COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP499-CR **Cir. Ct. No. 2007CF399**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LENITH J. HALL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON and MICHAEL S. GIBBS, Judges. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. A jury found Lenith J. Hall guilty of second-degree sexual assault of a child and of exposing his genitals. He appeals from the

judgment of conviction and from the order denying his motion for postconviction relief in which he alleged he was denied the effective assistance of trial counsel. For the reasons that follow, we affirm the judgment and order.

¶2 Hall and his wife lived for a time with his wife's sister and her two children, one of them thirteen-year-old Casandra. Casandra testified at trial that on three occasions "Uncle Lenny" got into bed with her, touched her vaginal area over her clothing and repeatedly asked her to have sex with him because he "wanted to teach [her] how to do it." Casandra also described another occasion when Hall exposed his penis to her and said he would allow her to go outside and play if she first would "do it with him." Two other witnesses testified for the State: Detective Tina Winger, who conducted a videotaped interview with Casandra, and Hall's brother-in-law, who testified that Hall made comments to him about "want[ing] to teach Casandra the right way, something about being the first one." The jury convicted Hall on all counts.

¶3 Postconviction, Hall sought a new trial on grounds that his trial counsel was ineffective for either failing to object to, or to move for a mistrial because of, claimed improprieties in the prosecutor's closing argument.[1] Trial counsel explained her actions at the postconviction motion hearing. Satisfied with her explanations, the court denied Hall's motion. Hall appeals. More facts will be supplied as necessary.

¶4 On appeal, Hall again asserts that his trial counsel was ineffective for failing to object to various allegedly improper arguments the prosecutor made

[1] Hall withdrew other bases for his motion and does not renew them on appeal.

during closing argument. To prevail on his claim, Hall must demonstrate that defense counsel made errors so serious as to not function as the "counsel" the Sixth Amendment guarantees and that this deficient performance prejudiced the defense so seriously as to deprive him of a fair trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation fell below objective standards of reasonableness, that is, whether, under the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). The test for prejudice is whether our confidence in the outcome is undermined such that the conviction is fundamentally unfair or unreliable. ***Id.***

¶5 Deficient performance and prejudice both present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶6 As noted, Hall takes issue with his trial counsel's lack of response to the prosecutor's closing argument. As a general principle, an attorney is allowed considerable latitude during closing argument. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The line between permissible and impermissible final argument is determined by viewing the statements in the context of the total trial. *See* ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line is drawn where the prosecutor suggests that the jury should arrive at a verdict by considering factors other than the evidence. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "Argument on

matters not in evidence is improper." ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980) (footnote omitted). The constitutional test is whether the remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Neuser***, 191 Wis. 2d at 136 (citation omitted).

¶7 Hall first highlights the prosecutor's comments about the lack of a plea bargain. The prosecutor told the jury:

> Base your verdict on the evidence. Your job is to determine his guilt or not. You might be wondering why are we here? If the case is that obvious, if the case is that strong, why wasn't there some sort of plea agreement reached? The defendant is not required to plea bargain. The state is not required to plea bargain.
>
> We live in a democracy. We have a constitution, and the defendant has many constitutional rights guaranteed to him. The very fact we are here having a jury trial means he's exercising one of his rights. The fact that he has an attorney sitting next to him means he is exercising one of his rights.

Hall contends the comments encouraged the jury to go beyond the evidence and speculate about why he might have rejected a plea.

¶8 The court concluded that the prosecutor's statement was little more than a "civics lesson" intended to give context to the situation. We agree. Besides, the court stated that it would have overruled any objection. Trial counsel is not ineffective for not pursuing futile arguments. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

¶9 Hall also asserts without specificity that the prosecutor's argument was prejudicial. A defendant must affirmatively prove prejudice. *See* ***State v. Johnson***, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990). If the jury gave the

comment any weight at all, it reasonably could have assumed that Hall refused to plead guilty to crimes he did not commit.

¶10 Hall next argues that the prosecutor vouched for the credibility of the State's witnesses, thereby throwing the "prestige of the government" behind their testimony. Again we disagree.

¶11 The jury had heard earlier that Casandra did not disclose the assaults for several months. The prosecutor stated during closing arguments:

> I, again, trusting the expert of Detective Winger who has years of experience dealing with these cases; and, again, to a degree, it is common sense. There may be a delay in disclosure. The child fears what might happen, fears breakup of the family, is not … exactly sure what happened, and maybe the child wants to forget this terrible thing happened to them ….

During rebuttal, the prosecutor argued:

> We as the [S]tate, we know our burden of proof and know our job. Our job is to do justice, and that is your job as well. Sometimes that means trying a case. Sometimes that means dismissing a case. When a defendant pleads not guilty, we have exactly two choices, go forward or dismiss. When we get to this point in a trial, we have exactly two choices, go forward or dismiss.
>
> We listened to all the same evidence that you did. We heard the same closing arguments that you have. We saw [Casandra's] testimony just the same as you have. And if the [S]tate did not believe it had proven its case, not only do I have a right, I have an ethical obligation to turn to this judge and say, Your Honor, the [S]tate moves to dismiss. Absolutely that is not going to happen. We have seen our evidence. We are confident we have proven our case beyond a reasonable doubt, and right here, right now it is time for justice. Find him guilty. Thank you.

