COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal Nos. 2015AP1746-CR
2015AP1747-CR

Cir. Ct. Nos. 2013CF347
2014CF291

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMANDO MEZO-REYES,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. Armando Mezo-Reyes appeals from judgments convicting him after a jury trial of second-degree sexual assault, misdemeanor battery, and two counts of sexual intercourse with a child over sixteen, contrary to WIS. STAT. §§ 940.225(2)(a), 940.19(1), and 948.09 (2013-14).[1] We reject his contentions that the trial court erred in denying his motions to suppress his custodial statements and for a mistrial. We affirm the judgments in the main but reverse them in part and remand to the trial court to vacate the DNA analysis surcharges assessed for the misdemeanor convictions.

¶2 In August 2013, Mezo-Reyes forced his way into the home of his ex-girlfriend, pushed her to the floor, and forcibly had sexual intercourse with her. He was charged with second-degree sexual assault, battery, and sexual intercourse with a child over sixteen. A second complaint filed in July 2014 alleged that in June 2013 he committed other crimes against the same victim. This led to charges of first-degree sexual assault causing great bodily harm and sexual intercourse with a child over sixteen. The matters were joined for trial. An amended information combined the counts. The jury acquitted Mezo-Reyes of the first-degree sexual assault charge but found him guilty of the other four. He appeals.

¶3 Mezo-Reyes first argues that the trial court erred in denying his motion to suppress his custodial statement. He asserts that police gave him the ***Miranda***[2] warning in English although his first language is Spanish and he does

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

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

not speak or comprehend English proficiently and he thus did not freely, voluntarily, and intelligently waive his rights.[3]

¶4 At a suppression hearing, the State must show that the defendant received and understood his or her ***Miranda*** warnings and knowingly and intelligently waived the rights the warnings protect. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. The State bears the burden of showing by a preponderance of the evidence that the warnings were sufficient in substance and that the defendant's statements were voluntary. ***Id.*** In reviewing an order allowing statements into evidence, this court upholds the trial court's findings of fact unless they are clearly erroneous, ***State v. Kelley***, 2005 WI App 199, ¶8, 285 Wis. 2d 756, 704 N.W.2d 377, including findings based on a video recording, ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. We then "review the application of constitutional principles to those facts de novo." ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

¶5 Mezo-Reyes directs us to ***State v. Santiago***, 206 Wis. 2d 3, 13, 556 N.W.2d 687 (1996), for the proposition that when a suspect cannot communicate in English, law enforcement officers should give the ***Miranda*** warnings in a language the suspect understands to ensure that he or she comprehends the warnings and can knowingly and intelligently waive the rights they protect. The recording of Mezo-Reyes's police interview was played at the hearing on his motion to suppress. The court also heard the testimony of three police officers who had contact with Mezo-Reyes on the day he was arrested. They testified that

[3] Mezo-Reyes also contends it is "uncontested" that he asked the interviewing officer to speak to him in Spanish. The record does not bear out that assertion and we discuss it no further.

they communicated with him in English; he answered in English; they had no trouble understanding him; he appeared to have no difficulty understanding them, as he responded appropriately to their statements and commands; and he showed no signs of needing an interpreter.

¶6 Testifying through an interpreter, Mezo-Reyes stated that he understood none of the rights that were read to him, as he did not speak or read English well and understood "less than half" of what the interviewing officer said to him. He also testified that he had been in the United States for four to five years, attended high school in Wisconsin for about two years, earned an A/B in his English instruction class, and has worked at various local restaurants.

¶7 Based on the testimony and the recorded police interview, the court found that Mezo-Reyes "now has a motive to minimize his understanding of English," that it was "rather apparent that some of his answers were self-serving," and that he was "selective" as to what he did or did not understand, such that the officers' testimonies were more credible. The court denied the motion.

¶8 The trial court was not obliged, as Mezo-Reyes argues, to make an explicit finding as to the level of his ability to speak and comprehend English. Our review of the record and of the recorded interview satisfies us that the trial court's findings are not clearly erroneous. We independently conclude that Mezo-Reyes freely, voluntarily, and intelligently waived his ***Miranda*** rights, such that his incriminating statements also were freely, voluntarily, and intelligently given.

¶9 Mezo-Reyes next asserts that the trial court erred in denying his motion for a mistrial after the prosecutor allegedly commented in closing

arguments on his decision not to testify and vouched for the strength of the State's evidence.

¶10 Whether to grant a mistrial lies within the sound discretion of the trial court. ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. "The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." ***Id.*** A denial of the motion will be reversed only on a clear showing of an erroneous exercise of discretion. ***Id.***

¶11 The prosecutor argued in closing that the "uncontroverted, uncontradicted evidence … show[ed] beyond a reasonable doubt that [Mezo-Reyes] committed the crimes charged." He argued in rebuttal that the victim's testimony was "uncontradicted" and "uncontroverted" and that "[e]ven the defendant's statements don't contradict" the victim's testimony. Mezo-Reyes contends the comments were an improper comment on his decision not to testify and an effort to shift the burden of proof.

