COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1085-CR **Cir. Ct. No. 2012CF866**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER ANTHONY DAWSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Christopher Dawson was convicted following a jury trial of four counts related to a home invasion and burglary and one count of witness intimidation, and was acquitted of two additional counts of witness

intimidation.[1] He makes five arguments on appeal: (1) his trial counsel was ineffective for failing to object and move for a mistrial when Dawson's half-sister referenced during her trial testimony that her brothers are "known for robberies"; (2) the circuit court erroneously denied Dawson's motion to exclude certain evidence of Dawson's gang affiliation, along with his "MAS" tattoo and witness testimony that "MAS" means "Murder All Snitches"; (3) the circuit court erroneously denied Dawson's motion to sever the witness intimidation charges from the charges related to the home invasion and burglary; (4) the circuit court erroneously denied certain mistrial motions; and (5) the guilty verdict on the witness intimidation charge is not supported by sufficient evidence. We reject Dawson's arguments and affirm.

BACKGROUND

¶2 In this section we relate pertinent aspects of the home invasion and burglary, as testified to without dispute, by the victims. We refer to additional facts relevant to each of Dawson's arguments in the Discussion section that follows.

¶3 In the early evening of November 17, 2010, a young woman knocked on Mr. and Mrs. W.'s front door and asked to use the phone. The woman was not permitted entry but was allowed to use Mr. and Mrs. W.'s phone outside of the front door. The woman appeared to use the phone, returned the phone, and left. An hour later, two men entered Mr. and Mrs. W.'s home through an unlocked

[1] Dawson was charged with several counts, including burglary and robbery, and we use the term burglary when we refer to the crimes charged. Witnesses in their statements and testimony used the term "robbery," and we use that term when we relate their statements and testimony.

back door. The men were young, nineteen to twenty years old, and wore gloves; one of the men wore a mask. The men were armed with handguns and demanded money and drugs from Mr. and Mrs. W. The men ransacked the house, leaving it looking like "a tornado went through it."

¶4 The men forced Mr. and Mrs. W. to lie on the floor and pushed Mr. W. with their feet, knocking off his glasses, which were subsequently crushed. The men pushed a gun against Mr. W.'s head numerous times, stuck the barrel of a gun in Mrs. W.'s ear, and demanded that Mr. and Mrs. W. give the men their rings and show the men where their money was. The men took their wedding rings and pulled Mr. W.'s Green Bay Packers ring off his finger. The men tied Mr. and Mrs. W.'s hands behind their backs with a cord, shoved Mr. and Mrs. W. down the basement stairs, and told Mr. and Mrs. W. that they were going to shoot them.

¶5 Once in the basement, the masked man placed a shirt over Mrs. W.'s face so that she "couldn't see him shoot [her] husband" and made Mr. and Mrs. W. lie on the concrete floor. The men declared, "We are the Maniacs" and "[W]e kill," and repeatedly threatened the couple's lives. The men eventually left, and Mrs. W. went to a neighbor's house for help. One of the officers responding to the call testified, as to the condition of Mr. and Mrs. W.'s house, that he had never seen anything like it in his twenty-two years as a police officer.

¶6 In addition to the rings mentioned above, the men took the phone used by the young woman earlier in the evening, a coin collection held in binders, certain commemorative coins, other jewelry, and a recycling bin with Mr. and Mrs. W.'s address marked on it.

DISCUSSION

A. Ineffective Assistance of Counsel for Failure to Object and Move for Mistrial With Respect to Dawson's Half-Sister's Testimonial References to Her Brothers Being "Known for Robberies"

¶7 Dawson argues that his trial counsel was ineffective for failing to object and move for a mistrial when Dawson's half-sister, Cassandra Sloviak, who at trial recanted her prior incriminating out-of-court statements and preliminary hearing testimony, testified that it was her uncle who actually committed the crime, and that her uncle told her to make the incriminating statements because her uncle "knows that [her] brothers are known for robberies." We first review the facts relevant to this argument, then review the substantive law and standard of review relevant to Dawson's ineffective assistance of counsel claim, and conclude that Dawson's claim fails because he fails to show that his counsel's performance prejudiced him.

¶8 On January 27, 2012, Sloviak called the Crimestoppers tip line, which was answered by Detective John Fahrney, and reported that her brother Dawson, her cousin Alonso Guzman, and her brother Michael Ransom, along with Guzman's girlfriend and Dawson's girlfriend Kristin Brickson, were involved in the November 2010 home invasion and burglary.

