COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3460-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAM ELAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Sam Elam appeals from the judgment of conviction for one count of burglary, as a party to a crime, contrary to WIS. STAT.

§§ 943.10(1)(a) and 939.05 (1997-98),[1] entered following a jury trial. Elam argues that: (1) there was insufficient evidence to support the conviction; (2) the trial court erroneously admitted opinion evidence from a police officer regarding her belief that Elam was one of the burglars; (3) the prosecutor committed plain error by improperly arguing to the jury during closing argument; and (4) this court should exercise its discretionary powers of reversal under WIS. STAT. § 752.35 because the real controversy has not been tried. Because we conclude that: there was sufficient evidence to support Elam's conviction; the trial court did not erroneously exercise its discretion by admitting the officer's testimony; the prosecutor's comments do not constitute plain error; and this case does not merit reversal under § 752.35 because the real controversy was tried, we affirm.

I. BACKGROUND.

¶2 On November 26, 1997, City of Milwaukee Police Officer Louise Schaefer was dispatched to a burglary in progress. When she arrived at the scene, Officer Schaefer spoke briefly with a witness who stated that she first noticed two men, one wearing a tan coat and the other wearing a red coat, loitering on the driveway of her next door neighbor's house. The witness watched as the two men walked up the driveway toward the house, paused, and then walked around the back of the house. The witness asserted that she later saw the men inside her neighbor's house and she called the police.

¶3 After speaking with the witness, Officer Schaefer approached the house. She observed that the front and side doors seemed to be secure, and that

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise indicated.

there were lights on inside the house. Officer Schaefer called for backup and then walked around to the rear of the house to check the back door. While she was standing in the back yard, Officer Schaefer saw the lights in the house switch off and she heard the door to an enclosed back porch open and close. Officer Schaefer, who was standing only ten feet from the back door to the porch, saw two men walk out. She shined the beam of her flashlight directly at the two men. One of the men was standing in front of the other and, as the bright beam of the flashlight illuminated the pair, Officer Schaefer was able to get a good look at the man standing in front. The second man, later identified as Elam, was hidden, but Officer Schaefer was able to see that he was wearing a tan coat and a black knit cap. Upon seeing the officer, Elam's accomplice threw down a flashlight he was holding and the two men fled on foot through the yards. Officer Schaefer, also on foot, pursued the two men, but lost sight of them as they ran through neighboring yards.

¶4 Several squads responded to the area and two men were spotted walking through a park not far from the place where Officer Schaefer lost sight of the fleeing suspects. As one of the squad cars approached the men, one of the men, later identified as Elam, tried to run away, but was quickly apprehended. When police stopped both men, they had shed their hats and coats and were sweating profusely. The officers retraced their escape route and recovered the jackets and hats the men had been wearing. In one of the pockets of the tan coat, later identified as the coat Elam had been wearing, the police found a roll of quarters. In the pockets of the red coat, the police found a twenty-dollar bill and two rings. The owners of the house informed police that a roll of quarters, a twenty-dollar bill, and two rings were missing. They subsequently identified two of the rings recovered from the red coat as the missing rings. Elam and his

accomplice were arrested and each was charged with one count of burglary as a party to a crime. Elam was convicted following a jury trial.

II. ANALYSIS.

A. Sufficient evidence was presented at trial to support Elam's conviction.

¶5 Elam argues that the evidence presented at trial was insufficient to support his conviction. When reviewing the sufficiency of the evidence, we may only reverse if the evidence viewed most favorably to the State and the conviction is so insufficient 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. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The test is not whether this court is convinced of Elam's guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. *See* ***id.*** at 503.

¶6 Elam focuses on five specific aspects of the evidence presented at trial: (1) the eyewitness who spotted the two men, called the police, and then spoke with Officer Schaefer, could not identify Elam; (2) Officer Schaefer's initial description differed from Elam's actual age and appearance; (3) the lack of forensic evidence, specifically footprints and fibers, linking Elam to either the clothing recovered along the escape route or the scene of the burglary; (4) Elam's employer's testimony that on the day in question, Elam left work without a coat, which is consistent with the fact that he was not wearing a coat when the police stopped him; and (5) the police officers who apprehended Elam and the other suspect did not have the squad car's lights or siren on as they approached the two

men. For these reasons, Elam concludes that no jury could find him guilty beyond a reasonable doubt.

