COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP205-CR **Cir. Ct. No. 2007CF3931**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROOSEVELT M. WILLIAMS,

DEFENDANT-APPELLANT.

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

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Roosevelt M. Williams appeals from a judgment of conviction for second-degree sexual assault with use of force, false imprisonment

and battery, contrary to WIS. STAT. §§ 940.225(2)(a), 940.30 and 940.19(1) (2007-08).[1] Williams argues that he is entitled to a new trial because the trial court: (1) erroneously admitted hearsay evidence from the victim's friend concerning what the victim told him about the assault; and (2) allowed trial counsel only thirty minutes to present his closing argument, thereby denying Williams due process and a fair trial. We reject Williams's arguments and affirm the judgment.

BACKGROUND

¶2 Williams was charged with six crimes in connection with an assault on his former girlfriend, Linda A. His case was tried to a jury, which acquitted him of three crimes: a second count of second-degree sexual assault with use of force, second-degree recklessly endangering safety and kidnapping.

¶3 At trial, Linda testified that she dated Williams for about three years.[2] She said Williams was "very controlling" and that she tried to break up with him "numerous times." She testified that in June 2007, her efforts to break up with him led to Williams punching her in the face after a party. Linda reported the incident to police and was told they could give Williams a ticket, but they would not "go looking for him."

¶4 Linda said she began a relationship with another man, Emerson Curtis, shortly thereafter. While Linda was dating Curtis, she tried to stay out of

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Linda's testimony is offered to provide the basic facts of the State's case against Williams. Because of the limited issues before us, we do not attempt to detail every aspect of her testimony or highlight inconsistencies in her testimony.

Williams's way, but she said he would "sit in front of my house for hours and hours and just wait on me to come home."

¶5 Linda testified that on the evening of August 11, 2007, Curtis drove Linda home from a laundromat. Linda saw Williams's car parked outside her home, with his cousin Kevin Raymond in the car. Linda said Curtis drove away and Williams then asked Linda if she would ride with him to drop Raymond off at his home.[3] Linda said she agreed to ride with Williams in order to keep Williams calm, because when she refused him in the past, she "got beat up for it."

¶6 According to Linda, after Williams dropped Raymond off, Williams refused to take Linda home and instead "got very angry and got to saying how I was dodging him." She said Williams was "going crazy" and yelling at her and pulling her hair. She said Williams took her to his current girlfriend's apartment and forced her to enter the apartment by pulling her up the stairs.

¶7 Linda said once they were in the apartment, Williams punched her and pulled her hair and then sexually assaulted her twice, threatening her with a knife before the first assault. Linda testified that after the second assault, she got dressed and suggested to Williams that they go close the windows on his car because it was raining. She said when they both went down to the car, she ran away to a sandwich shop a few blocks away and was able to use a phone to call

[3] Linda admitted at trial that she initially lied to police when she told them that instead of going with Williams willingly, she had been forced into the car by Williams. She testified that she lied to police because she was concerned, based on her previous experience reporting Williams's abuse, that the police would not arrest him if she said she had willingly gone with Williams.

police. The police responded to Linda's call and interviewed her before taking her for a physical examination at a hospital.

¶8 Numerous other witnesses testified at trial, including a nurse and three law enforcement officers who testified about what Linda told them the night of the assault and about what they observed. Curtis also testified. As relevant to this appeal, Curtis was allowed to testify, over trial counsel's hearsay objection, about a conversation he had with Linda at the hospital the day after the assault:

> Q All right, Mr. Curtis, I'm just going to ask you some more directed kind of questions. Okay?[4]
>
> A Okay.
>
> Q Did [Linda] tell you that Mr. Williams had taken her over to some apartment?
>
> A Yes, she did.
>
> Q And did she tell you that he had beaten her up when she was in the apartment?
>
> A Yes, she did.
>
> Q Did she use the expression he was acting crazy?
>
> A She said that he was crazy.
>
> Q He was crazy. Did she also tell you that he sexually assaulted her?
>
> A Yes. Twice.
>
> Q Did she tell you how she was able to escape?
>
> A Yes, she did.

[4] The decision to ask directed questions was apparently made after trial counsel's hearsay objection, during a sidebar conference that was not recorded. Therefore, we do not know why the State was allowed to ask leading questions or if Williams objected to the use of leading questions.

> Q And when you saw her, she only had the one shoe.[5]
>
> A Right. Correct.