¶9 On January 29, 2012, Detective Fahrney went with Sloviak at her direction to retrieve the Green Bay Packers ring from the person ("Cuban") who she said had bought the ring from Dawson. On that same date, Detective Fahrney obtained a recorded statement from Sloviak, in which she stated the following. In November 2010, Sloviak was at her uncle Johnnie Ransom's house with Dawson and Michael Ransom, when she saw a recycling bin with the victims' address on it, saw coins in the bin, and saw Dawson with a Green Bay Packers ring. Dawson

bragged about the robbery and told Sloviak that he had followed an old man home from a store, planned out the robbery, and went into the old man's house and robbed him. Dawson took the Green Bay Packers ring off the old man's finger and was going to kill the old man. Dawson sold the Green Bay Packers ring to Cuban after her uncle Alvin Triplett declined to buy it. Dawson had coins with Mr. W.'s name on them, in cardboard binders covered in plastic. Sloviak then went with Dawson and his girlfriend Brickson to a coin shop in Rockford, Illinois to sell the coins stolen by Dawson in the robbery, so that Sloviak could provide her identification and neither Dawson nor Brickson would be traced as the seller.

¶10 At a preliminary hearing in May 2012, Sloviak testified consistent with the recorded statement she had made in January.

¶11 At trial, Sloviak recanted the incriminating statements she had made to Detective Fahrney and at the preliminary hearing. She testified that she had lied, that she had been on drugs and thought she would receive money when she made the recorded statement, and that her uncle Alvin Triplett had told her to say everything that she had said in the recorded statement. She testified that Alvin Triplett told her to tell Detective Fahrney "what he wanted to hear, because Alvin Triplett knows that my brothers are known for robberies," and that, "Alvin and my dad, Leon Triplett, [were] the actual people who committed the crime and set it up for my brothers, for me to tell Detective Fahrney that my brothers did it because they were known for robberies."

¶12 Dawson argues that his counsel was ineffective for failing to object and move for a mistrial when Sloviak twice testified that her uncle Alvin told her to incriminate Dawson because her brothers were "known for robberies." To succeed on a claim of ineffective assistance of counsel, a defendant must

demonstrate that counsel's representation was deficient and that the deficiency prejudiced him. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

¶13 To prove deficient performance, Dawson must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, Dawson must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.[2] If we conclude that Dawson has not proved one prong, we need not address the other. ***State v. Nielsen***, 2001 WI App 192, ¶12, 247 Wis. 2d 466, 634 N.W.2d 325.

¶14 Defense counsel testified at the postconviction motion hearing that she did not object because she did not want to draw attention to that part of Sloviak's testimony, which was otherwise favorable to Dawson, and that it might

[2] The State argues that we should reject Dawson's argument because any deficient performance by counsel was harmless, citing to the harmless error rule that applies to circuit court errors. *See* ***State v. Magett***, 2014 WI 67, ¶29, 355 Wis. 2d 617, 850 N.W.2d 42. The State fails to point to any authority supporting its proposition that the harmless error rule applies to ineffective assistance of counsel claims or supplants the well-established deficient performance and prejudice test set out above.

help the defense strategy of "pinning this offense ... on [Michael] Ransom." However, as Dawson notes, counsel did not explain why she did not, out of the presence of the jury, move for a mistrial. Assuming without deciding that her failure to do so was deficient, we examine whether it was also prejudicial.

¶15 Dawson argues that Sloviak's two passing references that her brothers "are known for robberies" was a statement that Dawson himself had been involved in robberies, and was therefore prejudicial. We are not persuaded. As we explain, we conclude that counsel's failure to move for a mistrial based on Sloviak's two references to her brothers being known for robberies did not prejudice Dawson, because there was other evidence that reflected negatively on Dawson and substantial specific evidence of Dawson's involvement in this home invasion and burglary; therefore, it is not reasonably probable either that the circuit court would have granted a mistrial motion because of the references or that the outcome of the trial would have been different absent the references.

¶16 To start with, the two references themselves were subordinate to Sloviak's repeated testimony that Alvin Triplett coached her to cover up for him, and to the focus of her testimony throughout that Alvin Triplett told her to lie to Detective Fahrney, and that she had been on drugs and wanted the crime tip money. Sloviak's references to her brothers being "known for robberies" were made in the context of explaining Alvin Triplett's attempt to influence her, rather than her independent assessment of her brothers' character.

