COURT OF APPEALS DECISION DATED AND FILED

December 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 98-2992-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

QUENTIN L. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Quentin L. Rogers appeals from the judgment of conviction for attempted armed robbery, following a jury trial. He argues that the evidence was insufficient. Rogers also argues that the trial court erred in denying

his motion for mistrial because, he contends, the prosecutor, in rebuttal closing argument, improperly commented on his right to remain silent. We affirm.

¶2 The facts relevant to resolution of this appeal are undisputed. On September 6, 1997, at about 1:15 P.M., Alfred Jakober was working on his car when Rogers approached him and asked what time it was. On direct examination, Jakober testified:

> A: Well, I gave him the time; and then he told me to take everything out of my pockets.
>
> Q: And when he told you to take everything out of your pockets, what did you think?
>
> A: Well, I felt, you know, shocked.... [I]t seemed like he was trying to convince me that he had a gun in his pocket because he had his hand in his jacket and … it sort of like looked like he might have a gun.
>
> Q: Okay. So you believed at some point that he had a gun; is that correct?
>
> A: I thought about it. I wasn't quite sure.
>
> Q: Did he have his hand in his outer pocket, his jeans pocket, where?
>
> A: His jacket pocket.
>
> Q: Do you recall whether it was his right hand or his left hand?
>
> A: It was his right hand as I recall.
>
> Q: Do you recall whether he had his hand in his pocket before or after he told you to give him everything you had or everything in your pockets?
>
> A: Yes, the contents of my pocket, yes. Well, it was at the same time actually.

Jakober also testified: "I wasn't sure whether he had a gun. I thought that he might be bluffing." On cross-examination, Jakober also acknowledged that he "saw something in [Rogers's] right pocket that [he] didn't see before," and testified that "it looked like it could be a gun."

¶3 Rather than giving up his property, Jakober "took a chance" and ran away. On cross-examination, he acknowledged that he "made a real quick decision either he's bluffing, he doesn't have a gun at all; or if he does have a gun, maybe he is going to be a bad shot." After running about one hundred feet, Jakober was able to flag down a passing car, which proved to be an unmarked police car. Jakober told the police what had occurred, and the police immediately confronted Rogers. Rogers claimed that he and Jakober were friends "just goofing around here," but the police arrested Rogers based on Jakober's account and on their observations of Jakober frantically running away from where they had seen him and Rogers in conversation. When arrested, Rogers struggled and the police "took him to the ground," subsequently recovering a screwdriver where he had been lying.

¶4 Rogers first argues that the evidence was insufficient because "[t]he record contains no evidence of a threat of 'imminent use of force,' or that Jakober had a reasonable belief that Rogers had a dangerous weapon." More specifically, he contends: "It appears that Jakober may have feared that Rogers had a gun in his pocket, or that Rogers would resort to force, but nothing in the record supports the reasonableness of that belief. Any reasoning behind Jakober's belief was entirely subjective." Moreover, he maintains that "the record contains no evidence of the level of intent necessary to support the element of attempt." We disagree.

¶5 We will not reverse a conviction based on insufficiency of evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). Further, "viewing evidence which could support contrary inferences, the trier of

fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused." ***Id.*** at 506, 451 N.W.2d at 757. We conclude that the jury reasonably found the evidence proved attempted armed robbery.

¶6 Although Jakober conceded that he was uncertain whether Rogers had a gun, he provided ample testimony to support his reasonable belief that Rogers was attempting to forcefully take his property by threatening the imminent use of a weapon. He conveyed that Rogers, by words and gestures, "was trying to convince me that he had a gun in his pocket." Rogers, apprehended by police, falsely stated that he and Jakober were friends goofing around. He then resisted arrest and, after a struggle, police recovered a screwdriver from the ground where he had been lying. Although Rogers, testifying at the trial, denied making the statement about goofing around and denied that the screwdriver was his, the jury was free to reject his account. *See* ***State v. Gomez***, 179 Wis.2d 400, 404, 507 N.W.2d 378, 380 (Ct. App. 1993) ("It is the function of the jury to decide issues of credibility, to weigh the evidence and resolve conflicts in the testimony."). From Rogers's words and gestures, Jakober could have believed that Rogers was intentionally threatening him with a dangerous weapon and, from all the evidence, the jury reasonably could have concluded that Jakober's belief was reasonable. Thus, we conclude that the evidence was sufficient.

¶7 Rogers next argues that the trial court erred in denying his motion for mistrial, based on the following portion of the prosecutor's rebuttal closing argument: "Wouldn't you like to know everything that happened with Mr. Rogers? Wouldn't you like to know whether he was given an opportunity to talk? Wouldn't you like to know whether [the police] talked to him?" We reject his claim.

¶8 "The decision whether to grant a motion for mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995) (citation omitted). We will reverse a trial court's denial of a mistrial motion "only on a clear showing of an erroneous exercise of discretion." ***Id.***

¶9 Notwithstanding the general prohibition of prosecutorial comment on a defendant's exercise of his or her right to remain silent, *see* ***State v. Fencl***, 109 Wis.2d 224, 236, 325 N.W.2d 703, 709-10 (1982), comment is permitted under some circumstances, *see* ***State v. Adams***, 221 Wis.2d 1, 6-7, 584 N.W.2d 695, 698-99 (Ct. App. 1998). These circumstances include instances where, as here, the defendant testifies at trial, *see* ***State v. Sorenson***, 143 Wis.2d 226, 258-59, 421 N.W.2d 77, 89-90 (1988), and where a prosecutor provides "a pertinent and measured reply" to a defense assertion about the defendant's silence, *see* ***State v. Edwardsen***, 146 Wis.2d 198, 215, 430 N.W.2d 604, 611 (Ct. App. 1988). Here, we conclude that the prosecutor's rebuttal argument was "a pertinent and measured reply."

¶10 Rogers has failed to acknowledge the context from which the prosecutor's argument came, and failed to quote the full paragraph containing the words he challenges. At trial, Rogers testified, denying that he threatened Jakober or told police that "it's just my friend, we were just goofing around here." In closing argument, defense counsel contended that the police "rushed to judgment," basing the arrest on their brief interview of Jakober, without giving Rogers a chance to respond. Defense counsel argued: "You don't even get a chance to–it doesn't make any difference what you have to say. No one wants to hear. You're

cuffed and you don't get to say anything." In rebuttal closing argument, the prosecutor responded:

> There was another thing [defense counsel] said [in his closing argument]. He said, well, the police came over, they throw the handcuffs on you. And what I wrote down, ["]it doesn't matter what you say, no one wants to hear.["] That's what he said about Mr. Rogers. But wouldn't you like to know? Wouldn't you like to know everything that happened with Mr. Rogers? Wouldn't you like to know whether he was given an opportunity to talk? Wouldn't you like to know whether [the police] talked to him? Wouldn't you like to know that? You don't know, and it's speculation for [defense counsel] to ask you about that, and it is poppycock for him to say that ["]it doesn't matter what you say. No one wants to hear["].

Denying the mistrial motion, the trial court commented that it had "heard nothing in the closing argument … to warrant a mistrial." We agree.

¶11 The prosecutor's rebuttal comments quoted the defense argument, directed the jury away from speculation, and then specifically referred to the police testimony stating what Rogers had said when apprehended. Under the circumstances, the prosecutor's rebuttal argument was "a pertinent and measured reply" to defense counsel's closing argument. *See* ***State v. Keith***, 216 Wis.2d 61, 80-83, 573 N.W.2d 888, 897-98 (Ct. App. 1997) ("State does not violate the defendant's constitutional right by responding to defense counsel's assertions to the jury."). Accordingly, we conclude that the trial court correctly denied Rogers's motion for mistrial.

By the Court.—Judgment affirmed.

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