

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2994-CR

Cir. Ct. No. 2002CM3065

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEVONTES D. HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Devontes D. Harris appeals from a judgment of conviction for carrying a concealed weapon, party to a crime, in violation of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

WIS. STAT. §§ 941.23 and 939.05 (2003-04).² He also appeals from an order denying his postconviction motion. He raises three claims of error: (1) that the jury instructions permitted conviction on inadequate proof; (2) the prosecutor engaged in misconduct; and (3) his trial counsel provided ineffective assistance. Because this court resolves each claim in favor of upholding the judgment and order, this court affirms.

BACKGROUND

¶2 On April 16, 2002, Harris was charged with carrying a concealed weapon after a fully loaded, Ruger P-89, 9-mm semi-automatic handgun with an extended 32-round magazine was discovered next to him.

¶3 The gun was discovered during a traffic stop. After stopping the car in which Harris was a passenger in the rear-right seat, but before approaching the car, the arresting officers observed Harris lean to the left and he appeared to be stuffing something under the seat. The handgun was discovered in plain view by the arresting officers after approaching the car. The handgun was sticking out from the left side of the rear passenger seat of the car and Harris was seated on the right side of the rear passenger seat.

¶4 A jury found Harris guilty of carrying a concealed weapon. The trial court imposed a sentence of six months in the House of Correction. Harris's postconviction motion seeking relief from his conviction was denied. He now appeals.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

A. Jury Instructions.

¶5 Harris contends that comments by the prosecution during jury selection, the defense in its opening statement and closing argument, and the prosecution, in its rebuttal, gave the incorrect impression to the jury that the State's burden of proof was to make the jury 95% convinced of guilt. Harris contends these statements misled the jury. Harris makes no claim that the instructions by the court were incorrect or misleading.

¶6 A trial court has discretion in giving jury instructions but must fully and fairly inform the jury of applicable rules of law. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). On review, this court will reverse only if the jury instructions misled the jury or communicated an incorrect statement of the law. *Miller v. Kim*, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995).

¶7 The court, not counsel, instructs the jury. "Arguments by counsel cannot substitute for an instruction by the court." *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis. 2d 141, 626 N.W.2d 762. The court provided correct instructions and the jury is presumed to follow the given instructions in making their decision. *State v. Williamson*, 84 Wis. 2d 370, 396, 267 N.W.2d 337 (1978). Harris provides no evidence that the jury was misled by the instructions. This court also finds no evidence the jury was misled by the instructions.

B. Prosecutorial Misconduct.

¶8 Harris next contends his conviction should be overturned because of prosecutorial misconduct. Harris claims that the prosecutor engaged in misconduct by twice using the phrase "rock-and-roll" during closing arguments

and by telling the jury that the role of the prosecution was to expose the truth while the job of the defense was to sow doubt.

¶9 During closing argument, the prosecution argued that the only reason for Harris to be carrying the handgun found in the car was because Harris planned to “rock-and-roll” with the gun. The defense objected to this because it inappropriately implied Harris had plans to use the gun. The court sustained the objection and instructed the jury that arguments by counsel are not evidence and that the jury was to base their decision only on the evidence. Later in his closing argument, the prosecutor again used the phrase “rock-and-roll” but did not apply it directly to Harris or the gun. The defense did not object to the second use of “rock-and-roll.”

¶10 Also, during closing, the prosecution implied that the job of the prosecution was to expose the truth while the job of the defense was to create doubt. The defense did not object to this characterization of the respective jobs of counsel.

¶11 Counsel is allowed “considerable latitude in closing argument, and ... the trial court has discretion to determine the propriety of counsel’s statements and arguments to the jury.” *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). A criminal conviction is not to be overturned based solely on comments by the prosecution but only if the comments affected the fairness of the trial. *United States v. Young*, 470 U.S. 1, 11 (1985). This court rejects Harris’s request for a new trial based on prosecutorial misconduct.