¶12 This court said in ***State v. Jaimes***, 2006 WI App 93, ¶21, 292 Wis. 2d 656, 715 N.W.2d 669:

> [F]or a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument.

¶13 The challenged comments do not satisfy these factors. First, the remarks were not "manifestly intended" or "of such character that the jury would naturally and necessarily" construe them as a comment on the failure of Mezo-

Reyes to testify, which is the test for whether remarks are directed to a defendant's failure to testify. ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984) (citation omitted).

¶14 Second, the remarks did not propose that Mezo-Reyes's failure to testify demonstrated his guilt. The statements he made in his recorded interview describing the August 2013 incident demonstrated his guilt as to that incident. The jury heard him say that he telephoned the victim to say he wanted to see her; that she told him she hated him and did not want to reunite; that he went to her house anyway and let himself in through the garage; that she told him to get out and that she was going to call the police; and that he "want go to sex with her but her no want, so [he] pulled the pants down," "put [her] on the ground," held her down as she kicked at him and tried to get up, and had intercourse with her, after which she immediately called the police. Besides the video, a responding police officer and the nurse who examined the victim testified. Both corroborated the victim's version of events, and the nurse additionally described the victim's injuries and showed photographs of them to the jury.

¶15 Third, the rebuttal comments were a fair response to the defense argument that, against her parents' wishes, the victim invited Mezo-Reyes over, let him into the house, and engaged in consensual sex.

¶16 The other basis for the mistrial motion was that the prosecutor vouched for the strength of the State's evidence and the credibility of its witnesses. Mezo-Reyes took issue with the prosecutor's statement to the jury that, as a prosecutor, he has an ethical obligation to dismiss a case if he personally does not think he proved it beyond a reasonable doubt but, "I'm still here because I've seen the evidence." Mezo-Reyes contends the prosecutor's statement was "highly

inappropriate" and "crossed way over" the line between permissible and impermissible final argument, as there was no evidence about a prosecutor's ethical obligations and, further, it invited the jury either to convict him because the prosecutor had not moved to dismiss or, conversely, to infer that they would insult the prosecutor by finding Mezo-Reyes not guilty, since a finding of guilt "would impugn the prosecutor's ethical integrity."

¶17 "In Wisconsin a prosecutor or defense counsel may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him [or her] and should convince the jurors," as long as it is clear that the opinion "is based solely upon the evidence in the case." ***Embry v. State***, 46 Wis. 2d 151, 160, 174 N. W. 2d 521 (1970). Counsel may not suggest to the jury that it should consider any factors other than the evidence to arrive at a verdict. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). Even when a particular remark crosses the line, a new trial is not warranted unless the remark, taken in context of the entire trial, has "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted).

¶18 The prosecutor did not improperly vouch for the State's witnesses, misrepresent the record, or say anything that would directly impact the balance of a credibility contest. The challenged statements could not have unfairly altered the jury's consideration of the case, particularly since it acquitted Mezo-Reyes of the most serious charge, and he admitted the remaining offenses in his interview with the police. Further, the court already had instructed the jury to base its verdict solely on the evidence, that remarks of the attorneys, including in closing arguments, are not evidence, and that it should disregard any remark suggesting

facts not in evidence. We presume it followed those instructions. *See* ***State v. Marinez***, 2011 WI 12, ¶41, 331 Wis. 2d 568, 797 N.W.2d 399. Denying the mistrial motion reflects a proper exercise of discretion.

¶19 We address an additional matter. At sentencing, the court stated that it "will add the DNA sample and surcharge." The judgments of conviction reflect a $250 surcharge for the second-degree sexual assault and a $200 surcharge for each of the three misdemeanors. The $250 surcharge is correct for Mezo-Reyes' 2013 second-degree sexual assault. *See* WIS. STAT. § 973.046(1r) (2011-12).

¶20 The judgments also state that the surcharges for the misdemeanors are "mandatory … pursuant to [WIS. STAT. §] 973.046(1r)." That is incorrect. The version of the statute in effect when Mezo-Reyes committed his offenses did not authorize a DNA surcharge for the misdemeanors he committed. *See* § 973.046(1g), (1r) (2011-12). This is an ex post facto violation as applied to Mezo-Reyes and his misdemeanor convictions for 2013 crimes. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶12, 22, 363 Wis. 2d 633, 866 N.W.2d 758.

¶21 We reverse the judgments insofar as they impose DNA surcharges for the misdemeanor convictions. We remand for the trial court to vacate the DNA analysis surcharges for Mezo-Reyes's misdemeanor convictions to comport with the surcharge statute in effect when he committed his crimes.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

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