



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 14, 2018

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Michael D. Graveley
District Attorney
912 56th St.
Kenosha, WI 53140-3747

Lisa E.F. Kumfer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Timothy T. O'Connell
O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301

You are hereby notified that the Court has entered the following opinion and order:

2017AP704-CR

State of Wisconsin v. Gildardo Padilla-Martinez
(L.C. #2010CF1065)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gildardo Padilla-Martinez appeals from his judgment of conviction. He contends the circuit court erred in denying his motion for a mistrial. Based upon our review of the briefs and

the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

Padilla-Martinez was charged with and convicted of two counts of repeated sexual assault of a child related to sexual activity he engaged in with two of his children. During opening statements, the prosecutor made reference to Maria DeLaLuz, Padilla-Martinez's wife² and the mother of their two victim-children, by stating: "Now, you won't hear from Ms. DeLaLuz because she has been deported to Mexico as a result of all this." Padilla-Martinez moved for a mistrial, which motion the circuit court denied. The jury found Padilla-Martinez guilty on both counts, and he was subsequently sentenced. He now appeals, arguing the court erred in denying his motion for a mistrial.

Padilla-Martinez complains the circuit court erred in denying his mistrial motion because the above statement by the prosecutor "implied Padilla-Martinez was also in this country illegally" and "this mistake resulted in Padilla-Martinez's convictions" because the implication was "highly inflammatory" and would "likely trigger negative feelings of at least some jurors." He asserts that the prosecutor's comment "poisoned the atmosphere of the trial, and it infected the trial with unfairness as to make the resulting conviction a denial of due process." We disagree.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The parties dispute whether Maria DeLaLuz was in fact Padilla-Martinez's wife or just his long-time significant other. While the record provides reason to believe DeLaLuz was not Padilla-Martinez's wife, we will assume for this decision that she was, which assumption is more favorable to Padilla-Martinez. Ultimately, whether or not DeLaLuz was Padilla-Martinez's wife does not affect our decision.

“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.’” *State v. Mayo*, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). A defendant bears the burden of establishing prosecutorial misconduct. *State v. Harrell*, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978). “The determination of whether prosecutorial misconduct occurred and whether such conduct requires a new trial is within the trial court’s discretion.” *State v. Lettice*, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). “The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.” *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). We will reverse the denial of a mistrial motion only on a “clear showing” that the circuit court erroneously exercised its discretion. *Id.*

Padilla-Martinez’s assertion that his trial was so “infected” with unfairness by the prosecutor’s challenged comment so as to make his conviction a denial of due process does not get out of the gate because it is completely conclusory and undeveloped. *See Associates Fin. Servs. Co. of Wis. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (we decline to address issues that are inadequately briefed). He provides us with no reason to believe the trial was so infected. Furthermore, Padilla-Martinez’s contention that jurors would assume *he* was in the country illegally simply because the prosecutor’s comment may have caused some jurors to believe his wife had been here illegally is unfounded and speculative. He provides us with no substantive basis to conclude the jury believed he was illegally in the country, much less that jurors would have been biased against him even if they believed this. *See Callan v. Peters Constr. Co.*, 94 Wis. 2d 225, 248, 288 N.W.2d 146 (Ct. App. 1979) (where party’s assumption

that a juror had become biased during the trial was “mere speculation,” circuit court did not erroneously exercise its discretion in denying motion for mistrial).

Reviewing the trial transcript, we note the very specific testimony by Padilla-Martinez’s sixteen-year-old daughter and twenty-year-old son detailing the sexual acts Padilla-Martinez performed on them beginning when the daughter was in fifth grade and the son was fourteen years old. Furthermore, other witnesses who lived in their home at various times testified to observing Padilla-Martinez touch the children sexually. Padilla-Martinez has failed to convince us the verdict was based on anything other than the evidence, the trial was so infected or poisoned by the prosecutor’s challenged comment as to amount to a denial of due process, or the circuit court erroneously exercised its discretion in denying his motion for a mistrial.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals