COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 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. 2005AP847-CR

Cir. Ct. No. 2004CM768

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL S. GRAHAM,

DEFENDANT-APPELLANT.

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

¶1 NETTESHEIM, J.[1] A jury found Daniel S. Graham guilty of lewd and lascivious behavior by publicly and indecently exposing his genitals or pubic area pursuant to WIS. STAT. § 944.20(1)(b). Graham appeals from the ensuing judgment of conviction.[2] On appeal, Graham contends that the prosecutor improperly asked questions that were without a factual foundation and were hearsay, thereby permitting the prosecutor to functionally testify via his questions. We agree. However, we hold that the error was harmless. Therefore, we affirm the judgment of conviction.

TRIAL COURT PROCEEDINGS

¶2 The criminal complaint alleged that on April 14, 2004, Rocio Ortiz observed a man, later identified as Graham, masturbating while naked on the front porch of a residence at 4001 30th Avenue in the city of Kenosha. Ortiz was a passenger in a vehicle passing the residence when she made her observation of Graham. Ortiz reported the matter to the police, who responded to the residence. The police located Graham inside the residence. Ortiz, who had returned to the scene, then identified Graham as the man she had seen masturbating on the front porch.

¶3 Graham pled not guilty and the matter was scheduled for a jury trial. Pretrial, the State moved to admit evidence of a similar act of public masturbation by Graham on May 23, 2003, at the same location. The trial court granted the State's motion. At the jury trial, the State introduced evidence of this other act.

[1] This opinion is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Graham was convicted as a repeat offender.

¶4 At the jury trial, Ortiz testified consistent with the allegations in the criminal complaint regarding the incident. In addition, the State presented the other acts evidence through the testimony of a police officer, Kim Barfoth, who witnessed the event. Barfoth testified that on May 23, 2003, while she was operating her vehicle, she saw Graham masturbating while naked in the doorway of a residence on 30th Avenue. In a written statement, Graham confessed and further admitted that he had engaged in similar conduct about twenty times in the past. Graham said that publicly masturbating heightened his sense of sexual arousal.

¶5 Besides denying the charged offense, Graham's theory of defense took an unusual twist when he, himself, introduced evidence of yet a further other act, although Graham denied the incident. This involved an earlier incident of indecent exposure on August 17, 2002. Graham's theory was that police had targeted him as a suspect in the other acts episode of May 2003 because of their unfounded suspicion of him regarding the earlier August 17, 2002 incident.[3] To that end, Graham presented the testimony of the police officer who had investigated the indecent exposure incident. The officer testified that he had spoken with two females and a juvenile who had witnessed the incident, and they pointed out the house where the incident occurred. The officer's investigation revealed that Graham was a "possible" resident of the house.

¶6 Graham next presented the testimony of his girlfriend, Cynthia Trautman, who had lived with him at the 30th Avenue residence for approximately

[3] The trial court noted the unusual nature of this strategy. However, the court understandably was "wary of foreclosing a defendant from … his Constitutional Right to present a defense."

ten years. Trautman testified to an alibi defense regarding the indecent exposure incident of August 17, 2002. She stated that she and Graham flew on America West Airlines to Las Vegas on August 16, 2002, under their respective names and stayed at the Luxor, a Las Vegas hotel, from August 16 through August 19, 2002, under reservations made in Trautman's name. During cross-examination, the prosecutor stated to Trautman, "We checked with the Luxor, and ---" At this point, Graham interrupted with an objection, stating, "Judge, I object. This is testimony. He needs to call a witness." Because the prosecutor had not completed the question, the trial court did not rule on the objection and permitted the prosecutor to finish the question. The prosecutor then stated, "According to the people at the Luxor nobody by the name of Trautman has ever stayed there. Can you explain that?" Graham did not renew his objection to this question, and Trautman replied that she could not offer an explanation. Later, the prosecutor asked Trautman, "So, you wouldn't dispute the fact that the Luxor has no record of anybody by the name of Cynthia L. Trautman ever checking into that hotel ever?" Again Graham did not object, and Trautman answered that she could not answer the question, but she nonetheless maintained that she had stayed at the hotel.

¶7 Trautman also identified two photographs, which she stated were taken during this stay. One of the photographs bore a printed date of August 16 on the reverse side, the other a date of August 17. Trautman contended that these represented the dates the photographs were taken. However, on cross-

examination, the prosecutor suggested that the dates represented when the photographs were developed, not when they were taken.[4]

¶8 Graham testified on his own behalf. He denied the charged incident. He said that he signed the statement admitting the May 23, 2003 other acts incident because he wanted to get out of jail and that he pled guilty to the offense on the advice of his lawyer. He further testified he was in Las Vegas with Trautman staying at the Luxor at the time of the August 17, 2002 indecent exposure incident. He also stated that the records of America West Airlines would confirm his flight to Las Vegas with Trautman on August 16, 2002.

¶9 While cross-examining Graham, the prosecutor engaged in the same tactics used when cross-examining Trautman. The prosecutor asked Graham, "You don't have any explanation as [to] why the Luxor would have no record of a Cynthia Trautman ever checking into this hotel ever in their whole history?" Graham responded, "They should." After the answer, Graham's attorney objected, and the trial court overruled the objection. The prosecutor then followed up by asking Graham, "They don't have any—they do have a record of a Daniel Graham checking in August 5th, but that was a Daniel Graham from Alberta, Canada." Again Graham's attorney objected, stating, "Judge, he can't testify to these things." The trial court sustained this objection. Nonetheless, the prosecutor persisted with the following question: "You don't have any explanation as to why the Luxor would have no record of your ever staying at the Luxor Hotel?" Once again, Graham's attorney objected, stating, "Asked and answered." The trial court

[4] Trautman also testified concerning the other acts incident of May 23, 2003, contending that Graham admitted to that offense only because his lawyer so advised.

overruled this objection, and Graham responded that Trautman made the arrangements for his stays at the Luxor.

¶10 In its rebuttal case, the State presented the testimony of Sharon Ginther, a representative of America West Airlines, who testified that a search of the airline records revealed that no person under the name of Trautman or Graham had flown to Las Vegas on August 16, 2002. In addition, the State presented the testimony of one of the witnesses to the indecent exposure episode of August 2002.

¶11 During his closing argument, the prosecutor stated, "The defense, Miss Trautman acknowledged, as does the defendant, that they have no explanation as to why the Luxor would have no record of these people ever being there. Ever." Later, the prosecutor told the jury, "What [Trautman] underestimated was this machine called the telephone. So, I was able to have members of my staff telephone the Luxor, was able to have members of my staff telephone---" Graham's attorney interrupted this remark stating, "Judge, I object to that. That's not in evidence." The trial court sustained this objection.

¶12 The jury found Graham guilty. Graham appeals from the judgment of conviction.

DISCUSSION

¶13 We first address the State's argument that Graham's failure to seek a mistrial constitutes a waiver of his complaints about the prosecutor's questions. In support, the State cites to ***State v. Guzman***, 2001 WI App 54, 241 Wis. 2d 310, 624 N.W.2d 717, where the prosecutor improperly alluded to a penalty enhancer during the closing argument to the jury. *See* ***id.***, ¶24. The court of appeals held

that any error was waived because the defendant failed to immediately object and move for a mistrial. ***Id.***, ¶25. The supreme court reached similar conclusions in ***Haskins v. State***, 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980), and ***Davis v. State***, 61 Wis. 2d 284, 286-87, 212 N.W.2d 139 (1973). However, all of these cases addressed a claim of improper prosecutorial argument to a jury—not a claim of improper cross-examination of a witness. Here, while Graham objects to portions of the prosecutor's closing argument, he also objects to portions of the prosecutor's cross-examination, a matter not governed by ***Guzman***, ***Haskins***, or ***Davis***.[5]

¶14 While a motion for a mistrial may be necessary when the trial court *sustains* an objection to an improper question, *see* ***State v. Baker***, 16 Wis. 2d 364, 368, 114 N.W.2d 426 (1962), such is not the rule where the party has registered a proper and timely objection. In ***Pophal v. Siverhus***, 168 Wis. 2d 533, 545, 484 N.W.2d 555 (Ct. App. 1992), the court said, "We repeatedly review errors when a timely objection has been made unaccompanied by a motion for a mistrial." Therefore, Graham was not required to move for a mistrial in order to preserve his objections to the prosecutor's cross-examination. However, we do hold, consistent with the ***Guzman*** line of cases, that Graham was required to ask for a mistrial in order to preserve his objection to the prosecutor's final argument.