¶12 The defense objected to the first use of “rock-and-roll” and the trial court sustained the objection and correctly instructed the jury to base their decision only on evidence and not arguments. The defense did not object to the second use

and the postconviction court ruled the second use to be unobjectionable. This court agrees that the use of “rock-and-roll” did not affect the fairness of the trial.

¶13 The prosecution’s assertion that the prosecution’s job is to expose the truth was correct. A prosecutor’s duty is to “aid in arriving at the truth.” *O’Neill v. State*, 189 Wis. 259, 261, 207 N.W. 280 (1926). The postconviction court concluded that these remarks were merely argument. The second part of the comment regarding the defense role to create doubt is arguably objectionable. Nevertheless, Harris offers no evidence that any of the remarks affected the fairness of the trial. The jury was instructed that closing arguments did not constitute evidence and that the verdict must be based on the evidence. Accordingly, this court agrees with the trial court’s assessment that the prosecutor’s comments did not persuade the jury to convict Harris based on the respective roles of the parties.

¶14 Based on the foregoing, this court concludes that the trial court did not erroneously exercise its discretion by allowing the remarks, and that the remarks did not affect the fairness of the trial. Therefore, this court rejects Harris’s claim in this regard.

C. Ineffective Assistance.

¶15 Harris’s final contention is that defense counsel provided ineffective assistance because the defense counsel did not argue that the driver of the car could have possessed the gun.

¶16 At the time of the traffic stop, Harris was a passenger in the car driven by Jarrell Henry. Henry had been subpoenaed by the prosecution, but failed to appear at the trial. The prosecution moved for an order prohibiting the

defense from arguing that Henry's failure to appear indicated that Henry possessed the gun. The defense agreed that such an argument was inappropriate and the court granted the prosecution's motion. The trial court did permit the defense to argue that Henry was in control of the vehicle and, in closing arguments, the defense referred to the possibility that Henry owned the gun.

¶17 In order to succeed on an ineffective assistance claim, Harris must prove that counsel's performance constituted deficient conduct, and that such conduct prejudiced the outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697. The conclusion whether conduct resulted in violation of a defendant's right to effective assistance is a question of law and this court does not have to give deference to the trial court. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶18 This court does not need to decide if trial counsel's conduct was deficient because Harris offers no evidence that the conduct prejudiced the outcome. The jury was properly instructed on the elements of the crime of carrying a concealed weapon. Ownership of the weapon is not one of the elements. The jury was instructed to draw conclusions and inferences from the evidence. The jury was entitled to infer from the given testimony that one of the other occupants of the car possessed the gun. Evidence was provided to support this inference without defense counsel having to state that possibility. The jury instead, logically inferred that a gun, found within reach of a person observed by police to have been bending in the direction of the gun, was possessed by that person. This court cannot find the conduct of Harris's trial counsel prejudiced the outcome.

¶19 Based on the foregoing, this court affirms Harris's conviction for carrying a concealed weapon.³

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

³ Harris makes an appeal for discretionary reversal of his conviction under WIS. STAT. § 752.35. He argues that the two other people in the vehicle (the driver and front-seat passenger) could also have been the possessors of the gun. He argues that the police officers' testimony about Harris's furtive movements was not airtight. He further contends that these factors, together with the prosecutor's closing comments, adversely affected the ability to fully try the matter. Although this court can certainly understand Harris's argument, this court declines his request for discretionary reversal. Harris was the sole passenger in the backseat. Testimony from one police officer indicated that he observed the rear-seat passenger making furtive movements, as if attempting to hide an object. Thereafter, the officers saw the gun partially placed under the backseat. Although explanations other than the jury's conclusion that Harris had possessed the gun and attempted to hide it when the police conducted the traffic stop of the car were possible, the jury believed the police officers' testimony. After hearing the evidence presented, the jury concluded that Harris was guilty of carrying a concealed weapon. Harris has not presented this court with anything to convince us that a new trial is necessary in the interests of justice.

