COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP670-CR **Cir. Ct. No. 2014CF001059**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEANDRE D. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the trial court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, J.J.

¶1 DUGAN, J. Following a jury trial, Deandre D. Rogers was convicted of two counts of armed robbery, one count of robbery and three counts

of bail jumping.[1] On appeal, Rogers contends that the trial court erroneously exercised its discretion by (1) admitting evidence that a vehicle, from which his fingerprint was lifted, had been reported stolen, and (2) allowing the prosecutor's closing argument regarding the mathematical probability that Rogers had been mistakenly identified in the photo arrays.

¶2 We conclude that the trial court properly exercised its discretion in admitting evidence that the vehicle was reported stolen and that Rogers was not prejudiced by the prosecutor's improper comments in closing argument. Therefore, we affirm Roger's conviction.

¶3 The following facts are relevant to the issues on appeal. Additional facts will be included in our discussion.

BACKGROUND

¶4 On March 23, 2014, Rogers was charged with nine counts arising from five separate incidents that occurred on dates between March 7 and March 20, 2014. Three counts—misdemeanor retail theft (count one), bail jumping (count two) and misdemeanor operating a vehicle without owner's consent (count nine)—were resolved by Rogers' June 13, 2014 entry of a guilty pleas to counts one and nine. Also, as a part of that proceeding, the State dismissed the bail jumping charge in count two.

[1] Pursuant to a plea agreement that resolved three other charges, Rogers was also convicted on one count of misdemeanor retail theft and one count of misdemeanor operating a vehicle without the owner's consent.

¶5 The following six counts remained for trial: (1) one count of armed robbery (count three) and one count of bail jumping (count four) relating to a March 10, 2014 incident involving victim T.J.; (2) one count of robbery (count five) and one count of bail jumping (count six) relating to a March 11, 2014 incident involving victim J.M.; and (3) one count of armed robbery (count seven) and one count of bail jumping (count eight) relating to a March 13, 2014 incident involving T.R.

¶6 Prior to trial, Rogers filed a motion to exclude evidence that a 2000 Jeep Cherokee was reported stolen.[2] On June 20, 2014, after hearing the parties' arguments, the trial court issued an oral decision denying the motion. The court held that the State could use the fingerprint evidence and reference the fact that it was removed from the Jeep that had been reported stolen, and that, if requested by the defense, any other potential issues of prejudice could be addressed with a cautionary instruction.

¶7 The six remaining charges were tried to a jury from June 23 through June 26, 2014. During its opening statement, the State told the jury that the charges against Rogers arose out of three separate and distinct incidents and that the March 10 armed robbery began as T.J., the victim, was walking home from work and an older model gray Jeep Cherokee pulled up and someone in the rear passenger seat yelled out at T.J. The State further related that, a short time after

[2] Rogers had initially filed a motion in limine to exclude other acts evidence addressing the admissibility of evidence regarding any other acts outside of the crimes charged in counts three through eight. Several days later he filed the motion directed solely at excluding evidence of the stolen Jeep.

At no time during the proceedings did the State contend that Rogers had stolen the Jeep.

that armed robbery, an older model Jeep that reportedly had been taken the previous day was recovered and dusted for fingerprints—Rogers' fingerprint was found on the exterior rear passenger door. Based on that fingerprint, the police assembled a photo array that included a photograph of Rogers. They showed the photo array to T.J. and he identified Rogers as the person who had yelled out at him from the rear passenger seat of the Jeep.

¶8 The defense's opening statement asserted that Rogers had been mistakenly identified by the State's witnesses. Rogers said that he would raise questions about the ability of the witnesses to identify him in the photo array, the differences between the descriptions that the witnesses had provided to the police and his actual physical characteristics, and the lack of corroborating evidence. He also asserted that the presence of his fingerprint on a gray Jeep did not mean much of anything.

¶9 The State's first witness was T.J., who testified about the armed robbery and his identification of Rogers in the photo array. T.J. identified Rogers in the courtroom. Next, the State called Telly Kemos, the officer who conducted a follow-up investigation of that armed robbery and showed T.J. the photo array. The State asked the officer if he was made aware of a "possible vehicle description" and "what was that description." The officer responded, "[y]es.… It was described as a later model Jeep Cherokee." Then, the State asked, "[a]nd did you have a color on that?" The officer responded, "[y]eah, the Jeep Cherokee was stolen on March 10th." Trial counsel objected, stating "hearsay, irrelevant. No foundation, not responsive." The trial court sustained the objection.

