**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 7, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**



**Appeal No. 2008AP67-CR** **Cir. Ct. No. 1994CF1113**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**HAYES A. JACKSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Racine County: DENNIS J. BARRY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Hayes A. Jackson appeals a judgment entered after a jury found him guilty of armed robbery, *see* WIS. STAT. § 943.32(2) (1993–94), felony murder, *see* WIS. STAT. § 940.03 (1993–94), and burglary while armed with a dangerous weapon, *see* WIS. STAT. § 943.10(2)(a) (1993–94), all as a party to the

crime and an habitual criminal, *see* WIS. STAT. §§ 939.05, 939.62 (1993–94).[1] He also appeals an order denying his postconviction motion for a new trial.[2] Jackson claims that he is entitled to a new trial in the interest of justice because the State improperly bolstered the credibility of a witness's testimony. We affirm.

I.

¶2 Jackson was tried for robbing Lindsay Peters and Christopher Stauffer. During the robbery, Stauffer was shot and killed. In his opening statement, the prosecutor told the jury that Peters, a key witness at the trial, had been arrested for growing and selling marijuana: "[T]he most important evidence we're asking you to listen to is that of Mr. Peters. Keep in mind that he, as the evidence will show you, he has been arrested for his crimes and I think you'll find that he has no reason to lie to you today." Jackson's lawyer did not object.

¶3 Peters lived in an apartment with Stauffer. Peters testified that Jackson lived in the apartment below them and that he and Jackson had occasionally traded marijuana for cocaine. On the night of the crimes, Jackson knocked on the door. Peters told the jury that when he opened the door, Jackson pointed a pistol at him and "backed [him] up" into his bedroom. According to Peters, while this was happening, two men whom he did not know ran up the stairs and "came bursting through the door." Immediately after the men came in, Peters heard a shot fired toward Stauffer, who was in the living room.

[1] Jackson committed the crimes in 1994. His appeal rights were reinstated in 2006.

[2] In his postconviction motion, Jackson also sought sentence modification on the ground that his sentence was unduly harsh. He does not raise this issue on appeal. Accordingly, we do not address it. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

¶4 Peters testified that Jackson then hit him in the head with the pistol, told him to lie down, and asked Peters where he kept his gun. Peters told Jackson that it was on a nearby stereo. According to Peters, Jackson took the gun and then asked Peters where Stauffer's gun was. Peters told the jury that as he was pointing to the living room, he looked up and saw Stauffer fall onto a couch. According to Peters, one of the other men then jumped on top of Stauffer and shot three more times. The three men then ran out of the apartment. Peters testified that he called 911 because Stauffer had been shot in the head. He then grabbed marijuana and any other "illegal matters" and hid them.

¶5 The police seized from the apartment: marijuana plants, grow lights, gardening tools, baggies, packages of marijuana, and cash. Peters admitted that he initially told the police that the robbers "came for money." He explained at trial that he did not tell the police that the robbers stole two guns because he thought "we would get in trouble. I didn't know Chris was going to die so I was basically trying to cover our butts."

¶6 Officer David Boldus interviewed Peters several times. Boldus told the jury that the case involved "parallel investigation[s]"—a death investigation and a drug investigation. According to Boldus, the purpose of his first major interview with Peters was to investigate Stauffer's death:

> At that point we were obviously well aware of the drug related implications. Our concern was that he might be holding back some information, not knowing whether it was pertinent to the death investigation or as to whether it may have implications on himself. Our concern was to assure him that we needed to resolve the death end of it and that any problems he may be facing legally were going to be resolved based on what we had found in the residence, not on anything he would tell us.

Boldus testified that he interviewed Peters two more times because "it became apparent" that Peters "had left out … or altered various details that we needed to clear up." According to Boldus, "[t]hroughout the series of interviews there were variations in his statements in regards to details such as what was taken. The initial statements were pocket change. It ultimately ended up to be the two guns that were taken from the residence." Boldus told the jury that during the last interview, he again explained to Peters that his primary focus was the death investigation:

> [Peters's] particular concern was his own legal difficulties that he would be facing as a result of his, what was found in the apartment, and again, it was our position from the very first interview of him that what we had found regarding the drug related matters was going to result in his ultimately being arrested or charged or whatever, that his statements were needed to clarify and clear up the death investigation end of it and that they would not ever be used in regards to the drug prosecution because the more important issue was the death investigation.

Boldus testified that the information Peters provided during the last interview was "consistent with the physical evidence and other information [] developed" in the case. Jackson's lawyer did not object.

¶7 Jackson testified at the trial that on the night of the crimes, he went to Peters's apartment to trade cocaine for marijuana. According to Jackson, while Peters was showing him some marijuana, "two persons," whom he admitted on cross-examination were his cousin and his (Jackson's) friend, walked into the hallway. Jackson told the jury that as Peters tried to shut the door, he hit Peters in the head because "as the door bounced back on me, I didn't know what was his intention to do that, to slam the door on me." Jackson testified that he and Peters began to fight and he pushed Peters "all the way to the back room." According to Jackson, he heard shots while they were fighting and ran out of the apartment.

Jackson denied that he had a gun or that he stole a gun from Peters. He also claimed that he did not know the other two men had entered the apartment: "It was like a shock. I didn't know what was going on."

¶8 During summation, the prosecutor again commented that Peters had been arrested:

> Does he come here trying to hide his tracks today? That's what you have to ask yourselves. He comes here knowing that his friend has died. He comes here knowing that he has been ultimately arrested for the drug offenses. He comes here knowing that he has nothing to lose today and he's trying to do what's right. He's trying to tell you what happened. He's not trying to stick it to some innocent person.