¶9 The trial included testimony offered on the afternoon of February 21, 2008, the whole day on February 22, 2008, and most of the day on March 10, 2008.[6] Toward the end of the day on March 10, the parties gave closing arguments.

¶10 In a sidebar conference prior to the closing arguments, the trial court told the parties they could each have twenty-five minutes[7] for closing arguments. Later, after the closings and outside the jury's presence, a record was made summarizing what had occurred at the sidebar conference. Trial counsel said he had objected to the time limits imposed on closing arguments, telling the trial court that twenty-five minutes was "simply not enough time for me to complete my closing." Trial counsel explained that he knew he would not have enough time and, in fact, had not had enough time to finish his prepared remarks. He said:

> I understand the Court's concern about time, and I understand why the Court wanted to finish today…. I'm absolutely furious that I got to about 15 percent of my closing.
>
> Among other things, I didn't comment on the State's lack of evidence … [or] on the forensics…. I didn't get to do half of my reasonable doubts that I had on colored

[5] This is a reference to the fact that Linda claimed Williams threw one of her shoes out of a window during the assault and that she escaped wearing only one shoe.

[6] The case was originally scheduled to be completed on February 22, but testimony was not finished and the case had to be postponed until March 10, due to scheduling conflicts.

[7] Ultimately, the trial court allowed trial counsel closer to thirty minutes to complete his closing.

> paper and ready to pin up…. My best estimate is that I got to about 15 or 20 percent of my closing.
>
> ….
>
> This case was detail oriented. We went through this event about eight times, and each time was different, and the details were [presented] two and half weeks ago. That's why I structured my closing the way I did with the details on paper…. Some trials don't require a long closing. [But] I informed the Court early on, today, I mean early on, that I could easily fill four hours. But I specifically said that the 25 minutes that you gave us, even though you ended up giving me almost 30, was simply not enough.
>
> For all those reasons, I'm asking for a mistrial.

¶11 The trial court denied the motion for mistrial, explaining:

> The purpose of the closing argument is to sum up, essentially, what the evidence has shown….
>
> There is no requirement that the attorneys are given a certain amount of time…. [T]ypically, I do not put limits on closing arguments….
>
> [However, w]hen it became very apparent to me this afternoon that it would be difficult to instruct and to do lengthy closings, I did limit closings…. I did allow the parties to even go over a little bit. My reasoning for that was to ensure that at least we'd be able to get the matter to the jurors so that they can begin deliberations. We went beyond the time that I set, but I felt that the attorneys were given a sufficient amount of time to sum up the case.
>
> Now, I will agree that when you come into a case with a four-hour closing and [are] told that you have 25 minutes, that it does make it difficult, but I did not … require that you proceed in the same fashion as if you had a four-hour closing.
>
> This jury was attentive. They were taking notes, and … I find that the amount of time for closing was a sufficient amount of time for them to have.

¶12 The next morning, as the jury was deliberating,[8] trial counsel provided to the trial court a written memorandum in support of his motion for mistrial that included trial counsel's eight pages of typed notes that he intended to use to make his closing argument. The trial court received the memorandum, but did not discuss it or change its decision denying the motion for mistrial.

¶13 As previously noted, the jury found Williams guilty of second-degree sexual assault with use of force, false imprisonment and battery, but acquitted him of a second count of second-degree sexual assault with use of force, second-degree recklessly endangering safety and kidnapping. Williams was sentenced as follows: fifteen years of initial confinement and ten years of extended supervision for the sexual assault; two years of initial confinement and two years of extended supervision for the false imprisonment; and nine months in the House of Correction for the battery, all concurrent to one another. This appeal follows.

DISCUSSION

¶14 Williams argues that he is entitled to a new trial because the trial court: (1) erroneously admitted hearsay evidence from Curtis concerning what Linda told him at the hospital; and (2) allowed trial counsel only thirty minutes to present his closing argument. We consider each issue in turn.

[8] The deliberations began at approximately 8:30 a.m. on March 11, and a verdict was reached at about 1:00 p.m.

I. Admission of hearsay evidence.

¶15 Williams argues that Curtis should not have been allowed to testify about what Linda told him at the hospital because his testimony constituted hearsay and did not fall under an exception to the hearsay rule. Whether trial testimony is properly admitted is an issue we review using the erroneous exercise of discretion standard. *See* ***State v. Walters***, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778. "An appellate court will uphold an evidentiary ruling if it concludes that the [trial] court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.***, ¶14. This court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶16 Even erroneously admitted evidence will not justify a new trial in all cases. ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. ***Martindale*** explained:

> An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error "affected the substantial rights of the party." If the error did not affect the substantial rights of the party, the error is considered harmless.

