COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2003AP2205-CR

Cir. Ct. No. 2001CF483

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Antonio Jackson appeals from a judgment convicting him of first-degree reckless homicide and three counts of first-degree recklessly endangering safety and from an order denying his postconviction

motion for a new trial. Because Jackson's trial counsel was not ineffective and Jackson was not prejudiced by the prosecutor's misconduct, we affirm.

¶2 Jackson was charged with first-degree intentional homicide in the shooting death of Joseph Drane. Jackson and Drane had a confrontation prior to the shooting, and individuals who knew Jackson witnessed the shooting and later identified Jackson as the gunman. The jury convicted Jackson of the lesser included offense of first-degree reckless homicide.

¶3 Postconviction, Jackson sought a new trial citing ineffective assistance of trial counsel, prosecutorial misconduct during trial, and the interests of justice. The circuit court concluded that trial counsel did not perform deficiently, and that while the prosecutor's conduct was improper in several respects, Jackson was not prejudiced by that conduct. The circuit court declined to grant Jackson a new trial. Jackson appeals.

¶4 Jackson claims that the prosecutor: (1) on at least three occasions, improperly vouched for the credibility of a witness; (2) on two occasions, disparaged defense counsel; (3) on three occasions, referred to facts not of record; and (4) on two occasions, attempted to shift the burden of proof to Jackson. Jackson claims that his trial counsel ineffectively responded to this conduct and that the prosecutor's conduct amounted to misconduct requiring a new trial.

¶5 Without analyzing the prosecutor's conduct in detail, the circuit court agreed with Jackson that all but one of the instances cited by him constituted prosecutorial misconduct. The court found that the prosecutor: (1) expressed a personal belief or opinion regarding the truth or falsity of testimony and vouched for witnesses' credibility; (2) disparaged defense counsel; and (3) made arguments that sought to shift the burden of proof to Jackson. The incidents occurred during

the prosecutor's opening statement and closing argument. The circuit court concluded that Jackson waived his objections to this conduct because his trial counsel failed to seek a mistrial.

¶6 The circuit court then turned to whether trial counsel was ineffective for failing to object or seek a mistrial in response to the prosecutor's misconduct. The circuit court determined that counsel did not perform deficiently and did not reach the prejudice prong of the ineffective assistance analysis. The court also concluded that Jackson was not prejudiced by the prosecutor's misconduct.

¶7 We agree with the circuit court that most of the instances cited by Jackson constituted improper conduct by the prosecutor. The circuit court was in the best position to observe the impact of the prosecutor's conduct. Considering the totality of the circumstances, including the strong evidence of Jackson's guilt, we agree with the circuit court that Jackson was not prejudiced by either his trial counsel's failure to object or seek a mistrial or the prosecutor's misconduct.

¶8 As an example of prosecutorial misconduct relating to vouching for the credibility of a witness,[1] we cite the following remark by the prosecutor:

> I'm a district attorney. I have to present evidence which is true. I would not put these people up on the stand and have them testify if I didn't believe they were telling the truth.

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[1] Vouching for the credibility of witnesses is improper. *See* ***State v. Smith***, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854.

¶9 As an example of prosecutorial misconduct relating to disparaging defense counsel,[2] we cite the following remark by the prosecutor:

> My job is to tell you what the truth is, present all of the witnesses to you…. [Defense counsel's] job is to try to get your attention focused somewhere else, use innuendo, try to make you speculate. Her job is to try and get the guy off. That's it.

¶10 As an example of attempting to shift the burden of proof to the defendant,[3] we cite remarks by the prosecutor that Jackson: (1) did not offer an alibi for his whereabouts on the night of the shooting, and (2) did not have a defense and in lieu of a defense, "start[ed] dirtying up people."

¶11 The foregoing remarks are at odds with the prosecutor's role in the case. "A prosecutor's interest as a representative of the state is 'not [to] win a case, but [to see] that justice shall be done.'" ***State v. Smith***, 2003 WI App 234, ¶24, 268 Wis. 2d 138, 671 N.W.2d 854 (alterations in original) (quoting ***Viereck v. United States***, 318 U.S. 236, 248 (1943)).

