COURT OF APPEALS
DECISION
DATED AND FILED

January 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP635-CR **Cir. Ct. No. 2011CF346**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TYRONE L. LIPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Tyrone L. Lipson appeals from a judgment of conviction and an order denying his motion for a new trial. He contends that he was denied his right to effective counsel and a fair trial when, during closing arguments, the prosecutor engaged in both personal and institutional vouching for

the truthfulness of the complainants' accusations. We reject Lipson's claims and affirm the judgment and order.

¶2 In August 2011, the State filed a criminal complaint accusing Lipson of sexually assaulting two girls, A.R.M. and K.G.M. Lipson was charged with repeated acts of assaulting A.R.M. and a single incident of sexual contact with K.G.M.

¶3 The matter proceeded to trial, and the jury was confronted with a credibility dispute between the girls and Lipson. Consequently, as the prosecutor acknowledged during closing arguments, the jury had to determine whether "the girls are telling the truth and [Lipson's] lying or the girls are lying and he's telling the truth."

¶4 During the rebuttal portion of his closing argument, the prosecutor made two additional statements that are now the subject of this appeal. First, the prosecutor remarked,

> And when [defense counsel] says you are to search for the truth he and I agree on this. But that's why I wanted to read to you the actual quotes from those statements, and the actual quotes from the doctor's report because that's where the truth is. *And the actual truth is from what those little girls told you on the witness stand.*

(Emphasis added).

¶5 Second, the prosecutor observed,

> *But the police know better*. They're trained so well these days that *they know to not fall for that and to press on* and have somebody who is trained to do a good interview, *a forensic interview designed to get out the truth* and look at the substance of what they say and how they say it and their motives *and then decide to bring it to us. And we don't have to file every case that's given to us.* And so he hopes

> that a prosecutor will go, I can't believe this beyond a reasonable doubt. I don't have an eyewitness. I don't have a confession. I don't have physical evidence. I'm going to tell [the girls' mother], go home, we don't want to hear about your kid being assaulted, take that case, Detective Gritzner, take it out. *But, no, we bring it here because it's the right thing to do and we look at why these girls say it.* Is there some sort of motive? Because it's not a pleasant thing to say, and there isn't in this case, *so we go, there is no motive here. These girls are saying things that are very credible and there is no motive to say otherwise. And we look at his actions as well.* Leaving without any reason. *But then we come to you.* And you're the last stand for a defendant and counsel to say I wouldn't act like this if I was assaulted. I wouldn't act like this if my kids were assaulted. I want physical evidence. I want him to confess. I want [the prosecutor] to get him to break down on the stand and admit it and if those don't happen it's easier for me to say nothing happened. That will reward him and I'm asking you not to reward him.

(Emphasis added). Lipson's trial counsel did not object to either statement.

¶6 Ultimately, the jury found Lipson guilty of repeated acts of sexual assault of a child for his actions toward A.R.M. and first-degree sexual assault of a child for his actions toward K.G.M. After sentencing, Lipson filed a motion for a new trial, alleging, in part, that his trial counsel was ineffective for failing to object to the above statements. Following the filing of briefs and a ***Machner***[1] hearing, the circuit court denied the motion. This appeal follows.

¶7 On appeal, Lipson first contends that his trial counsel was ineffective for failing to object to the statements cited above. With respect to the first statement, Lipson submits that the prosecutor effectively engaged in a prohibited

[1] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

expression of personal belief in the truthfulness of the girls' allegations.[2] With respect to the second statement, Lipson submits that the prosecutor employed a form of institutional third-party vouching implicitly premised upon the opinions and judgments of unnamed other professionals involved in the criminal justice system.

¶8 To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate review of an ineffective assistance of counsel claim is a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not disturb the circuit court's findings of fact unless they are clearly erroneous, but the ultimate determination of whether counsel's performance fell below the constitutional minimum is a question of law we review independently. ***Id.*** at 634.

¶9 As noted, the statements at issue came from the rebuttal portion of the prosecutor's closing argument. An attorney is allowed considerable latitude during closing argument. *See* ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The line between permissible and impermissible final argument is determined by viewing the statements in the context of the total trial. *See* ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. The line is drawn where the prosecutor suggests that the jury should arrive at a verdict by considering factors other than the evidence. *See* ***State v. Draize***, 88

[2] In a related argument, Lipson accuses the prosecutor of running afoul of the ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), rule barring a witness or prosecutor from rendering an opinion as to the truthfulness of a witness's statements or testimony.

Wis. 2d 445, 454, 276 N.W.2d 784 (1979). The constitutional test is whether the remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Neuser***, 191 Wis. 2d at 136.

¶10 Viewing the prosecutor's statements in the context of the total trial, we are not persuaded that they warranted an objection from Lipson's trial counsel. With respect to the first statement, the prosecutor was not engaging in a prohibited expression of personal belief in the truthfulness of the girls' allegations. Rather, he was simply responding to a defense attack regarding the evidence.[3] In that response, the prosecutor discussed the evidence, addressed the defense attack, and explained why the girls' testimony was arguably truthful. This was proper argument. *See* ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998) (a prosecutor may remark on the credibility of witnesses as long as the comment is based on evidence presented).

¶11 With respect to the second statement, the prosecutor was not employing a form of institutional third-party vouching premised upon the opinions and judgments of unnamed other professionals involved in the criminal justice system. Instead, he was responding to a defense argument regarding delayed reporting of the alleged assaults and a lack of other corroborating evidence. The prosecutor explained that it is because of delayed reporting and a lack of other

[3] The defense had argued that the girls' allegations were not believable, in part, because (1) the video interview showed K.G.M. excited to recount the "story" of what A.R.M. had told her and (2) the reports from the girls' doctor referenced allegations of vaginal penetration when neither girl testified to such. The prosecutor responded by reading the transcript of the video interview to note that K.G.M. was specifically asked to tell the interviewer what A.R.M. had told her. Additionally, the prosecutor read from the doctor reports to clarify that they spoke only to vaginal penetration of one of the girls, and to give the opinion that the physician may have used the word "genitals" broadly and that was later mistaken to mean "vaginal."

evidence that special tactics are used by law enforcement to determine if a case should be pursued. In recounting these tactics, the prosecutor did not rely on facts outside of the record. Indeed, both the police detective and the forensic interviewer testified at trial, so there was no suggestion that they knew something the jury did not. Moreover, nowhere in his closing argument does the prosecutor state that the jury must find that the girls are telling the truth because his office charged the case.

¶12 Even if the prosecutor's statements could be viewed as improper, Lipson was not prejudiced by them. The jury was instructed that closing arguments are not evidence and that it is the sole judge of credibility. We presume the jury follows the circuit court's instructions, *see* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490, and Lipson provides no reason for this court to conclude otherwise.

¶13 For these reasons, Lipson cannot establish a claim of ineffective assistance of counsel. Thus, we are satisfied that the circuit court properly denied his motion for a new trial on that basis.

¶14 As an alternative argument, Lipson next contends that he should receive a new trial in the interest of justice. He asks for this relief pursuant to WIS. STAT. § 752.35 (2011-12).[4]

¶15 We exercise our discretionary power to grant a new trial infrequently and judiciously. *See* ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). We have determined that no error occurred as to the statements made

[4] All references to the Wisconsin Statutes are to the 2011-12 version.

by the prosecutor during closing arguments. We therefore conclude that no basis exists to order a new trial under WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

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