Id. "For an error 'to affect the substantial rights' of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶52, 246 Wis. 2d 132, 629 N.W.2d 301 (citations omitted).

¶17 In this case, we decline to consider whether the trial court properly admitted Curtis's hearsay testimony because even if we assume it was improperly admitted, we conclude that the error was harmless.[9]

¶18 Curtis was permitted to testify that Linda told him, on the day after the assault, that Williams took Linda to the apartment, beat her and sexually assaulted her twice, and that Linda then escaped. This is the same information that the jury heard Linda testify about, and the same information that a nurse who interviewed Linda at the hospital testified Linda told her.[10]

¶19 Williams argues that Curtis's testimony was not harmless because the jury "once again" heard "the details of what [Linda] claimed to have happened." He states:

> Mr. Curtis's hearsay testimony bolstered Linda's credibility regarding the sexual assault, battery, and false imprisonment as it was consistent with her own testimony. The jury could have been believed that while she lied to police about the kidnapping she would not have lied to her friend … and, therefore, that she was telling the truth about these other offenses.

[9] One reason we decline to consider whether the testimony falls within a hearsay objection is that the sidebar conference where the issue was discussed was not recorded or summarized, so we do not know the basis for the trial court's decision to admit the testimony. Once again, we emphasize "'that appellate review is better served by counsel following the [WIS. STAT. § 901.03(1)(a)] procedure of stating objections and grounds on the record,'" and if "trial judges and trial attorneys are understandably reluctant to interrupt the flow of testimony," then "it is essential that the subsequent on-the-record comments repeat or summarize the arguments and confirm exactly what was presented to the trial court at the time of its ruling." ***State v. Munoz***, 200 Wis. 2d 391, 402-03, 546 N.W.2d 570 (Ct. App. 1996) (citation and emphasis omitted).

[10] In addition, three law enforcement officers testified that Linda told them she had been assaulted, although, as Williams points out in his reply brief, their testimony focused more on their investigatory steps and observations than on what Linda told them.

We are not convinced. Curtis's testimony was cumulative to that provided by other witnesses. In addition, it was short and consisted of brief answers to leading questions, rather than narrative testimony. We are unconvinced that there is a reasonable possibility that the admission of Curtis's brief testimony contributed to the outcome of the action or proceeding at issue. *See* ***Nommensen***, 246 Wis. 2d 132, ¶52.

II. Time limitations imposed for closing arguments.

¶20 The second issue is whether the trial court erroneously exercised its discretion when it limited the length of the parties' closing arguments. "When restrictions on argument deprive a party of due process in the sense that they result in a fundamental unfairness, a new trial will be granted on this ground." ***State v. Lenarchick***, 74 Wis. 2d 425, 457, 247 N.W.2d 80 (1976). However, although "counsel has wide latitude in closing arguments, the control of the content, duration of the argument, and the form of the closing argument are within the sound discretion of the trial court." ***Id.*** On appeal, even if we might have exercised our discretion to allow more time for closing argument, we will not reverse unless the trial court erroneously exercised its discretion and that erroneous exercise of discretion "was likely to have affected the jury's verdict." *See* ***id.*** Applying these standards, we have refused to overturn a jury verdict where "[a]ll the significant points which are now argued to the court on appeal were fully presented to the jury," *see* ***id.***, and where we concluded that a closing argument limited to forty-five minutes per side provided reasonable time to close a case that involved multiple witnesses and three criminal charges, *see* ***State v. Stawicki***, 93 Wis. 2d 63, 66, 76-77, 286 N.W.2d 612 (Ct. App. 1979).

¶21 Williams argues the trial court erroneously exercised its discretion when it told the parties they had only twenty-five minutes each to conduct their closing arguments, stating: "The [trial] court's sole reason articulated for limiting closing argument was to allow the jury to begin deliberations that day. Yet that did not occur." Instead, the alternate juror was selected and excused and the remaining jurors were instructed to "get situated" in the jury room and then return in the morning to begin deliberations. Williams states:

> Certainly, it is reasonable for a court to wish to utilize valuable court and jurors' time in an efficient manner. But to do so in a manner which risks the integrity of the proceeding is counterproductive.
>
> Moreover, the convenience of the jurors was not advanced by limiting the closing arguments as it was evident the case could not be concluded that day…. The court provided no explanation for why the closing arguments had to be completed that day, why the prosecutor's closing could not have been done that day and the defense counsel's the next, thereby affording each more time, or even why all closing arguments could not have been given the following morning.
>
> When balanced against other factors in the case, the court's concern with time did not warrant restricting the closing arguments of the parties to 25 minutes each.