[5] In support of its holding, the ***Guzman*** court cited to ***State v. Goodrum***, 152 Wis. 2d 540, 549, 449 N.W.2d 41 (Ct. App. 1989). ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. In ***Goodrum***, the court of appeals addressed prosecutorial statements made during closing argument and during the trial. *See* ***Goodrum***, 152 Wis. 2d at 549. However, it is not clear from the opinion whether the statements made by the prosecutor during the trial were in the form of questions. Therefore, we do not view ***Goodrum*** as informative on the question of whether Graham has waived any challenge to the prosecutor's questions.

¶15 We therefore turn to the merits. Graham contends that the prosecutor's cross-examination questions regarding the photographs and the Luxor were improper because the questions did not have any factual predicate. As such, Graham argues that the prosecutor was functionally permitted to testify via his questions.

¶16 The State first responds that the prosecutor's questions did not require a factual predicate because the questions were asked during the course of cross-examination. In support, the State cites to ***State v. Williamson***, 84 Wis. 2d 370, 267 N.W.2d 337 (1978). There, the prosecutor asked a witness, "Isn't it a fact … that you stated to [the police] at that time that you would not be able to identify the suspects?" ***Id***. at 378 (alteration in original). The witness denied making that statement, and the prosecutor never offered evidence that contradicted the witness's denial. ***Id***. However, the defense later offered a police report that did provide the factual predicate for the prosecutor's question. ***Id***. at 379. Given that, the supreme court held that the prosecutor's failure to provide the factual predicate for the question was not reversible error. ***Id***. at 381.[6] Here, unlike ***Williamson***, the record is devoid of any factual predicate for the prosecutor's questions of Trautman and Graham regarding the records of the Luxor. Therefore, ***Williamson*** does not support the State's argument.

¶17 Moreover, even though the supreme court did not address the matter, we doubt that the question at issue in ***Williamson*** required a factual predicate. The witness there was merely asked whether he had made a certain statement to

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[6] The supreme court also noted that the defendant never objected or moved to strike the testimony for which no factual predicate was supplied. ***State v. Williamson***, 84 Wis. 2d 370, 381, 267 N.W.2d 337 (1978). Here, Graham objected to some of the questions at issue.

the police. That inquiry addressed a matter obviously within the knowledge and command of the witness. In this case, however, the prosecutor's questions inquired as to Graham's and Trautman's knowledge about information purportedly conveyed in a private telephone call between the prosecutor's staff members and some representative of the Luxor. Such information would obviously be beyond the knowledge of these witnesses. Moreover, the form of the questions affirmatively represented to the jury that the Luxor had no record of Graham or Trautman ever staying at the hotel. And unlike ***Williamson***, no factual predicate ever was offered for the representations stated in the questions. As such, the prosecutor was permitted to offer unsworn testimony without any factual predicate via his questions.

¶18 Graham makes a similar complaint about the prosecutor's cross-examination of Trautman regarding the photographs. Graham contends that the prosecutor's inquiry whether the dates on the reverse side of the photographs represented the dates of development, as opposed to the dates the photographs were taken, was without a factual predicate. We disagree. Graham introduced the photographs through Trautman's direct examination. During that testimony, Trautman affirmatively represented that the dates on the photographs were the dates when the photographs were taken. Unlike the topic of the Luxor, Trautman had firsthand knowledge regarding these photographs—both as to when they were purportedly taken and when they were developed. As such, we hold the prosecutor was entitled to probe on cross-examination as to the truth and accuracy of this testimony.

¶19 In summary, we hold that the prosecutor's cross-examination regarding the photographs was proper but that portions of the cross-examination regarding the Luxor were improper.

¶20 Next we address the question of prejudice to Graham under the law of harmless error. To be deemed harmless, we must be able to declare that the error was harmless beyond a reasonable doubt. ***State v. Stuart***, 2005 WI 47, ¶40, 279 Wis. 2d 659, 695 N.W.2d 259. This means that the State must show beyond a reasonable doubt that the error complained of did not contribute to the verdict. ***Id***. In making this determination, we look to the following factors: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. ***Id***., ¶41. We address each of these factors in turn.

A. Frequency of the error

¶21 We will allow for the sake of argument that the frequency of the error supports Graham's argument.