¶7 The State responds that "the overwhelming weight of the circumstantial evidence in this case fully and reasonably supported the jury's determination that Elam was the second burglar." We agree. Although the evidence presented at trial may have been circumstantial, circumstantial evidence is often stronger and more satisfactory than direct evidence, and a finding of guilt may rest entirely on circumstantial evidence. *See* ***Poellinger***, 153 Wis. 2d at 501-02. The standard for reviewing the sufficiency of the evidence is the same in either a direct or a circumstantial evidence case. *See* ***id.*** at 501. Consequently, we review the evidence, in a light most favorable to the State, to determine whether a trier of fact, acting reasonably, could have found Elam guilty beyond a reasonable doubt. *See* ***id.***

¶8 The evidence presented at trial indicates that Elam and his accomplice were apprehended just a few blocks from the scene of the burglary and minutes after the two men had run from Officer Schaefer. When the officers stopped Elam, he was breathing heavily and sweating and, despite the cold temperature, he was not wearing a coat. As the officers approached Elam and a second man walking with him, Elam tried to run away. Officer Schaefer was able to positively identify the man stopped with Elam as the man she had seen leaving the house where the burglary reportedly occurred. It was later learned that Elam's accomplice, who eventually pled guilty to the burglary, was a man Elam had known and worked with for several years. Finally, the police recovered the items identified by the owners of the burgled house as the items that were missing following the burglary from the pockets of the jackets worn by Elam and his accomplice. Specifically, the police recovered two rings and a $20 bill from the

pockets of the red jacket worn by Elam's accomplice, and they recovered a $10 roll of quarters from the pockets of the tan jacket that Elam had been wearing.

¶9 To support his argument, Elam relies heavily on testimony given by his employer, the eyewitness, and Officer Schaefer, which, he contends, demonstrates the State's inability to identify him as the second burglar. However, the credibility of the witnesses and the weight of the evidence are for the trier of fact. *See* ***Poellinger***, 153 Wis. 2d at 503. The jury was free to assign as much or as little importance to this testimony as it deemed appropriate. Even assuming that more than one reasonable inference can be drawn from this evidence, we must adopt the inference consistent with the finding of guilt. *See* ***id.*** Elam also points to the lack of forensic or physical evidence linking him to the crime. However, in light of the remaining circumstantial evidence, the absence of forensic evidence does not undermine the conviction. For these reasons, we are satisfied that a trier of fact, acting reasonably, could have found Elam guilty beyond a reasonable doubt, and, therefore, we conclude that the evidence presented at trial was sufficient to support Elam's conviction.

B. The trial court did not err in allowing Officer Schaefer's testimony.

¶10 Next, Elam argues that the trial court erred by allowing Officer Schaefer to give improper opinion testimony regarding Elam's guilt. At trial, Officer Schaefer was cross-examined regarding her identification of the two men at the time of the incident. Officer Schaefer admitted that she did not have personal knowledge that Elam was the second person who emerged from the house and then ran away. Then, on redirect, the following exchange took place between the prosecutor and Officer Schaefer:

> [Prosecutor]: Do you have any doubt in your mind, you see the subject in court today?
>
> [Officer Schaefer]: I have absolutely no doubt.

Elam objected, stating that the testimony was speculative, but the objection was overruled.