¶22 Williams implicitly asserts that the trial court's erroneous exercise of discretion "was likely to have affected the jury's verdict." *See* ***Lenarchick***, 74 Wis. 2d at 457. He explains:

> There was little physical evidence so the testimony and credibility of the witnesses, particularly Linda A., was of paramount importance….
>
> The task for defense counsel was to lead the jury to doubt Linda's credibility, to question her version of events by highlighting inconsistencies in her various statements to police and in her testimony…. To do this counsel needed to recall and compare the various statements and testimony

> for the jury. This was particularly important here as there was a [sixteen-day] gap in the three-day trial.

Williams argues that if he had "been permitted to give a more extensive closing argument in which he was able to relate Linda's various lies and inconsistencies to individual charges, the jury may well have returned not guilty verdicts" on the three charges of which Williams was convicted.

¶23 We reject Williams's assertion that the trial court erroneously exercised its discretion when it ultimately allowed Williams only thirty minutes to present his closing argument. As the trial court noted—and Williams emphasizes on appeal—Linda's credibility was the paramount issue in the case. The facts and legal issues were not complex; either the jury would believe Linda's testimony that certain acts occurred, or it would reject part or all of her testimony. Not only was the testimony uncomplicated, it was not extensive, with witnesses testifying for a total of about two and one-half days. Although the sixteen-day gap in the trial was not ideal, we are not persuaded that the trial court's assessment that the jury would remember the testimony presented was erroneous.

¶24 Moreover, the trial court's desire to get the case to the jury for deliberation as soon as feasible was reasonable.[11] The jurors had already been required to return for a third day of testimony after the expected two-day trial ran long, and they were set to return for a fourth day of deliberations. Delaying the

[11] We reject Williams's suggestion that the fact the jury did not ultimately begin deliberating the day of closing arguments renders the trial court's exercise of discretion unreasonable. First, the trial court said it wanted "to get the matter to the jurors so that they can begin deliberations," but it did not indicate that deliberations had to begin the same day as closing arguments. Second, even if the trial court hoped deliberations would start immediately, the fact that the jury ultimately did not begin deliberating until 8:30 a.m. the next day does not render the trial court's exercise of discretion unreasonable.

closing arguments until the morning of that fourth day would have delayed the start of deliberations and increased the likelihood of returning for a fifth day. Indeed, the jury did not return a verdict until about 1:00 p.m. after beginning deliberations at about 8:30 a.m. In light of all the circumstances, we cannot conclude that the trial court erroneously exercised its discretion when it limited the time for closing arguments.

¶25 Williams has also not convinced us that ultimately allowing only thirty minutes for trial counsel's closing argument "was likely to have affected the jury's verdict." *See* ***id.*** Trial counsel's goal at closing—as outlined in his eight pages of notes that were later provided to the trial court—was to attack Linda's credibility, both by arguing she lied and emphasizing inconsistencies in Linda's testimony. In closing, trial counsel noted that Linda: (1) lied about being kidnapped; (2) failed to initially tell police that Raymond was in Williams's car; (3) failed to initially tell police that Curtis was present when Linda went with Williams; (4) lied when she said her mother said Williams would blow his horn outside the mother's house; (5) failed to tell police that she went with Williams to avoid a fight; and (6) admitted that she had lied about being abducted only after Curtis gave police his statement, and then claimed she came clean because "her conscience was bothering her." Trial counsel identified numerous other instances where he claims Linda lied, and he pointed out inconsistencies between Linda's testimony and that of other witnesses, such as testimony concerning whether it was raining all night or not.

