COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2835-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD J. KENYON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

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

DEININGER, J. Richard Kenyon appeals convictions for two counts of felony theft by virtue of employment. *See* § 943.20(1)(b) and (3)(c), STATS. He claims the trial court erred in admitting certain "other acts" evidence. He also argues that he was denied his constitutional right to a fair trial because of two curative instructions given by the trial court and a statement made by the

prosecutor in the presence of the jury. We reject Kenyon's arguments and affirm his convictions.

BACKGROUND

After an internal audit and an insurance investigation indicated that over $100,000 was missing from the accounts of two interrelated La Crosse County businesses, Kenyon, the former business manager for both companies, was charged with embezzling the funds during the period March 31, 1994, to May 19, 1995. He pled not guilty and the matter was tried to a jury.

Prior to trial, the State moved to introduce evidence that, in December 1993, some checks written on company accounts were posted to the ledger in inflated amounts, the effect of which would be to lower the year-end cash on hand reflected on the companies' books. The State maintained that this evidence was relevant to show a cover-up of ongoing thefts of cash. Kenyon objected to the evidence, arguing that it was impermissible propensity evidence and that the State lacked proof that Kenyon had posted the inflated check amounts. The court concluded that the evidence was probative of a plan to steal funds and cover up the theft, and that it was not unfairly prejudicial. Also, on the basis of what the prosecutor informed the court the State would show at trial, the court concluded that "[Kenyon] was the business manager, as I understand it, and almost solely and exclusively involved with both taking the money and writing the receipts. That makes it legitimate."

During the trial, a defense expert testified regarding a State exhibit that "I have no supporting data whatsoever for any of this." The State objected on relevance grounds. During the ensuing colloquy between the court and counsel, defense counsel complained that "no underlying data had been provided to the

expert" to support the exhibit, to which the prosecutor replied that the expert had not requested it "[a]nd if he wanted to see it, it's sitting in my office, he can see it any time." The prosecutor's remark prompted defense counsel to respond as follows:

> Your Honor, we demanded all discovery. Assurances were given to us that we had it all. If there's evidence that's sitting down in the prosecutor's office at this late moment in this trial, it should have been given to us before now.

All of the foregoing occurred in the presence of the jury, which the court then ordered sent to the jury room.

Outside the presence of the jury, the court concluded that the defense was aware that company records must have existed to support the summaries in the State's exhibits; that discovery of those records could have been requested but was not; and that "for counsel or this witness to imply that those documents were deliberately withheld from them is misleading and wrong." After further argument on the matter, the court requested the reporter to read back the last question and answer of the witness, as well as defense counsel's last comments before the jury was removed. Upon the jurors' return, the court instructed them as follows:

> Members of the jury, under the law in the State of Wisconsin a defendant in a criminal case has the right to ask for and receive virtually every bit of evidence that the State has.
>
> To the extent that the comments or arguments of counsel misled you, I believe it is necessary that I make a statement and give an instruction to you.
>
> The existence of the documents in question has been known by both parties for a substantial period of time, and to the best of the record no request by the defense was ever made to examine those documents. So any

> misrepresentation that somehow those documents were withheld or hidden from the defense is erroneous.[1]

During the defense's closing argument, counsel began an argument as follows: "Now, look at little Mr. Kenyon. A humble-looking, quiet—." The following colloquy ensued:

> [Prosecutor]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Prosecutor]: No testimony that he is quiet at all.
>
> [Defense Counsel]: The jury has observed him for three days.
>
> THE COURT: Counsel, I've made my ruling. Get on to another argument, please.
>
> [Defense Counsel]: The jury has had an opportunity to observe the demeanor of Mr.—
>
> [Prosecutor]: Objection. He was not on the witness stand. He was not a witness.
>
> THE COURT: Sustained. I've made my ruling, counsel. Get on to another argument, please.
>
> [Defense Counsel]: I have a motion in the absence of the jury.