¶11 On appeal, Elam argues that Officer Schaefer's opinion testimony was improper because her perceptions had been formed based on other acts evidence and information gathered after the incident. Because Officer Schaefer had not been qualified as an expert witness, she was only allowed to offer an opinion as a lay witness. Under WIS. STAT. § 907.01, opinion testimony offered by a lay witness is acceptable if it is "limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Elam posits that Officer Schaefer's opinion testimony was improper because it was not based on her perceptions, but rather "could have been based on any information she, as an officer involved in the case, may have had at the time of her testimony." Finally, Elam also asserts that, given the circumstantial nature of the State's evidence, the impact of Officer Schaefer's inadmissible testimony cannot be overstated. Elam maintains that Officer Schaefer's comments on redirect were prejudicial because, absent her statements, her testimony was limited to her initial description of the suspect, which did not resemble Elam. Therefore, Elam concludes that the trial court erred by allowing Officer Schaefer to offer opinion testimony regarding Elam's guilt. We disagree.

¶12 A trial court's ruling admitting evidence is discretionary, and we will uphold the ruling if we can find a reasonable basis for it. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). In reviewing evidentiary issues,

the question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *See* ***State v. Alsteen***, 108 Wis. 2d 723, 727, 324 N.W.2d 426 (1982). We are satisfied that the trial court properly exercised its discretion in allowing Officer Schaefer's testimony on redirect to be admitted.

¶13 Contrary to Elam's assertions, there is no evidence in the record to indicate that Officer Schaefer's conclusions were formed by anything other than her perceptions of the events that transpired on the evening in question. Furthermore, the record indicates that the prosecutor's question and Officer Schaefer's answer on redirect were in response to the questions put to Officer Schaefer and her responses on cross-examination. As noted above, on cross-examination, Officer Schaefer indicated that she did not have personal knowledge that Elam was the second burglar. Taken in context, defense counsel's questions were meant to demonstrate that Officer Schaefer, given her inability to personally and positively identify Elam, could not be certain that Elam was the second man she saw leaving the home. Given the defense's questions and Officer Schaefer's answers on cross-examination, it was appropriate for the prosecutor to respond on redirect with questions designed to elicit answers to counter the answers given during cross-examination. The prosecutor sought to establish that, despite Officer Schaefer's inability to positively identify Elam, based on the remaining circumstantial evidence she had no doubt that Elam was the second burglar. Therefore, because Elam's cross-examination "opened the door" to the prosecutor's questions on redirect, we conclude that the trial court properly exercised its discretion in allowing Officer Schaefer's testimony.

C. The prosecutor's comments during closing argument do not rise to the level of "plain error."

¶14 Elam argues that during closing argument the prosecutor explained away the absence of forensic or physical evidence linking him to the crime by improperly appealing to the jurors as taxpayers. In commenting on the lack of forensic evidence, the prosecutor remarked:

> I can't imagine going into the County Board asking for money to do fingerprints or D.N.A. testing on a hat. I can just see my boss coming into the County Board and saying we need a half a million dollars because we want to start D.N.A. testing for any burglary suspect that is caught running away from the scene of a burglary. We would be laughed out of the County Board. You've got to be dreaming, spend $1,000 on a case that there is no alibi consistent with innocence. That when we know we have the right guy, that we should do D.N.A. testing. I don't know that a lot of us want to spend our tax dollars in such a way.

Elam contends that the prosecutor's remarks were "clearly an attempt to appeal to the self-interest and prejudice of the jurors as taxpayers in order to belittle the need for forensic evidence in this entirely circumstantial case." Furthermore, Elam maintains that the prosecutor's error was compounded when he referred to the lack of an alibi. Acknowledging that he waived the right to raise this issue on appeal by failing to object at trial, *see* ***State v. Kircher***, 189 Wis. 2d 392, 404, 525 N.W.2d 788 (Ct. App. 1994), Elam nevertheless argues that the prosecutor's comments rise to the level of "plain error" and, therefore, this court should grant relief even though Elam failed to object. We disagree.

¶15 Despite Elam's failure to object to the prosecutor's comments during closing argument, we may grant relief if the prosecutor's comments constitute

"plain error." WIS. STAT. § 901.03(4)[2]; *see also* ***State v. Street***, 202 Wis. 2d 533, 552, 551 N.W.2d 830 (Ct. App. 1996). In order to constitute plain error, an error must be obvious and substantial, and so fundamental that a new trial or other relief must be granted. *See* ***Street***, 202 Wis. 2d at 552. "'The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right.'" ***Id.*** (citation omitted).[3] We are satisfied that the prosecutor's comments do not rise to the level of plain error.

