COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1895-FT

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

IN THE INTEREST OF JERMAINE D.P.,
A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

JERMAINE P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Jermaine P., a juvenile, appeals from an order adjudging him delinquent entered after a jury convicted him of first-degree reckless homicide, first-degree recklessly endangering safety, and possession of a dangerous weapon by a child, contrary to §§ 940.02(1), 941.30(1), 948.60(2), STATS. Jermaine claims that remarks made during the State's rebuttal

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

closing argument violated his due process right to a fair trial.[2] Because the trial court did not erroneously exercise its discretion in determining that the remarks at issue, even if improper, were not prejudicial, this court affirms.

I. BACKGROUND

This case arises out of a shooting incident that occurred on July 4, 1994. After a fight between Jermaine and another child, Jermaine and his friends went to a friend's home. Four other boys approached and Jermaine hid. The four boys, one of whom was pointing a gun, indicated they were looking for Jermaine. One of the four saw Jermaine hiding in the bushes and said "there he is." One of the four pointed his gun and it was discharged twice. Jermaine shot back with his gun. As a result of the shooting, one juvenile was shot and killed, another was shot and injured.

Jermaine was charged for these crimes. He presented a self-defense theory to the jury. During Jermaine's closing argument, his lawyer reflected on society's impact on Jermaine, stating:

> Now, relative to a 14-year-old boy walking around with a gun, you may not feel comfortable with that concept....
>
> But I don't live in reality, Jermaine's world. I haven't been shot.
>
> I haven't had a tube in my chest for seven days in the hospital. I don't have to encounter the daily fear in my neighborhood that shootings and drugs and gangs bring on. Jermaine does.

[2] Jermaine's attorney did not make a contemporaneous objection to the remarks. Hence, if this court determines that the issue was waived, Jermaine argues, in the alternative, that trial counsel was ineffective for failing to object. Because this court rejects the prosecutorial misconduct claim on the merits, it is not necessary to address the ineffective assistance claims. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

> ....
>
> You know it satisfies that measure of [how] society is [by] how they treat their children. Given what we have heard in this case so far[,] I am not sure that society has been real fair to Jermaine. Don't fail him now[,] because it's [the prosecutor's] burden as representing the State in this case to prove to you beyond a reasonable doubt the existence of guilt of [Jermaine].

In response to this argument, the prosecutor argued in his rebuttal closing:

> Finally, he is appealing to you for his client was brought up in that situation and that you should give him some kind of consideration. Well, are you going to talk about passion or be concerned about someone else, concerned about a young man that was killed, that his life in this case was snuffed out. Was that fair to him? Who was the cause of it? Society was the cause of his death, David M.'s death. Society or Jermaine P.?
>
> How do you think his mother feels? How do you think his mother feels, relatively speaking?
>
> You should also balance that. But frankly, that's not what the law calls for what you are going to do.

The jury convicted Jermaine on all three counts. Jermaine moved for a new trial on the grounds that the prosecutor's remarks were improper. The trial court denied the motion. Jermaine now appeals.

II. DISCUSSION

Whether prosecutorial misconduct occurred and whether such

conduct requires a new trial is left to the discretion of the trial court. ***State v. Bembenek***, 111 Wis.2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983). This court will not reverse unless the trial court erroneously exercised its discretion. ***Id.***

The trial court, in deciding this issue in the instant case, reasoned:

> The prosecutor[']s comments can only be characterized as a "pertinent and measured reply....", ***State v. Edwardsen***, 146 Wis.2d 198, 215, 430 N.W. 2d 604 (1988), "invited" by the earlier comments of defense counsel, ***United States v. Young***, 470 US 1, 11 (1985), citing ***Lawn v. United States***, 355 US 339, 359 (1958) and intended to "'right the scale'", ***Young***, at 12. Further, the arguments were exceedingly brief and in the context of an otherwise perfectly appropriate closing and rebuttal argument. The jury was fully and repeatedly admonished as to their duty to decide guilt or innocence based solely on the evidence received and instructions given by the court.... Notably, they were specifically instructed that the arguments of the lawyers were not evidence and, in that context, reminded of the obligation to decide the case based upon the evidence and instructions.
>
> Finally, it is imperative to note that immediately following the improper comments, the prosecutor himself admonished the jury not to focus on irrelevant issues but to decide guilt or innocence based upon the critical issue in the trial.
>
> ....
>
> Based upon the factors cited above, I am absolutely convinced this was a fair proceeding and the challenged comments had no effect on the jury's ability to judge the evidence fairly and impartially.

It is clear from this exposition that the trial court considered the pertinent facts, applied the proper law, and reached a rational conclusion. The trial court found that, although the comments were improper in this case, the comments were "invited," and that despite the comments, the jury was not prejudiced by the comments because of curative instructions. Based on the foregoing, this court concludes that the trial court did not erroneously exercise its discretion in deciding this issue. Accordingly, this court affirms.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.