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DISTRICT I

April 4, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Milwaukee County Safety Building
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1634-CR State of Wisconsin v. Otis Davis (L.C. # 2019CF3993)

Before Donald, P.J., Dugan and White, 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).

Otis Davis appeals his judgment of conviction entered after a jury found him guilty of first-degree recklessly endangering safety with a dangerous weapon, and possession of a firearm by a felon. He also appeals the order denying his postconviction motion, where he argued that the trial court erred by allowing testimony which he asserted was inadmissible hearsay. Davis also argued that the State made improper statements during its closing argument, which entitles him to a new trial, and that his trial counsel was ineffective for failing to object to those

statements. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21(1) (2021-22).[1] We affirm.

According to the criminal complaint, in September 2019, officers from the Milwaukee Police Department responded to a report of a shooting on Thurston Avenue in Milwaukee. Upon their arrival, they found a man who was bleeding and in pain. That man, D.E.M., said that he had been shot by Davis. D.E.M. also identified Davis in a photo array.

Davis was arrested and charged with first-degree recklessly endangering safety and possession of a firearm by a felon.[2] The matter proceeded to trial in January 2020. One of the responding officers testified that when he found D.E.M. and asked if he knew who had shot him, D.E.M. had "blurted out" Davis's name, and provided a description of what Davis was wearing.

D.E.M. also testified. He explained that his girlfriend, C.R.J., had previously dated Davis, and they had a child together. D.E.M. said that he had seen pictures of Davis, and had also seen him once in person.

D.E.M. stated that on the night of the shooting, he had received several text messages from C.R.J.'s phone, which he believed were from Davis. Through that exchange, D.E.M. said that he and Davis made arrangements to fight at C.R.J.'s home.

When D.E.M. arrived at C.R.J.'s home, he met Davis in the street. D.E.M. testified that Davis "swung at [him]" with a pistol, then managed to get behind him and shoot him in the

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] The Information was later amended to include the dangerous weapon penalty enhancer.

lower back. D.E.M. stated that Davis told him to "[s]tay away from [his] family" and then ran off.

C.R.J. also testified, and corroborated that the messages to D.E.M. from her phone that night had come from Davis. Additionally, there was evidence regarding a GPS monitoring bracelet that Davis was wearing on the night of a shooting, which showed him to be in "the middle of the street" in the area of C.R.J.'s house at the time of the shooting.

The jury found Davis guilty on both counts. The trial court imposed a total sentence of thirteen years of initial confinement to be followed by eight years of extended supervision.

Davis filed a postconviction motion. He argued that the trial court erred in allowing the responding officer's testimony regarding D.E.M.'s identification of Davis as the shooter, contending that it was inadmissible hearsay. The trial court had determined it was admissible as an excited utterance, a hearsay exception, during a pretrial motion hearing, and "[stood] by its decision" upon its postconviction review. *See* WIS. STAT. § 908.03(2). Furthermore, the court noted in its postconviction decision that D.E.M.'s on-scene identification of Davis was not actually hearsay since D.E.M. testified at trial, pursuant to WIS. STAT. § 908.01(4)(a)3.

Additionally, Davis argued in his postconviction motion that during closing arguments, the prosecutor had improperly vouched for the credibility of D.E.M. This challenge stems from an attack by Davis's trial counsel on D.E.M.'s credibility during his closing argument, in which he described D.E.M. as "deceitful," a "liar," and an "enemy of the truth," particularly with regard to his testimony relating to the seriousness of his relationship with C.R.J. In rebuttal, the prosecutor stated that the jury should "trust" that D.E.M.'s testimony that Davis was the shooter

was reliable, considering the text messages Davis had sent through C.R.J.'s phone and the GPS data from Davis's monitoring bracelet.

The trial court determined that the prosecutor's remarks were based on the evidence and were not improper vouching. The trial court also rejected Davis's claim of ineffective assistance of counsel relating to the alleged improper vouching, finding that Davis had failed to establish that he was prejudiced by any error. The court, therefore, denied Davis's postconviction motion. Davis appeals.

First, with regard to Davis's argument that the officer's testimony regarding D.E.M.'s on-scene identification of Davis was inadmissible hearsay, we conclude that this testimony was not hearsay pursuant to WIS. STAT. § 908.01(4)(a)3. *See* ***State v. Bodoh***, 226 Wis. 2d 718, 724, 595 N.W.2d 330 (1999) ("Statutory interpretation and applying a statute to a set of facts are both questions of law which this court reviews *de novo*."). That statute provides that a statement is not hearsay if the declarant's statement is "[o]ne of identification of a person made soon after perceiving the person[.]" ***Id.*** Under this rule,

> [a] prior consistent statement of a witness is not hearsay and may be offered for substantive purposes if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is consistent with the declarant's testimony; and (3) the statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

State v. Miller, 231 Wis. 2d 447, 470, 605 N.W.2d 567 (Ct. App. 1999).

