COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1174-CR **Cir. Ct. No. 00 CT 2701**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN A. PATTERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Reversed and cause remanded with directions*.

¶1 SCHUDSON, J.[1] Brian A. Patterson appeals from the judgment of conviction for Operating After Revocation (OAR) – Fifth or Subsequent

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Offense, in violation of WIS. STAT. § 343.44(1) (1997-98), following a jury trial, and from the order denying his motions for post-conviction relief. He argues that "the prosecutor's violation of the trial court's evidentiary rulings and his final argument dealing with suspected drug activity … constitute plain error," and that trial counsel rendered ineffective assistance by failing to move for a mistrial based on prosecutorial misconduct.

¶2 This court concludes that the prosecutor's violations of the trial court's evidentiary ruling constitute "plain error" under WIS. STAT. § 901.03(4).[2] This court also concludes that, on appeal, the State, which has offered no response to Patterson's plain-error argument, *see* ***State v. Peterson***, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998), has failed to show that the error was harmless beyond a reasonable doubt, *see* ***State v. King***, 205 Wis. 2d 81, 93, 555 N.W.2d 189 (Ct. App. 1996). Accordingly, this court reverses and remands for a new trial.[3]

I. BACKGROUND

¶3 At his jury trial, Patterson did not dispute that his driving privilege had been revoked; the issue was whether he was driving. The State's single witness, Milwaukee County Sheriff's Department Detective Todd Armstrong, testified that he observed Patterson driving. Patterson and his friend, Odean

[2] WISCONSIN STAT. § 901.03(4) states: "PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

[3] Reversing on this basis obviates the need to address Patterson's ineffective-assistance claim. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

Taylor, testified that Taylor was the driver and Patterson was the passenger. Thus, the verdict hinged on the jury's credibility call.

¶4 Just before jury selection, the prosecutor informed the trial court of his desire to elicit testimony that, when Detective Armstrong saw Patterson driving, he and other detectives were at Patterson's apartment building because Patterson "was under investigation for drug activity." The prosecutor explained that he wanted to present such evidence in anticipation of what he suspected would be Patterson's defense—"that when [Patterson] denied the detectives permission to enter his apartment, that was the basis why they accused him wrongly of O.A.R."[4]

¶5 Defense counsel did not object; she merely commented that she "was aware of those particular facts regarding the circumstances surrounding Mr. Patterson's arrest." When the trial court pressed defense counsel for a more definitive response, she replied, "I would have no objection to the State introducing evidence regarding the circumstances surrounding the arrest which includes surveillance around drug activities and Mr. Patterson's refusal to let them enter into his home."

¶6 Nevertheless, the trial court denied the State's request to introduce such evidence. The court explained:

> I think that the full information even in the absence of an objection from the defense as to the purpose of the surveillance is too prejudicial to the Defendant.

[4] The prosecutor, quite properly, brought this to the trial court's attention in advance of making any attempt to introduce such evidence.

> I will allow testimony that Officer Armstrong … was [outside] the apartment complex … doing surveillance … particularly looking out for Brian Patterson[.]
>
> ….
>
> *But the purpose of the surveillance* or … how long Mr. Patterson had been under surveillance … *I won't allow that*.
>
> ….
>
> And so … it seems reasonable and not prejudicial to allow in only that much. *But not the purpose of the surveillance which I think would be prejudicial*.
>
> That is[,] *the jury could use that information that he's under surveillance for drug activity to come to the conclusion he's guilty for that reason rather than he's guilty for driving after revocation* of his license.

(Emphasis added.)

¶7 Patterson first contends that the prosecutor, in his opening statement, violated the trial court's ruling from the outset. The record, however, refutes his contention. The prosecutor commented that Detective Armstrong and four other detectives were at Patterson's apartment building "in surveillance of various matters in the area." Such a generic reference was within the trial court's allowance of evidence that the officers were "doing surveillance" without revealing its drug-related purpose.[5]

¶8 The prosecutor's compliance with the trial court ruling, however, did not continue. He began his direct examination by eliciting testimony that Detective Armstrong was assigned to the "High Intensity Drug Trafficking Area

[5] Here, again, the prosecutor's conduct was proper, clearly reflecting his understanding of the trial court's ruling and his ability to phrase his comments in a manner wholly consistent with that ruling.