¶26 On appeal, Williams references "significant points" that he believed the jury needed to hear, and he has provided us with the eight-page typed outline that trial counsel prepared for closing argument. However, Williams does not identify which of the seventy-three points trial counsel hoped to make were not

made, and how the absence of those specific points "was likely to have affected the jury's verdict." *See* ***id.*** Having reviewed the trial transcript, we are unconvinced that giving trial counsel additional time to close would have resulted in an acquittal on additional charges. Trial counsel's stated goal for the closing argument was to attack Linda's credibility and he did just that, using numerous examples. All indications are that the jury was persuaded that the State had not met its burden of proof on some of the charges and that the jury carefully considered the evidence relating to each of the six charges, as evidenced by over four hours of deliberation and a verdict that rejected three of the charges. For the foregoing reasons, we reject Williams's argument that the limit on trial counsel's closing argument "was likely to have affected the jury's verdict." *See* ***id.***

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶27 FINE, J. (*concurring/dissenting*). I agree with and join in Part I of the Majority opinion. I respectfully dissent from Part II, however, because I believe that under the circumstances of this case and the disjointed way the trial was stretched out and tried in pieces, Williams's defense lawyer should have been given substantially more time for his closing argument.

¶28 I agree with the majority's well-written opinion that time allowed for closing arguments is within the trial court's reasoned discretion. There is no dispute about that. There is, however, also no dispute that this was not an ordinary trial. The trial started on Wednesday, February 20, 2008. The State's presentation ended on Friday, February 22, 2008. The trial was then *adjourned* and did not re-start with the defendant's case until Monday, March 10, seventeen days later![12] Thus, the jury had some two and one-half weeks to think and re-think about the State's evidence.

¶29 The State has a significant advantage in a criminal case because it gets to go first. Normally, of course, the defendant goes next, generally immediately. Thus, the jury will, essentially, hear both sides of the case in temporal sequence. Giving the jury two and one-half weeks to absorb the State's evidence is a significant handicap for any defense lawyer. *See* Shankar Vedantam, *Persistence of Myths Could Alter Public Policy Approach*, THE WASHINGTON

[12] The adjournment was precipitated because the trial court was going to Oregon for a conference. Much of the scheduling discussion was not on the Record, and Williams does not assert that the adjournment was error.

POST, Sept. 4, 2007 at A03 (Reporting on research that "highlights the disturbing reality that once an idea has been implanted in people's minds, it can be difficult to dislodge.") (available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090300933.html). *See also* ***Herring v. New York***, 422 U.S. 853, 858–862, 864 (1975) (Stressing the importance of a closing argument in a *bench trial* because the "three-day trial was interrupted by an interval of more than two days—a period during which the judge's memory may well have dimmed, however conscientious a note-taker he may have been."). In light of this, Williams had a steep hill to climb during his closing argument because the length of the trial was exacerbated by the two and one-half-week delay. Indeed, *extended time* for closing argument may be needed when there is a mid-trial delay. *See* ***United States v. Smith***, 44 F.3d 1259, 1268 (4th Cir. 1995).

¶30 Significantly, this is not a case where a lawyer just seeks to ramble on; Williams's lawyer's closing-argument notes show careful planning and a logical exegesis that he was unable to complete.

¶31 Of course, trial courts need to be able to control their calendars and schedules. ***Herring***, 422 U.S. at 862 (Trial judge "may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial.") But this control must be sensitive to more than mere expedience and a desire "to move cases." Our criminal-justice system should not be assembly-line justice where the speed of the line trumps all else. Thus, I agree with ***Flaminio v. Honda Motor Co., Ltd.***, 733 F.2d 463, 473 (7th Cir. 1984), that although "reasonable deadlines" are appropriate, imposition of "rigid" time limits may be counterproductive, and also agree with its advice that trial courts should not "not try to slice the loaf so

thinly." *See also* ***Adams v. State***, 585 So. 2d 1092, 1094 (Fla. App. 1991) ("Although there is no bright shining rule that dictates the exact amount of time a criminal defendant is given for closing argument, cases are abundantly clear that a trial court abuses its discretion by imposing arbitrary time limitations on a criminal defendant's closing argument.").

¶32 Closing arguments are important. ***Herring***, 422 U.S. at 858–862; *see also, e.g.*, Dan K. Webb and J. David Reich, *In a closing, argue, don't summarize*, THE NATIONAL LAW JOURNAL (May 18, 2009), reprinted at: http://www.winston.com/siteFiles/Publications/005050910WinstonS.pdf. The State and each criminal defendant it prosecutes are entitled to the time to efficiently *and sufficiently* present their cases to the jury. Otherwise, we just dance a meaningless quadrille.

¶33 I respectfully dissent.