

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 5, 2003

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. 02-2718-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-47

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JIMMY L. HANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Jimmy Hanson appeals a judgment convicting him of armed robbery while concealing his identity, and an order denying postconviction relief. He contends that he received ineffective assistance from trial counsel. We reject his contention and affirm.

¶2 The State charged Hanson for the armed robbery of a gas station. The victims could not identify the masked perpetrator. Consequently, the primarily inculpatory evidence at trial was the testimony of Ben Thoreson, Hanson's friend and, initially at least, his alleged accomplice. Thoreson testified that on the evening of the robbery Hanson showed him a gun and proposed the gas station robbery. Thoreson testified that he refused to participate, but later saw Hanson's car parked near the station, and shortly afterwards saw Hanson driving away in a suspicious manner. The State originally charged Thoreson as Hanson's accomplice, but dismissed the charge in exchange for his plea to felon possessing a firearm. The State also acknowledged that its case against Thoreson for armed robbery was weak.

¶3 Defense counsel stated in closing arguments that Thoreson, the real perpetrator, had lied in his testimony numerous times, and that the prosecutor's use of Thoreson's testimony was the equivalent of fitting a square peg into a round hole. In rebuttal, the prosecutor made the following statement:

And we're not here to put square pegs into round holes. I will come into court and prosecute a case if I believe in it, if I believe the evidence supports that case. And if I don't, I'll do exactly like I did with Mr. Thoreson, and that's make an agreement that fits the facts, that fits the evidence. And I would do that for Mr. Hanson. Nobody is trying to drive a square peg into a round hole.

¶4 After his conviction on the jury's guilty verdict, Hanson sought postconviction relief. His motion argued that trial counsel ineffectively failed to object to the prosecutor's rebuttal statement, which, in his view, constituted an improper and prejudicial comment on Thoreson's credibility.

¶5 Following a hearing in which trial counsel conceded he had no strategic reason to withhold objection, the trial court denied the motion upon

concluding that the prosecutor's statement was not outside the scope of permissible argument.

¶6 The prosecutor's closing argument is subject to objection when it so infects the trial with unfairness as to make the conviction a denial of due process. *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors. *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). The prosecutor may comment on a witness's credibility, but may not do so by implying the existence of certain facts not in evidence. *State v. Draize*, 88 Wis. 2d 445, 455, 276 N.W.2d 784 (1979). The prosecutor's comments must be examined in context in order to determine whether they exceed the bounds of proper argument. *Wolff*, 171 Wis. 2d at 168. "Prosecutorial comments on the significance of a witness' testimony are entirely proper so long as rooted in the evidence and not mere expressions of personal opinion." *Briggs v. State*, 76 Wis. 2d 313, 335, 251 N.W.2d 12 (1977) (footnote omitted).

¶7 The prosecutor's comment did not cross the line into improper argument. The prosecutor, in effect, said the following: "I believe the evidence did not support a prosecution against Thoreson. That is why I dropped the armed robbery charge against him. I believe the evidence supports Hanson's guilt. That is why I am prosecuting him." The comment bore on the issue of Thoreson's alleged participation as an accomplice, an issue that was thoroughly addressed in direct testimony and on cross-examination. Nothing in the prosecutor's statement implies facts about Thoreson's involvement that were not in evidence. Moreover, the prosecutor's statement in rebuttal was prompted by defense counsel's argument that the prosecutor charged the wrong person. Consequently, the

argument was not an improper and ungrounded “mere expression of personal opinion.”¹

¶8 The trial court noted that it would have denied an objection to the prosecutor’s comments. Because that ruling would have been affirmed on appeal, Hanson failed to prove that he received ineffective assistance from trial counsel. *See State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (Counsel who fails to pursue a motion is not ineffective without a showing that the motion would have succeeded.).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

¹ Although we conclude that the prosecutor’s comments during rebuttal argument were not improper in this case, we caution that prosecutors should generally refrain from couching their arguments in terms of what “I believe.” So prefacing a statement in argument tends to blur the line between commentary on the evidence and a statement of personal opinion. Moreover, a statement of what the prosecutor “believes” directs jurors’ attentions away from the evidence at trial and, arguably, invites them to speculate that the prosecutor may know more about the case or the defendant than what was presented at trial.

