

As will be set forth in more detail below, the trial court abused its discretion in denying Grayson's motion for a mistrial because: (1) The basis for the motion was the admission of "other acts" evidence which the courts have recognized is particularly prejudicial; and, (2) The admission of the evidence was not inadvertent- that is, Officer Johnson deliberately told the jury the details of the prior contact contrary to instructions he was given by the prosecutor.

A motion for a mistrial is addressed to the trial court's discretion. In exercising its discretion on a motion for mistrial, the trial court must determine, "in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***State v. Ross***, 260 Wis.2d 291, 659 N.W.2d 122 (Ct. App. 2003) The trial court's decision will be reversed only on a clear showing that the court erroneously exercised its discretion. ***State v. Adams***, 223 Wis.2d 60, 83, 588 N.W.2d 336 (Ct.App. 1998).

Here, the basis for Grayson's motion for a mistrial was the fact that otherwise inadmissible "other acts" evidence was deliberately made known to the jury by a disobedient State's witness.

A. The trial court failed to conduct a "Sullivan analysis" and, therefore, abused its discretion as a matter of law.

Although a motion for a mistrial is addressed to the trial court's discretion, here, the trial court failed to apply the proper legal standard to the motion and, therefore, the trial court abused its discretion *per se.* In order to determine whether a mistrial was

warranted the trial court should have, first of all, conducted a "Sullivan analysis" to determine whether the other acts evidence is admissible; and, if it is not, then the trial court should have determined whether the improper admission of the evidence was sufficiently prejudicial.

Regarding the admission of other acts evidence, Sec. 904.04, STATS., provides:

> 904.04 **Character evidence not admissible to prove conduct; exceptions; other crimes**.
>
> (1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> * * *
>
> (2) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although the admission of other acts evidence is clearly within the trial court's discretion, to determine whether evidence of other acts is admissible, the trial court must engage in a three-step analysis. First, the trial court must determine if the proffered evidence fits within one of the exceptions of RULE 904.04(2), STATS.; second, the trial court must determine if the other acts evidence is relevant under RULE 904.01, STATS.; third, pursuant to RULE 904.03, STATS., the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. See ***State v. Sullivan***, 216 Wis.2d 768, 772-773, 576 N.W.2d 30, 32-33 (1998).

It is well established that a decision which requires the exercise of discretion and which on its face demonstrates no consideration of any of the factors on which the decision should be

properly based constitutes an abuse of discretion as a matter of law. ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547, 552 (1983). However, if the reviewing court can conclude ab initio that there are facts of record which would support the trial court's decision had discretion been exercised on those facts, reversal is not automatic. *Id.*

Plainly, because the trial court did not conduct a "***Sullivan*** analysis" the court abused its discretion. The only remaining question, then, is whether the appellate court can examine the record and determine that facts exist which would support the trial court's decision nonetheless. Here, the nature of the other acts evidence renders it inadmissible and, further, its admission was unfairly prejudicial.

B. Had the court conducted a proper legal analysis the court would have been required exclude the evidence and to grant a mistrial.

It is implicit in the comments of the attorneys and the court that evidence of the 1998 *contact* between Grayson and Officer Johnson was admitted for a permissible purpose under the statute; that is, to provide a basis for Johnson's identification of Grayson in the 2004 incident.

However, Officer Johnson went beyond merely testifying that he had previous contact with Grayson. Rather, Johnson deliberately added the details that Grayson had been untruthful and, further, that a warrant had been issued for his arrest. Plainly, neither of these details could be offered for a permissible purpose under the statute. These "details" do nothing other than suggest that Grayson is of poor character.

Therefore, had the trial court done a proper analysis it would have been forced to strike the evidence of the details.

The question now is whether the evidence is sufficiently prejudicial to have warranted a mistrial.

The appellate courts have consistently recognized that

character evidence is particularly prejudicial. In, ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967) the Supreme Court explained why the admission of character evidence is so unfairly prejudicial. The court wrote:

> The character rule excluding prior-crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Additionally, the Supreme Court observed:

> We think the standards of relevancy should be stricter when prior-crime evidence is used to prove identity or the doing of the act charged than when the evidence is offered on the issue of knowledge, intent or other state of mind. McCormick, Evidence (hornbook series), p. 331, sec. 157. In identity cases the prejudice is apt to be relatively greater than the probative value.

Whitty, 34 Wis. 2d at 294. Thus, the evidence that was improperly admitted in this case has been recognized by the appellate courts as being singularly prejudicial.

It is also important to examine the means by which the evidence was made known to the jury. Here, the prosecutor recognized the unfairly prejudicial nature of the "details" of the 1998 contact and instructed Officer Johnson not to mention it during his testimony. Despite this admonition, Johnson blurted out the character evidence in an obvious attempt to prejudice the jury against Grayson. In other words, this was not an accident. There was no good faith argument that the "details" were admissible.

The courts have consistently distinguished between "accidental" prejudice caused by the State and "deliberate" prejudice caused by the State. For example, where a prosecutor deliberately causes a mistrial to avoid acquittal the double jeopardy clause bars retrial. ***State v. Lettice,*** 221 Wis.2d 69, 585 N.W.2d 171

(Ct.App. 1998). Likewise, negligent or accidental destruction of evidence by the State is not necessarily a due process violation whereas purposeful destruction of evidence is and requires dismissal. *See, e.g.,* ***State v. Oinas,*** 125 Wis.2d 487 373 N.W.2d 463 (Ct.App. 1985).

Here, Officer Johnson knew that the details of the 1998 were unfairly prejudicial (one need not be a lawyer to recognize this); and, further, he knew that the evidence was not admissible. Nonetheless, like a character on a made-for-TV legal drama, Johnson blurted out the details to the jury. No inference can be drawn other than that Johnson was purposely trying to prejudice the jury against Johnson.

This misconduct by Johnson poisoned the entire atmosphere of the trial.[1]

Therefore, the trial court abused its discretion in denying Grayson's motion for a mistrial.

CONCLUSION

For these reasons it is respectfully requested that the Court of Appeals reverse Grayson's conviction and remand the matter for a new trial.

1 The record is unclear as to the exact timing of the incident but at the same time Grayson moved for a mistrial due to Johnson's misconduct he also moved for a mistrial because a spectator at the trial was threatened with arrest for outbursts during the trial. (R:26-87) It is apparent from the description of the incident that the spectator, who was described as being associated with Grayson, was reacting to perceived unfairness during the trial.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2005.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2588 words including footnote, tables, and cover.

This brief was prepared using *Microsoft Word* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated at Milwaukee, Wisconsin, this
_____ day of _____.

_____

Jeffrey W. Jensen

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DEFENDANT-APPELLANT'S APPENDIX

A. Record on Appeal

B. Trial court's ruling on motion for mistrial