After the jury was sent to the jury room, Kenyon moved for "dismissal" on the grounds that the prosecutor had "just committed a severe, egregious transgression against the constitutional rights of this defendant. He just told the jury and commented on the defendant not having been on the witness stand." The court

[1] Kenyon subsequently moved for production of the documents. The record indicates that only one box of receipt books were in the prosecutor's possession. He had requested them from the company just days before trial in order to possibly use one receipt book as a demonstrative exhibit for the jury, but then decided against it. Many more documents constituting the "underlying data" for the summary exhibits had been retained in the company's possession. The court excused the jury at 1:26 p.m. until 9:00 a.m. the next day to allow Kenyon's counsel and the defense expert to go to the company offices and inspect the documents, which they then did.

had previously instructed the jury regarding a defendant's right to not testify.[2] The trial court denied Kenyon's motion, citing the instruction it had previously given and noting that "the comment that was made was a statement of fact and only a statement of fact that the jury has already been appraised of." When the jury returned, the court instructed them as follows:

> Members of the jury, [defense counsel]'s comments about Mr. Kenyon's demeanor and [the prosecutor]'s comments about Mr. Kenyon's demeanor are both irrelevant and immaterial. We're here to discuss facts, and that is your job. Go ahead, counsel.

Later in the defense's closing argument, the following interchange occurred:

> [Defense counsel]: One of the amazing things to me in this case has been the fact that they have the guts to come in here—
>
> [Prosecutor]: Objection, Your Honor. Personal attacks are improper.
>
> THE COURT: Members of the jury, under the rules of professional conduct that govern attorneys, under Supreme Court Rule 20.3.4., a lawyer is prohibited in a trial to state a personal opinion as to the justness of a cause. It's a violation of the code of judicial ethics to do so and, as such, such an argument is improper. It is wrong. You are instructed to disregard it.
>
> Counsel is admonished not to make that argument again.
>
> [Defense Counsel]: They came in here with the slipshod, sloppy argument—
>
> [Prosecutor]: Objection. Same objection. Nothing to do with the facts of the case at all.
>
> [Defense Counsel]: This is my argument.

[2] The jury was told "A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner."

> THE COURT: Counsel, you may comment on the witness. You may comment on the evidence. You may comment on the lack of evidence. Your personal opinion is not relevant as I've indicated to this jury….

Kenyon was found guilty on both counts and sentenced to a prison term and concurrent probation. He appeals the judgment of conviction.

ANALYSIS

a. Standards of Review

A trial court's decision to admit or exclude evidence is discretionary and will not be disturbed unless the court has erroneously exercised its discretion. *See* ***Johnson v. Kokemoor***, 199 Wis.2d 615, 635-36, 545 N.W.2d 495, 503 (1996). The decision to grant or deny a motion for a mistrial is also a matter of discretion for the trial court, and we will reverse the denial of a mistrial motion only on a "clear showing" that the court erroneously exercised its discretion. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). We will uphold a trial court's discretionary determination if it exercised its discretion according to accepted legal standards and in accordance with the facts of record. *See* ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265-66 (Ct. App. 1992).

Whether a defendant has been denied the fundamental right to a fair trial guaranteed by the due process clause of the Fifth Amendment, however, is a legal question which we decide de novo. *See* ***State v. Hollingsworth***, 160 Wis.2d 883, 893, 467 N.W.2d 555, 559 (Ct. App. 1991). Similarly, we decide independently whether a prosecutor's statement in the presence of the jury regarding a defendant's failure to testify violates the Fifth Amendment. *See, e.g.,*

State v. Johnson, 121 Wis.2d 237, 246-49, 358 N.W.2d 824, 828-29 (Ct. App. 1984).

b. Admission of Other Acts Evidence

The Wisconsin Supreme Court recently outlined the three-step analysis required when determining whether evidence of other acts of a criminal defendant should be admitted at trial:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* Wis. Stat. § (Rule) 904.03.

