COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2087-CR **Cir. Ct. No. 2009CF3118**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO LAVEL MANCE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Antonio Mance appeals a judgment of conviction for first-degree intentional homicide and attempted first-degree intentional

homicide, and orders denying his motion and supplemental motion for postconviction relief. Mance contends that he is entitled to a new trial based on newly discovered evidence, prosecutorial misconduct, ineffective assistance of trial counsel, and plain error, and in the interest of justice. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Mance was charged with first-degree intentional homicide of Derrick Kimber and attempted first-degree intentional homicide of M.R. At trial, Mance admitted that on November 24, 2009, near the intersection of Porter Avenue and Randall Street in Beloit, he fired multiple shots from two handguns into a vehicle, killing Kimber and wounding M.R. Mance's defense was that he shot at Kimber and M.R. in self-defense. *See* WIS. STAT. § 939.48 (2015-16)[1] (setting forth under what circumstances the privilege of self-defense may be asserted).

¶3 At trial, the State presented evidence that included the following. Mance filed multiple shots into a Chevrolet HHR driven by Kimber as Kimber was approaching Randall Street while driving north on Porter Avenue. While Mance was shooting, Kimber backed the vehicle into a pole on Porter Avenue, between the intersections of Randall Street and Harvey Street. M.R. ran from the vehicle after it crashed into the pole, and the vehicle moved forward again until it crashed to a stop in the vicinity of Merrill Elementary School, which is located at the intersection of Copeland Avenue and Porter Avenue, one block north of the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

intersection of Randall Street and Porter Avenue. The State also presented evidence that at the time of the shooting, Kimber and M.R. were unarmed.

¶4 M.R. testified that he and Kimber were driving north on Porter Avenue and as they approached Randall Street, they came upon Mance, who was standing in the center of Porter Avenue. M.R. testified that Mance began shooting at the vehicle and Kimber put the car in reverse and backed into a pole. M.R. testified that after the vehicle came to a stop and Mance stopped shooting, Mance took off running and M.R. sought help at a nearby house. M.R. testified that he and Kimber did not display any weapons at Mance before Mance began shooting at them, and that they did not have any weapons with them in the car at the time of the shooting.

¶5 Patsy Thurman testified that on November 24, 2009, she was inside her home on Randall Street when she heard gunshots. Thurman testified that after the gunshots stopped, she looked outside her home toward the intersection of Randall Street and Porter Avenue and saw "a [] huge amount of smoke in the air," and M.R. limping towards her home. Thurman testified that M.R., who appeared to be unarmed, informed her that he was dating her daughter and asked to use her phone to call emergency personnel. Thurman testified that M.R. took a seat in her living room where he remained until police arrived, that M.R. was always within view, and that she and the police did not find any handguns in Thurman's living room.

¶6 Michael Sminchak, who was working in the area and who had no relationship with the parties noted in the record, testified that at the time of the shooting, he was working outside, near the intersection of Porter Avenue and Keeler Avenue, a few blocks south of the intersection of Randall Street and Porter

Avenue. Sminchak testified that after hearing gunshots, he looked in the direction of the gunshots and observed an individual standing in the street with his arm out in front of him pointing a gun in the direction of Kimber and M.R.'s vehicle. Sminchak testified that after the shooting stopped, he observed the individual with the gun and one passenger from the vehicle run away from the vehicle. Sminchak testified that he did not observe any guns sticking out of Kimber and M.R.'s vehicle and did not see anything suggesting shots fired from within the vehicle.

¶7 Bobby Brown testified that he was inside his home on Copeland Avenue at the time of the shooting. Brown testified that after hearing multiple gunshots, he stepped onto his porch and observed a vehicle "fly up the street," and then heard a crash in the vicinity of Merrill Elementary School. Brown testified that he went to the scene of the accident where he observed Kimber sitting in the driver's seat with his upper body slumped over into the passenger seat. Brown testified that he did not observe any other individuals in the vicinity of the crash at that time. Brown testified that he opened the passenger side door and told Kimber to "keep breathing," and that at that point law enforcement officers arrived at the scene and ordered him to lie "on the ground." Brown testified that from the time he arrived at the scene, approximately ninety seconds passed before law enforcement arrived. Brown testified that he did not reach into the vehicle and that he did not see anyone take anything from it. Like Sminchak, there is no indication at trial that Brown had any relationship with the parties prior to the shooting.

