

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-1252-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

**ROMELL QUIN,
A/K/A ROMEAL O'QUIN,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals the trial court's order granting Romell Quin's¹ motion for mistrial based on certain comments made by the prosecutor during the rebuttal stage of the State's closing argument. The State argues that this court should reverse the trial court's ruling, contending that the trial court erroneously exercised its discretion in granting Quin's motion for mistrial. The State urges us to conclude that the trial court erred for three reasons: (1) although the prosecutor's comments regarding Quin's pretrial custody constituted error, the error was innocuous; (2) in asserting that Quin's alibi witness had never approached the police prior to trial, the prosecutor was within the parameters of acceptable closing argument; and (3) the jury received curative instructions explaining that Quin had timely filed a notice of alibi; therefore, Quin was not prejudiced by the State's comments about his alibi witness. Although the procedural posture of this case is somewhat unusual, we are satisfied that the trial court did not erroneously exercise its discretion in granting Quin's motion for mistrial and, therefore, we affirm.

I. BACKGROUND.

¶2 The facts of this case revolve around a shooting that took place inside a Milwaukee nightclub. As a result of the shooting, one person died and four others were injured. An eyewitness identified Quin as the shooter. Quin was charged with one count of first-degree reckless homicide while armed with a dangerous weapon; two counts of first-degree reckless injury while armed with a dangerous weapon; and two counts of first-degree recklessly endangering safety

¹ Romell Quin is also known as Romeal Oquin. We note that the defendant's name is spelled in various ways throughout the record. This court will refer to the defendant as Romell Quin, or simply Quin, as this is the name that appears on the original caption.

while armed with a dangerous weapon. Quin maintained his innocence, claiming that he was elsewhere at the time of the shooting.

¶3 During the jury trial, Quin objected to certain comments made by the prosecutor during the rebuttal stage of the prosecution's closing arguments. In that argument, the prosecutor questioned the credibility of Quin's alibi witness. Specifically, the prosecutor questioned why the alibi witness came forward only four days prior to trial to state that Quin was someplace else at the time of the shooting, despite the fact that Quin had been incarcerated for some time. These comments prompted Quin to object and move for a mistrial. The trial court sustained the objection and took the motion for mistrial under advisement. The trial court issued a curative instruction to the jury, informing the jury that Quin had timely filed his notice of alibi, and allowed the prosecutor to proceed. However, again during his rebuttal argument, the prosecutor made certain comments about the alibi witness, prompting Quin to object and renew his motion for a mistrial. The trial court continued to take the motion under advisement.

¶4 Holding Quin's motion for a mistrial in abeyance, the trial court permitted the jury to deliberate. The jury convicted Quin on all counts. The trial court then granted the State's motion for judgment on the verdicts, subject to the resolution of Quin's motion for mistrial. Approximately one month later, the trial court granted Quin's motion for mistrial and ordered a new trial. The trial court found that the prosecutor's remarks constituted an impermissible comment on the fact that Quin had been in custody prior to the trial. The trial court also considered the evidence identifying Quin as the shooter and determined that it created "a very

close decision in terms of whether or not we have a good identification here.”² Considering the totality of the circumstances, the trial court was not satisfied that Quin had received a fair trial. Therefore, the trial court granted Quin’s motion for mistrial.

¶5 On appeal, the State argues that the trial court erred in granting Quin’s motion for mistrial based on the prosecutor’s comments. The State asks this court to conclude that the prosecutor’s comments concerning Quin’s pretrial incarceration were erroneous, but harmless, and with respect to the comments about the alibi witness failing to contact the police until four days before trial, the State argues that the comments were innocuous, and Quin was not sufficiently prejudiced to warrant a new trial. We disagree.

¶6 First, we resolve the question as to what is the proper standard of review. We conclude that the trial court held Quin’s motion for mistrial in abeyance and accepted the jury’s verdicts subject to the resolution of Quin’s motion, and thus, the proper standard of review is the erroneous exercise of discretion standard. Second, because we are satisfied that the trial court properly exercised its discretion in granting Quin’s motion for mistrial, we affirm.