¶17 Moreover, other evidence more directly reflected negatively on Dawson, including testimony by Michael Ransom's girlfriend at the time, Samantha Warner, that Sloviak had told her in November 2010 that Ransom, Guzman, and Dawson "had been trying to hit licks all week" (and that to "hit a

lick" is to rob somebody), and that she was afraid to testify because "these men scare me"; a threatening text message from Dawson's telephone number to another of Dawson's brothers, Raymond Triplett, who had made incriminating statements about Dawson to the police; Detective Fahrney's testimony that when he arrested Dawson's girlfriend Brickson in April 2012, Dawson asked why he was not getting arrested, and that when the detective saw Dawson in early May 2012 Dawson said he heard that the detective was having trouble locating witnesses. Thus, Sloviak's references to her brothers being "known for robberies" were merely cumulative.

¶18 Other evidence that specifically implicated Dawson in this home invasion and burglary, in addition to Sloviak's recanted prior out-of-court statements and preliminary hearing testimony described above, included:

- prior out-of-court statements by Dawson's brother Raymond Triplett (who recanted those statements at trial and testified that his uncle Alvin Triplett told him to make those statements) that in November 2010 Dawson told him about robbing an old man whom he had followed home from the store and asked Raymond to participate in the robbery, and that later that month Dawson tried to sell him certain rings including a Green Bay Packers ring;

- prior out-of-court statements by Dawson's uncle Johnnie Ransom (who denied making those statements at trial) to Detective Fahrney that Dawson had brought a recycling bin full of coins to his residence in November 2010 and that he told Dawson to leave because he was nervous about having stolen property in his home;

- testimony by Michael Ransom's girlfriend Samantha Warner about picking up Michael Ransom in November 2010 after being told that he and Dawson and Guzman had been "trying to hit licks," that Michael was jittery and pulled out two handguns, and that she saw Dawson, Guzman, and Michael go into Johnnie Ransom's house with a recycling bin; and

- testimony by Dawson's uncle Alvin Triplett (who testified consistent with his prior out-of-court statements and denied telling Sloviak and Raymond to cover up for him by implicating Dawson) that in November 2010 Dawson tried to sell him a Green Bay Packers ring and a man's gold ring, and that he saw Dawson a few days later at Sloviak's house and Dawson had coins in an album with "little white packages in it ... in rows," along with a lot of empty coin wrappers that he was told were silver coins that came from "hitting a lick."

¶19 Dawson fails to persuade us that, in light of the weight of all of this other evidence, both about Dawson and about his involvement in the home invasion and burglary, it was reasonably probable that the circuit court would have granted a mistrial because of Sloviak's two passing cumulative references to her brothers being known for robberies or that the result of the trial would have been different absent those references. In sum, Dawson fails to show that he was prejudiced by his trial counsel's failure to move for a mistrial out of the presence of the jury.

B. Admission of Evidence: Gang Affiliation and Gang-Related Tattoo

¶20 Dawson argues that the circuit court erroneously denied Dawson's motion to exclude evidence of Dawson's gang affiliation along with his "MAS" tattoo and witness testimony that "MAS" means "Murder All Snitches." We conclude that Dawson fails to show that the circuit court did not properly exercise its discretion in denying his motions to exclude this evidence.

¶21 Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. WIS. STAT. § 904.01 (2013-14).[3] Although evidence may be relevant, it nonetheless may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. WIS. STAT. § 904.03. We review evidentiary rulings with deference, limiting our analysis to whether the circuit court properly exercised its discretion based upon the facts and accepted legal standards. ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115. We will uphold a circuit court's decision to admit or exclude evidence if the court "examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion using a demonstrated rational process." ***Id.***

¶22 The circuit court denied Dawson's motion to exclude the evidence of gang affiliation because it was relevant to explaining the witnesses' recantation of their prior testimony and incriminating statements to Detective Fahrney, and, if necessary, to refuting or explaining the "We are the Maniacs" declaration made by one of the perpetrators during the burglary. The circuit court also denied the

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

motion to exclude evidence pertaining to the MAS tattoo because it was probative of consciousness of guilt. The court ruled that the evidence sought to be excluded was not unfairly prejudicial so as to outweigh its probative value.