State v. Sullivan, 216 Wis.2d 768, 772-73, 576 N.W.2d 30, 32-33 (1998) (footnote omitted). We conclude that the trial court properly applied this analysis to the facts before it, and that it did not erroneously exercise its discretion in deciding to admit the evidence relating to the check postings in December 1993.

The court expressly concluded that the evidence was offered to establish Kenyon's plan and the methods by which he concealed his thefts, a purpose that is consistent with the non-exclusive list of permissible purposes under

§ 904.04(2), STATS., as opposed to the sole impermissible purpose of establishing a propensity on Kenyon's part to steal. By the same token, the court deemed the evidence relevant in that it sought to establish an ongoing scheme of thefts and their concealment, and in particular, "why the—or how the accounts had to balance at the end to cover the missing money, it does have some probative value as to the plan."

Kenyon's principal theory of defense was that other employees had access to the businesses' cash receipts, and that sloppy bookkeeping and poor internal control practices made it impossible to determine who, if anyone, had pilfered cash during the period in question. Evidence that Kenyon was uniquely in a position to conceal the losses with improper bookkeeping entries, and that he had made such entries just prior to the period of the thefts charged, would tend to make it more probable that he had committed the thefts. Thus, the evidence is probative of a "fact or proposition that is of consequence to the determination of the action."[3] *See* ***Sullivan*****,** 216 Wis.2d at 772, 576 N.W.2d at 38.

It was not unreasonable for the court to have concluded that the probative value of the evidence was not outweighed by unfair prejudice, or any of the other considerations cited in § 904.03, STATS. The probative value of the proffered other acts evidence was substantial in that the December 1993 check postings were near in time, place and circumstances to the crime to be proved. *See* ***Whitty v. State***, 34 Wis.2d 278, 294, 149 N.W.2d 557, 564 (1967). Evidence is not unfairly prejudicial simply because it is adverse to a party; rather, evidence is

[3] Kenyon's trial counsel subsequently acknowledged the relevance of the evidence when he told the jury in closing argument: "If you think that you can find on this evidence that this is the man who engaged in the plugging, then you find him guilty." ("Plugging" refers to the practice of posting improper check amounts to cover a cash shortage.)

unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. *See* ***State v. DeSantis***, 155 Wis.2d 774, 791-92, 456 N.W.2d 600, 608 (1990). The trial court determined that the evidence was not "unfairly prejudicial," and we agree. Evidence that Kenyon had posted inflated check amounts several months before the period for which his thefts were charged is not the type of shocking, inflammatory, or scandalous information that would excite the jury's passions against him. Moreover, the trial court gave an instruction directing the jury to consider the evidence only on the issue of "preparation or plan," and this court has recognized that a limiting instruction is a cure of the danger of unfair prejudice. *See* ***State v. Clark***, 179 Wis.2d 484, 497, 507 N.W.2d 172, 177 (Ct. App. 1995).

Kenyon argues, however, that even if the ***Sullivan*** tests are met, the evidence should still have been excluded because of the State's lack of proof that Kenyon had performed the fraudulent check postings in December 1993. In ***State v. Schindler***, 146 Wis.2d 47, 55, 429 N.W.2d 110, 114 (Ct. App. 1988), this court concluded that the standard applicable to the admissibility of other acts evidence is whether the "evidence is sufficient to permit a reasonable jury to find, by a preponderance of the evidence, that [the] defendant" committed the other acts. Whether a jury could reasonably find that Kenyon posted the inflated check amounts to the ledger in December 1993, based on the evidence presented to it, is a question of law which we decide de novo. *See* ***id***. at 54, 429 N.W.2d at 113. We conclude that it could so find.