unit" and, at the time of this surveillance, was working with the "drug interdiction unit," with four other detectives, "conducting a drug investigation" at Patterson's apartment building. Additionally, re-calling Detective Armstrong in rebuttal, the prosecutor asked him to offer "a better sense now [of] what was going on and why [he] knew [Patterson] was revoked on that particular day." Detective Armstrong responded that Patterson "was under investigation."[6]

¶9 Whenever Detective Armstrong testified about the drug-related purpose of the surveillance, defense counsel did not object and the trial court offered no curative instruction. Apparently concerned about the violations of its ruling, however, the trial court ultimately instructed the jury:

> Ladies and gentlemen, there was also *testimony in this case surrounding the purpose of the surveillance of the Defendant. You must disregard that* in reference to whether the Defendant committed the crime he's charged with.
>
> That testimony was given simply to provide context, and because it is irrelevant and immaterial to whether the Defendant committed the crime of operating after revocation of his license or not, *you must disregard that other testimony about the purpose of the surveillance*.

(Emphasis added.)

[6] Then, answering defense counsel's questions, Detective Armstrong further clarified that he was conducting a "drug investigation" in which he intended to perform a "knock and talk," and a search of Patterson's apartment and vehicle, in response to "a complaint about drugs."

Detective Armstrong's testimony is troubling. The record reflects that he participated in the pre-trial proceedings at which the trial court considered the prosecutor's request to introduce evidence of the purpose of the surveillance. Detective Armstrong was in court when the trial court ruled that references to the drug-related purpose would not be permitted.

¶10 Neither the trial court's ruling nor its jury instruction, however, was enough to deter the prosecutor. He began his closing argument:

> Thank you. Good morning. Make no mistake, ladies and gentlemen. Somebody's not telling the whole truth in this case. This is what happened on March 31, 2000. The Defendant came barreling down 20th Street with Mr. Taylor as his passenger. He drove right by Detective Armstrong, and he took a right around the corner. He drove into the parking lot of his apartment building.
>
> There he was confronted when he got into the building by other detectives *who were conducting drug surveillance on the apartment building*.

(Emphasis added.) The trial court immediately intervened, "Jurors, I caution you, and *I ask no more argument on the issue of why surveillance was being done*." (Emphasis added.) Nevertheless, the prosecutor then continued:

> Thank you. The [r]eason [w]hy I mention that is because there were three detectives inside the apartment building. And when Mr. Taylor was eventually arrested for operating after revocation—[a]nd the detectives didn't tell Mr. Patterson why he was being arrested or why he was going to be arrested at that particular point *because they did want to get into his apartment. They wanted to ask him for his consent so they could search his apartment for anything that might be in there*, so they didn't tell him actually that he was going to be arrested for operating after revocation.

(Emphasis added.)

¶11 Thus, the prosecutor, apparently determined to have the jury understand that Patterson was under surveillance for drugs, repeatedly violated the trial court's ruling. *Without ever asserting that the defense had somehow opened the door to this evidence, and without ever asking the trial court to reconsider or modify its ruling*, the prosecutor, through his questioning of Detective Armstrong, detailed the drug-related purpose of the surveillance. And then, in closing argument, despite the trial court's jury instruction reiterating its ruling, and despite

the trial court's additional instruction warning him away from the subject, the prosecutor persisted and even went on to declare the detectives' desire to search Patterson's apartment.[7]

II. DISCUSSION

¶12 Patterson argues that, despite defense counsel's failure to object or move for a mistrial, this court should conclude that the prosecutor's conduct constituted plain error and, therefore, reverse his conviction and remand for a new trial. This court agrees.

---

[7] And in light of this court's comments at n.8, this is all the more important. After all, having carefully reviewed the record, this court understands the basis on which the prosecutor sought to introduce evidence of the purpose of the surveillance. This court realizes that the defense never objected and, in fact, even stated its readiness to accept evidence "regarding the circumstances surrounding the arrest which includes surveillance around drug activities." This court recognizes that *defense counsel* also elicited testimony from Detective Armstrong about the purpose of the surveillance.

Therefore, this court appreciates that the prosecutor reasonably could have disagreed with the trial court's ruling, and reasonably could have requested reconsideration of that ruling in the course of the trial. But instead, he repeatedly violated the ruling.

Still, attempting to give the prosecutor every possible benefit of the doubt, this court has considered whether he might have inferred that the trial court had somehow modified its ruling without saying so. After all, the record reflects: (1) the absence of objection to his questions of Detective Armstrong; (2) the absence of any *sua sponte* trial court correction of those questions or curative jury instruction during the questioning; and (3) the presence of defense counsel's questions on the same subject.

