COURT OF APPEALS
DECISION
DATED AND FILED

May 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1783-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RUFUS DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

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

SNYDER, P.J. Rufus Davis appeals from a judgment of conviction[1] and from an order denying postconviction relief. Davis now renews

[1] After a jury trial, Davis was found guilty of the following offenses: (1) operating a motor vehicle without the owner's consent, *see* § 943.23(2), STATS.; (2) burglary of a commercial building, *see* § 943.10(1)(a), STATS.; (3) criminal damage to property, *see* § 943.01(1), STATS.; and (4) felony theft, *see* § 943.20(1)(a) and (3)(c), STATS.

his postconviction claim that he was denied his due process right to a fair trial because the prosecutor commented in closing arguments on Davis's failure to testify and implied that Davis had delayed the trial in the hope of securing a "windfall." After reviewing the prosecutor's comments within the context of the trial itself, we conclude that the first set of comments were permissible as an invited response to Davis's innocent bystander defense and did not unduly prejudice Davis, and that the later reference to the six-year delay between the crime and the trial may have prejudiced the State as readily as Davis. We therefore affirm the judgment and the order.

During the early morning hours of April 21, 1990, some individuals driving a stolen van broke into a Nike factory outlet store near Kenosha and removed over $5000 in merchandise. A police officer on routine patrol observed a van in the parking lot of the outlet store around 5:00 a.m. and followed it as it headed south on I-94. As the officer was following the van, he received a report that an alarm had gone off at the Nike store. He stopped the van; however, a few seconds after pulling over to the side of the road, the van pulled out and continued south on the freeway.

Approximately two miles from the Illinois border the van pulled over and four African-American men exited the vehicle and ran across the freeway and into a wooded area.[2] Less than two hours later, two African-American men were arrested south of where the van had pulled off; both men were wet and dirty. Later that same morning, an Illinois police officer was dispatched to a local motel after it was reported that two men who were not guests of the motel were in the

[2] It had rained recently and the area was quite wet.

laundry room. When police arrived the two men jumped from a second floor balcony and ran into a nearby field where they were apprehended. One of the men was later identified as Davis.

According to an officer who interviewed Davis in the back of a squad car that morning, Davis stated that the night before three men had come to his house in a van and picked him up. They told him they were going out to get some clothes; however, they first stopped at a local hospital where one man's girlfriend was in labor.[3] According to Davis, the four of them then drove around for a while before driving to Kenosha where they broke into the outlet store. This explanation was given orally; Davis did not provide police with a written statement.

A criminal complaint was filed on April 25, 1990. An information was filed on January 12, 1996, renewing the four counts set forth in the original complaint.[4] Following a jury trial, Davis was found guilty of all four counts. After sentencing, Davis filed a postconviction motion requesting that the court amend the judgment and award sentence credit, and renewing "the objections raised at trial for purposes of appellate review." The trial court entered an order correcting several defects in the judgment but denied Davis's request for a new trial. Davis now appeals that denial and argues that because of the prosecutor's improper comments in closing arguments, this court should grant him a new trial. Additional facts will be set forth as necessary in the discussion below.

[3] The van was stolen from the hospital parking lot while its owner was working third shift.

[4] The reason for this delay is not clear from the record.

Davis did not testify at his trial. He claims that the prosecutor's closing rebuttal argument "undermined [his] constitutional right not to testify at trial by effectively commenting upon the defense failure to present testimony demonstrating [that he] was an innocent bystander." He also argues that the prosecutor raised an irrelevant factor for the jury's consideration with remarks that "suggest[ed] that the trial process had been delayed and manipulated by the defense." Davis claims that each of these errors was prejudicial and contends that the trial court erred in refusing to grant a mistrial.

We begin our analysis with a determination of the proper standard of review for these issues. We recognize that a determination that is decisive of a constitutional right is reviewed de novo. *See* ***State v. Griffin***, 131 Wis.2d 41, 62, 388 N.W.2d 535, 543 (1986), *aff'd*, 483 U.S. 868 (1987). This is so the scope of constitutional protections does not vary from court to court and requires this court to apply constitutional principles to the facts as found. *See* ***State v. Fry***, 131 Wis.2d 153, 171, 388 N.W.2d 565, 573 (1986). In this case, the transcript of the closing arguments is before us and there is no dispute as to what was said; the dispute centers on the impact of the prosecutor's comments. We therefore conclude that our review presents a mixed question of fact and law, and we apply the appropriate standard of review to each.