1. Gang affiliation evidence

¶23 The following gang-related evidence pertinent to Dawson was presented at trial. A correctional officer testified that Dawson told him that he was a Young Money Vice Lord, that co-defendant Guzman told him that he was a Latin King, and that "Vice Lords and Latin Kings will at times associate with each other based on the gang alliance." Cassandra Sloviak testified that she previously told Detective Fahrney that she was afraid to testify because members of the Latin Kings had threatened Raymond Triplett because he had testified against Dawson and Guzman.

¶24 Dawson argues that there was no evidence that the witnesses who recanted had been intimidated by Dawson's gang members, and therefore evidence of his gang affiliation was not relevant to whether they had a motive to slant testimony towards Dawson. We disagree. Evidence of gang affiliation may be relevant to whether a witness has a motive to recant prior incriminating statements. ***State v. Rodriguez***, 2006 WI App 163, ¶31, 295 Wis. 2d 801, 722 N.W.2d 136. The absence of evidence that those witnesses had been intimidated by Dawson's gang members, along with evidence of intimidation by members of his co-defendant Guzman's gang, were factors for the jury to consider in their weighing of the witnesses' prior out-of-court statements and testimony and their explanations of why they recanted those statements and that testimony at trial. And, "given the crucial nature of evidence provided by [the recanting witnesses'] out-of-court assertions, we cannot say that the 'probative value' of a possible

motive for [the witnesses] to falsely recant was 'substantially outweighed by the danger of unfair prejudice' to [Dawson]." *See* ***id.*** (quoted source omitted).

¶25 The circuit court also determined that evidence of gang affiliation was relevant to refute or explain the "We are the Maniacs" declarations of the perpetrators during the home invasion and burglary. Dawson does not challenge this basis for the circuit court's decision. Accordingly, we deem Dawson to have conceded this point.

2. "MAS" tattoo evidence

¶26 The following evidence relating to Dawson's "MAS" tattoo was presented at trial. A correctional officer and Detective Fahrney testified that Dawson has an "MAS" tattoo, and that "MAS" means "Murder All Snitches." Raymond Triplett testified that prior to the trial, he had told Detective Fahrney that after he initially spoke with the detective, he received threatening messages from Dawson that Dawson would "beat [his] ass" and that the messages referred to MAS. On February 2, 2012, Raymond received the following text message from Dawson's number: "I see you got a lot a bitch in your blood. Must came from your dad side. Just know you not good nigga runnin' your mouth, you know what happens, and go ahead show it to the law, hoe."

¶27 Dawson argues that the "MAS" tattoo-related evidence was not relevant because it was neither needed for identification nor to show motive for the crime. However, Dawson ignores the circuit court's reason for finding the evidence relevant, that it was related to the witness intimidation charge because it was probative of consciousness of guilt. *See* ***State v. Neuser***, 191 Wis. 2d 131, 144-45, 528 NW.2d 49 (Ct. App. 1995) (evidence related to witness intimidation is highly probative of consciousness of guilt and therefore admissible even in light

of its prejudice to the defendant). Because Dawson does not challenge this basis for the court's decision, we deem him to have conceded it.

¶28 In sum, we conclude that Dawson fails to show that the circuit court erroneously exercised its discretion in denying his motions to exclude evidence that he was a member of a gang and evidence related to his "MAS" tattoo.

C. Severance of Charges

¶29 Dawson argues that the circuit court erroneously denied Dawson's motion to sever the witness intimidation charges[4] from the charges related to the home invasion and burglary. A motion for severance is committed to the circuit court's discretion. ***State v. Hoffman***, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982)

¶30 Dawson contends that the evidence of the threats relevant to the intimidation charges was not relevant to the home invasion and burglary charges, and that its probative value was substantially outweighed by unfair prejudice as bad character evidence. To the contrary, it is well-established law that attempts to threaten a witness are "circumstantial evidence of consciousness of guilt and, hence, of guilt itself" and that such evidence "has relatively high probative value." ***Price v. State***, 37 Wis. 2d 117, 132, 154 N.W.2d 222 (1967). Evidence of threats to witnesses who made statements or will testify against a defendant concerning a charged crime is "evidence directly related to the crime charged." ***Id.*** at 133. While evidence of threats to witnesses may be prejudicial in terms of its portrayal

[4] Dawson was charged with three counts of witness intimidation, and was found guilty of only one of the charges, involving threats from Dawson to Raymond Triplett.

of a defendant's character, it is nevertheless admissible. *See* ***Neuser***, 191 Wis. 2d at 144-45 & n.2 (noting that "[n]early all evidence operates to the prejudice of the party against whom it is offered").