¶10 Kemos went on to testify that, when a stolen vehicle is recovered, standard police procedure includes recovering any latent fingerprints from the

vehicle, and that two latent fingerprints were obtained from the Jeep recovered on March 10. The State then asked, "[a]nd you mentioned that the vehicle had been reported stolen?" Kemos responded: "Yes." The State asked, "[a]nd when had it been reported?" Kemos said, "March 9th."

¶11 Trial counsel objected on hearsay grounds. The trial court initially sustained the objection. The State then responded that it was not offering the statement for the truth of the matter asserted, but was "offering it as [the State] had in our pretrial discussions." At trial counsel's request, the court held a side bar, after which the trial court overruled the objection on the ground that the statement that the vehicle had been reported stolen was not offered for the truth of the matter asserted.

¶12 After all the evidence had been presented, the trial court read the closing instructions to the jury, the prosecutor gave an initial closing argument, and Rogers made his closing argument. Then, in the rebuttal argument, the prosecutor argued that odds of the four victims misidentifying Rodgers "is [one] in 1,296." Trial counsel immediately stated, "I'm going to object, there's no testimony or basis for that at all." The prosecutor responded, "[i]f you could do the math—" The trial court overruled the defense objection, stating "it's argument."

¶13 Thereafter, the jury returned a guilty verdict on count three, four, seven, and eight. However, it found Rogers not guilty of counts five and six—the counts involving J.M.

¶14 On October 9, 2014, the trial court sentenced Rogers to an aggregate sentence on counts three and four of twenty-one years, consisting of thirteen years of initial confinement, followed by eight years of extended supervision. The

sentences on the remaining counts were concurrent with the twenty-one year aggregate sentence.

¶15 This appeal followed.

DISCUSSION

¶16 We begin our discussion with Rogers' contention that the trial court committed prejudicial error by admitting evidence that the Jeep, from which his fingerprint had been obtained, had been reported stolen. Rogers asserts that the evidence was improper other acts evidence and inadmissible hearsay.

I. The Trial Court Properly Exercised its Discretion by Admitting the Evidence Regarding the Reportedly Stolen Jeep

A. Standard of Review

¶17 Our review of an evidentiary ruling is limited to determining whether the trial court properly exercised its discretion. *See* ***Chomicki v. Wittekind***, 128 Wis. 2d 188, 195, 381 N.W.2d 561 (Ct. App. 1985). We will affirm the trial court if it (1) "examined the relevant facts," (2) "applied a proper standard of law," and, (3) "using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

B. The Trial Court Properly Concluded that Evidence Regarding the Reportedly Stolen Jeep was Admissible to Provide Context and Background

¶18 ***State v. Marinez*** succinctly sets forth the three-prong ***Sullivan***[3] test that Wisconsin state courts should apply to determine whether other acts evidence is admissible for a proper purpose under WIS. STAT. § 904.04(2)(a)(2013-14).[4] *See* ***Marinez***, 2011 WI 12, ¶19, 331 Wis. 2d 568, 797 N.W.2d 399. Evidence of other acts may be admitted (1) if offered for a permissible purpose pursuant to WIS. STAT. § 904.04(2)(a), (2) if it satisfies the two relevancy requirements in WIS. STAT. § 904.01, and (3) "if its probative value is not substantially outweighed by the risk or danger of unfair prejudice under WIS. STAT. § 904.03." ***Marinez***, 331 Wis. 2d 568, ¶19.

¶19 The party seeking to admit the other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. ***State v. Payano***, 2009 WI 86, ¶¶63, 68 n.14, 320 Wis. 2d 348, 768 N.W.2d 832. Once the proponent of the other acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other acts evidence to show that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* ***id.***, ¶80.

¶20 Under the first prong, Rogers concedes that given T.J.'s testimony that he was robbed by persons in a gray Jeep, the fact that Rogers' fingerprint was

[3] ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), sets forth the test for the admissibility of other acts evidence.

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

found on a gray Jeep a short time later is relevant to identity. However, he objects to the reference that it was a reportedly stolen vehicle. We agree that the fact that the Jeep was reportedly stolen did not add anything to the probative value of the evidence of identity. The fact that the fingerprint was found on the rear passenger door of a late model gray Jeep was probative in establishing Rogers' identity as being the person involved in the March 10th armed robbery. However, the fact that the Jeep had been reportedly stolen added nothing to the identification.