¶8 Vincent Myers, also not noted as having had any relationship with the police or anyone involved in this incident, testified that on November 24, 2009, he was walking on Copeland Avenue with his brother when he heard multiple gunshots and observed a vehicle "flying past the corner of Copeland

[Avenue] and Porter [Avenue] and crash[]" near Merrill Elementary School. Myers ran toward the vehicle and arrived at the vehicle approximately sixty seconds after the vehicle crashed. Myers testified that when he arrived at the vehicle, two other individuals were already there—Brown, who was standing at the passenger door telling the victim to keep breathing, and another individual, Cornell Murray, who Myers observed walk from the passenger's side to the driver's side of the vehicle. Myers walked toward the driver's side of the vehicle and by the time he made it to the door, law enforcement officers arrived at the scene and ordered him to the ground. Myers testified that he did not see anyone running from the vehicle, that he did not touch the vehicle, and that he did not observe anyone take anything from the vehicle.

¶9 Andrew Arnold, a sergeant with the Beloit Police Department, testified that he arrived at the scene of the crash near Merrill Elementary School, approximately one and one-half to two minutes after receiving a call reporting the shooting. Sergeant Arnold testified that upon arriving at the scene of the crash, he observed three individuals standing near the vehicle and those individuals were commanded to lie on the ground. Sergeant Arnold did not observe any other non-law enforcement personnel in the vicinity of the vehicle and he did not observe anyone walking away from the vehicle carrying anything. Sergeant Arnold testified that the three individuals who were commanded to lie on the ground were searched, as was the vehicle, and that no guns were found.

¶10 The defense presented evidence that Mance shot at Kimber and M.R. in self-defense. The defense presented evidence that Mance received a death threat from M.R. prior to the shooting and that before Mance shot at the two men, Kimber and M.R. had threatened Mance with handguns.

¶11 Mance testified that a few hours before the shooting occurred, he received a death threat from M.R. Mance testified that at the time of the shooting he was taking a walk and that, because of the earlier threat, he was carrying two handguns in the pockets of his coat. While Mance was walking, a vehicle driven by Kimber pulled up next to him, and Mance saw Kimber and M.R. pointing "semiautomatic" handguns at him. Mance testified that Kimber "started clicking the trigger [of his gun] real fast but [] nothing happen[ed]." Mance testified that he heard the gun "clicking" and that he saw Kimber pulling the trigger with his finger, making a repetitive "click, click, click, click, click, click, click, click" sound. Mance testified that when Kimber's gun failed to fire, he ran in front of the car and pulled out his two guns, a .40 caliber Glock and a nine millimeter, and fired multiple shots into Kimber's vehicle. Mance testified that, after he fired the shots into the vehicle, he observed Kimber "leaning over and pointing his gun at" him, and that he took off running away from the vehicle.

¶12 Sandra Taylor, a cousin of the mother of Mance's children, testified that she observed M.R. run from the vehicle after it crashed and that "it looked like [M.R.] had [a gun] in his hand." Taylor testified that her cousin ran after M.R., and that she had "scream[ed] at [her cousin] to tell her to quit chasing [M.R. because M.R. had] a gun in his hand." Taylor also testified that after the crash, she ran toward the vehicle "and it was like a boy and a girl had went in the car. [] I thought they was trying to see if the boy was alive that was still in the car … [t]hey … put half their bodies inside [the driver's side of] the car." Taylor testified that the boy "took something out of the car and put it in his pockets." Taylor testified that approximately fifteen minutes elapsed from the time the boy took something from the car until police arrived. On cross-examination, Taylor

testified that she was not certain that M.R. had a gun in his hand when he ran from the crashed vehicle.

¶13 Nora Steel, Mance's father, testified that he was standing near the intersection of Harvey Street and Porter Avenue shortly before the shooting took place on November 24, 2009. Steel testified that he observed Kimber driving a Chevrolet HHR north on Porter Avenue with three or four occupants in the vehicle, and one of the occupants of the vehicle "had a gun." Steel testified that he saw M.R. running away from the vehicle before it crashed near the school and that he saw M.R. holding something "dark" in his hand. Steel testified that before law enforcement officers arrived at the scene of the crash, "people [were] running around, back and forth, in and out of [the] car. So whatever they took, they took before any police got there."

