COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2574-CR **Cir. Ct. No. 2010CF201**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK S. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS McNAMARA, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Frederick Brown appeals a judgment convicting him of false imprisonment, strangulation, and intimidation of a victim, following a jury trial. Brown contends that the State violated the circuit court's evidentiary ruling excluding the results of laboratory testing that confirmed the presence of the

victim's blood in Brown's hotel room. We conclude that the State's comments regarding the blood found in Brown's hotel room were not improper. Accordingly, we affirm.

Background

¶2 The State charged Brown with multiple counts based on a report by the victim, T.B., that Brown had restrained T.B. in Brown's hotel room, threatened her, and strangled her to the point of unconsciousness. Defense counsel moved to exclude the State's laboratory test results indicating that a specimen collected from the bathroom doorframe in Brown's hotel room was blood because the state did not timely disclose the results. The circuit court determined that the State had timely disclosed test results indicating the substance contained T.B.'s DNA, but had not timely disclosed separate testing indicating that the substance was blood. Thus, the court allowed evidence that the sample was collected and contained T.B.'s DNA, but prohibited the parties from indicating that the substance was blood.

¶3 During closing arguments, defense counsel attacked T.B.'s credibility based on the lack of evidence supporting T.B.'s testimony that she woke up in a pool of blood in the hotel room after Brown strangled her. Counsel pointed out that investigators had not discovered any blood in the areas where T.B.'s testimony suggested blood would be found, and that T.B.'s testimony that Brown had cleaned up the blood was not realistic. In rebuttal, the prosecutor argued: "But there was blood in the room. [T.B.]'s biological substances were in that room." After defense counsel objected and the court overruled the objection, the prosecutor made his final comments, beginning: "Evidence was gathered, evidence was analyzed. I want you to take a look at all of the evidence which was

analyzed, rely on your collective knowledge, fill in the gaps ….” Following closing arguments, the court explained its overruling of Brown’s objection, stating: “And I do find that the statement, ‘But there was blood in the room’ doesn’t violate the order.” The court referenced T.B.’s testimony and defense counsel’s statements that blood was not found where T.B. had claimed blood would be.

¶4 The jury returned guilty verdicts. Brown appeals.

Discussion

¶5 Brown argues that the State’s comments during closing argument violated the circuit court’s ruling prohibiting reference to the test results indicating the substance collected from Brown’s hotel room was blood. He argues that the prosecutor’s statement in rebuttal that “there was blood in the room” improperly informed the jury that the sample collected from the room was blood. He contends that the prosecutor’s subsequent statement—“Evidence was gathered, evidence was analyzed”—elevated the argument that blood was in the room to a statement that the evidence collected from the room tested positive for blood. Brown contends that the prosecutor’s statement infected the trial with unfairness, depriving Brown of due process. *See* ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (“When a defendant alleges that a prosecutor’s statements and arguments constituted misconduct, the test applied is whether the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process.” (citation omitted)).

¶6 The State responds that the circuit court properly exercised its discretion by overruling Brown’s objection to the prosecutor’s statements in closing arguments. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49

(Ct. App. 1995) ("[I]t is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury. We will affirm the court's ruling unless there has been a misuse of discretion which is likely to have affected the jury's verdict." (citation omitted)). The State argues that the prosecutor's statement that "there was blood in the room" did not violate the court's ruling prohibiting reference to the laboratory test results confirming that the substance collected from the bathroom doorframe of the hotel room was blood. The State asserts that the prosecutor's argument that "there was blood in the room" referred to T.B.'s testimony as to the presence of blood in the hotel room. The State contends that the prosecutor did *not* state that testing had confirmed that blood was present in the room. Finally, the State argues that the prosecutor's statement that "[e]vidence was gathered, evidence was analyzed" could only have been interpreted by the jury to refer to the DNA testing of the substance on the door confirming that the substance was T.B.'s biological material or to the medical testing of T.B.'s injuries, not as a reference to testing the substance from the doorframe for blood.

¶7 We conclude that the prosecutor's statements in rebuttal did not violate the court's ruling prohibiting reference to test results establishing that the specimen collected from the bathroom doorframe was blood. The prosecutor's comment that "there was blood in the room" was consistent with T.B.'s testimony that she woke up in a pool of blood and that Brown then cleaned up the blood. The prosecutor's next comment, that "[T.B.]'s biological substances were in that room," was consistent with the admissible test results establishing that the specimen collected from the doorframe contained T.B.'s DNA. The prosecutor's statement that "[e]vidence was gathered, evidence was analyzed," began the prosecutor's final comments and led into the prosecutor's argument that the jury

should look at all of the evidence in reaching its determination. We do not agree with Brown that the State's comments, in context, indicated that the substance collected from the doorframe of the hotel room was blood, such that it infected the trial with unfairness and deprived Brown of due process. Accordingly we affirm.

By the Court.—Judgment affirmed.

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