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." ***Smith v. Phillips***, 455 U.S. 209, 219 (1982). If a proceeding is otherwise fair, inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction. *See* ***United States v. Young***, 470 U.S. 1, 11-12 (1985). The test is whether the remarks made to the jury "'so infected the trial with unfairness as to make the resulting conviction a

denial of due process.'" ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) (quoted source omitted).

In analyzing this issue, we must consider the character of the remarks in their proper context, any admonition by the court to the jury, the strength of the evidence apart from the contested remarks and all other facts which may be relevant in determining the effect of the remarks on the jury. *See* ***State v. Spring***, 48 Wis.2d 333, 340, 179 N.W.2d 841, 845 (1970). In ***State v. Werlein***, 136 Wis.2d 445, 456, 401 N.W.2d 848, 853 (Ct. App. 1987), we described this task as follows:

> The test for determining whether remarks are directed to a defendant's failure to testify is whether "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Questions about the absence of facts in the record need not be taken as a comment on defendant's failure to testify.* [Quoted source omitted; citation omitted; emphasis added.]

Counsel is permitted considerable latitude in closing arguments, and the trial court has discretion to determine the propriety of a prosecutor's statements to the jury. *See* ***Wolff***, 171 Wis.2d at 167-68, 491 N.W.2d at 501. We also recognize that "'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.'" ***Id.*** at 168, 491 N.W.2d at 501 (quoting ***United States v. Young***, 470 U.S. 1, 11 (1985)).

We begin our analysis by considering the text of the prosecutor's contested remarks. As part of the rebuttal portion of the closing arguments, the prosecutor said:

> [Defense counsel] is asking this jury to accept that Mr. Davis didn't know what was going on and was just an innocent—innocent man with these three other individuals. If you break down the facts in this case and analyze it you can see that that's just hooey.
>
> ….
>
> Mr. Davis gets in the van at some point. The column of the steering wheel is broken out. What is going through his mind if he's an innocent bystander? … Where are we going? Why are you picking me up at this time of night? What's our purpose in going out; and then they start driving.
>
> And where do they go? Does Mr. Davis ask which direction are we going? … The van, it goes on the interstate. It's driving north. Does Mr. Davis say to himself or to the others where are we going? It's 3:00 o'clock in the morning now.

At this point defense counsel lodged an objection. The court declined to hear argument on the objection, but noted that the objection was preserved. The prosecutor continued:

> At some point they're going to hit the toll booths coming up on the interstate if they're coming from South Chicago. At this point somebody throws in the money. Does Mr. Davis say at that point, gentlemen, where are we going?

Again, defense counsel objected and asked to be heard outside the presence of the jury. The court declined to hear argument, but noted that the objection was preserved. The prosecutor went on:

> Is this going through his mind at that point? Another toll booth. Where are we going? What is the purpose of this? … Can he be an innocent bystander at that point? If he has any common sense? Absolutely not.
>
> ….
>
> They pull up before the store. It's 5:00 in the morning. The store looks closed to me. What are we doing here? I'm just an innocent bystander…. What are you doing with that tire iron there? Why are you breaking that window? It just—it's implausible. Totally implausible.

Davis contends that the above argument "effectively comment[ed] on [his] failure to testify …."

During trial, defense counsel suggested that Davis was an innocent bystander. Counsel had argued to the jury that Davis did not know what the other three men were engaged in and that party to the crime charges were a "dragnet theory" by which innocent people were dragged into the system. During his closing arguments, defense counsel had argued:

> This is what the State does when they get into a bind. They don't have any evidence directly linking the person. So, what they do is they throw out the dragnet and they ask you to make all sorts of guesses and inferences and speculations, and basically what they're saying is, hey, we can't prove our case. So, that's really what's going on here, and you should find him not guilty.

The State claims that the contested comments were not impermissible, but rather were an invited response to the above argument. The State maintains that "the argument was an effort to convince the jury that [Davis] had to have had knowledge or intent given what had preceded the crimes."