¶31 Dawson further contends that the circuit court erroneously failed to analyze the witness intimidation evidence as other acts evidence under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). However, the court's failure to analyze the witness intimidation evidence as other acts evidence caused no harm because, as noted above, the intimidation evidence was admissible to prove a "consciousness of guilt of the principal criminal charge." *See* ***State v. Bettinger***, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) ("It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.").

¶32 In sum, Dawson fails to show that the circuit court erroneously exercised its discretion in denying his motion to sever the witness intimidation charges from the home invasion and burglary charges.

D. Mistrial Motions

¶33 Dawson argues that the circuit court erroneously failed to grant his motions for mistrial with respect to the prosecutor's questioning of Raymond Triplett and to the prosecutor's rebuttal closing argument. A mistrial is appropriate if the circuit court determines, in light of the whole proceeding, that the claimed error was sufficiently prejudicial to warrant a new trial. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. Whether to grant or deny a mistrial is within the circuit court's discretion. ***Id.*** Where the court fails to give a reason for denying a mistrial motion, this court may independently review the

record to determine whether there is a basis for the circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983). We review Dawson's mistrial motions with these principles in mind.

1. Questions during cross-examination of Raymond Triplett

¶34 During cross-examination, the prosecutor twice asked Raymond Triplett about the contents of a recorded telephone conversation between Raymond and Dawson that took place when Dawson was in jail, after evidence of the contents of that conversation was excluded as irrelevant by the circuit court. Dawson's counsel objected each time, and the objection was sustained. The prosecutor also twice asked Raymond about his having been pressured by family members, and the circuit court sustained objections to those questions as irrelevant.[5] The circuit court denied the motion for a mistrial as to both sets of questions, because the jury would be instructed as to counsel's right to object and as to stricken testimony.

¶35 As to the questions about the recorded telephone conversation, the jury never heard any information about the contents of the conversation, and Dawson does not explain why the fact that the conversation took place was significant or prejudicial, particularly in light of evidence of the contents of other threats from Dawson to Raymond, including the threatening text message. Similarly, as to the two questions about pressure from family members, Dawson fails to persuade us that they were prejudicial, given their brevity in the context of the entire four-day trial and their vagueness as compared to the specific evidence

[5] The circuit court subsequently ruled that testimony about being pressured would be limited to pressure coming from the defendants, Alvin Triplett, and the Latin Kings.

of pressure by Dawson himself. Accordingly, we conclude that the circuit court acted within its discretion to deny the mistrial motion as to these two sets of questions.

2. Rebuttal closing argument

¶36 During rebuttal closing argument, the prosecutor made two statements, one referring to threats by family members, and one referring to the defendants (Dawson and his co-defendant Guzman) having no alibi. The circuit court sustained defense counsel's objections to each statement. The circuit court denied the subsequent motion for mistrial as to both statements, because the jury was instructed that arguments are not evidence and that each defendant had the right to remain silent, and because there are many interpretations of alibi, including presenting a witness other than the defendant to provide testimony as to the defendant's whereabouts at the time of the crime.

¶37 "[A] motion for mistrial on the grounds of improper prosecutorial conduct is addressed to the sound discretion of the [circuit] court ...." ***State v. Camacho***, 176 Wis. 2d 860, 886, 501 N.W.2d 380 (1993) (quoted source omitted). We must decide whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***Mayo***, 301 Wis. 2d 642, ¶43 (quoted source omitted). We must also review the comment in the context of the entire trial. ***Neuser***, 191 Wis. 2d at 136. As the United States Supreme Court has stated, "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).

¶38 As to the first statement, the prosecutor argued that witnesses recanted their out-of-court statements "after threats and coercions made by Mr. Dawson and Mr. Guzman, and associates of Mr. Guzman and Mr. Dawson, friends and family members." Dawson does not explain how that one reference to asserted pressure by family members, within a broader non-objectionable statement specifically referring to pressure by Dawson himself, prejudiced Dawson. Rather, Dawson argues that the cumulative nature of the prosecutor's attempts to circumvent the circuit court's rulings excluding inquiry into pressure by family members warranted a mistrial. However, as the circuit court noted, it carefully instructed the jurors on what they could and could not consider in deciding Dawson's guilt:

> Remarks of the attorneys are not evidence. If the remark suggested certain facts not in evidence, disregard the suggestion.
>
> Consider carefully the closing arguments of the attorneys, but their arguments and conclusions and opinions are not evidence....
>
> ....
>
> Attorneys for each side have the right and duty to object to what they consider are improper questions to ask of witnesses and to the admission of other evidence which they believe is not properly admissible. You should not draw any conclusions from the fact an objection was made....
>
> ....
>
> Disregard entirely any question that the court did not allow to be answered.... If the question itself suggested that certain information might be true, ignore the suggestion and do not consider it as evidence.
>
> During the trial, the court has ordered certain testimony to be stricken. Disregard all stricken testimony.
>
> ....

