COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2299-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC C. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

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

BROWN, J. Three issues are presented by this appeal. They are: (1) whether portions of the district attorney's closing arguments were improper and prejudicial; (2) whether due process required the district attorney and the court to inform defense counsel, who was not a local attorney, that a relative of a juror used to practice law with the district attorney's wife; and (3)

whether trial counsel was ineffective for failing to properly advise concerning a plea offer and its consequences for failing to object to the suspect juror. Although we decide that certain comments by the district attorney during closing arguments were improper, they did not likely have an affect on the jury verdict. We also hold that there was no denial of due process involving the juror and that trial counsel was not ineffective.

Eric C. Martin was convicted by a jury of attempted sexual assault of a girlfriend's daughter, who was under sixteen years of age. As is the case in most of these kinds of allegations, the jury trial consisted of a credibility battle over whether the incident occurred. We will treat the issues in seriatim fashion and relate the facts as they pertain to the individual issues.

The Closing Arguments

Martin alleges four instances where the district attorney engaged in improper argument. Of these, the trial counsel asked for a mistrial regarding only one of those instances. The law is clear that a claim of error in closing argument is waived if there is no request for a mistrial. *See* ***Haskins v. State***, 97 Wis.2d 408, 424, 294 N.W.2d 25, 36 (1980). In the interest of judicial administration, however, we choose to address each claim.

Appeal to Class Prejudice Claim

The district attorney made the following comment about Martin:

> I mean, I think the evidence shows that Eric Martin is a very self-absorbed, immature, not very productive citizen. I mean, he hasn't even had his own place since 1983. He's either been living off his girlfriend or living off his mother since 1983 and this man's 42 years old.

There was an objection on the grounds that there was no testimony about him living off his girlfriend. Trial counsel said the evidence showed that Martin was

staying at the girlfriend's house, but that does not mean that he was living with her. The trial court instructed the jury that the opinions and conclusions of counsel are not evidence and the jury is to determine what the evidence is based on its recollections of the testimony.

Martin's appellate counsel has refashioned the objection into one of "appeal to class prejudice." That is raised for the first time on appeal and is waived. But as we said, we are going to overlook waiver in this case. In our view, the inference to be drawn from the district attorney's statement is that Martin was a freeloader. We are unable to determine what relevance this kind of inference has toward any of the elements of the crime. It is nothing more or nothing less than a comment on Martin's character—his bad character.

It is incumbent on the defendant, however, not just to show that improper remarks were made by the prosecutor, but also that the comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Darden v. Wainwright***, 477 U.S. 168, 181 (1986) (quoting ***Donnelly v. DeChristoforo,*** 416 U.S. 637, 643 (1974)). We are convinced that the district attorney's statement was but a marginal comment when the theme of the arguments are viewed in totality. Both counsel worked at keeping the jury focused on the conflicting testimony in the case and whether certain testimony should be believed. We do not believe that the district attorney's comment caused the jury to penalize Martin as it assessed his credibility.

Excited Utterance

The victim in this case did not immediately tell her mother about the assault, but did tell her girlfriend early on. The statement came into evidence as an excited utterance. Commenting on this evidence, the district attorney said:

> Clearly, ladies and gentlemen, the reason that we brought those statements in is because they are called excited utterances. You heard the judge rule that way when defense counsel objected to those statements coming in, saying they are hearsay. They are not hearsay.

When counsel objected to the comment that counsel fought the statement's admission, the objection was sustained. The district attorney then continued:

> The reason that those statements are admissible, ladies and gentlemen, is because the law in the United States of America is that there are certain statements made outside the courtroom that are so compelling and that are so reliable they are admissible in a court of law.
>
> Ordinarily, what's said in a court of law you can only testify about things that occurred—that a person saw.

An objection was interposed at this point that the district attorney was instructing the jury on the law. Although the objection was sustained, the district attorney continued instructing the jury:

> However, those statements are exceptions to the hearsay rule. These are excited utterances. These are statements that are so reliable that they can come into court even though these statements were made outside of a courtroom.

These comments form the basis of Martin's second allegation concerning the prosecutor's closing arguments. Martin argues that the district attorney was telling the jury that because the statements were reliable, they were admissible in court and the jury must therefore consider the statements to be reliable. If this were all there was, we would agree that the prosecutor engaged in improper conduct and would be hard-pressed to say that the comment had no affect upon this jury's deliberative process.

But that is not all the district attorney said. He was not saying that the jury must believe the excited utterance to be reliable just because it was admitted into evidence. He said:

> [Y]ou want to know why they are so reliable, ladies and gentlemen?… You already know why. Because in your own experience when you're making decisions who's telling the truth and who's telling a lie, one of the first questions you ask yourself is, well, who said this first and where did they say it and did they have enough time to think up a story and was the person still very upset.
>
> ….
>
> [W]hat was coming out of [the victim's] mouth, it was the truth. It was coming directly from her heart.