We must determine whether the comments unfairly prejudiced Davis's trial. At issue is whether the prosecutor's language was "of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." ***Werlein***, 136 Wis.2d at 456, 401 N.W.2d at 853. In ***Young***, 470 U.S. at 12, the Supreme Court noted that "most Courts of Appeal … have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray." Thus, where an argument of the defense "'clearly invited and provoked the remark of the prosecutor … the appellant cannot complain because his argument backfired.'" ***Wolff***, 171 Wis.2d at 169, 491 N.W.2d at 502 (quoted

source omitted). However, the fact that an argument or comment may have been invited does not invariably compel a conclusion that it can never be considered error. *See* ***id.*** at 168-69, 491 N.W.2d at 501. The question that must be answered is whether the prosecutor's "invited response," when placed in context, unfairly prejudiced the defense. *See* ***id.*** at 169, 491 N.W.2d at 501.

Prior to holding that the contested comments fell into an "invited response type exception," the trial court allowed that the remarks "[are] about as close to the line as you can get" to improper and prejudicial closing arguments.[5] We agree, however, that under the invited response rule the prosecution's comments were a measured and reasonable response to the proffered defense theory of the case. The substance of the prosecutor's comments was to point out the implausibility of the theory that Davis had been swept along as an innocent bystander throughout the events leading up to the burglary. The argument was made in direct response to the defense's position that there was no evidence linking Davis to the actual commission of any of the charged crimes and the defense theory that Davis was in the wrong place at the wrong time. Read in the context of the closing arguments offered by both sides, the prosecutor's comments did not unfairly prejudice Davis. *See* ***Werlein***, 136 Wis.2d at 457, 401 N.W.2d at 853. We therefore conclude that the trial court's denial of the mistrial motion was an appropriate exercise of discretion.

[5] In such circumstances, where an objection to closing arguments presents "a close question," a desirable course of action would be to excuse the jury and immediately resolve the objection so that the jury can be instructed to disregard any improper arguments before retiring to deliberate.

Davis also claims that another portion of the prosecutor's closing arguments was improper in that it "impl[ied] that [he] delayed the trial in the hope of securing a windfall." The text of that portion of the argument is as follows:

> Looking at the evidence in this case … you may wonder why are we here…. [Mr. Davis] is entitled and that is his right to plead not guilty and put us to the test; but … when you look at this case and you wonder … what is the issue in this case ….
>
> After six years you can always hope that Mr. Espino is unavailable. That Deputy Mustell maybe has moved on or is unavailable, or that some other witness is not around or is unavailable; but that's all you have got. You can plead guilty or you can go to trial and be found guilty and hope for the fumbles that something goes wrong with the prosecution; but ladies and gentlemen, this case has been proven by the evidence.

At the end of the closing arguments, defense counsel argued before the court that the above comments had suggested to the jury that "my client somehow or another intentionally engineer[ed] this trial to occur late in the game …." Counsel also argued that there had been no evidence submitted that would have made this an issue and he characterized the above comments as "highly prejudicial." The State responded that the above comments were meant as a statement on the strength of the case.

The trial court held that the above comments were not "particularly problematic viewed in the context of the entire trial; and the fact [is] that the time gap between the offense and the trial is there, it exists." Given the context and brevity of the remarks, we agree that these comments were not unfairly prejudicial. The prosecutor's brief reference to the passage of six years' time, when placed in context, focused primarily on the strength of the State's case. A juror could just as readily speculate that the State was remiss in its prosecution of Davis as that Davis himself did something to delay the trial. Indeed, one potential

juror on voir dire questioned why the case was so old, and his remarks evinced a bias against the prosecution because of the delay in bringing the case. We agree with the trial court that the above argument was not such that it would "sway the jury improperly."

Considering the contested remarks within their proper context, we conclude that the trial court's denial of the motion for a mistrial was an appropriate exercise of discretion, that Davis's rights to due process and a fair trial were not infringed upon and that there is no error that would warrant overturning Davis's conviction. *Cf.* ***Wolff***, 171 Wis.2d at 170, 491 N.W.2d at 502.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.