Jackson's lawyer did not object.

¶9 As we have seen, the jury found Jackson guilty of armed robbery, felony murder, and burglary while armed with a dangerous weapon, all as a party to the crime and as an habitual criminal. Ultimately, the State decided not to charge Peters with any crimes.

II.

¶10 Jackson claims that he is entitled to a new trial in the interest of justice because the State impermissibly bolstered Peters's credibility when at the trial: (1) the prosecutor and Boldus implied that Peters would be prosecuted for the drugs found in his apartment; and (2) Boldus testified that the information Peters gave during the last interview was consistent with the evidence. As we have seen, Jackson's trial lawyer did not object to any of these matters. As Jackson recognizes, however, we may review unobjected-to trial court errors

under WIS. STAT. § 752.35 (discretionary reversal).[3] *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 17, 456 N.W.2d 797, 805 (1990).

¶11 Under WIS. STAT. § 752.35, we may order a new trial in the interest of justice if it appears from the Record that: (1) the real controversy has not been fully tried; or (2) it is probable that justice has for any reason miscarried and we can conclude that a new trial would probably produce a different result. ***Vollmer***, 156 Wis. 2d at 27, 456 N.W.2d at 809 (Bablitch, J., concurring on behalf of six members of the court); *see also* ***State v. Williams***, 2006 WI App 212, ¶12, 296 Wis. 2d 834, 845, 723 N.W.2d 719, 725 (court of appeals independently reviews the Record to determine whether a new trial is warranted in the interest of justice). We will exercise our discretion to reverse under this statute "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662, 667 (1983). We review Jackson's claims with this standard in mind.

¶12 First, Jackson claims that the prosecutor's opening and closing statements and Boldus's testimony that Peters would be or had been arrested implied to the jury that Peters had no motive to lie because he was going to be

[3] WISCONSIN STAT. § 752.35 provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

prosecuted for drug crimes. Jackson thus contends that the real controversy was not fully tried because this implication compromised the jury's ability to "critically assess" Peters's credibility. We disagree.

¶13 No witness may render an opinion on the credibility of another witness. ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (Ct. App. 1984) (witness may not testify "that another mentally and physically competent witness is telling the truth"); *see also* ***United States v. Cornett***, 232 F.3d 570, 575 (7th Cir. 2000) ("Improper vouching occurs when a prosecutor expresses her personal opinion about the truthfulness of a witness or when she implies that facts not before the jury lend a witness credibility."). This is improper because it usurps the jury's role to determine credibility. ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899, 905 (1988). To determine whether a witness improperly commented on the credibility of another witness, we examine the purpose for which the testimony was submitted and its effect. *See* ***State v. Tutlewski***, 231 Wis. 2d 379, 388, 605 N.W.2d 561, 565 (Ct. App. 1999). This is a question of law that we review *de novo*. *See* ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244, 246 (Ct. App. 1996).

¶14 The prosecutor and Boldus did not improperly express an *opinion* that Peters was truthful. Rather, as we have seen, they merely told the jury that Peters would be or had been arrested. *See* ***State v. Kaster***, 148 Wis. 2d 789, 800, 436 N.W.2d 891, 895 (Ct. App. 1989) (asking witness understanding regarding pre-trial agreement "nothing more than a disclosure of facts affecting … credibility"). The jury was free to draw its own inferences from this information and could just have easily concluded that Peters had a motive to testify favorably for the State. *See, e.g.*, ***State v. Lindh***, 161 Wis. 2d 324, 357, 468 N.W.2d 168, 180 (1991) (Pending criminal charges "might be likely to produce at least a strong

suspicion of bias, motive and intent in the eyes of a jury. A jury might reasonably have found the evidence 'furnished the witness a motive for favoring the prosecution in his testimony.'") (quoted source omitted); *see also* ***United States v. Mealy***, 851 F.2d 890, 899 (7th Cir. 1988) ("'[A]sking a witness whether he is testifying by agreement is not likely to bolster his credibility. If anything it is likely to have the opposite effect, by imputing a motive for the witness's testifying as the prosecution wants him to testify, regardless of the truth.'") (quoted source omitted). There was no vouching.

¶15 Second, Jackson claims that Boldus impermissibly commented on Peters's credibility when he testified as follows:

> Q Did he detail the events of [the crimes] to you on that last interview?
>
> A On that particular interview he had, was able to supply some additional details that had come to memory as he had, as he had calmed down and had a chance to reflect on what occurred.
>
> Q Was this consistent with the physical evidence and other information you developed?
>
> A Yes.
>
> Q Did you notice any particular inconsistencies?
>
> A No.

Jackson again contends that this testimony prevented the real controversy—Peters's credibility—from being tried. Again, we disagree.

¶16 Boldus's testimony was not a comment on Peters's credibility. It was, rather, the officer's view that what Peters told him at that point jibed with what Boldus's investigation had uncovered. This is different from an opinion that

a witness is or was telling the truth, and it did not interfere with the jury's ability to assess Peters's credibility. This is not a ***Haseltine*** case.

¶17 In addition, Jackson claims that the cumulative effect of what he claims were errors also compromised the jury's ability to evaluate Peters's credibility. We disagree. *See* ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752, 758 (1976) (larding a final catch-all plea for reversal with arguments that have already been rejected adds nothing). In short, the issue of Peters's credibility was fully and fairly tried. Jackson is not entitled to a new trial in the interest of justice.

*By the Court.*—Judgment and order affirmed.

Publication in the official reports is not recommended.