¶14 Irrie Fisher, Mance's girlfriend and the mother of two children fathered by Mance, testified that at the time of the shooting, she was inside a house on Porter Avenue located near the pole that Kimber's vehicle backed into during the shooting. Fisher testified that she looked out the door of the house and observed Kimber driving the vehicle, M.R. climbing into the backseat of the vehicle, and another individual named "Mo" in the back seat. Fisher testified that, after the vehicle crashed into the pole in front of her residence, M.R. ran from the vehicle and Fisher's mother chased after M.R. "screaming [M.R.] got a gun." Fisher testified that she saw M.R. carrying something in his right hand as he ran from the vehicle, but was unable to identify what it was. Fisher further testified that at the time of the shooting, M.R. believed that she or Mance owed him money, that M.R. had threatened to kill Mance if Mance did not repay the money, and that after the shooting, she spoke with M.R. who stated "it's not over," which Fisher took to mean that M.R. was going to get another chance to kill Mance.

¶15 During the State's rebuttal, Detective John Fahrney attempted to repeatedly dry-fire (firing a weapon without a loaded chamber) a .40 caliber Glock handgun, a single action semiautomatic weapon. Detective Fahrney was able to dry-fire the unloaded weapon one time, but was unable to pull the trigger any additional times. Detective Fahrney testified that when the trigger is pulled on a loaded semiautomatic gun, the bullet is fired and the "slide" moves back on the gun and then forward, loading the next bullet. Detective Fahrney testified if there are no more bullets in the gun, after the last bullet is fired the "slide" will remain back and the trigger cannot be pulled until the slide is "recycled." On cross-examination by the defense, Detective Fahrney testified that he was not aware of any semiautomatic gun that functions in the following way: if the gun is unloaded, the trigger can be pulled repeatedly without manually recycling the slide forward. No foundation was laid for Detective Fahrney to testify as an expert on the mechanics of firing semiautomatic handguns.

¶16 The jury found Mance guilty of both first-degree intentional homicide and attempted first-degree intentional homicide. Mance moved the circuit court for postconviction relief. Mance asserted in part that he is entitled to a new trial on the basis of newly discovered evidence in the form of a video report prepared by Anthony Paul in which Paul demonstrated that there are double action semiautomatic handguns that will make "repeated clicking sounds" when the gun is repeatedly dry-fired without recycling the slide before each trigger pull. Mance also asserted that he is entitled to a new trial on the basis of ineffective assistance of counsel. Mance argued that his trial counsel was ineffective for failing to object to Detective Fahrney's testimony that an unloaded Glock cannot be repeatedly dry-fired without manually recycling the slide forward and that he was not aware of any semiautomatic gun that could. Mance also argued that his trial

counsel was ineffective for failing to object to the State's reference to Detective Fahrney's testimony in the State's closing argument. The court denied Mance's motion following a hearing.

¶17 Mance filed a supplemental postconviction motion in which he argued that additional newly discovered evidence, a recorded jail telephone call between M.R. and an unidentified man, and a felony conviction by M.R., warrants a new trial. Following a hearing on Mance's supplemental postconviction motion, the circuit court denied the motion. Mance appeals.

¶18 We set forth additional facts in our discussion below.

DISCUSSION

¶19 Mance contends that he should be granted a new trial based on newly discovered evidence, ineffective assistance of counsel, prosecutorial misconduct, and plain error, and in the interest of justice. We address each contention in turn below.

A. Newly Discovered Evidence

¶20 Mance contends that the following newly discovered evidence, separately and cumulatively, satisfies the standard for granting a new trial: (1) a video in which Paul demonstrates on four different double action semiautomatic handguns that the trigger on those guns can be repeatedly pulled, creating an audible "clicking" without the shooter having to manually recycle the slide; (2) a recorded conversation between M.R. and an inmate at the Rock County jail; and (3) evidence that M.R. has a prior out-of-state felony conviction.