> 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.

¶39 We presume that juries follow instructions. *See* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). In light of all the other evidence presented at trial, the prosecutor's single passing reference in rebuttal closing argument to pressure from family members, promptly subjected to a sustained objection, both alone and taken together with the prosecutor's questioning discussed above, which was also promptly subjected to sustained objections, did not infect the trial with unfairness.

¶40 As to the second statement, the prosecutor argued, "[n]othing they threw against the wall sticks in this case. Defendants had no alibi for this. There is no evidence ...." After defense counsel objected, and the circuit court sustained the objection, the prosecutor continued, "The ... only evidence you heard in this case was that the defendants on November 17th, 2010, were engaged in this brutal home invasion and robbery of the" victims. Dawson argues that in saying that Dawson "had no alibi for this," the prosecutor improperly commented on Dawson's rights to remain silent and not to testify.

¶41 "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.'" ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984) (quoted source omitted).

¶42 We conclude that the stray alibi reference was such that the circuit court could reasonably conclude that the jury would not naturally and necessarily take it to be a comment on the absence of Dawson's testimony. Rather, the reference appeared to be a comment on the evidence, or lack of it. "[I]t is proper for the district attorney to point out generally that no evidence has been introduced to show the innocence of the defendant." ***Bies v. State***, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972).

¶43 In sum, we conclude that the circuit court properly exercised its discretion when it denied Dawson's motion for mistrial with respect to the prosecutor's statements in rebuttal closing argument.

E. Sufficiency of the Evidence

¶44 Dawson argues that the jury's verdict finding him guilty of the charge of intimidating a witness as to Raymond Triplett was not supported by sufficient evidence, because the threats testified to at trial preceded formal charges against Dawson, and therefore Raymond could not have been a "witness" at the time the threats were made. We reject Dawson's argument as follows.

¶45 WISCONSIN STAT. § 940.42 provides that "whoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor." WISCONSIN STAT. § 940.43(3) makes the crime a Class G felony "[w]here the act is accompanied by any express or implied threat of force, violence, injury or damage." When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force" that it can be said as a

matter of law "that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Zimmerman,*** 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoted source omitted).

¶46 Raymond Triplett told Detective Fahrney that after he initially spoke with the detective, he received threatening messages from Dawson that Dawson would "beat [my] ass" and that the messages referred to MAS, which is a tattoo that Dawson has and that means "Murder All Snitches." On February 2, 2012, Raymond received the following text message from Dawson's number: "I see you got a lot a bitch in your blood. Must came from your dad side. Just know you not good nigga runnin' your mouth, you know what happens, and go ahead show it to the law, hoe." Accepting Raymond's out-of-court statement as true, and considering the text message, the jury had more than sufficient evidence to find that Dawson had knowingly and maliciously attempted to dissuade Raymond Triplett from attending or giving testimony as a witness at any hearing or trial that might follow from the then-ongoing investigation into Dawson's involvement in the home invasion and burglary, and that such act was accompanied by an express or implied threat of violence.

¶47 Dawson nevertheless contends that Raymond was not a "witness" when he received the threatening messages because Dawson had not yet been charged with the home invasion and burglary charges, and therefore, Dawson did not intimidate a witness. Dawson cites no legal authority supporting his interpretation of WIS. STAT. § 940.43 as requiring charges to have been filed before the intimidated individual is considered a "witness," and we therefore reject his argument as undeveloped. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[a]rguments unsupported by legal authority will not be considered"). Moreover,

his argument defies common sense. It was more than reasonable for the jury to find that the threats of violence described by Raymond were made to dissuade Raymond from appearing as a witness in any legal proceeding that might follow from his having "snitched" to the detective. The statute requires no more.

¶48 In sum, we conclude that sufficient evidence supported the jury's verdict finding Dawson guilty of intimidating a witness as to Raymond Triplett.

CONCLUSION

¶49 For all the reasons stated above, we affirm.

By the Court.—Judgment and order affirmed.

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