² Although there was eyewitness testimony identifying Quin as the shooter, the eyewitness’s credibility was called into question. It was revealed that the eyewitness had provided conflicting identifications of the shooter. At first, the witness identified Quin as the shooter. However, he later recanted and asserted that he had had a great deal to drink that night and could not positively identify the shooter. Next, he reversed his story again, claiming that he had recanted due to threats made by Quin’s family. Then, after being arrested on a felony drug charge, he informed police that he had been bribed with drugs because he was a witness in Quin’s case, presumably by someone attempting to persuade him not to identify Quin as the shooter. Finally, at trial, he testified that Quin was the shooter, but he admitted to having had six prior criminal convictions. These are all factors that could have entered into the trial court’s characterization of the identification evidence. See *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968) (asserting that an appellate court will look for reasons to sustain the trial court’s discretionary decision).

II. ANALYSIS.

A. We apply the erroneous exercise of discretion standard of review.

¶7 We reject the State’s argument that this case is more appropriately reviewed under a *de novo* standard. The State contends that because the trial court decided Quin’s motion for mistrial after the jury rendered a verdict, this case is more appropriately reviewed as a grant of a postconviction motion for a new trial. The State concludes that as a review of a postconviction motion for a new trial we should review the trial court’s decision *de novo*. However, it is well established that the decision to grant a motion for mistrial is a discretionary decision and, therefore, we apply the erroneous exercise of discretion standard of review.

¶8 Whether to grant a motion for mistrial is a decision that is committed to the sound discretion of the trial court. *See, e.g., State v. Hampton*, 217 Wis.2d 614, 621, 579 N.W.2d 260, 263 (Ct. App. 1998). The trial court must review the entire proceeding to determine “whether the claimed error is sufficiently prejudicial as to warrant a mistrial.” *Id.* We will not reverse the trial court’s decision regarding a motion for mistrial unless the trial court has erroneously exercised its discretion. *See id.* “A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process.” *State v. Bunch*, 191 Wis.2d 501, 506-07, 529 N.W.2d 923, 925 (Ct. App. 1995).

¶9 The State has failed to persuade this court that the trial court erroneously exercised its discretion when it granted Quin’s motion for mistrial. While it is true that counsel is typically allowed considerable latitude in making closing arguments, the propriety of counsel’s closing argument remains subject to the trial court’s discretion. *See State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d

49, 51 (Ct. App. 1995). To determine whether the prosecutor's comments during closing argument sufficiently prejudiced the defendant to merit a new trial, the court must consider the statements in the context of the entire trial. *See id.* We are satisfied that the trial court properly considered the totality of the circumstances, and determined that the prosecutor's comments, when reviewed in conjunction with the tenuous identification evidence, was sufficient to call into question the fairness of Quin's trial. The trial court's decision may have been a decision that another court would not have reached; however, it was a decision that a reasonable judge could arrive at after considering the law and the facts, and engaging in a process of logical reasoning. *See Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). Therefore, we must affirm.

B. The State's arguments fail because the trial court properly exercised its discretion.

¶10 The trial court granted Quin's motion for a mistrial based on comments made by the prosecutor during closing arguments. During the rebuttal stage of his closing argument, the prosecutor asserted: "Ladies and gentlemen, where do you get alibi witnesses from four days before a trial who suddenly come in and say oh you got the wrong guy? Yeah, *he's been in jail since November 23*. I just forgot to mention he was with me." (emphasis added). Quin objected to the prosecutor's comments and moved for a mistrial. The trial court held a discussion in chambers.³ During the discussion Quin demonstrated that he had timely filed a notice of alibi and named the witness well in advance of four days prior to trial. Upon returning to the courtroom, the trial court instructed the jury that Quin had