¶21 "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. A defendant alleging newly discovered evidence must prove, by clear and convincing evidence, that: "'(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.'" ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quoted source omitted). If the defendant establishes the four criteria, the circuit court must determine whether there is a reasonable probability that a different result would be reached on retrial. ***Id.*** "'A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Plude***, 310 Wis. 2d 28, ¶33 (quoted source omitted). We review a circuit court's determination that the first four factors have or have not been met for an erroneous exercise of discretion. ***State v. Edmunds***, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590. Whether there is a reasonable probability that a different result would be reached is a question of law that we decide independently. *See* ***Plude***, 310 Wis. 2d 28, ¶33. In making the reasonable probability determination, a reviewing court "should consider whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." ***Id.***, ¶33.

1. Anthony Paul Video

¶22 Assuming for the sake of argument that Mance was able to establish the first four criteria necessary to obtain a retrial based on newly discovered evidence with regard to the Paul video, we conclude that Mance has not shown by

clear and convincing evidence that there is a reasonable probability that a different outcome would be reached on retrial.

¶23 Mance argues that there is a reasonable probability that the jury would have found him not guilty had the jury seen the Paul video because: the issue of whether Kimber and M.R. had guns at the time of the shooting "was the subject of disparate testimony"; although Detective Fahrney testified as a lay witness, he "appeared to be an expert" on guns and was called to prove that Mance was not truthful; the prosecution "repeatedly argued that [Detective] Fahrney's testimony proved Mance's version of events was 'impossible,'" meaning the jury could believe either Mance or Detective Fahrney, but not both; and Detective Fahrney was, at a minimum, ignorant as to whether semiautomatic weapons can be repeatedly dry-fired without manually recycling the slide. Mance argues that the facts of this case are similar to those in ***Plude***, wherein our supreme court concluded that evidence that an expert witness testified falsely about his credentials was newly discovered evidence that gave rise to a reasonable probability that had the jury heard the expert's misrepresentations about his credentials, the jury would have had a reasonable doubt as to the defendant's guilt. ***Id.***, ¶3.

¶24 In ***Plude***, the defendant was convicted of first-degree homicide for the death of the defendant's wife. ***Id.***, ¶1. The State's theory at trial was that the defendant poisoned his wife and drowned her in toilet water. The defendant argued that his wife committed suicide by overdosing on drugs and ultimately drowned in fluids created by her own body. ***Id.***, ¶4. At trial, the position that the defendant found his wife in was the subject of "much testimony," including the testimony of Dr. Saami Shaibani, who was called as an expert by the State to testify on injury mechanism and analysis. ***Id,*** ¶¶2, 8, 23-24. Dr. Shaibani testified

that the position in which the defendant said he found his wife's body was physically impossible. ***Id.***, ¶¶2, 8. It was discovered after trial that Dr. Shaibani had lied under oath about his credentials. ***Id.***, ¶¶23-24, 34. Our supreme court stated that aside from Dr. Shaibani's testimony, the State's evidence regarding the manner of death was either inconclusive or exculpatory, and as a result, Dr. Shaibani's testimony was "a critical link in the State's case." ***Id.***, ¶46-48. The court concluded that "[t]he inconclusive inculpatory medical expert testimony … leads us to conclude that … [there is] a reasonable probability that the jury hearing of [Dr.] Shaibani's false testimony about his credentials would have had a reasonable doubt as to [the defendant's] guilt." ***Id.***, ¶49.

¶25 The present case is distinguishable from ***Plude***. The critical issue here is whether Kimber and M.R. had guns at the time of the shooting. As summarized in detail above, the State presented strong evidence from multiple sources, including from witnesses who had no interest in the case, that they did not have guns. To summarize some of that evidence, M.R. testified that he and Kimber did not have weapons at the time of the shooting. Thurman, who let M.R. into her home after the shooting, testified to the multiple reasons that she believed that M.R. did not have a gun on him and that no guns were found in her home. Myers testified that he arrived at the scene of the crash at Merrill Elementary School approximately sixty seconds after the vehicle crashed, that when he arrived Brown was already there and was speaking to Kimber, and that he did not see anyone running from the vehicle. Brown testified that he did not see anyone take anything from the vehicle. Sergeant Arnold testified that no guns were found inside the vehicle. In addition, unlike in ***Plude***, Mance does not assert that Detective Fahrney lied during his testimony.

