COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0161-CR **Cir. Ct. No. 00-CF-76**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARLAN SCHWARTZ,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County: JOSEPH A. MCDONALD, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Harlan Schwartz appeals orders denying his motions for postconviction relief. Schwartz argues that prosecutorial misconduct in the State's closing arguments violated his due process right to a fair trial and the trial court therefore erred when it refused to grant him a new trial. Schwartz also argues that the presentence investigation report (PSI) the court relied upon was

biased and that the court erred when it denied his motion for sentence reduction. We reject Schwartz's arguments and affirm the circuit court's orders.

I. Background

¶2 Schwartz and his codefendant William Teas were tried jointly for two counts of arson, party to a crime; one count of possession of a fire bomb, party to a crime; and one count of recklessly endangering safety.[1] The charges arose out of two incidents involving the Douglas County district attorney's home.[2] Neither defendant contested the underlying facts regarding their participation in the incidents, but they instead proceeded to trial with a coercion defense, claiming they were in imminent fear for their lives and the lives of their families based on threats by Alejandro Rivera. Rivera, a purported gang leader, allegedly hired Schwartz and Teas to dissuade the district attorney from proceeding with a murder case against Rivera.

¶3 The jury rejected Schwartz's coercion defense and found him guilty of the two arson counts and the possession of a fire bomb count. They acquitted Schwartz of the reckless endangerment charge, apparently accepting his testimony that he did not believe anyone was home when he attacked the house. Schwartz argues that the jury was improperly influenced by the AG's misconduct in closing arguments. Claimed errors will be specified as appropriate in our discussion.

[1] Schwartz and Teas were prosecuted by an assistant attorney general (AG).

[2] One incident was an attempt to burn the district attorney's garage; the second was a fire bombing of the home itself with a "Molotov cocktail."

¶4 The court sentenced Schwartz to twenty years' confinement for the first arson count; thirty-five years' confinement plus fifteen years of extended supervision for the second count, concurrent to the first; and two years' confinement plus three years of supervision for the possession count, consecutive to count two.[3] Schwartz argues that the court relied on a biased PSI in handing down the sentence. For reasons set forth below, we reject both of Schwartz's arguments and affirm the orders of the circuit court.

II. Prosecutorial Misconduct and New Trials

A. Standard of review

¶5 The determination whether prosecutorial misconduct occurred warranting a new trial is generally within the trial court's discretion. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). However, prosecutorial misconduct can sometimes rise to such a level that it deprives the defendant of the due process right to a fair trial. ***Id.*** This presents us with a question of constitutional fact, subject to a two-part review. *See* ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891.

¶6 We will uphold the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous, but we will apply the facts to

[3] The first arson count was sentenced under our "old" scheme; the second arson count was sentenced under the new "truth-in-sentencing" revisions.

We note that the judgment of conviction says Schwartz was sentenced to thirty years on count one, but in the transcript of the sentencing hearing, the judge announced the sentence as twenty years. Schwartz did not raise this issue, but it is harmless in any event. The sentence for count one is concurrent to the determinate, thirty-five year incarceration for count two, so the error on the judgment of conviction does not result in any actual extension of the confinement period.

law de novo. *See* ***State v. Williams***, 2002 WI 94, ¶17, __ Wis. 2d __, 646 N.W.2d 834. We must review the alleged misconduct in light of the entire record. ***Lettice***, 205 Wis. 2d at 353. If the misconduct poisoned the entire trial atmosphere causing us to question the trial's fairness, we will not hesitate to reverse the resulting conviction and order a new trial based on the due process violation. ***Id.*** at 352.

B. The "Golden Rule" argument

¶7 Schwartz claims the AG used an improper "golden rule" argument in closing. A golden rule argument is one that asks individual jurors to put themselves in another's place and decide what they would want for a particular injury or damage. ***Rodriguez v. Slattery***, 54 Wis. 2d 165, 170, 194 N.W.2d 817 (1972). In Wisconsin, it is an improper argument to put before a jury and sometimes, but not always warrants a new trial depending on the nature of the case, the emphasis on the improper measuring stick, the reference in relation to the entire argument, and the likely impact the argument had on the jury. ***Id.***

¶8 Schwartz claims that the AG erred with the following statements:

> [This crime] has sent a message to every law enforcement officer, every prosecutor, and *every law abiding citizen in this state*.
>
> It told *us* something *we* couldn't believe: *We* had terrorists right here. Right in *our* midst.
>
> ….
>
> [This crime] caught the attention of this community and affected *us* so deeply …. (Emphasis added.)

¶9 Schwartz objected to these statements and moved for a mistrial, but the court denied the motion. The trial court considered the statements to approach being inappropriate because jurors themselves were law abiding citizens, but

allowed the case to continue. The State argued that the jury could have inferred the collective pronouns referred only to the law enforcement community. At the postconviction hearing, the trial court declined to consider these statements error because one element of each offense was whether the crimes were committed as an attempt to influence a government official.[4]

¶10 We are not convinced the use of collective pronouns such as "we," "our" or "us" automatically creates a golden rule violation. Counsels' closing arguments "are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." ***Donnelly v. DeChristoforo***, 416 U.S. 637, 646-47 (1974). Thus, "we" could have meant all prosecutors, all police officers, all court officials or all citizens. A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury will draw that meaning from a plethora of less perfidious meanings. ***Id.*** at 647.

¶11 The "law-abiding citizen" remark, however, necessarily includes more than just law enforcement and requires more scrutiny. Even assuming it would qualify as a golden rule argument, we do not believe it requires a new trial. The nature of the case was an attack on the home of a government official, striking directly at the legal order of the community, and the AG merely observed the obvious. The remark was de-emphasized by an immediate statement from the AG reminding jurors to use common sense and to follow the judge's instructions. These statements would serve to deflate any emotional response Schwartz claims

[4] *See* WIS. STAT. §§ 939.648(2)(c) and (3) (1999-2000) (committing a felony with the intent to influence a government unit may result in an enhanced sentence).

the golden rule argument evoked. Finally, the comment takes up less than a full line in a closing argument transcript of more than 100 pages, and it was at the very introduction of the AG's first remarks. We conclude that impact on the jury was minimal, if it even existed.

C. Availability of a witness

¶12 Schwartz next claims the AG improperly highlighted the absence of Alejandro Rivera as a witness, contrary to an agreement that both sides would treat the witness as unavailable. The AG said:

> And I want you to keep in mind that the only origin, the only evidence we have in this case of the threats comes out of the mouths of Mr. Teas and Mr. Schwartz. No other witness—oh, there are witnesses that say that Teas told me thus and so and Schwartz told me thus and so. But you didn't see any other witness in this case, and you won't, that can corroborate for a fact that Alejandro Rivera did anything but offer money to these men.

We do not view this as a statement commenting on the availability of the witness. It is a summary of evidence and a reminder to the jury that no witness *who took the stand in this case* other than the defendants testified to hearing any threats from Rivera. Schwartz points to nothing in the record suggesting this statement inaccurately reflects the testimony.

¶13 On rebuttal, the AG stated Schwartz was in "the unique position of being able to testify as to threats, because Rivera isn't here."[5] This was clearly an inappropriate comment on the witness' availability. The judge, however, gave a curative instruction to the jury indicating that the witness was unavailable to both

[5] We note that Schwartz does not raise this error until his reply to the State.

sides and that the jurors should draw no inference from his absence. Improper remarks by a prosecutor are not necessarily prejudicial where curative instructions and admonitions are given by the court. ***Hoppe v. State***, 74 Wis. 2d 107, 120, 246 N.W.2d 122 (1976). Juries are presumed to follow the court's instructions. ***State v. Delgado,*** 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

D. Suggestion of other evidence/opinions of the prosecutor

¶14 Schwartz claims error when the AG implied he had other evidence of Schwartz's guilt to which the jury was not privy and when the AG opined on Schwartz's guilt. The AG stated he was "letting [the jury] in on aspects of the investigation …." Schwartz claims this implies existence of facts outside the record. Schwartz also claims the AG's statement, "our belief that the defense of coercion isn't here," was improper.

¶15 Review of the transcript does not support Schwartz's contentions. The AG said:

> We have the burden, the State of Wisconsin, to prove this case beyond a reasonable doubt, and that was why we had witness after witness take the stand, to try and prove this case to your satisfaction, beyond a reasonable doubt, to try to prove every one of these elements that I mentioned to you beyond a reasonable doubt.
>
> But there were other reasons why we spent time letting you in on aspects of the investigation in the course of proving this case beyond a reasonable doubt, but I think beyond a reasonable doubt, any doubt, we did that.
>
> But, in any event, we wanted you also to understand the case, because you have to understand the State's case in order for you to understand our belief that the defense of coercion isn't here.

¶16 The State explained it was informing the jurors why it bothered to put on witness after witness when the underlying crime was not disputed. Contextually, we are not convinced one would reasonably interpret the statement to mean other evidence existed. Additionally, we reiterate ***DeChristoforo***, 416 U.S. at 647, which directs reviewing courts to avoid assuming the jury will select the most insidious interpretation of a statement.