³ Quin's alibi witness had testified that the first time the police "came to [her]" was four days before the trial. Therefore, the prosecutor was mistaken in suggesting that the witness had waited until four days prior to trial to come forward.

timely filed a notice of alibi and, therefore, the jury became aware that Quin had complied with the procedure for proffering an alibi witness. Nevertheless, the prosecutor made several additional references regarding the fact that the alibi witness never volunteered any information until four days before trial.⁴ In granting Quin's motion for a mistrial, the trial court construed the prosecutor's remarks as impermissible commentary on the fact that Quin was in custody for the four months between his arrest and the trial. On appeal, the State argues that the trial court erred in granting Quin's motion for a mistrial.

¶11 The State argues that this court should conclude that despite the prosecutor's erroneous comments about Quin's pretrial custody, the error does not merit reversal of the jury's verdict or a mistrial. The State contends that to the

⁴ Immediately after the court issued the curative instruction and the prosecutor resumed his closing argument, he asserted:

A person who's with the defendant the night he is supposed to have committed a murder ... when he gets arrested for that murder, are the doors of the police station beaten down? Are the doors of the District Attorney's office beaten down? Ladies and gentlemen, does anybody come? Is there any testimony?

We know when the police got to it, four days before.

... [D]efendant is arrested ... November 23, 1997. March 2 as the defendant and his group are preparing their ... alibi defense, they finally notify. Oh, I guess we forgot that he wasn't there.

What leads that to take place in a courtroom like this, ladies and gentlemen? March 2, why does somebody suddenly say yeah, oh me and this other person who you haven't heard from, me and my family, we can support this alibi?

Quin objected again. After the second objection, the prosecutor continued:

Why would someone create an alibi that doesn't exist? Why would somebody notify March 2 when you have March 6 be the jury [sic]?

The State argues that the prosecutor's comments were "entirely within the bounds of proper argument" because the alibi witness admitted on cross-examination that she did not volunteer any information regarding Quin's alibi to the police.

extent that the trial court's decision to grant a mistrial was based on the prosecutor's remarks about when Quin's alibi witness came forward, the trial court's decision was unwarranted. We cannot accept the State's arguments for two reasons. First, as the trial court noted, the comments were misleading. Ms. Guy, Quin's alibi witness, testified that the police first came to her four days before the trial—not that she had first come forward four days before trial. Second, in its decision on Quin's motion for mistrial, the trial court asserted that “the District Attorney made direct reference to the fact that the defendant was in custody and had been in custody since his arrest in November.” Therefore, we conclude that the trial court did not base its decision on the prosecutor's remarks regarding the timing of Quin's alibi motion, but on the fact that the comments were misleading and constituted impermissible commentary on Quin's pretrial custody. Further, if we were to separately consider each of the reasons offered by the trial court for granting the mistrial, we might agree that none of the prosecutor's comments, standing alone, was so misleading as to merit a new trial. However, given their reiteration, even after the cautionary instruction, under the totality of the circumstances, we are satisfied that the trial court properly exercised its discretion in granting Quin's motion for a mistrial.

¶12 Our review of the trial court's decision clearly reveals that the trial court set forth the basis of its exercise of discretion. *See State v. Pharr*, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). Specifically, in granting Quin's motion, the trial court relied heavily on two factors: (1) the court concluded that the prosecutor's remarks during his closing argument constituted impermissible commentary on Quin's pretrial custody; and (2) the trial court characterized the evidence identifying Quin as the actual shooter as a close call. Given the cumulative effect of these two factors, and considering the totality of the

circumstances, the trial court was not satisfied that Quin had received a fair trial and, therefore, the court granted the motion for mistrial and ordered a new trial. We are satisfied that the trial court reviewed the entire proceeding and “examined the relevant facts, applied the proper standard of law, and engaged in a rational decision making process.” *Bunch*, 191 Wis.2d at 506-07, 529 N.W.2d at 925.

¶13 For these reasons, we affirm the trial court’s order granting Quin’s motion for mistrial.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