¶26 In comparison, Mance presented relatively weak evidence that Kimber and M.R. had guns, which consisted of testimony by Mance and others connected to him. To summarize, Mance testified that Kimber pointed a gun at him and dry-fired the gun at him multiple times. Taylor, a relative of the mother of his children, testified that she had told another relative to stop chasing M.R. because M.R. had a gun, but later admitted that she was not certain that M.R. had a gun in his hand, and she testified that she observed a boy take something from the vehicle after it crashed. Steel, Mance's father, testified that before the shooting he saw someone in Kimber's vehicle who "had a gun"; after the vehicle crashed he saw M.R. holding something "dark"; and he observed people "running around" the vehicle after it crashed. Fisher, Mance's girlfriend, testified that she saw M.R. running from the vehicle after it crashed carrying something. For obvious reasons, Mance's evidence could have been discounted by the jury in light of the State's evidence to the contrary, which included testimony by multiple individuals with no identified connection to Mance.

¶27 In light of the much stronger evidence that Kimber and M.R. did not have guns at the time of the shooting, we conclude that the testimony described above in paragraphs 25 and 26 was unlikely to have played a significant role at trial, and this topic would also not be significant at a new trial that included the new firearms testimony. Accordingly, we conclude that Mance has not shown that there is a reasonable probability that the jury would have had reasonable doubt as to Mance's guilt had the jury been presented with evidence that the trigger on a particular type of semiautomatic weapon can be repeatedly pulled without manually recycling the slide, because there was insufficient reason for the jury to believe that Mance was threatened with such a gun.

2. Recorded Telephone Call

¶28 Mance contends that a recorded conversation between M.R. and an unidentified inmate at the Rock County jail satisfies the standard for a new trial based on newly discovered evidence. During the call, M.R. stated as follows: "the night before that we had the nigga. I was like Man let's get him. Man said no and then look what happened."

¶29 We agree with the State that there is not a reasonable probability that the jury would have had reasonable doubt as to Mance's guilt if they had heard the recorded conversation. We, therefore, do not address the first four criteria.

¶30 As discussed above, the critical issue at trial was whether Kimber and M.R. had threatened Mance with guns at the time of the shooting. M.R.'s statement to the unknown person in the recorded conversation is so ambiguous that it is difficult to see how the statement stands for evidence of anything, much less that it sheds light on this critical issue. Although the telephone call could possibly support the inference that there was an ongoing feud between Kimber and M.R. on the one hand, and Mance on the other, Mance fails to explain how it sheds light on the question of whether Kimber and M.R. had guns at the time of the shooting. Accordingly, we agree with the circuit court that this evidence does not satisfy the standard for a new trial.

3. M.R.'s Prior Felony Conviction

¶31 Mance contends that newly discovered evidence that M.R. had a prior felony conviction satisfies the standard for granting a new trial. Mance and the State do not dispute whether the first and second criteria are satisfied. Accordingly, we will assume, without deciding, that they are.

¶32 Mance asserts that the third criterion, that the evidence is material, is satisfied because whether M.R. was a felon was "material to [M.R.'s] credibility." However, the discovery of new evidence that merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone. ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968). Mance does not argue that evidence that M.R. had a prior felony conviction is material for any reason other than impeachment. Accordingly, we conclude that he has failed to establish that this evidence satisfies the criteria for a new trial.[2]

B. Ineffective Assistance of Counsel

¶33 Mance contends that he received ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Mance bears the burden of proving that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, the defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." ***Id.*** Because a defendant must show both deficient performance and prejudice, an appellate court need not consider one prong if the defendant has failed to establish the other. ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666,

[2] Mance argues that if the evidence discussed above in ¶¶22-32 does not separately satisfy the standard for a new trial, taken together it does. We have determined that the evidence does not satisfy the standard for a new trial. Adding them together adds nothing. Zero plus zero equals zero. Accordingly, we reject this argument.