¶17 Regarding the AG's "belief that the defense of coercion isn't here," Schwartz's argument is unconvincing. It *is* the State's position that the coercion defense did not exist; otherwise, it would not have pursued a trial. It is the license and duty of an attorney to say what the evidence tends to prove, that it convinces him or her, and that it should convince the jurors as well, as long as the attorney does not depart from the evidence on record. ***Embry v. State***, 46 Wis. 2d 151, 161, 174 N.W.2d 521 (1970). Schwartz claims the AG never linked his statement to the record, but we note that immediately following the AG's statement, Schwartz objected. The court held a sidebar, but as soon as the jury was reseated the AG began to summarize the evidence. Schwartz cannot use his interruption of the AG to claim failure to link to the evidence. Although we do not know what would have happened if Schwartz had allowed the AG to continue, the record indicates the AG next went to the evidence.

E. Vouching for witnesses

¶18 Schwartz claims it was inappropriate for the AG to tell the jury "Joshua Sargent gave a credible account" of what happened. However, the AG made this statement in his rebuttal, after Schwartz had argued that "Josh Sargent lied and lied and lied" based on inconsistencies in Sargent's testimony. While it may be inappropriate for a prosecutor to express his or her personal belief as to the

truth of any testimony, defense counsel must also refrain from interjecting personal beliefs into the presentation of his case. ***United States v. Young***, 470 U.S. 1, 8-9 (1985). We will not allow Schwartz to cry foul when he committed the error first, opening the door to the AG's reply. Moreover, Schwartz's complaint is grounded in semantics. The AG's characterization of Sargent's account was more akin to describing it as plausible rather than a personal endorsement of Sargent's credibility.

F. Appeal to jurors' emotions

¶19 Schwartz next claims the AG erred when he told the jury "you can't avail yourself of a defense which requires reasonable conduct just because you say you were afraid. If that were the case, folks, we wouldn't have many convictions in this system."

¶20 A prosecutor's arguments regarding the law are not improper unless they misstate the law. *See* ***State v. Neuser***, 191 Wis. 2d 131, 137, 528 N.W.2d 49 (Ct. App. 1995). The first part of the AG's statement, that simply claiming fear does not constitute a coercion defense, is a correct statement of law. The second part of the statement was inappropriate, but Schwartz immediately objected and the court instructed the jury to disregard the statement. Again, any prejudice caused by a prosecutor's improper remarks may be abated by the court's curative instructions and admonitions, ***Hoppe***, 74 Wis. 2d at 120, which juries are presumed to follow. ***Delgado,*** 2002 WI App at ¶17. We are satisfied that the court's instruction sufficiently addressed any prejudicial effect the AG's comment might otherwise have caused.

¶21 Schwartz claims there was also an emotional appeal to the jurors when the AG told the jurors "[t]he only folks involved in this trial that were in

imminent fear of death" were the victims and "victims have rights in this state, too."

¶22 The first statement followed the AG's explanation to the jury that a "coercion defense requires that the person have a reasonable fear of imminent death or great bodily harm. That didn't happen to Mr. Teas and Mr. Schwartz. There was nothing immediate about anything even from their own testimony." The comparison between the defendants' and the victims' state of mind is an appropriate statement based on the evidence in the case. The AG was responding to and refuting Schwartz's defense.

¶23 The second statement was made in the rebuttal argument. Schwartz had also argued that the State was not playing fair because photos remained in view of the jury during closing arguments.[6] The State had a right to explain the photos' presence.

G. Cooperation of law enforcement

¶24 Schwartz also claims error when the AG argued that different law enforcement agencies worked together on the case. Schwartz argues that the statement was beyond the scope of the evidence. However, a prosecutor may comment on the evidence, detail the evidence and argue from it to a conclusion. ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). There was testimony regarding the efforts of several law enforcement agencies such as the Superior police, the arson bureau and the FBI. Even absent specific testimony of

[6] Schwartz does not argue that this was an error we should review, but it is the argument to which the AG was responding.

cooperation, it is not an improper inference that the agencies worked together. Moreover, we cannot conceive how that comment could materially prejudice Schwartz given the evidence of multi-agency participation.

H. *Haseltine* violation

¶25 Schwartz also claims a ***Haseltine*** violation. *See* ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). The AG asked Schwartz to comment on the veracity of other witnesses on cross-examination:

> Q: And in that conversation, Mr. Teas talked about having to burn the house, not the garage; is that correct or not?
>
> A: That is incorrect.
>
> Q: And so if Mr. Gonzales and Mr. Sargent said it was the house, they are incorrect, and you're correct?
>
> [SCHWARTZ'S COUNSEL]: Object to that as argumentative.
>
> THE COURT: Objection overruled.
>
> A: Say the question again, please.
>
> Q: Mr. Gonzales and Mr. Sargent testified that Mr. Teas said he had to burn the house, they are incorrect, and you are correct?
>
> A: Correct.