The controller for the two businesses testified that only Kenyon and one other employee could have posted the improper check amounts in December 1993, and that Kenyon had the primary responsibility for assuring that discrepancies such as this did not occur. The other employee testified that he did

not make the December 1993 ledger entries in question. Kenyon did not testify at trial. In determining whether the State introduced sufficient evidence to support the admission of the evidence of the December 1993 acts, neither we nor the trial court need weigh the credibility of the State's witnesses. *See* ***id.*** at 53-54, 429 N.W.2d at 113 (citing ***Huddleston v. United States***, 485 U.S. 681, 685 (1988)). We conclude that the testimony of these individuals, if believed by the jury, was sufficient to permit a jury to reasonably find by a preponderance of the evidence that Kenyon had posted the improper amounts.

Thus, we conclude that the admission of evidence that certain December 1993 checks had been posted in inflated amounts constituted a proper exercise of trial court discretion and was supported by sufficient evidence that Kenyon had committed the acts.

c. Trial Court's Instructions to the Jury During Trial and Closing

Kenyon complains of two instances where the trial court gave instructions to the jury which allegedly prejudiced his defense. On both occasions, the court responded to statements Kenyon's counsel had made in the jury's presence which the court deemed to necessitate a curative instruction. The first of these occurred after defense counsel stated that the company records which had been summarized in certain State exhibits "should have been given to us before now." The court instructed the jury that "any misrepresentation that somehow those documents were withheld or hidden from the defense is erroneous." The second occasion cited by Kenyon occurred during his counsel's closing argument when the court informed the jury that it should disregard counsel's statement of personal opinion regarding the "justness of the cause," citing the rules governing professional conduct of attorneys.

Kenyon claims he "found himself in the shadow of the pall unnecessarily cast over his attorney" on account of the court's instructions to the jury. He argues that as a result of the court's comments, he was denied his constitutional right to a fair trial. We disagree.

A defendant's due process right to a fair trial is violated "only if the judge, in fact, treats him or her unfairly." *See* ***Hollingsworth***, 160 Wis.2d at 894, 467 N.W.2d at 560 (citation omitted). A "strained relationship between the court and counsel" does not necessarily constitute "unfair treatment … of constitutional proportions." ***Id***. at 894-95, 467 N.W.2d at 560. Rather, judicial bias toward defense counsel must be "severe" before we will conclude that partiality against the defendant has occurred. *See* ***id.*** at 894, 467 N.W.2d at 560. Here, as in ***Hollingsworth***, we conclude that Kenyon was not treated unfairly.[4]

Our review of the transcript shows that Kenyon's trial counsel mounted an aggressive, and sometimes emotional, defense which triggered many heated exchanges between defense counsel and the prosecutor, as well as numerous removals of the jury to resolve objections. The dispute regarding the existence and production of the "underlying data" to support the State's summary

[4] We described the court's conduct and comments under review in ***State v. Hollingsworth***, 160 Wis.2d 883, 894, 467 N.W.2d 555, 560 (Ct. App. 1991), as follows:

> True, certain of [the trial court]'s rulings on evidence assumed the proportions of pedantic lectures which dressed down Hollingsworth's counsel. The judge on one occasion sustained an unmade objection for the state and also tended to monopolize verbal interchanges at numerous side bar conferences. Hollingsworth's counsel did not provoke the court, and, for the most part, quietly acquiesced in its adverse rulings.

We concluded, however, that the record did not demonstrate "unfair treatment toward Hollingsworth of constitutional proportions." ***Id***. at 895, 467 N.W.2d at 560.

exhibits arose during the direct examination of the defense's expert witness. Prior to the comments Kenyon complains of, the court and counsel had engaged in a lengthy colloquy outside of the jury's presence regarding the relevance of the expert's testimony and whether he was commenting on the credibility of the State's witnesses. Another lengthy discussion ensued regarding the State's obligation, if any, to have produced company records not in its possession, during which the prosecutor complained that he had been labeled a liar and the court instructed both counsel to "just calm down." During this exchange, defense counsel also insisted that nothing had been said in the jury's presence to suggest that documents had been improperly withheld from the defense. Only after having the reporter read back the final witness response and counsel's statements prior to the jury's removal did the court proceed to give the cautionary instruction, informing Kenyon's trial counsel before the jury returned that:

> I have considered very carefully Mr. [defense counsel]. You force me to do something that I have never done in twelve years on the bench, and I don't particularly like it. But I'm not going to allow you to mislead this jury….