643 N.W.2d 878. Whether counsel's performance was deficient or prejudicial are questions of law that we determine *de novo*. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

¶34 Mance asserts that his trial counsel was ineffective for failing to object to Detective Fahrney's testimony regarding the dry-firing of semiautomatic handguns, because it was irrelevant and lacked a sufficient foundation.

¶35 We do not address whether Mance's trial counsel was deficient in failing to object to Detective Fahrney's testimony because we conclude that Mance has not established that trial counsel's failure to object to that testimony was prejudicial. First, we have already explained above our conclusion that this testimony was not significant, based on the strong evidence that Kimber and M.R. did not have guns at the time of the shooting. Second, Mance provides us with only conclusory assertions on the prejudice issue, which are not sufficient. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (generally, this court does not consider conclusory assertions and undeveloped arguments). Accordingly, we reject this argument.

¶36 Mance argues that his trial counsel was ineffective because counsel "ask[ed] [Detective Fahrney] specifically about clicking, and failed to object to the demonstrably false inference repeatedly argued by prosecutors." Mance does not present this court with a developed argument explaining why counsel's actions were deficient or how or why he was prejudiced. We therefore reject this argument. *See* ***id.*** (we do not address insufficiently developed arguments).

C. Alleged Prosecutorial Misconduct

¶37 Mance contends that he is entitled to a new trial because prosecutorial misconduct denied him due process. The alleged misconduct is based on the following three acts by the prosecutor: (1) "eliciting misleading testimony from [Detective] Fahrney"; (2) failing to exercise due diligence to discover M.R.'s felony conviction; and (3) making two improper arguments during closing remarks. The reversal of a defendant's conviction is warranted only when the prosecutor's action "has 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Haywood***, 2009 WI App 178, ¶15, 322 Wis. 2d 691, 777 N.W.2d 921 (quoted source omitted).

1. Prosecutor's Examination of Detective Fahrney

¶38 Mance argues that his due process rights were violated because the testimony elicited from Detective Fahrney by the prosecutor "created a false inference [that] no gun could click[], which led to the inescapable conclusion that Mance was lying." We reject this argument for two reasons.

¶39 First, it could not have infected the trial with unfairness to elicit testimony that we have concluded was not significant, as explained above.

¶40 Second, the State argues that Mance has forfeited his right to raise this challenge on appeal because Mance did not object to the alleged error at trial. *See* ***id.***, 322 Wis. 2d 691, ¶15 (failure to object to alleged prosecutorial misconduct forfeits the defendant's right to direct review of the conduct). In his reply brief, Mance does not challenge the State's argument. A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App.

1994). Accordingly, we treat Mance's failure to dispute the State's forfeiture argument as a concession and do not further address this issue.[3]

2. Discovery of M.R.'s felony conviction

¶41 Mance argues that he is entitled to a new trial based on a ***Brady***[4] violation relating to new information that M.R. has a prior felony conviction. A ***Brady*** violation occurs when the State withholds evidence favorable to the defendant, whether willfully or inadvertently, resulting in prejudice. ***State v. Harris***, 2004 WI 64, ¶15, 272 Wis. 2d 80, 680 N.W.2d 737.

¶42 The defendant has the burden of demonstrating a ***Brady*** violation. *See* ***id.***, ¶¶13-14 (explaining the ***Brady*** violation standards, and stating that the defendant must demonstrate that the standards are met). The ultimate determination of whether a ***Brady*** violation occurred is a due process issue that presents a question of law, which we review de novo. *See* ***State v. Lock***, 2012 WI App 99, ¶94, 344 Wis. 2d 166, 823 N.W.2d 378.

¶43 Mance argues that the new information that M.R. had a prior felony conviction was favorable to him and that the State did not exercise due diligence in disclosing that information. We conclude that regardless of whether Mance is correct on these points, he fails to show prejudice.

¶44 In the context of ***Brady***, "[p]rejudice means that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the

[3] We note that we have rejected Mance's ineffective assistance of counsel claim based on his trial counsel's failure to object to Detective Fahrney's testimony.

[4] ***Brady v. Maryland***, 373 U.S. 83, 87 (1963).

result of the proceeding would have been different.'" ***Harris***, 307 Wis. 2d 555, ¶61 (quoted source omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***Id.*** (quoted source and internal quotation omitted). "'[S]trictly speaking, there is never a real ***Brady*** violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" ***Id.*** (quoted source omitted).