¶21 Nonetheless, the trial court properly concluded that evidence about the Jeep being reportedly stolen was admissible under WIS. STAT. § 904.04(2)(a) for the proper purpose of providing context and background. As noted by the trial court, the evidence provided a more complete presentation of the evidence with respect to how it was that Rogers' fingerprint "was even removed from a particular … gray Jeep Cherokee." Stated somewhat differently, the evidence helped complete the story for the jury why the particular Jeep came to be dusted for fingerprints and why Rogers' photo was included in the photo array shown to T.J.[5]

¶22 In his testimony, Kemos explained why the police sought to recover prints from the reportedly stolen Jeep. He stated that when a stolen vehicle is recovered, standard protocol includes obtaining any available fingerprints from the vehicle. He also testified that, after recovering the Jeep that had been reported stolen on March 9th, it was checked for fingerprints on March 10th, two

[5] Rogers also contends that the evidence is also inadmissible because it is hearsay. However, the reportedly stolen nature of the Jeep was not admitted as evidence that the Jeep had been stolen; that is, the evidence was not admitted for the truth of the matter asserted and, therefore, it was not inadmissible hearsay. *See* WIS. STAT. § 908.01(3). In fact the State never asserted that the Jeep was actually stolen—only that it was reported as stolen.

fingerprints were recovered, and that "based on the results of the fingerprints," Rogers became the "target" of the photo array used in the investigation of the March 10 armed robbery.

¶23 The fact that Rogers' fingerprint was found on the rear passenger door of the recovered Jeep corroborates T.J.'s testimony that Rogers was sitting in the rear passenger seat when the armed robbery of T.J. began. Additionally, finding the fingerprint on the Jeep was relevant to explain the context of how Rogers' photo came to be placed in the photo array that police showed to T.J. Specifically, based on the facts that the fingerprint was found on the gray Jeep and that color and type of vehicle was implicated in the March 10 armed robbery, the police assembled a photo array that included Rogers' photo and showed it to T.J.

¶24 Regarding the second prong, we conclude that pursuant to WIS. STAT. § 904.01, the trial court reasonably determined that the evidence that the Jeep was reported stolen was relevant to establish why police checked the Jeep for fingerprints and the connection between Rogers and the March 10 armed robbery. Although Rogers states that the trial court's relevancy analysis "simply ignored the stolen []vehicle aspect" in its analysis, the reportedly stolen nature of the Jeep was included in the trial court's analysis since the Jeep's status as a recovered vehicle that was reported stolen was the reason it was checked for fingerprints.

¶25 Under the third prong, the trial court also reasonably determined that, in accord with WIS. STAT. § 904.03, the probative value of the evidence that the Jeep was reported stolen was not substantially outweighed by the danger of unfair prejudice to Rogers. Rogers argues that the evidence that his fingerprint was on a reportedly stolen vehicle unduly prejudiced him, because the jury would infer that he was more likely to steal and thus more likely to have committed the

theft-type offenses with which he was charged. However, we conclude that while the evidence connecting Rogers with the reportedly stolen Jeep could prejudice him, he has not shown that its admission was unduly prejudicial. The jury's return of not guilty verdicts as to the March 11th robbery, which included the allegation that Rogers stole J.M.'s vehicle, supports our conclusion.

¶26 Additionally, the trial court provided the jury with cautionary instructions advising them as to context and background,

> [e]vidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically, evidence has been presented that the defendant's fingerprint has been recovered from a stolen vehicle. *If you find that this conduct did occur, you should consider it only on* the issues of *identity* and *context or background*.
>
> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case.
>
> *And context and background*, that is to provide a more complete presentation of the evidence relating to the offense charged.

(Emphasis added.) The jury is presumed to comply with properly given limiting and cautionary instructions. *See* ***State v. Hurley***, 2015 WI 35, ¶92, 361 Wis. 2d 529, 861 N.W.2d 174. Thus, any potential prejudice was obviated because the jury was properly instructed regarding the only purposes that they could consider the evidence that the Jeep had been reported stolen and that the fact the vehicle had been reported stolen could not be considered for the improper purpose of suggesting that Rogers had a character trait or acted in conformity with that trait. Thus, we conclude that the trial court did not err in admitting the evidence regarding that the Jeep was reported stolen.