The cautionary instruction which the court then gave to the jury, which we have quoted above in the "Background" section of this opinion, was brief and non-accusatory. We conclude the court did not err in correcting what it perceived as a possible misimpression given to the jury by Kenyon's counsel and expert witness.

Similarly, the court's instruction regarding improper comment by Kenyon's counsel on the justness of the cause was preceded by several emotional statements of personal opinion by defense counsel. The following are examples:

> His explanation of the 4,400 cash is pathetic, pathetic.… They're really grabbing at straws.… This in my estimation on this evidence is criminal.

> ….
>
> …And despite this, [the prosecutor] has the guts to get up here and say that you should find Mr. Kenyon guilty of something.
>
> ….
>
> I think it is absolutely shocking that they ever brought Richard Kenyon, little Richard Kenyon to court. It's pathetic.
>
> …..
>
> One of the amazing things to me in this case has been the fact that they have the guts to come in here—.

(The last comment triggered an objection from the State which prompted the court to give the challenged instruction.)

Kenyon acknowledges on appeal that "defense counsel's argument, expressed in colloquial terms as it was, approaches that nebulous area where commenting on the weakness of the evidence and commenting on the justness of the cause co-exist." He argues, however, that the court should simply have instructed the jury to disregard any opinions expressed by counsel regarding the justness of the cause instead of telling the jury that defense counsel had violated a rule of professional conduct. The State, for its part, "agrees it would have been preferable had the trial court simply told the jury that an attorney's comment on the justness of a cause was improper and should be disregarded."

We need not, however, consider what the trial court might have said, or even what it did say. The court gave the challenged instruction spontaneously in response to the State's objection, following which defense counsel proceeded with his closing argument, making no request for a sidebar or moving for a mistrial. Prior to returning the jury to receive its verdict, the court inquired of counsel whether there was "anything we have to put on the record" and Kenyon's

counsel replied "No." In order to preserve for appeal any allegedly improper and prejudicial remarks made by a prosecutor during closing argument, a defendant must object and move for mistrial. *See* ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). We see no reason to relieve Kenyon of a similar obligation to bring to the trial court's attention the allegedly prejudicial nature of its curative instruction and to move that court for relief in the form of a mistrial.

Even if the issue had been properly preserved, however, we would be compelled to review the court's instruction, not in isolation, but in the context of the comments which had preceded it. In light of the tenor of defense counsel's closing argument, and the numerous objections to defense arguments the court had previously sustained, it is unlikely we would conclude that the court's instruction violated Kenyon's right to a fair trial. The instruction was directed toward counsel, and not toward Kenyon himself. *Cf.* ***State v. Walberg***, 109 Wis.2d 96, 106-07, 325 N.W.2d 687, 693 (1982) (judicial prejudice against an attorney is not "generally or presumptively" transferable to the client).

Finally, lest the impression be created that the trial court unduly curtailed defense counsel in his attempts to vigorously argue Kenyon's defense to the jury, we note that the trial court overruled many of the State's objections to counsel's remarks during closing. The following are examples:

> [Defense counsel, following an objection]: This is my argument, Your Honor.
>
> THE COURT: It's a characterization. He can—I'll allow it.
>
> ….
>
> THE COURT [outside the jury's presence]: Well, counsel, you are getting dangerously close [to arguing matters not in evidence]. I will allow it only because this is

a criminal case of a client who is on trial here, but don't push it any further.

….

THE COURT: Well, the jury heard the testimony. I will allow him some leeway in his argument. They can decide whether or not there is facts to back up his argument.

….