¶45 Mance argues that evidence that M.R. had a prior felony conviction would have impeached M.R.'s credibility and provided a motive for M.R. to lie about having a gun at the time of the shooting. However, the fact of a prior felony conviction would not necessarily have destroyed M.R.'s credibility. Moreover, M.R.'s testimony on the critical issue of whether he and Kimber were armed was strongly supported by the testimony of other witnesses, as we have already discussed. This other evidence renders the credibility of M.R. less important, and we conclude that there is no reasonable probability that there would have been a different outcome had the prior conviction been disclosed to the jury.

3. Prosecutor's Remarks in Closing Arguments

¶46 Mance argues that during the prosecution's closing arguments, the prosecutor improperly asked the jury to draw the following two false inferences: (1) that it was impossible for Mance to have heard a "clicking" sound coming from Kimber's gun; and (2) that M.R. did not have any criminal convictions. Mance asserts that because the State should have known that these inferences were false, the State bears the burden of proving that they were harmless.

¶47 The State argues that Mance has forfeited direct review of this issue because Mance did not object to these statements at trial. *See* ***Haywood***, 322

Wis. 2d 691, ¶15 (failure to object to alleged prosecutorial misconduct forfeits the defendant's right to direct review of the conduct). In his reply brief, Mance does not challenge the State's argument. A proposition asserted by a respondent on appeal and not disputed by the appellant's reply is taken as admitted. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Accordingly, we treat Mance's failure to dispute the State's forfeiture argument as a concession and do not further address this issue. Moreover, even if we did address these two issues, we have already effectively addressed both and rejected them.

D. New Trial in the Interest of Justice

¶48 Mance contends that he is entitled to a new trial in the interest of justice. This court has discretion to set aside a verdict and order a new trial in the interest of justice where "'it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.'" ***State v. Harp***, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991), quoting WIS. STAT. § 752.35.

¶49 Mance argues that Detective Fahrney's demonstration of dry-firing a semiautomatic weapon was inadmissible because it was not relevant; Detective Fahrney's testimony as to whether Detective Fahrney was aware of any other semiautomatic weapons that can be repeatedly dry-fired without manually recycling the slide was inadmissible because the testimony lacks foundation; and Detective Fahrney's testimony was misleading. Mance argues that had this evidence been excluded at trial, and had the jury been told of M.R.'s recorded jail conversation, he would have "had a viable self-defense claim."

¶50 We are not persuaded. We will assume without deciding that Mance is correct that Detective Fahrney's demonstration and testimony as to the ability of

a semiautomatic gun to be repeatedly dry-fired was inadmissible. As we discussed above, the issue central to Mance's conviction was whether M.R. and Kimber had threatened Mance with guns at the time of the shooting. As discussed above in ¶25, the State presented strong evidence that M.R. and Kimber did not have guns on them at the time of the shooting. Accordingly, we conclude that the real controversy was fully tried.

E. Plain Error Doctrine

¶51 Mance argues that Detective Fahrney's testimony set forth above, reinforcement of that testimony by questions from the court, and the prosecutor's references to that testimony during closing arguments amount to plain error and entitle him to a new trial.

¶52 "The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. The plain error doctrine should be used "sparingly," only when the error is "obvious and substantial" and so fundamental that relief is warranted. ***Id.*** If a defendant shows that an unobjected-to error is obvious, substantial, and fundamental, the burden shifts to the State to prove beyond a reasonable doubt that the error was harmless. ***Id.***, ¶23.

¶53 Mance asserts that the circumstances of this case "are ideal for applying the plain error doctrine," but does not develop an argument explaining why the alleged errors are obvious, substantial, and so fundamental that relief is warranted. As previously noted, this court generally does not address undeveloped arguments, and we decline to do so here. *See* ***Associates Fin. Servs. Co. of Wis., Inc.***, 258 Wis. 2d 915, ¶4 n.3; *see also* WIS. STAT. RULE 809.19(1)(e) and 809.83(2).

CONCLUSION

¶54 For the reasons discussed above, we affirm.

By the Court.—Judgment and orders affirmed.

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