COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2012

Diane M. Fremgen
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. 2011AP243-CR | Cir. Ct. No. 2007CF1218

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUAN MALDONADO,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Juan Maldonado appeals judgments convicting him of two counts of delivering a controlled substance, following a jury trial. Maldonado contends that he is entitled to a new trial because: (1) the circuit court erred by allowing the State to present impermissible other acts evidence to the

jury; and (2) the State made improper and prejudicial statements during closing arguments. We conclude that any error in admitting the other acts evidence was harmless. We also conclude that the State's closing arguments, viewed in context, did not harm Maldonado. Accordingly, we affirm.

Background

¶2 The State charged Maldonado with delivery of a controlled substance, alleging Maldonado sold heroin to an informant working with the Brown County Drug Task Force. At trial, during opening statements, the State informed the jury it would hear evidence that Maldonado told an investigator that he "middled" heroin deals. Defense counsel objected. Outside the presence of the jury, defense counsel argued that the State had referenced impermissible other acts evidence, and moved for a mistrial. The court determined that there was no suggestion of other acts evidence, and denied the motion.

¶3 During its case-in-chief, the State called the investigator, and elicited testimony that Maldonado had informed the investigator that he was a "middler" for heroin. Defense counsel objected, arguing Maldonado's statements to the officer were not related to the incidents underlying the arrest in this case. The court determined there was nothing improper about the investigator's testimony. The investigator then testified that Maldonado explained his role as a "middler" as accepting money from a buyer, obtaining heroin from a seller in exchange for half the money he had received from the buyer, and then giving the heroin to the buyer. He testified that Maldonado said he dealt with small quantities of heroin, which, the investigator said, was the case here. Finally, the investigator stated that Maldonado told him that he was not the individual who sold the heroin to the informant, that someone else did so but he would not identify that person, and that

he did not handle the money or the heroin. The State pointed out during closing arguments that Maldonado had admitted to being a "middler" for heroin.

¶4 Defense counsel argued in closing arguments that the State was relying on a lack of evidence rather than positive evidence that the crime actually occurred. Counsel pointed out that a recorded phone call between Maldonado and the informant, referenced by the State, was not played for the jury. Counsel noted that all the jury had to rely on was testimony as to what was said two and a half years previously, not the actual recording. In rebuttal, the State argued that defense counsel had a copy of the recording. Defense counsel objected in front of the jury on grounds that the State was arguing facts not in evidence. The State responded by stating that it did not play the recording because the quality was poor. Defense counsel argued again that the statement was improper, and requested to address the issue for the jury. The court allowed counsel to do so, and counsel stated that he had a copy of the recording but that it was worthless because the quality was so poor. Counsel argued that his point was that the State had not played anything for the jury, and that they had nothing to play.

¶5 While the jury was deliberating, defense counsel moved for a mistrial on grounds that the State had inappropriately commented on facts not in evidence by informing the jury that defense counsel had a copy of the recorded phone call. Counsel stated he did his best to cure the error, but that he had performed as an unsworn witness, and that the error was a substantial, material error requiring a mistrial. The State opposed the motion, asserting that defense counsel raised the issue and the State had to respond because defense counsel misled the jury. Defense counsel disputed that he had misled the jury, asserting that he pointed out that it would have been helpful to hear the recording. The court denied the motion for a mistrial. The jury found Maldonado guilty of two

counts of delivery of heroin. The court entered the judgments of conviction on the two counts. Maldonado appeals.

Discussion

¶6 Maldonado argues that the circuit court failed to recognize that the investigator's testimony as to Maldonado's statements about being a "middler" for heroin deals constituted other acts evidence. WISCONSIN STAT. § 904.04(2)(a) (2009-10),[1] which generally prohibits other acts evidence, provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The statute states that it "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Maldonado argues that the evidence that Maldonado had, at other times, acted as a "middler" for heroin deals was evidence of other acts under § 904.04(2)(a). He concedes that the other acts evidence could have been offered for a proper purpose, such as proof of motive, and was relevant, but argues that the evidence should have been excluded as unduly prejudicial. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 783, 576 N.W.2d 30 (1998) (holding that other acts evidence is admissible if it is offered for a permissible purpose; is relevant; and is not unduly prejudicial). We conclude that, assuming the evidence was other acts evidence and was improperly admitted, the error was harmless.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶7 A circuit court's error in admitting other acts evidence that should have been excluded is subject to harmless error analysis. *See* ***State v. Eison***, 2011 WI App 52, ¶12, 332 Wis. 2d 331, 797 N.W.2d 890. An "error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397 (citation omitted). An alternative wording of the harmless error test asks "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." ***Id.***, ¶43 (citation omitted). In determining whether an evidentiary error was harmless, we look to:

> the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Id., ¶45.

