

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-1031-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS STELDT,

DEFENDANT-APPELLANT,

SHAUN P. LYNCH,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Curtis Steldt appeals a judgment convicting him of three felonies, including first-degree intentional homicide while armed, in concert with a criminal gang. He also appeals the order denying postconviction relief. He

contends that the trial court erred by refusing to declare a mistrial during his jury trial, and that the prosecutor's remarks during closing arguments violated his due process rights. We reject Steldt's arguments and affirm.

¶2 All of the charges against Steldt arose from the beating, false imprisonment and shooting death of Anthony Socha, a member of Steldt's drug-selling gang. Steldt admitted his part in the beating and false imprisonment. Both the State and Steldt identified a fellow gang member, Shaun Lynch, as the person who actually shot Socha. Essentially, the only issue at trial was whether Steldt induced or ordered Lynch to shoot Socha, as the State contended and Steldt denied.

¶3 Several witnesses testified that Lynch shot Socha. Lynch himself had already pled guilty to first-degree intentional homicide. However, when called to the stand as a State witness, Lynch denied shooting Socha or possessing a gun on the night of the murder. When Lynch so testified, the prosecutor asked him whether he recalled being interviewed earlier that day. Before Lynch answered, defense counsel moved for a mistrial, believing that it would now be necessary to call the prosecutor as an impeachment witness to testify about Lynch's presumably inculpatory statements in the prior interview. The trial court denied the mistrial and instead instructed the jury that the State and Steldt stipulated that Lynch shot Socha. (Counsel agreed to the stipulation after the trial court denied the mistrial motion.)

¶4 We conclude that the trial court properly denied the motion for a mistrial. Counsel moved for the mistrial because he needed the jury to believe that Lynch was the trigger man, and concluded that he could only convince the jury of that fact by calling the prosecutor as an impeachment witness. However, the

stipulation accomplished the same purpose. It removed Lynch's primary role in the killing as an issue at the trial and rendered his denial insignificant. Therefore, Steldt cannot reasonably claim prejudice from the trial court's handling of the matter.

¶5 Steldt also contends that the court erred by informing the jury of the stipulation because the defendant must personally approve a stipulation that removes an element of the crime from the jury's consideration. *See State v. Villarreal*, 153 Wis. 2d 323, 326-27, 450 N.W.2d 519 (Ct. App. 1989). However, the parties' stipulation that Lynch shot Socha did not prove any element of the homicide charge against Steldt. His involvement in Lynch's crime remained for the jury to resolve, and the trial court did not err by informing the jury of the stipulation.

¶6 In closing arguments, the trial court sustained an objection to the prosecutor's reference to facts outside the record which were mentioned in order to challenge Steldt's professed ignorance of the location of hospitals in Milwaukee.¹ The trial court overruled several other defense objections to the prosecutor's argument, specifically: to a statement that defense counsel had the right "to use everything within his arsenal ... to try to misguide you";² to a misstatement that one witness had not ingested drugs the night of the incident; to a

¹ After Socha was beaten, Steldt took him on an automobile ride that eventually ended at the murder site. Steldt testified that the original purpose of the trip was to take Socha to a hospital near the murder site, because it was the only hospital Steldt knew how to find.

² During his argument, Steldt's trial counsel told the jury that "this is a desperate prosecution as far as the homicide is concerned." During rebuttal, the prosecutor responded that defense counsel "is entitled to use everything within his arsenal to try to defend his client, to try to misguide you...." Defense counsel objected without further comment, and the court overruled without comment. Steldt did not move for a mistrial.

comment that State witnesses testifying pursuant to plea bargains were not compelled to testify favorably to the State; and to a statement that Lynch lied on the stand.

¶7 The prosecutor's comments in closing did not violate Steldt's due process rights. A prosecutor exceeds permissible argument by going beyond reasoning from the evidence and suggesting that the jury arrive at its verdict by considering outside factors. *See State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The constitutional test is whether the prosecutor's remarks so infect the trial with unfairness as to make the resulting conviction a due process violation. *See State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements ... must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985).

¶8 Here, the prosecutor's allegedly improper comments generally touched on peripheral matters and none can reasonably be described as grossly unfair or prejudicial. In the first instance, the trial court sustained Steldt's objection and instructed the jury on the proper means of considering Steldt's knowledge of Milwaukee hospitals. In another, the prosecutor misstated that a State witness did not ingest alcohol or drugs on the night of the murder, when the witness had testified to ingesting a small amount of marijuana. That misstatement cannot reasonably be considered either material or prejudicial. The same may be said of the prosecutor's description of defense counsel's role as trying to "misguide" the jury, and the comment that Lynch lied on the stand, after both sides had effectively deemed him a liar with their stipulation.

¶9 Finally, the prosecutor was not improperly vouching for the credibility of the State's witnesses when he stated that their version of the events was not compelled by their plea agreements. He was merely pointing out, accurately, that they first gave that version in statements to the police, before they were offered any bargains. In short, the prosecutor's comments, whether taken individually or together, had no measurable impact on the fairness of Steldt's trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