¶16 While it is generally improper for a prosecutor to appeal to the pecuniary interests of jurors, *see* ***United States v. Trutenko***, 490 F.2d 678, 679 (7th Cir. 1973), or to comment on the lack of an alibi, *see* ***State v. Feela***, 101 Wis. 2d 249, 268, 304 N.W.2d 152 (Ct. App. 1981), we are satisfied that the prosecutor's comments do not rise to the level of plain error. Here, the prosecutor's comments concerning taxpayer money were made in response to Elam's repeated complaints about the lack of DNA testing, and the prosecutor's fleeting comment regarding Elam's lack of an alibi was simply a small part of the explanation for the State's decision not to conduct DNA testing. While these

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[2] WISCONSIN STAT. § 901.03(4) provides:

> PLAIN ERROR. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

[3] Appellate courts have had difficulty defining "plain error," *see* ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984); however, in ***Virgil v. State***, 84 Wis. 2d 166, 267 N.W.2d 852 (1978), our supreme court found plain error stating, "[t]his violation of the defendant's constitutional rights is so serious, viewed in the context of the other evidence properly admitted in this case, that we conclude that the admission of the evidence constitutes plain error, requiring a reversal of the conviction," ***id.*** at 192. Then in ***Sonnenberg***, the court failed to find plain error because it "[did] not see the denial ... of any fundamental constitutional right or a substantial impairment of the right of fair trial." 117 Wis. 2d at 178. Essentially, for the prosecutor's comments to constitute plain error, the remarks must have been "so prejudicial that [they] affected a substantial right to a degree warranting a reversal even though no contemporaneous objection was made." ***Id.*** at 168.

comments could be problematic under different circumstances, we conclude that the comments, considered either separately or in conjunction with one another, were not so egregious that they denied Elam a basic constitutional right. Furthermore, the effect of any error was diminished when the trial court instructed the jury that counsel's remarks do not constitute evidence. *See, e.g.,* ***State v. Draize***, 88 Wis. 2d 445, 456, 276 N.W.2d 784 (1979).[4] Therefore, because Elam failed to object to the prosecutor's comments during closing argument, and because we are satisfied that the comments do not rise to the level of plain error, we will not address this issue further.

D. We will not exercise our discretionary powers of reversal.

¶17 Under WIS. STAT § 752.35, this court has the discretionary power to reverse the trial court when we conclude that the real controversy has not been tried. Elam argues that the prosecutor's comments during closing argument prevented a trial of the real controversy and, therefore, he argues that this court should exercise our discretionary power of reversal to grant him a new trial in the interests of justice. We disagree. We are satisfied that none of the alleged errors argued above, either separately or in concert, prevented a trial of the real

[4] The trial court issued the following instruction, in relevant part, to the jury:

> The remarks of the attorneys are not evidence. If the remarks implied the existence of certain facts not in evidence, disregard any such implication and draw no inference form the remarks.
>
> Likewise, consider carefully the closing arguments of the attorneys, but their arguments, and conclusions, and opinions are not evidence. Draw your own conclusions and your own inferences from the evidence and decide upon your own verdict according to the evidence under the instructions given to you by the Court.

controversy in this case. Therefore, we decline Elam's request to exercise our discretionary powers of reversal under § 752.35.

III. CONCLUSION.

¶18 For the above stated reasons, we conclude that: (1) there was sufficient evidence presented at trial to support Elam's conviction; (2) the trial court did not erroneously exercise its discretion in admitting Officer Schaefer's testimony on redirect; (3) the prosecutor's comments during closing argument did not rise to the level of plain error; and (4) discretionary reversal under WIS. STAT. § 752.35 would not be appropriate in this case. Therefore, we affirm.

By the Court.—Judgment affirmed.

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