¶27 Moreover, even if the reference to the Jeep being reportedly stolen was not admissible, its admission was harmless. *See* WIS. STAT. § 805.18(2). As noted, the State did not assert or argue that Rogers was involved in the theft of the Jeep. Additionally, although Rogers argues that the jury was allowed to conclude that since Rogers' fingerprint was on a reportedly stolen vehicle, he was more likely to steal, and thus, he was more likely to have committed the theft-type offenses with which he was charged, his argument is refuted by the fact that the jury acquitted Rogers of the robbery (count five) arising out of the March 11, 2014 incident involving J.M. In particular, we note that the March 11 robbery of J.M. was the only crime in which the victim's vehicle was stolen. If the jury was swayed by the reportedly stolen car reference to believe Rogers was a bad person and, therefore, more likely to have committed the theft offenses, they would have convicted him of stealing J.M.'s car—they did not. We hold that even if the trial court erred in admitting the reference to the Jeep being reportedly stolen, it was harmless error.

II. The Prosecutor's Improper Rebuttal Closing Comments regarding the Mathematical Probability of Misidentification in the Photo Array were Not Prejudicial

¶28 Rogers also contends that the trial court committed prejudicial error in allowing the prosecutor's rebuttal closing argument regarding the mathematical odds of him being misidentified. The State contends that the argument was not improper and, even if it was improper, any error was harmless.

A. Standard of Review

¶29 Generally, counsel is allowed significant latitude in closing argument and it is within the trial court's discretion to determine the propriety of

counsel's statements and arguments to the jury. ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). We will affirm the trial court's ruling "unless there has been an [erroneous exercise] of discretion that is likely to have affected the jury's verdict." *See* ***State v. Bjerkaas***, 163 Wis. 2d 949, 963, 472 N.W.2d 615 (Ct. App. 1991).

¶30 "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). Argument based on facts that are not in evidence is improper. *See* ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980).

¶31 However, the constitutional test is whether the prosecutor's remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***Wolff***, 171 Wis. 2d at 167 (citation omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *See* ***id.*** at 168. Thus, courts consider the prosecutor's arguments in the context of the entire trial. *See* ***id.*** Improper remarks of counsel may be cured if "'given the overall evidence of guilt and the curative effect of instructions, no prejudice is shown.'" ***Albright***, 98 Wis. 2d at 677 (citation omitted).

B. Rogers was not Prejudiced by the Improper Comments in the Prosecutor's Closing Argument

¶32 Rogers asserts the trial court erred in allowing the prosecutor to argue:

> *Now, I'm not a math person, lucky I have a partner here who is.* Four victims, each looked at photo arrays separately, three of the four on completely different dates. … Four different people looked at photo arrays with six people in each photo array. *The odds of misidentification by all four of those individuals—I have it written down—is [one] in 1,296.*

(Emphasis added.)

¶33 The State maintains that the prosecutor's comments simply involve an observation of the mathematical probability of error. This assertion is not supported by any citation to legal authority and is not developed. Thus, we decline to further consider the assertion.[6] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶34 Moreover, there was no testimony at trial regarding the mathematical probability of misidentification. Thus, we conclude that the prosecutor's assertion in closing that "[t]he odds of misidentification by all four of those individuals …[was one] in 1,296" improperly refers to facts not in evidence and improperly presented the argument as though it was based on expert testimony.[7] *See* ***Albright***, 98 Wis. 2d at 676.

[6] To be specific, we do not consider whether any evidence of a mathematical probability calculation would be relevant, and if so, what type of evidence would be admissible to establish such probability.

[7] In contending that the trial court erred, Rogers relies on ***Affett v. Milwaukee & Suburban Transport Corp.***, which addressed the use of a formula in a civil case closing argument to calculate damages for pain and suffering. *See* ***id.***, 11 Wis. 2d 604, 612, 106 N.W.2d 274 (1960). The court held that the use of a mathematical formula was "pure speculation by counsel, which is not supported by the evidence and presents matters which do not appear in the record." *See* ***id.*** The court was addressing the broader issue of what counsel may do in terms of asking the jury to attach a figure to damages in a personal injury case. *See* ***Halsted v. Kosnar***, 18 Wis. 2d 348, 351-54, 118 N.W.2d 864 (1963). It does not provide guidance in the context of the issue presented in this criminal case.