¶8 Here, the State referenced the evidence that Maldonado was a "middler" for heroin in its opening statement as follows:

> And ultimately you'll hear that [the investigator] said that [Maldonado] admitted that he would middle deals.
>
> ….
>
> [The investigator] will explain what middling means…. [H]e'll tell you too that he used the example that … if someone had $100 and they wanted to get some heroin, the defendant could obtain $50 worth for another person, charge that person $100, and then make a $50 profit. So the defendant would middle the deal between the source and an informant. So the defendant did acknowledge that he did that and that he doesn't sell large quantities.

The State questioned the investigator as follows:

> Q. … Did you discuss the fact that [Maldonado] was a middler for heroin?
>
> A. Yes.
>
> Q. And what did he say?
>
> A. He said what he would do is somebody would want to buy some heroin. He would take $100 from them, go to his source that has the heroin, pay $50 for it, bring the heroin back to the person who wanted it, and then keep the $50 for himself.
>
> Q. And did you discuss whether he would middle large quantities or small quantities?
>
> A. He stated it was small quantities.
>
> Q. Okay. Such as [the amounts obtained in the controlled buys in this case]?
>
> A. Yes.
>
> Q. Did you talk to him specifically about the November 19, 2007 incident?
>
> A. Yes.
>
> Q. The one at the Brennan Buick?
>
> A. Yes.
>
> Q. What did he say about it?
>
> A. He says he remembers the incident; however, he was not the one who sold the drugs to [the confidential informant], that someone else did. He did not handle the money or the drugs.

Finally, in closing, the State said:

> [Maldonado] also admitted or acknowledged that he was a middler for heroin. They were discussing heroin. And [the investigator] gave the example, the same one where he had taken the $100 from [the confidential informant] for the five bindles, and they discussed where— if he would get $50 worth of heroin from a source and he

> knew another person willing to pay $100 for it, he'd go do it, he'd middle that deal, get the heroin, bring it back to the other person, in this case [the confidential informant], or whoever, and then he'd make $50 profit. And he also said he would middle small amounts, which is the exact case here. We have very small amounts of heroin…. [A]nd the defendant acknowledged that.

¶9 The State's evidence besides the "middler" evidence included testimony by the informant, who explained the controlled buy from Maldonado, and that she received $100 from the Brown County Drug Task Force in this case as well as consideration in a domestic violence case. The informant testified that she has been convicted of a crime four times. She testified that she called Maldonado and asked for heroin; that the investigator gave her $100 and a recording device; and that she met with Maldonado, Maldonado gave her four foil packets, which he said were heroin, and she gave him $80. The informant testified that she told Maldonado she needed another packet, that he told her to wait and said he would return with another packet, and that he then left and returned and handed her a fifth packet, and she gave him another $20.

¶10 The State also presented testimony by the investigator and three other police officers who corroborated the informant's testimony. The investigator also testified that the substance the informant obtained from Maldonado was tested and confirmed to be heroin. The State played a digital video recording for the jury of the informant's interaction with Maldonado during the alleged controlled buy, and a police officer testified that he conducted surveillance during the controlled buy and obtained the video footage in the course of his surveillance. The officer identified Maldonado and the informant's car on the video. The record establishes that the State's case was strong, and the references to the other acts evidence was not so frequent or important as to cast any doubt on the jury's verdict. We conclude that, viewing the trial as a whole, it

is clear beyond a reasonable doubt that the verdict would have been the same absent the erroneously admitted evidence.