We view the district attorney's objective here as wanting to convince the jury that the excited utterance was reliable because human experience suggests that it is reliable. The district attorney clearly "asked" the jury to believe the excited utterance; he did not instruct the jury that, as a matter of law, the jury had no choice but to accept the utterance's reliability. Taken in proper context, the district attorney's argument does not cross the line.

Prior Consistent Statement

At one point in the closing argument, the district attorney told the jury that all it needed to do was to listen to the testimony of the victim. The defense counsel said, "[O]bjection your Honor. He's reading from something that's not in evidence." The district attorney responded, "Your Honor, I'm not quoting from what's—I'm using this to refresh my recollection and her testimony was consistent with what's contained here." The defense counsel objected again and moved for mistrial. The objection was overruled and the court admonished the district attorney to confine his argument to the facts in evidence.

At another point in the closing arguments, the district attorney was responding to charges that other witnesses in the case gave conflicting statements. The district attorney asked the jury to view these conflicting statements as insignificant. Then the following occurred:

District Attorney: Don't you suppose that if there'd been any inconsistencies in the four-page statement that [the victim] gave to these officers—to this officer the day after that incident—

Defense Counsel: Objection, your Honor. The statement is not in evidence and he's arguing something that isn't in evidence to corroborate the witness.

The Court: It is not in evidence ... the statement.

District Attorney: I understand it's not in evidence, your Honor. I'm not suggesting this statement is in evidence. What I'm suggesting to you is the reason it's not in evidence is because there were no inconsistencies and if there were, he would have brought them in.

Defense Counsel: Objection.

The Court: What's the objection?

Defense Counsel: That may not be the reason. He's arguing that the reason the thing isn't in evidence—It might not be admissible into evidence, which it wouldn't be. That's why it isn't in evidence.

District Attorney: That's true. Prior inconsistent statements—

The Court: Just a moment…. Ladies and gentlemen, the arguments and opinions and conclusions and inferences of counsel are not evidence. You are to draw your own conclusions and your own inferences from the evidence in the record.

District Attorney: Now, the reason that defense counsel was able to cross-examine Jason [A.] about not saying anything—not writing out in the statement that was written for him anything about the pants being pulled down is because counsel was getting that in as a prior inconsistent statement. There were no prior inconsistent statements in [the victim's] statement. If there were, defense counsel would have made you aware of them.

Defense Counsel: Objection, your Honor. Again, your Honor, that is not in evidence. He's testifying as to what's in that statement. He cannot testify, your Honor, and that's what he's doing.

The Court: Sustained. There are no inconsistent statements. The exhibit itself is not in evidence Mr.

> [District Attorney]. You cannot comment on what it contains.

Martin argues that the district attorney was able to tell the jury by his remarks that there was a statement which was not part of the evidence but which was consistent with the victim's testimony. This, he argues, was an attempt to support the victim's credibility by evidence that was not part of the record and that the jury would have no opportunity to test. We agree that the statements made by the district attorney were improper. The victim's written statement was not part of the record. And it was disingenuous for the district attorney to suggest that the only reason the statement was not made part of the record was because the defense could find nothing inconsistent in the statement. It is disingenuous because it was a round-about way of letting the jury know that there existed a prior consistent statement. The district attorney had to know that he could not get the statement into the record as a prior consistent statement. Prior consistent statements are used to rebut express or implied charges of recent fabrication or recent influence or motive. *See* § 908.01(4)(a)2, STATS. There were no such charges of recent fabrication here. The district attorney's comments were wrong.

But the court gave a curative instruction to the jury concerning the statement not in evidence and this instruction presumptively erases any possible prejudice. *See* ***State v. Bowie,*** 92 Wis.2d 192, 210, 284 N.W.2d 613, 621 (1979). Correlatively, the control of the content and duration of the closing argument is within the sound discretion of the trial court. *See* ***State v. Stawicki,*** 93 Wis.2d 63, 77, 286 N.W.2d 612, 618 (Ct. App. 1979). Reversal is granted only when there is an erroneous exercise of discretion which is likely to have affected the jury's verdict. *See* ***id***. Here, the trial court cut off the district attorney in midstatement and issued a curative instruction. Shortly afterward, while sustaining defense counsel's objection, it admonished the district attorney in front of the jury and

admonished the district attorney one other time. It is evident that the trial court reacted quickly to the prosecutor's statement. We are convinced that the presumption given to the curative instructions, which presumption erases any possible prejudice, has not been overcome. We are satisfied that the trial court took control of the problem and that the jury paid attention to the court when it admonished the district attorney.