¶12 Vouching for a witness' credibility outside of the evidence is improper because it usurps the jury's role to determine credibility. *See* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). A prosecutor may remark on the credibility of witnesses, however, as long as the comment is based on evidence presented. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). "A 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." ***Adams***, 221 Wis. 2d at 19.

¶13 Here, Winger had prefaced her testimony by detailing her significant credentials in investigating sexual assaults and her work with children. The postconviction court found that, since the prosecutor simply was saying that Winger was a credible witness, it would not have sustained an objection or granted a mistrial.[2] Similarly, the court stated that the "we" argument was a common one and would not have been grounds for a mistrial because the argument merely recited the evidence that "we, the prosecutor's office" put on. Trial counsel therefore cannot be faulted for not objecting. *See* ***Toliver***, 187 Wis. 2d at 360.

¶14 We agree that the prosecutor's comment was nothing more than a fair characterization of Winger's expertise and inferences from the evidence. The balance of the prosecutor's argument directed jurors' attention to the evidence presented at trial, urging them to accept it as sufficient proof of the assaults. Furthermore, the "we" comments were in response to the defense's closing argument that Casandra presented as "a teenager who loves theatrics, who loves

[2] Judge Carlson presided over the trial. Through judicial rotation, Judge Gibbs presided over the postconviction motion hearing.

drama … who loves to play act," and whose testimony was "a performance." In this context, we conclude that the prosecutor's invited response was wholly permissible. *See* ***State v. Wolff***, 171 Wis. 2d 161, 169, 491 N.W.2d 498 (Ct. App. 1992). We reject the notion that the remarks so infected the proceedings that the jurors found for the State not because *they* believed its witnesses, but because the *prosecutor* did. *See* ***United States v. Young***, 470 U.S. 1, 18-19 (1985).

¶15 In context of the total trial, we conclude that the prosecutor's remarks were not improper and, consequently, that defense counsel's performance was objectively reasonable under prevailing professional norms. Our confidence in the outcome is not undermined.

¶16 Hall next complains that two other remarks the prosecutor made during closing argument deprived him of a fair trial. The first arose in the context of implicitly recognizing that jurors might struggle with accepting that an uncle could sexually assault his young niece. The prosecutor stated:

> [W]e cannot speculate…. We do not have any evidence to understand why that happens. We know it happens.
>
> We read it about [sic] in the papers. We heard about the unfortunate scandals with the Catholic [C]hurch. We know priests commit sexual assaults. We know men and women commit sexual assaults. Why we do not know, but it happens, and it happened to [Casandra], and she explain[ed] to you what happened to her.
>
> This comes down to credibility.

¶17 The second comment, Hall argues, improperly suggested to the jurors that they had input on the sentence. The prosecutor stated:

> You might be concerned with what happens next. That is not your job. You might have an opinion about what should happen next as far as a sentence when you return a guilty verdict. That is up to the judge. If you have

> an opinion, and you're entitled to have it, send a letter to the judge for his consideration. But do not go back and say, well, let's cut him a break and find him not guilty on a count or two just to give him a little bit of a break.

Hall contends that both remarks improperly encouraged the jury to consider matters not in evidence: the priest abuse scandal, calculated to inflame the jury's outrage, and sentencing considerations, which were out of its realm.

¶18 Hall's failure to object in the trial court to these claimed errors requires that we review them for plain error. *See* ***State v. Mayo***, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115. Plain error is error so fundamental that a new trial or other relief must be granted despite no objection at the time. ***State v. Robinson***, 146 Wis. 2d 315, 329, 431 N.W.2d 165 (1988). The test of plain error is whether the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Mayo***, 301 Wis. 2d 642, ¶43 (citation omitted). Its existence turns on the facts of the particular case. ***Id.***, ¶29.

¶19 On the facts here, plain error does not lie. The prosecutor used a familiar and topical example to clarify that the jury need concern itself only with the narrow question of whether the credible evidence established that the assaults occurred, not with fathoming a motive. Likewise, the prosecutor reminded the jury that what flows from that determination should not influence its decision. Taken in isolation, an invitation to write to the judge might suggest that jurors have some input in a sentence. Here, however, they clearly were told, "That is not your job…. That is up to the judge." We reject Hall's contention that the prosecutor's arguments were "so fundamentally unfair and irrelevant that [they] infected the fairness of the jury trial."

¶20 We conclude that none of the arguments to which Hall objects reached beyond the evidence. The prosecutor simply explained why the jury could believe Winger, why Casandra might have delayed reporting the assaults, why the State pressed forward with the case, and why a guilty verdict made sense, although the repugnant assaults did not. Moreover, Hall has not shown prejudice. The jury was instructed that closing arguments are not evidence and that the jury is the sole judge of credibility. We presume the jury follows the instructions given it. ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992).

¶21 Finally, Hall requests in the alternative that we grant a new jury trial in the interest of justice because, he asserts, the prosecutor's numerous improper arguments prevented the real controversy—Casandra's veracity—from being fully tried. *See* WIS. STAT. § 752.35 (2007-08); *see also* ***Neuser***, 191 Wis. 2d at 140.

¶22 Our discretionary reversal power under WIS. STAT. § 752.35 is formidable and should be exercised sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. We are reluctant to grant new trials in the interest of justice and exercise our discretion to do so "only in exceptional cases." *See* ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98. We decline to do so here because Hall's request is based on the tenuous premise that the prosecutor's comments were improper. Singly or together, they do not make this an "exceptional case."

By the Court.—Judgment and order affirmed.

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