B. Importance of the erroneously admitted evidence

¶22 The importance of the prosecutor's improper cross-examination is significantly diminished in light of the fact that Graham failed to object to some of the improper questions. For instance, Graham did not object to any of Trautman's cross-examination about the Luxor.[7] Thus, the substance of the information, albeit improper, was known to the jury by virtue of Graham's failure to object.

[7] As noted, Graham did object when the prosecutor first broached the subject of the Luxor with Trautman via a partial question. *Supra,* at ¶6. However, Graham did not renew or pursue this objection after the prosecutor completed the question.

Moreover, the topic of the Luxor and the indecent exposure event of August 17, 2002, were collateral matters introduced by Graham, not the State, and were not directly related to the charged event of April 14, 2004. This factor favors the State.

C. Evidence corroborating or contradicting the erroneously admitted evidence; duplication of untainted evidence

¶23 We address these two factors in a single discussion, and we deem both factors very important. The prosecutor's improper cross-examination conveyed to the jury that Trautman and Graham were not at the Luxor in Las Vegas on August 17, 2002. However, contrary to the testimony of Trautman and Graham that they flew to Las Vegas on America West Airlines on August 16, 2002, the unimpeached testimony of Sharon Ginther, the America West Airlines representative, revealed that the airline records showed no such flight by Trautman or Graham to Las Vegas on that date. Thus, the message conveyed to the jury by the prosecutor's improper cross-examination was nonetheless corroborated by competent evidence from a neutral witness. This testimony did serious damage to the credibility of both Trautman and Graham.

¶24 We have also considered whether the photographs testified to by Trautman as having been taken at the Luxor during the purported August 2002 Las Vegas visit contradict the message conveyed by the prosecutor's improper cross-examination. Trautman contended that the dates on the reverse side of the photographs established that she and Graham were at the Luxor during this time period. However, the prosecutor's proper cross-examination raised a legitimate question as to whether the date on the photographs represented the date the photographs were taken or the date the photographs were developed. The trial court expressed similar reservations about this matter when it addressed this

evidence in the course of its sentencing remarks. In addition, we take note, as did the prosecutor in his closing argument, that the photographs depict only the Luxor facility, but not Trautman or Graham. These factors favor the State.

D. Nature of the defense

¶25 Here again we note that the entire matter of the Luxor and the events of August 2002 were collateral to the charged offense of April 14, 2004. As noted, Graham offered his alibi to the events of August 2002 in an effort to defend against the other acts event of May 23, 2003, not as a direct defense against the charged event of April 14, 2004. This factor favors the State.

E. Nature of the State's case; overall strength of the State's case

¶26 We discuss these factors in a single discussion. The State presented the testimony of Ortiz, who was an eyewitness to Graham's act of public masturbation. Ortiz identified Graham at the scene of the offense shortly after the event. At trial, Ortiz confirmed this identification and additionally described a tattoo on Graham's arm. Graham's arm was displayed to the jury and the display revealed a tattoo consistent with Ortiz's description. While Graham attempted to show that Ortiz did not have an adequate opportunity to provide a reliable identification of him, Ortiz remained steadfast in her testimony.

¶27 In addition, the State introduced evidence of Graham's strikingly similar prior act of public masturbation on May 23, 2003. Importantly, Graham confessed to this act and stated that he had engaged in similar conduct about twenty times in the past. Graham also stated that he sought and achieved heightened sexual arousal when engaging in public masturbation. Given the similarity of this prior conduct and that the conduct occurred at the same location

as that charged in the instant case, this evidence was highly probative of Graham's motive to engage in similar conduct and of Graham's identity as the offender in this case.[8] These factors favor the State.

¶28 In conclusion, we are persuaded beyond a reasonable doubt that the prosecutor's improper cross-examination of Trautman and Graham did not contribute to the conviction.

CONCLUSION

¶29 We hold that the challenged portions of the prosecutor's cross-examination of Trautman and Graham were improper and that the trial court's rulings overruling Graham's objections to such cross-examination were error. However, we hold that beyond a reasonable doubt such error did not contribute to Graham's conviction and therefore the error was harmless.

By the Court.—Judgment affirmed.

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

[8] The trial court instructed the jury that it could consider the other acts evidence on the questions of Graham's motive and identity.