Statement that the Victim's Mother Believed the Victim's Statement

Finally, Martin argues that the district attorney made an improper reference to the fact that the mother believed the victim's statement. The district attorney stated that the mother "believes her daughter." Viewed in context with the full statement by the district attorney, however, we are satisfied that the district attorney was not saying what Martin claims. The district attorney was responding to the defense counsel's argument to the jurors that they should not believe the mother's testimony because the mother was biased against Martin. The district attorney responded by agreeing that, probably, the mother *did* hate the defendant. But the district attorney said there was nothing wrong with this feeling given the fact that Martin assaulted her daughter. When the district attorney went on to say that "she believes her daughter," we construe the comment to mean not that her daughter's testimony was the truth, but rather the mother believed *in* her daughter and stood by her. We see nothing wrong with this argument.

In sum, of the four claimed improper arguments, we agree that two of them were improper. But, as to those two, we are convinced that the jury was not infected.

The Suspect Juror

Martin argues that the district attorney, the court, or both violated his due process right to a fair trial because they did not inform out-of-town defense counsel about the "relationship" between one of the jurors and a former partner of the district attorney's wife, a practicing attorney. In an association that ended February 1, 1995, the district attorney's wife was a partner in a law practice with Mario Ventura, Jr. and Gregory Dowse. One of the jurors, Julius Ventura, is a second cousin of Mario. During voir dire, the district attorney asked if there was any person who had business dealings with his wife. No juror responded to that question. Ventura was chosen for the jury.

There is no claim that Ventura answered any question during voir dire incorrectly or incompletely. The claim is that Ventura should have been on "notice" that even if he had no business dealings with his cousin, he had a duty to volunteer that he was related to a person who used to practice law with the district attorney's wife. Relatedly, Martin alleges that because the district attorney and the trial judge both knew of the "relationship" between the Ventura name and the district attorney's wife, they had a duty to disclose this fact to the out-of-town counsel. While Martin can cite no law for either of these propositions, he cites law to say that a prosecutor has a duty to deal fairly with the accused and argues, therefrom, that the prosecutor and the court are guilty of a "conspiracy of silence." Further, Martin cites law holding that the prosecutor has a duty to disclose all exculpatory evidence and, therefore, by analogy, has a duty to disclose this relationship as well. Finally, he argues from ***State v. Gesch***, 167 Wis.2d 660, 482 N.W.2d 99 (1992), that Ventura has to be viewed as being "impliedly biased" because of the family relationship.

As to Ventura, he never incorrectly or incompletely answered a question during voir dire. So there is no question but that there was no juror

concealment here. No law has been cited that a juror has some sua sponte duty to come forward with information that the juror has not been asked about.

As to the balance of this claim, while ***Gesch*** speaks of implied bias due to a significant family relationship, here we have what the State calls a "protracted" family relationship. Ventura was a second cousin of the lawyer. We agree with the State's characterization, at least absent any record to the contrary. We cannot arrive at the conclusion that such a relationship compels the result of bias as a matter of law. This also answers the claim that the district attorney and the court had some duty to inform out-of-town counsel about the relationship. If there is any duty in this regard at all, and as we just said, no cases have been cited to us that so state, the duty does not arise when the relationship is a protracted one such as this.

Ineffective Assistance of Counsel

To prove that counsel was ineffective, the law requires that Martin show how his trial counsel's performance was deficient and, having shown that, that the deficient performance prejudiced him. *See* ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). Martin first claims that counsel was ineffective for refusing to take a plea bargain without giving Martin himself the chance to either accept or reject the plea bargain. But the trial court found as a matter of fact that it was Martin who rejected the bargain, not his attorney. That finding is not clearly erroneous. *See* § 805.17(2), STATS. The trial court noted during the ***Machner***[1] hearing that when the trial court asked if counsel and the defendant needed more time to consider the district attorney's offer of a plea

[1] ***State v. Machner***, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

bargain, and when the defense counsel responded by saying that the defense was ready to go to trial, Martin, of his own volition, said, "[Y]es sir." Also, during the ***Machner*** hearing, the trial counsel testified that Martin wanted to reject the offer and go to trial. The trial court so found. There is no error in the factfinding.

Martin also faults counsel for not explaining to him the collateral consequences of turning down the plea offer because if he were found guilty of the charged offense, he might be subject to a petition for sexual predator under ch. 980, STATS. The trial court held that such consequence need not be explained to the defendant in order to make a plea knowing and voluntary, pursuant to ***State v. Myers,*** 199 Wis.2d 391, 544 N.W.2d 609 (Ct. App. 1996). On appeal, Martin's counsel concedes that ***Myers*** so states, but suggests that because the opinion was issued by a different court of appeals district, we are free to ignore it. Counsel should know better than to make that argument. We must follow the published decisions of this state. The supreme court has just recently so restated in no uncertain terms. *See* ***Cook v. Cook,*** 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). Counsel's recourse is to petition the supreme court for review.

Finally, Martin claims that counsel was ineffective for reasons relating to juror Ventura. Since we have already held that there was no error in seating Ventura, there is no ineffective assistance of counsel in that regard.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.