

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-0520-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-552

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MAXINE ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Maxine Anderson appeals from a judgment convicting her of child abuse and first-degree reckless homicide. On appeal, she argues that she was prejudiced by the prosecutor's improper cross-examination of her, the circuit court should have granted her motion for a mistrial due to the

prosecutor's conduct, and the prosecutor's conduct deprived her of her right to due process. We reject each claim and affirm.

¶2 Anderson was charged in connection with the blunt-trauma death of Joseph, a two and one-half year old for whom she was appointed the guardian. In her appellant's brief, Anderson concedes that the record reveals the following. The medical examiner testified that Joseph died of internal bleeding due to blunt trauma to the abdomen and that there were eighty-five separate injuries on the child's body, the vast majority of which had occurred within twelve to twenty-four hours before his death. The medical examiner also testified that some of the abrasions on Joseph "lined up" with the stones on a ring belonging to Anderson and some of the wounds on Joseph's back and chest included marks which were consistent with the sole of a sandal found in Anderson's house. Anderson's four children testified that they saw Anderson repeatedly strike Joseph on the day in question, including punching him in the stomach, throwing him on the floor and hitting him with a sandal. Joseph eventually stopped breathing and died at a hospital several hours later.

¶3 Anderson testified that she sometimes "played rough" with the children, that some of Joseph's bruises resulted from spankings administered by her and others, and that she had hit Joseph with a shoe. Anderson also admitted to punching Joseph in the chest on previous occasions. Anderson claimed that Joseph had a seizure disorder and many of his bruises occurred while he was seizing. She also claimed that Joseph had been ill on the day in question. He slipped and fell while getting out of the bathtub, his eyes rolled up into his head, and she hit Joseph in the chest to get his eyes to return to normal. Anderson denied knowing how Joseph became bruised or suffered ring and sandal marks on his body.

¶4 The appellate issues focus on aspects of the prosecutor's cross-examination of Anderson. We conclude that these complaints are either: (1) waived for failure to object at trial; or (2) not prejudicial because the court sustained Anderson's objection, admonished the prosecutor and instructed the jury to disregard testimony to which an objection had been sustained.

¶5 A party must raise and argue an issue with some prominence to permit the circuit court to address the issue and make a ruling. *State v. Ledger*, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993). The following appellate issues are waived because Anderson did not object at trial: (1) the prosecutor offered to show Anderson pictures of Joseph after she contended that she had never seen a child beaten to death; (2) the prosecutor suggested that Anderson had beaten Joseph several months before he died; (3) the prosecutor suggested that Anderson threw Joseph against the crib, when the testimony at trial was that Anderson had dragged or pulled Joseph out of the crib; (4) the prosecutor suggested that Anderson lanced a bump on Joseph in the absence of any evidence that Anderson did such a thing; and (5) the prosecutor asked Anderson to identify her sandal by noting that all of Anderson's children had identified the sandal when only two of the four children had done so.

¶6 We turn to the instances in which Anderson objected and which were the basis for her mistrial motion. Anderson argues that the prosecutor improperly insinuated that she had never taken Joseph to a doctor in response to Anderson's assertion that Joseph had been diagnosed with a skin disease which caused him to bruise easily. We disagree with Anderson's characterization of the prosecutor's remark. The prosecutor was disputing Anderson's claim that such a diagnosis had been made and was not contending that Anderson had never taken Joseph to a doctor. Even if the prosecutor's remarks are open to interpretation, the

circuit court sustained Anderson's objection and admonished the prosecutor to refrain from such comments.

¶7 Anderson also argues that the prosecutor improperly remarked on whether the sandal fit Anderson's foot. After Anderson put on the sandal, the prosecutor remarked that it "looks like it fits pretty well." Anderson responded that the shoe was too big and that it was not hers. The prosecutor responded that he used to work in a shoe store. Anderson objected, the objection was sustained and the prosecutor ordered to refrain. After Anderson stepped in front of the jury so the jury could see the shoe, the prosecutor again remarked that "it looks like the shoe fits pretty well." Anderson again objected and the court again admonished the prosecutor for making comments instead of asking questions.

¶8 Finally, Anderson contends that the prosecutor often repeated questions without giving her a chance to respond. Anderson objected and the court sustained the objection.

¶9 In moving for a mistrial, Anderson asked the circuit court to consider the prejudicial and inflammatory tone of the prosecutor's cross-examination. The court noted that objections had been sustained, and the prosecutor had been admonished and directed to refrain from editorial comments. The court denied the mistrial motion.

¶10 Ordering a mistrial due to prosecutorial misconduct is within the circuit court's discretion. *State v. Pankow*, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). In deciding a motion for a mistrial, the circuit court must consider the entire proceeding and determine whether the claimed error is sufficiently prejudicial to require a new trial. *State v. Adams*, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). Not all errors warrant a mistrial, and it is

preferable to employ less drastic alternatives to address the claimed error. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶11 We conclude that the circuit court did not misuse its discretion in denying Anderson’s mistrial motion. The court sustained Anderson’s objections, admonished the prosecutor and later instructed the jury to disregard testimony to which an objection had been sustained. We presume that the jurors acted in accordance with this instruction. *State v. Edwardsen*, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). These steps were sufficient to address the prosecutor’s conduct and safeguard Anderson’s due process right to a fair trial. *See State v. Collier*, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) (“[p]otential prejudice is presumptively erased when admonitory instructions are properly given by a trial court.”). The drastic remedy of a mistrial was not necessary.

¶12 In closing, we note that there was sufficient evidence to convict Anderson without her testimony and the problems which arose during cross-examination. Anderson’s four children testified that they saw Anderson beat Joseph in particular ways which the medical examiner was able to tie to Joseph’s injuries.

By the Court.—Judgment affirmed.

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