¶11 Next, Maldonado contends that the State's argument in closing that defense counsel had a copy of the recorded phone calls was improper, prejudicing the trial and denying Maldonado his due process rights. Maldonado contends that the State again made improper argument in response to Maldonado's objection by commenting on the quality of the recording. Thus, Maldonado argues, the State made two arguments based on facts not in evidence: (1) that defense counsel had a copy of the recording; and (2) that the quality of the recordings was poor. Maldonado contends that these arguments were improper under ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979), which prohibits the State from arguing on matters not in evidence. He argues that the State's arguments implied that defense counsel was being deceptive, suggesting defense counsel was hiding other evidence of Maldonado's guilt. He contends the State's comments infected the trial with unfairness, entitling Maldonado to a new trial. We disagree.

¶12 The State's closing argument is improper if it "goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). "Generally, counsel is allowed latitude in closing argument and it is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury." ***Id.*** We will disturb the court's exercise of discretion only if it was erroneously exercised and the error likely affected the jury's verdict. ***Id.*** If the State has made improper arguments, we view the State's arguments in the context of the entire trial to determine whether they "so infected the trial with unfairness as to make the resulting

conviction a denial of due process." ***Id.*** (citation omitted). Improper arguments are also subject to a harmless error analysis. ***Id.*** at 142.

¶13 Here, Maldonado contends that the State's arguments improperly referenced facts not in evidence, and so infected the trial with unfairness that Maldonado was denied due process. However, assuming without deciding that the State's arguments were improper, we conclude that, viewing the arguments in the context they were made and in the context of the trial as a whole, the arguments did not infect the trial with unfairness. Rather, we conclude that the State's arguments were harmless.

¶14 Defense counsel argued in closing as follows regarding the State's failure to play the recorded phone call for the jury:

> Wouldn't it have been nice if an actual recording had been played for the jury? ….
>
> Wouldn't it have been nice if that recording had been played, that consent recorded phone call, but it wasn't. So that's one of the things that I'm going to ask you to take into account regarding that very damaging testimony against Mr. Maldonado that relates to that alleged phone call.

In rebuttal, the prosecutor stated: "And you know the recorded calls? The defense has a copy of them. And, you know, that was a judgment …." Defense counsel objected, stating: "Objection. That's not in evidence…. She just said I have a copy of them. Now I'd like to tell the jury what I have a copy of." The following exchange then occurred:

> [STATE]: Well, it was a judgment call on my part not to play them because of the quality, Your Honor. I mean—
>
> [DEFENSE COUNSEL]: It's not appropriate for her to mention this in front of the jury. Now I'd like to

> respond in front of the jury to those—to that to try to cure it.
>
> THE COURT: Well, you've said that you don't have them? Go ahead, … tell us what you've got.
>
> ….
>
> [DEFENSE COUNSEL]: …. Yes, I have a copy of it. I listened to it just this morning again. You can't hear anything. It's all scratchy junk. You can't make anything out from it.
>
> So do I have a copy of this recording? Oh, yeah, there's a recording. I never said there wasn't a recording. But they didn't play it. They didn't play it because there's nothing to listen to. It's junk. It's a garbage recording.
>
> ….
>
> [DEFENSE COUNSEL]: Bottom line is, they don't have anything that they played yesterday for you. There's nothing available.

¶15 In context, then, the dispute began when defense counsel suggested that jurors should draw an inference against the State because the State had not played the recording. The state responded that defense counsel had a copy of the recording, and that the reason the State did not play the recording was that it was of poor quality. Defense counsel agreed that he had a copy of the recording and that the recording was essentially worthless ("junk," "garbage"), and argued that his point was that the State did not have a meaningful recording to play for the jury, and that nothing was available. The record establishes that defense counsel thoroughly aired before the jury the points he was trying to make, namely, that the jury had not heard the recording and that the recording was of very poor quality.

¶16 Moreover, we do not agree with counsel that the State's arguments called into question defense counsel's credibility. Rather, the comments of both counsel, considered as a whole, primarily clarified for the jury relevant facts about

the recording. The exchanges summarized above would not reasonably have suggested to jurors that defense counsel had purposely sought to mislead them on this topic. In this context, and in light of the State's other evidence highlighted above, we conclude that, assuming the State's arguments in rebuttal were improper, those arguments were harmless. Accordingly, we affirm.

By the Court.—Judgments affirmed.

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