Those are the circumstances here: D.E.M. testified at trial and was thus subject to cross-examination; the officer's testimony regarding D.E.M.'s on-scene identification of Davis was consistent with D.E.M.'s testimony that Davis was the shooter; and the testimony was elicited to

offset the defense's theory that D.E.M. was motivated to lie due to the "tawdry love triangle" involving Davis, D.E.M., and C.R.J.

Furthermore, the officer's testimony was also admissible as an excited utterance by D.E.M. An excited utterance is an exception to the hearsay rule when the statement is "relat[ed] to a startling event or condition" and was made "while the declarant was under the stress of excitement caused by the event or condition." WIS. STAT. § 908.03(2). This rule is "based in the spontaneity of the statements and the stress of the incident which endow the statements with the requisite trustworthiness necessary to overcome the general rule against admitting hearsay evidence." ***State v. Moats***, 156 Wis. 2d 74, 97, 457 N.W.2d 299 (1990).

Here, the officer testified that he and his partner were the first to arrive on the scene; that they heard D.E.M. "screaming" when they arrived, trying to get their attention; that D.E.M. was bleeding and appeared to be in pain and "a little bit of distress"; and that D.E.M. "blurted out" that Davis had shot him. The trial court, in its discretion, determined that these circumstances supported the admissibility of this statement under the excited utterance exception. The record supports that determination, and thus it was not erroneous. *See* ***id.*** at 96.

Moreover, the officer's testimony regarding D.E.M.'s on-scene identification of Davis was cumulative, as D.E.M. had also identified Davis in a photo array, as well as making an in-court identification of Davis during the trial. The admission or exclusion of evidence that is redundant or cumulative generally has no "reasonable possibility … [of] contribut[ing] to the conviction," and thus, any potential error relating to its admission or exclusion is harmless. *See* ***State v. Speese***, 199 Wis. 2d 597, 606, 545 N.W.2d 510 (1996) (citation omitted). We, therefore, reject Davis's claim that the trial court erred in admitting the officer's testimony.

Next, with regard to Davis's claim that the State made improper statements vouching for D.E.M.'s credibility during its closing argument, we conclude that the statements were not improper. *See* ***State v. Burns***, 2011 WI 22, ¶¶23, 49, 332 Wis. 2d 730, 798 N.W.2d 166 (regarding the issue improper vouching, the question is whether the comments by the prosecutor "so infected the trial with unfairness as to make the resulting conviction a denial of due process," which is a question of law that this court reviews *de novo* (citations omitted)).

Lawyers are allowed "[s]ubstantial latitude" in closing arguments. ***State v. Draize***, 88 Wis. 2d 445, 456, 276 N.W.2d 784 (1979). "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." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). Furthermore, "a prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented." ***Id.*** at 17. Here, the record demonstrates that the prosecutor's statements being challenged by Davis were based on the evidence and were appropriate to rebut the defense's attack on D.E.M.'s credibility. *See* ***id.*** at 17, 19.

Moreover, the statements of the prosecutor "must be looked at in context of the entire trial," including the strength of the other evidence against Davis presented by the State. *See* ***State v. Lammers***, 2009 WI App 136, ¶¶23-24, 321 Wis. 2d 376, 773 N.W.2d 463. In addition to D.E.M.'s testimony, the evidence against Davis included C.R.J.'s testimony that Davis was sending D.E.M. messages on the night of the shooting, and the location information from Davis's GPS monitoring bracelet. Therefore, we are not persuaded that the prosecutor's comments constituted an error. *See* ***id.***

Nor are we persuaded that the prosecutor's comments "usurped the role of the jury as arbiter of witness credibility." *See* ***id.***, ¶24. The jurors were told that they "are the judges of the credibility of the witnesses[.]" Furthermore, the jury was instructed that the closing arguments by the attorneys should be considered, but that "their arguments and conclusions and opinions are not evidence." "Jurors are presumed to have followed jury instructions." ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. We, therefore, reject Davis's claim that he is entitled to a new trial due to improper statements by the prosecutor during closing arguments.

Based on that conclusion, we also reject Davis's ineffective assistance of counsel claim for counsel's failure to object to the State's closing argument.[3] *See* ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245 ("It is well-established that trial counsel could not have been ineffective for failing to make meritless arguments.").

Therefore, because we reject all of Davis's claims, we affirm the judgment of conviction and the trial court's denial of his postconviction motion.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[3] We also note that Davis's trial counsel did object during the State's rebuttal closing argument, regarding the prosecutor's statement that "nobody else" was in the area at the time of the shooting; D.E.M. had testified that prior to seeing Davis that night, he had seen a "seven-foot guy with a baby" while he was walking to C.R.J.'s house. After a sidebar on the objection, the prosecutor corrected his statement.

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

Sheila T. Reiff
Clerk of Court of Appeals