¶35 We further conclude that the prosecutor's comment to the jury that they were "lucky [she had] a partner here who is [a math person]," also improperly told the jury that they should believe the partner's probability assessment and vouched for a fact not in evidence. *See* ***State v. Smith***, 2003 WI App 234, ¶26, 268 Wis. 2d 138, 671 N.W.2d 854 (stating "[t]his portion of the prosecutor's closing argument unfairly referenced matters not in the record and vouched for the credibility of the police witnesses"). Moreover, the mathematical calculation has to assume the identification was purely random—it is not. Identification involves many factors such as the witness' opportunity and ability to make observations, the duration of the observation, the lighting, and the effect on the witness' memory due to the time elapsed between the observation and the identification procedure. *See* WIS JI-CRIMINAL 141. For all these reasons we conclude these comments in the prosecutor's rebuttal argument were improper.

¶36 However, we further hold that when the comments are considered in the context of the entire trial, they do not infect the fairness of the trial and, therefore, Rogers has not shown that he was prejudiced by this conduct. *See* ***Wolff***, 171 Wis. 2d at 167-68. First, at the close of the evidence, the trial court instructed the jury that its duty was to follow all of the court's instructions and that it should "[c]onsider only the evidence during the trial and the law as given to you from the instructions, …." The trial court also instructed the jury that "[r]emarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion." Thus, the jury was properly instructed that closing arguments are not evidence.

¶37 Second, the trial court read WIS JI-CRIMINAL 141, which addresses identification of a defendant, to the jury. That jury instruction reads in part "The identification of the defendant is an issue in this case and you should give it your

careful attention…You should consider the credibility of a witness making an identification of the defendant in the same way you consider credibility of any other witness." It goes on to say "Identification evidence involves an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification."

¶38 The jury instructions then instructs the jury to "[c]onsider the witness' opportunity for observation, how long the observation lasted, how close the witness was, the lighting, the mental state of the witness at the time, the physical ability of the witness to see and hear the events, and any other circumstances of the observation." It goes on to instruct "You should also consider the period of time which elapsed between the witness' observation and the identification of the defendant and any intervening events which may have affected or influenced the identification."

¶39 Summarizing the factors the jury should consider regarding identification the instruction states "In evaluating the identification evidence, you are to consider those factors which might affect human perception and memory and all the influences and circumstances relating to the identification. Then give the evidence the weight you believe it should receive." Juries are presumed to follow the trial court's instructions. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490. As noted, improper remarks of counsel may be cured if "'given the overall evidence of guilt and the curative effect of instructions, no prejudice is shown.'" *See* ***Albright***, 98 Wis. 2d at 677 (citation omitted).

¶40 Third, despite the prosecutor's improper argument, the jury acquitted Rogers of the charges involving J.M., even though J.M. identified Rogers as the person who robbed her. This shows the jury was not swayed by the prosecutor's improper remarks.

¶41 Lastly, T.J.'s testimony clearly identified Rogers as the person whose actions initiated the armed robbery and T.R.'s testimony clearly identified Rogers as the person who robbed her. T.J., the victim of the March 10 armed robbery, testified that the incident occurred as he was walking home from work about two o'clock on a sunny day. A gray Jeep pulled up and someone in the rear right seat yelled out to T.J. that he had fought his cousin. T.J. also testified that when he was shown a photo array with six photographs and selected a photo from that array, he was "very sure" that he had picked the photograph of one of the guys who was involved in the incident. He also identified Rogers, who was seated in the courtroom, as having participated in the crime. T.J. said that Rogers yelled at him from the rear seat of the Jeep, he was the first person to step out of the Jeep, their faces were a couple of inches apart when Rogers was next to T.J. and Rogers was wearing a Bulls knit cap at the time of the offense.

¶42 T.R., the victim of the March 13 armed robbery, testified that the robbery occurred at about at 9:45 p.m., as she was driving her car into the garage in the alley behind her house. She testified that she saw two men running toward the garage, they entered it, and one of the men stood next to her with a gun pointed at her forehead, and ordered her to the ground. The lights were on in the garage and she had a good opportunity to look at the man with the gun because he was "standing right next to [her]." T.R. testified that when the police subsequently showed her a photo array, she identified Rogers. In the courtroom, she also identified Rogers as the man with the gun.

¶43 Based on the foregoing, and having considered the prosecutor's mathematical probability comments under the totality of the circumstances, we conclude that prejudice has not been shown.

CONCLUSION

¶44 We conclude that the trial court did not err by admitting evidence that the Jeep bearing Rogers' fingerprint was stolen and that Rogers was not prejudiced by the prosecutor's improper comments. Therefore, we affirm Rogers' judgment of conviction.

By the Court.—Judgment affirmed.

This opinion is not recommended for publication.