¶26 Haseltine was charged with the sexual abuse of his daughter. ***Id.*** at 93. A psychiatrist testified that there was "no doubt whatsoever" in his mind that the daughter had been a victim of incest. ***Id.*** at 95-96. Haseltine's entire defense consisted of witnesses who testified the daughter was dishonest. ***Id.*** at 96. Under the circumstances, the court ruled the expert testimony implied the daughter was telling the truth, and with its aura of scientific reliability it was highly prejudicial. ***Id.*** The rule has been restated to mean that no witness may testify that another

competent witness is telling the truth. ***State v. Jensen***, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988).

¶27 Whether a witness has improperly testified as to the credibility of another witness is a question of law that we review independently of the trial court. ***State v. Huntington***, 216 Wis. 2d 671, 697, 575 N.W.2d 268 (1998). Upon our review of the record, we cannot call the AG's line of questioning a ***Haseltine*** violation.

¶28 Asking whether another witness is correct *may* imply the witness is lying, but that is not the only interpretation. A witness may recall an event he or she believes is true, and testify that it is true, even if the event happened differently. A witness who is in error is not necessarily lying, and asking if a witness is correct does not necessarily impugn the witness's individual credibility, only his or her memory or the accuracy of their perception.

¶29 Even assuming the AG improperly asked Schwartz to comment on whether the other witnesses were telling the truth, we conclude that the error was harmless. In ***State v. Romero***, 147 Wis. 2d 264, 279, 432 N.W.2d 899 (1988), the supreme court noted that "[o]ther state courts, likewise, have rejected testimony which interferes with the role of the jury by assessing the credibility of *a complaining witness*." ***Id.*** at 279 (emphasis added). We interpret this to mean that ***Haseltine***'s exclusionary rule is most appropriately applied when one witness is asked to testify regarding the credibility of a complainant and, correspondingly, a victim or a defendant.

¶30 This is not the situation here. Schwartz was asked only about conflicting recollections regarding what part of the building was supposed to be burned. Schwartz never disputed that the conversation itself occurred. Moreover,

Schwartz does not dispute that he participated in the underlying crimes. We cannot conclude that the disputed testimony bears significantly on the jury's consideration of Schwartz's coercion defense; there was no "one-on-one battle of credibility" between Schwartz and the witness he was asked about. *See* ***Romero***, 147 Wis. 2d at 279.

III. Bias in the PSI

A. Standard of review

¶31 A defendant has a due process right to a fair sentencing hearing. *See* ***State v. Suchocki***, 208 Wis. 2d 509, 516, 561 N.W.2d 332 (Ct. App. 1997). Our supreme court has acknowledged the importance of a PSI at sentencing, and the integrity of the sentencing process requires that the PSI be accurate, reliable and objective. ***Id.*** at 518.

¶32 When claiming bias taints a PSI, the defendant must demonstrate first that the writer actually was biased and, second, that the sentencing process was prejudiced by the bias. ***Id.*** at 516. Whether the writer of a PSI was biased is a mixed question of law and fact, and whether the sentencing process was prejudiced is a question of law. ***Id.*** at 514-15.

B. Analysis

¶33 Schwartz points to nothing in the factual reporting of his background or history to support his claim of bias. Rather, Schwartz complains that the PSI writer neglected to interview Sargent and Gonzales who, he contends, would have told the agent that Schwartz was "sincerely frightened" at the time of the attack on the district attorney's house. This omission, assuming it would be relevant, is

harmless because the information had already been put before the trial court when Sargent and Gonzales testified.

¶34 Schwartz also complains about comments the agent made in the "Agent's Assessment and Impressions" section. By its very nature, this section contains conclusions drawn by the writer based on the factual background laid out. We see nothing in the agent's assessment that is unfounded given the background. Because Schwartz has not shown that the agent had actual bias in preparation of the PSI, we need not consider whether the PSI tainted sentencing.

IV. Conclusion

¶35 Schwartz's argument of prosecutorial misconduct does not survive review. Most of the alleged errors are simply not errors, and the few comments that may have been questionable were cured by jury instructions. The trial court noted that the trial itself had run smoothly, and we have no reason to question the trial's fairness (*see* ¶6, *infra*). We therefore decline to reverse the trial court and order a new trial. Because there is neither prosecutorial misconduct in the closing arguments nor bias in the PSI, the orders denying a new trial and sentence modification are affirmed.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.