¶12 Jackson contends that his trial counsel ineffectively responded to the prosecutor's misconduct. Trial counsel's failure to object and seek a mistrial can

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[2] "[D]isparaging remarks directed at defense counsel are reprehensible. Such remarks can prejudice the defendant by directing the jury's attention away from the legal issues in or by inducing the jury to give greater weight to the government's view of the case. Disparaging remarks that suggest that defense counsel has lied to or withheld information from the jury can further prejudice the defendant by causing the jury to believe that the defense's characterization of the evidence should not be trusted and, therefore, that a finding of not guilty would be in conflict with the true facts of the case. This kind of statement, if inflammatory in nature, might also detract from the dignity of judicial proceedings." ***United States v. Xiong***, 262 F.3d 672, 675 (7th Cir. 2001).

[3] It is improper to attempt to shift the burden of proof to the defendant. *See* ***United States v. Vargas***, 583 F.2d 380, 386 (7th Cir. 1978).

constitute ineffective assistance of counsel. *Cf.* ***State v. Carter***, 2002 WI App 55, ¶14, 250 Wis. 2d 851, 641 N.W.2d 517 (failure to object can be ineffective assistance of counsel). The ineffective assistance standards are:

> To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance. A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court's inquiry is done.

State v. Kimbrough, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (citations 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.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). We need only address the prejudice prong of the ineffective assistance analysis. *See* ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

¶13 As we consider whether trial counsel's conduct prejudiced Jackson, we also consider whether the prosecutor's conduct affected the fairness of the trial. We review the prosecutor's statements in the context of the entire trial. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

> The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. The constitutional test is whether the

> prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. Thus, we examine the prosecutor's arguments in the context of the entire trial.

Id. (citations omitted).

¶14 We examine the prosecutor's misconduct in the context of the entire trial. The proof at trial consisted of three eyewitnesses who identified Jackson as the individual who shot Drane after they had a confrontation. Two of those eyewitnesses, Kellen Riddle and Dwan Earl, saw Jackson daily before the shooting. Those eyewitnesses were in a position to identify Jackson, who did not conceal his identity, based upon the events of the night of the shooting and their acquaintance with him. The shooting occurred eight to ten feet from Riddle and Earl, and the street was well lit. Darrell Gunn, the victim's older brother, saw Jackson shoot Drane; Earl also saw Jackson shoot Drane. When found at his aunt's house, where he had been hiding, Jackson admitted arguing with Drane. Riddle and Earl identified Jackson at the police station. The gun was never found.

¶15 Jackson's defense was that Riddle, Earl and Gunn either lied or mistakenly identified Jackson as the gunman. Jackson attempted to undermine the witnesses' credibility by informing the jury of their prior convictions and that Gunn had had dealings with the district attorney's office (Gunn received concessions from the district attorney's office in a misdemeanor case, the district attorney's office recommended a signature bond for Gunn in two other cases, and the district attorney's office sought a stay of Gunn's commitment in two pending child support cases). Additionally, Jackson presented a resident of the house adjacent to the shooting who testified that he saw someone with a gun whose description did not match Jackson. The resident did not identify Jackson as the

gunman at a lineup. However, the resident conceded that he did not see the face of the man with the gun and did not see the shooting occur.

¶16 In light of this evidence, which the jury was entitled to believe, it is not reasonably likely that the prosecutor's misconduct affected the outcome of the trial, precluded a fair trial or prejudiced Jackson, or that Jackson was prejudiced by any failing of his trial counsel in response to the prosecutor's misconduct. Jackson cannot show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ***Reed***, 256 Wis. 2d 1019, ¶17 (citation omitted). Our confidence in the outcome of the trial is not undermined.

¶17 Even though we hold that the prosecutor's misconduct did not prejudice Jackson, such conduct nevertheless reflects very poorly on the office of the district attorney in Racine County and demeans the trial process. At some point in the future, this type of conduct may very well be grounds for a determination of prejudice and reversal of a conviction.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).