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June 12, 2013

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

2012AP848-CR State of Wisconsin v. Marvin E. Gilliom, Sr. (L.C. # 2009CF801)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Marvin Gilliom, Sr. appeals from judgments convicting him of six offenses[1] and from an order denying his postconviction motion seeking a new trial due to the prosecutor's allegedly improper remarks during closing argument and ineffective assistance of trial counsel. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).[2] We affirm.

[1] The jury convicted Gilliom of robbery with use of force, two counts of resisting an officer, disorderly conduct, criminal damage to property and misdemeanor battery, all as a repeater.

[2] All references to the Wisconsin Statutes are to the 2011-12 version.

Gilliom's convictions arose from an incident in which he stole a car stereo, damaged the victim's car in the process, battered the victim, and resisted two police officers as they tried to apprehend him. Postconviction, Gilliom argued that the prosecutor made inappropriate remarks during her closing argument and that Gilliom's trial counsel was ineffective because she did not object to the prosecutor's remarks. The circuit court denied Gilliom's new trial motion. Gilliom appeals.

We begin our analysis with some preliminary observations about the nature of closing argument. Counsel is allowed "considerable latitude" in closing argument, with discretion to be given to the circuit court to determine the propriety of counsel's argument. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The 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.'" ***Id.*** (citation omitted). The prosecutor should aim "to analyze the evidence and present facts with a reasonable interpretation to aid the jury in calmly and reasonably drawing just inferences and arriving at a just conclusion upon the main or controlling questions." ***Id.*** (citation omitted). "The line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence." ***Id.***

To the extent trial counsel did not object to the challenged remarks, Gilliom must establish either that the prosecutor's remarks were plain error[3] or that his trial counsel was ineffective. To

[3] When a party fails to object, a court may nevertheless review an alleged error under the plain error doctrine. ***State v. Miller***, 2012 WI App 68, ¶18, 341 Wis. 2d 737, 816 N.W.2d 331. Plain error is an "obvious and substantial" error that is "so fundamental that a new trial or other relief must be granted" even in the absence of an objection at the time the error was committed. ***Id.*** (citation omitted).

determine whether the prosecutor's remarks constituted plain error, the remarks are examined in the context of the entire trial record to determine whether they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Miller***, 2012 WI App 68, ¶19, 341 Wis. 2d 737, 816 N.W.2d 331 (citation omitted).

"There are two components to a claim of ineffective assistance of counsel: a demonstration that counsel's performance was deficient, and a demonstration that such deficient performance prejudiced the defendant. The defendant has the burden of proof on both components." ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citation omitted). To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted).

Gilliom complains about three remarks made by the prosecutor during closing argument. Trial counsel did not object to the following remarks:

> Mr. Gilliom was lying to you. And not everyone who takes the oath and swears to tell the truth does tell the truth, unfortunately. [The prosecutor argues that Gilliom's defense is fabricated and that the jury can assess his credibility in light of his ten prior convictions.]
>
> [Confronting the stereo owner and] grabbing at her car keys, that's disorderly conduct. And when he punches her in the cheek causing her head to hit the car, that's battery. And when he punches her and then grabs for the stereo… that's robbery. [The prosecutor argues that Gilliom used force to take the victim's property.] And when he causes that damage to her car in order to get the stereo out, he's guilty of the damage to property count. When he runs

> from Officer DeLaRosa… he's guilty of resisting. … and then struggles with Officer Dillhoff … that's another count of resisting.

Postconviction, the circuit court determined that the remarks were permissible. First, the circuit court instructed the jury that it must make the necessary credibility determinations and that closing arguments are not evidence. Second, in these remarks, the prosecutor reviewed the evidence adduced at trial, argued that the evidence demonstrated that Gilliom committed the charged crimes, and urged that evidence to the contrary was unconvincing. We agree with the circuit court that the prosecutor permissibly recited the evidence and argued that the evidence established the elements of the crime. We presume the jury followed its instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

We turn to the second challenged remark. In his defense, Gilliom claimed that the victim gave him the stereo to repay a debt. In her closing argument, the prosecutor observed that Gilliom's behavior was inconsistent with his claim that he lawfully possessed the stereo: he fled from the police and removed his shirt as he was being pursued. The prosecutor then argued:

> When you don't have a defense to the crime that you've committed and you make up a crazy story in front of a jury of 13, what is your lawyer supposed to do?

Trial counsel objected to the remark, and the circuit court directed the prosecutor not to use the term "lawyer." Postconviction, the circuit court found that the prosecutor's reference to "lawyer" was a one-time remark to which it sustained an objection. The circuit court concluded that this remark did not impact the outcome of the trial. We agree that this isolated remark neither infected the trial with unfairness nor denied Gilliom due process. ***Miller***, 341 Wis. 2d 737, ¶19. Even if this remark disparaged the role of defense counsel, remarks such as these may

not be prejudicial in the context of the entire trial. ***State v. Mayo***, 2007 WI 78, ¶¶42-43, 301 Wis. 2d. 642, 734 N.W.2d 115.

In the third challenged remark, the prosecutor argued:

> The defendant wants you to say, well, you know, that's not what the officer testified to. Well, really? Was the officer asked what did Mr. Michalski tell you? I don't remember that question. I didn't ask it and I know she didn't ask it. And you know why? Because that's hearsay. We're not allowed to ask those kinds of questions.

Trial counsel did not object to this remark. The circuit court did not find this remark problematic.

We consider the third remark in the context of the entire trial. Jonathan Michalski, a citizen witness, testified that the victim entered his workplace and asked him to call the police. The victim was "very shaken up" and one side of her face was reddened. She reported that she had been hit. Michalski then observed Gilliom, whom he knew, trying to pull a stereo out of a car. Michalski observed Gilliom run off as the police arrived. Michalski testified that he told the police officer that he saw Gilliom's behavior at the car.

In her closing argument, Gilliom's counsel argued that Michalski's testimony was not credible because while Michalski claimed that he told an unidentified police officer what he saw, Michalski's account did not appear in the report of the responding officer. The prosecutor responded that the officer was not asked what Michalski told him because the rules of evidence governing hearsay forbade such an inquiry.

We conclude that the prosecutor's remark was a fair response to Gilliom's attempt to discredit Michalski's testimony by citing its absence from the police officer's report. *See* ***State v. Wolff***, 171 Wis. 2d 161, 169, 491 N.W.2d 498 (Ct. App. 1992).

Postconviction, the circuit court found that the evidence of Gilliom's guilt was overwhelming. The circuit court concluded that had the prosecutor not made any of the challenged remarks, Gilliom would still have been convicted. We agree that Gilliom was not prejudiced when his trial counsel failed to object to the prosecutor's remarks. Furthermore, we discern no plain error in the prosecutor's remarks. Therefore, the circuit court properly denied Gilliom's motion for a new trial due to plain error or ineffective assistance of counsel.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order of the circuit court are summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals