COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 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. 98-3517-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK D. O'DONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Patrick D. O'Donnell has appealed from a judgment convicting him of possession of marijuana with intent to deliver in

violation of § 961.41(1m)(h)1, STATS.[1] In convicting O'Donnell of this charge, the jury rejected a lesser included offense of simple possession of marijuana. We reverse the portion of the judgment convicting O'Donnell of possession of marijuana with intent to deliver and remand the matter for a new trial on that charge.

¶2 At trial, O'Donnell did not dispute that the marijuana, sandwich bags and scale that were found by police during a search of his vehicle belonged to him. The only issue that was contested at trial was whether O'Donnell possessed the marijuana with intent to deliver.

¶3 Before trial, O'Donnell's counsel filed a motion in limine seeking to exclude evidence that the officer who searched O'Donnell's vehicle after stopping it for a traffic violation had information that O'Donnell was involved in drug activity. According to the officer's report, he obtained the information from his sergeant, who told officers at roll call that he had received information that O'Donnell was involved in drug activity at his high school. The trial court prohibited the State from introducing evidence that O'Donnell's high school had provided information to the police indicating that he was possibly involved in drug distribution, concluding that such information was unfairly prejudicial. However, it permitted the officer to testify that he had information that O'Donnell might be involved with drugs, reasoning that it would provide the jury with an explanation for why the officer requested O'Donnell's permission to search his vehicle during the traffic stop.

[1] The judgment also convicted O'Donnell of the misdemeanor offense of possession of drug paraphernalia in violation of § 961.573(1), STATS. However, O'Donnell does not challenge this portion of the judgment on appeal and requests a new trial only on the charge of possession of marijuana with intent to deliver.

¶4 Pursuant to the trial court's ruling, the officer testified at trial that he had received information that O'Donnell "was involved in possible drug activity" and that he requested permission to search O'Donnell's vehicle "[b]ecause of the information I received on possible drug activity involving him and his vehicle." In his closing argument, the prosecutor subsequently went beyond the officer's testimony, stating to the jury that "Officer Brasch … told you that he had information or he believed that the defendant was involved in drug dealing or drug activity."

¶5 When reviewing a question on the admissibility of evidence, this court must determine whether the trial court exercised its discretion in accordance with accepted legal standards and the facts of record. *See* ***State v. Brecht***, 143 Wis.2d 297, 320, 421 N.W.2d 96, 105 (1988). A trial court erroneously exercises its discretion if it misapplies or relies upon an erroneous view of the law. *See* ***State v. Anderson***, 163 Wis.2d 342, 347, 471 N.W.2d 279, 280 (Ct. App. 1991).

¶6 It is undisputed that the officer's testimony that he had information that O'Donnell was involved in drug activity was hearsay and could not have been admitted to prove the truth of the matter asserted—namely, that O'Donnell was involved in drug dealing or other drug-related activity. *See* §§ 908.01(3), 908.02, STATS. In addition, the State concedes that the officer's reason for asking O'Donnell for consent to search his vehicle was irrelevant to the issues at trial and that the testimony therefore was not properly admitted to explain why the officer asked for O'Donnell's consent.

¶7 This court has the responsibility to review the record even when error is confessed on appeal. *See* ***State v. Neave***, 220 Wis.2d 786, 788, 585 N.W.2d 169, 170 (Ct. App. 1998). However, we agree with both O'Donnell and

the State that the officer's testimony regarding drug activity was irrelevant. Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *See* § 904.01, STATS. Evidence which is irrelevant is inadmissible. *See* § 904.02, STATS.

¶8 The substantive law determines the elements of the crime charged, as well as the ultimate facts and links in the chain of inferences that are of consequence to the particular case. *See* ***State v. Sullivan***, 216 Wis.2d 768, 786, 576 N.W.2d 30, 38 (1998). In this case, the sole issue at trial was whether O'Donnell possessed the marijuana which was found in his vehicle with the intent to deliver it, or whether he possessed it merely for his personal use. The reason why the officer asked to search O'Donnell's vehicle was of no consequence to the determination of that issue.[2]

¶9 The State also concedes that the prosecutor's reference to drug dealing in his closing argument was improper. As recognized by both O'Donnell and the State, a prosecutor oversteps the bounds of permissible argument when he goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. *See* ***State v. Neuser***, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). Argument based on

[2] The State argues that O'Donnell's counsel was satisfied with the trial court's order limiting the officer to testifying regarding possible drug activity, as long as he did not testify regarding drug dealing. However, the record indicates that defense counsel moved the court and argued for an order preventing the officer from testifying that O'Donnell was involved in drug activity. The fact that counsel did not continue to protest when the trial court precluded testimony regarding drug dealing does not establish that he abandoned his objection to the officer's testimony that he had information regarding drug activity.

facts which are not in evidence is improper. *See* ***State v. Albright***, 98 Wis.2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980).

¶10 O'Donnell moved for a mistrial based on the prosecutor's argument. A motion for mistrial based on prosecutorial misconduct is addressed to the sound discretion of the trial court. *See* ***id.*** at 677, 298 N.W.2d at 204. The test to be applied is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See* ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). The remarks must be viewed in context to determine whether the prosecutor's conduct affected the fairness of the trial. *See* ***Neuser***, 191 Wis.2d at 136, 528 N.W.2d at 51.

¶11 Although conceding that the prosecutor's argument was improper, the State contends that any error was harmless. It contends that the remark was isolated, that the evidence strongly supported a conclusion that O'Donnell possessed the marijuana with intent to deliver, and that the jury was instructed that the remarks of counsel are not evidence and that if counsels' remarks implied the existence of facts which were not in evidence, they should be disregarded.

¶12 The test for determining harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *See* ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41. The burden of proving no prejudice is on the State. *See* ***id.*** The defendant's conviction must be reversed unless this court is certain that the error did not influence the jury. *See* ***id.***

¶13 We conclude that the errors were not harmless and that the cumulative effect of the prosecutor's improper argument and the officer's

testimony was to deprive O'Donnell of a fair trial.[3] In making this determination, we emphasize that the crucial issue at trial was whether O'Donnell possessed the marijuana merely for his personal use or with the intent to deliver it. Both parties presented expert testimony on the issue, and the trial court submitted an instruction on the lesser included offense of possession of marijuana. Based on the evidence, the jury reasonably could have decided the issue either way. Consequently, the prosecutor's comment was not only improper and a violation of the trial court's ruling prohibiting information regarding drug distribution or dealing, it spoke to the key question in the case—that is, O'Donnell's intent.

¶14 Under these circumstances, the cumulative effect of the errors was of substantial prejudice to O'Donnell's case. The prejudice cannot be deemed cured by the trial court's general instruction to disregard the remarks of counsel that did not pertain to matters in evidence because the instruction was not given until after completion of closing arguments and did not tell the jury what comment to disregard. *Cf.* ***State v. Penigar***, 139 Wis.2d 569, 581-82, 408 N.W.2d 28, 34 (1987). A new trial is necessary. *Cf.* ***Albright***, 98 Wis.2d at 677-78, 298 N.W.2d at 204.

[3] The State argues that the officer's testimony was not prejudicial because it referred simply to "drug activity," which was consistent with possession of marijuana for personal use. We conclude that the evidence was prejudicial because "drug activity" could also be understood by jurors to imply involvement in drug distribution. We need not, however, consider whether this evidence alone would warrant a new trial. Our decision is based on the cumulative effect of the testimony and the improper prosecutorial argument.

By the Court.—Judgment reversed and cause remanded.

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