Such an inference was not impossible. Still, any such inference would have been erased by the trial court's jury instruction, *before* closing arguments, warning the jury that it "must disregard" the "testimony about the purpose of the surveillance," and by the trial court's additional warning, *during* the prosecutor's closing argument, in direct response to his violation of its ruling.

Thus, this court takes great pains to explain that, before articulating the concerns expressed in n.8, it has searched the record for any possible explanation that might obviate the need to admonish counsel.

¶13 Despite the lack of a proper objection, this court may review alleged claims of error under WIS. STAT. § 901.03(4), for "plain error." "Plain error is error so fundamental that a new trial or other relief must be granted." ***State v. Vander Linden***, 141 Wis. 2d 155, 159, 414 N.W.2d 72 (Ct. App. 1987). The plain error exception is to be used sparingly and only where an accused has been denied a basic constitutional right. ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984). "Review under the doctrine of plain error is reserved for those cases where there is a likelihood that the defendant has been denied a fundamental constitutional right or the right of fair trial." ***Vander Linden***, 141 Wis. 2d at 159. Here, this court concludes, the prosecutor's violations of the trial court's evidentiary ruling establish the "likelihood that [Patterson] has been denied … the right of fair trial." *See* ***id.***

¶14 While responding that the defense waived any objection to the evidence and, in any event, that the trial court's curative instructions preserved a fair trial, the State, on appeal, never even mentions "plain error." Thus, failing to address Patterson's primary argument, the State concedes its merit. *See* ***Peterson***, 222 Wis. 2d at 459 (unrefuted argument deemed conceded).

¶15 Responding to the ineffective-assistance claim, however, the State argues that Patterson suffered no prejudice. But in the distinct plain-error context, the State "has the burden to show that the error was harmless beyond a reasonable doubt." ***King***, 205 Wis. 2d at 93. Thus, even if one could somehow graft the State's ineffective-assistance/no-prejudice argument onto a plain-error/beyond-a-reasonable-doubt analysis, the State has not offered anything to carry its burden.

¶16 And that is not surprising. This case required a credibility call, and even that call did not rest simply on a choice between the State and defense

witnesses. Denying the defense motion to dismiss at the conclusion of the State's case-in-chief, the trial court commented that *Detective Armstrong's* testimony could lead the jury to believe that Patterson *was or was not* the driver, and concluded, "I think it's a real close question at this point." Thus, while it is impossible to know the exact extent to which the prosecutor's repeated emphasis on the purpose of the surveillance skewed the jury's view, it also is impossible to conclude, beyond a reasonable doubt, that it did not significantly do so.

¶17 Accordingly, this court reverses the judgment of conviction and order denying post-conviction relief, and remands the case for a new trial.[8]

[8] This case is particularly troubling in one more respect. After determining the merits of this appeal, this court discovered that, just two years ago, this court, reversing another conviction, admonished the same prosecutor, Milwaukee County Assistant District Attorney David Weber. *See* ***State v. Thomas***, No. 00-1219, unpublished slip op. (Wis. Ct. App. Sept. 26, 2000).

In ***Thomas***, Mr. Weber had not tried the case; he handled the appeal. This court admonished Mr. Weber for his brief's many material misrepresentations of the trial record. *See* ***id.*** at ¶¶6-7 and n.3. In ***Thomas***, however, while this court issued its decision to Mr. Weber as appellate counsel for one of the parties, it did not name him in the opinion; instead, it referred to him only as "counsel." Understanding that, perhaps, Mr. Weber's missteps may have resulted from inadvertence or inexperience, this court trusted that an admonishment to appellate "counsel," with instructive reference to the applicable ethical standards, would be constructive and sufficient. *See* SCR 60.04(3)(b).

Now, with the additional sampling of Mr. Weber's conduct in the instant case, this court's concerns have increased. While this court cannot know whether these two cases are aberrational, and can appreciate the possibility that, in all other cases, Mr. Weber's performance may well have been exemplary, his conduct in these two cases causes doubt about his understanding of the prosecutor's ethical responsibilities—for candor with our courts, *see* SCR 20:3.3(a)(1); for obedience to judicial rulings, *see* SCR 20:3.4(c); and for the obligation to do justice, *see* Comment, SCR 20:3.8.

By the Court.—Judgment and order reversed and cause remanded with directions.

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