

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 18, 1997

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

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, STATS.

No. 97-1557-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TONYA R. RIO,

DEFENDANT-APPELLANT.

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APPEAL from a judgment of the circuit court for Columbia County:  
RICHARD REHM, Judge. *Affirmed.*

DYKMAN, P.J. <sup>1</sup> Tonya R. Rio appeals from a judgment convicting her of operating a motor vehicle while under the influence of an intoxicant (OMVWI), third offense, contrary to § 346.63(1), STATS. Rio argues that the prosecutor violated her right to a fair trial by improperly vouching for the

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

credibility of law enforcement witnesses during closing argument. We disagree and affirm.

### **BACKGROUND**

Shortly after 11:15 p.m. on November 20, 1995, Police Officer Terry Loos arrested Rio for OMVWI. At Rio's jury trial, Loos testified that on the night of the arrest, he noticed a vehicle traveling with a burned out license plate lamp. Loos followed the vehicle and observed it proceed slowly, change directions several times, and turn into a convenience store parking lot. Loos saw Rio exit the vehicle, enter the store, and then exit the store, looking around nervously. Loos concluded that Rio was trying to avoid him. Rio got back into her car and drove twenty-five to thirty feet without the vehicle's headlights illuminated. Rio then drove through an alley and entered a driveway in the rear of a residence. There Loos made contact with her.

Loos asked Rio for her driver's license, which Rio had trouble finding. Loos smelled an odor of intoxicants in Rio's vehicle. Rio exited the vehicle at Loos's request. Loos noticed that Rio's breath smelled of intoxicants, that her eyes were glassy and bloodshot, and that she had slurred speech. Loos asked whether she had been drinking, and Rio answered in the affirmative. Suspecting that Rio was intoxicated, Loos asked her to perform field sobriety tests. Based on Rio's performance of these tests, Loos arrested her for OMVWI. Loos then transported Rio to the police station. There, Rio refused to take a breathalyzer test.

During closing argument, the prosecutor made the following remarks:

In closing [Rio's attorney] indicated that there were thirty bases of reasonable doubt. Where are they? The closest that he can even get to any beginning of a reasonable doubt is some kind of big conspiracy theory. Everybody is out to get to the defendant either because they think she's her sister, she thinks—they think that she's black, these officers are a bunch of liars, they're a bunch of buffoons. Well, that's not law enforcement. You saw law enforcement at work right here today testifying. Law enforcement are very respectable individuals that take their jobs very serious—

At that time, defense counsel objected, claiming “improper argument.” The trial court overruled the objection, and the prosecutor continued:

They take their jobs seriously. They write reports after making observations to be able to refresh their recollections so they can come and tell you in as great a detail as possible exactly what happened that night so you can draw the conclusions from it. They're not telling you to convict this person. They're telling you, in great detail, exactly how they formulated their opinions and what facts they observed and they're allowing you to draw the conclusions yourself. These officers are not making up a bunch of lies just because they don't like Ms. Rio.

At the conclusion of closing argument, defense counsel moved for a mistrial and elaborated on the objection, claiming that the prosecutor improperly vouched for the credibility of the officers. The trial court denied the motion. The jury returned a guilty verdict. Rio appeals.

## DISCUSSION

The trial court's decision to grant or deny a motion for a mistrial lies within its sound discretion. *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). A denial of a motion for mistrial will be reversed only on a clear showing that the trial court erroneously exercised its discretion. *Id.* In exercising this discretion, the trial court must determine whether the claimed error was sufficiently prejudicial to warrant a new trial. *Id.*

Rio argues that the trial court denied her right to a fair trial when it refused to grant the motion for mistrial. Rio claims that during the closing argument, the prosecutor vouched for the credibility of the officers who testified at trial. Because the resolution of her case rested on the credibility of the testifying officers, Rio contends that the prosecutor's act of vouching for their credibility deprived her of a fair trial.

A prosecutor's closing argument is improper when it so infects the trial with unfairness as to make the conviction a denial of due process. *State v. Wolff*, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). This level of impropriety is reached when the prosecutor's argument "goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." *State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). Whether this level of impropriety is reached must be determined by examining the statements and the context in which they were made. *Id.*

We find *State v. Draize*, 88 Wis.2d 445, 276 N.W.2d 784 (1979), instructive. *Draize* also concerned a claim of improper prosecutor comment. The court stated that the prosecutor may, among other things, properly offer comment on the evidence presented, argue a conclusion based on that evidence, and inform the jury that the evidence convinces him or her and that it should also convince the jury. *Id.* at 454, 276 N.W.2d at 789. The prosecutor is permitted to comment on the credibility of witnesses so long as that comment is based on evidence presented. *See id.* at 455, 276 N.W.2d at 789; *State v. Johnson*, 153 Wis.2d 121, 132 & n.9, 449 N.W.2d 845, 850 (1990).

We do not believe that the prosecutor's comments here were improper. Taken as a whole, the comment merely stated in a general manner how law enforcement officers observe, record, and report their findings and evidence. From these procedures, the prosecutor attempted to emphasize a sense of reliability. At no time did the prosecutor specifically vouch for the credibility of the officers who were connected to the case. Any comment made relating to the reliability of the evidence those officers presented was properly based on the evidence of the procedures used to collect and preserve that evidence. Because the prosecutor's comments were not improper, we conclude that the trial court properly exercised its discretion in denying Rio's motion for a new trial.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