[Defense Counsel, following court's challenged instruction discussed above]: Folks, this has nothing to do with the justness of the cause. This has to do with the quality of what's been called evidence.

[Prosecutor]: Objection, Your Honor. Same objection.

THE COURT: Well, that—I'll allow it. I said I'll allow it counsel. Go ahead.

[Defense counsel]: Yes. The terrible, rotten quality of what's been called evidence.

….

[Defense counsel]: …. They brought in Mr. Jacobs again to try to give some flimflam excuse for it about postings—

[Prosecutor]: Objection.

THE COURT: Well, it's final argument. I'll allow it. Go ahead.

….

[Prosecutor]: Objection, Your Honor. That misstates the testimony.

THE COURT: Well, it's argument. I'll allow it.

….

[Prosecutor]: Objection, improper argument.

[Defense Counsel]: That was his testimony.

THE COURT: For the purpose of this, I'll allow it. Go ahead.

d. Prosecutor's Statement that Kenyon Did Not Testify

The parties dispute whether it was proper for defense counsel to ask the jury to consider Kenyon's demeanor in the courtroom given that Kenyon never took the witness stand. We need not decide that issue, however, because we conclude that the prosecutor's brief and factual statement that Kenyon had not testified did not constitute an improper comment on his silence.

A prosecutor may not comment to the jury upon a defendant's silence at trial; to do so violates the Fifth Amendment. *See* ***Griffin v. California***, 380 U.S. 609, 615 (1965). However, just because a prosecutor's statement prompts a jury to recall and reflect upon a defendant's failure to testify, there is no constitutional violation if the statement does not "highlight" the failure to testify, that is, if the statement is not "manifestly intended or of such a character" to cause the jury to "naturally and necessarily" understand it to be a comment on the defendant's silence. *See* ***State v. Johnson***, 121 Wis.2d 237, 248, 358 N.W.2d 824, 829 (Ct. App. 1984). We conclude that, taken in context, the prosecutor's simple, declaratory statement, directed to the court and not the jury, that Kenyon "was not on the witness stand. He was not a witness," did not constitute an improper comment on Kenyon's silence at trial.

The prosecutor's statement was made as grounds for the State's objection that defense counsel may not ask the jury to consider Kenyon's demeanor since he did not testify. The statement was not repeated thereafter nor embellished upon in any way during the prosecutor's rebuttal argument. The statement, made in response to defense counsel's attempt to get potentially favorable information before a jury without calling the defendant to testify, is in many ways similar to the circumstances we reviewed in ***State v. Lindvig***, 205

Wis.2d 100, 106, 555 N.W.2d 197, 200 (Ct. App. 1996). In ***Lindvig***, we affirmed a trial court's refusal to grant a mistrial after the State had objected during defense counsel's opening statement, as follows: "I'm going to object to [defense counsel] testifying unless he's going to call his witness." ***Id***. We concluded that the prosecutor "was attempting to limit defense counsel's opening statement to facts that would be elicited during trial" and that the statement was "not of such a character that the jury would naturally and necessarily take it to be a comment on the failure of Lindvig to testify." ***Id.*** at 107, 555 N.W.2d at 200. The same may be said for the purpose and character of the prosecutor's statement cited by Kenyon.

Finally, as in ***Lindvig***, the possibility that the jury would focus improperly on the prosecutor's remark was minimized by the court's instruction to the jurors that "[t]he defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner." Thus, we conclude that the prosecutor's statement violated neither Kenyon's constitutional right to a fair trial nor his right to remain silent. We concur in the trial court's analysis when it denied Kenyon's motion to dismiss the charges:

> [T]he comment that was made was a statement of fact and only a statement of fact that the jury has already been appraised of. And the jury already has been fully instructed of the constitutional right not to testify, and that they are not to hold that against the defendant in any way. They have been properly instructed.

CONCLUSION

For the reasons discussed above, we affirm the judgment convicting Kenyon of two counts of felony theft.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.