STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2015AP000451-CR and 2015AP000452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RANDALL RAY MADISON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ORDERED, AND THE ORDER DENYING MOTION FOR DISMISSAL OR A NEW TRIAL, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE LINDSEY GRADY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

John T. Chisholm
District Attorney
Milwaukee County

William T. Berens
Assistant District Attorney
State Bar No. 1088986
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES CITED

Page

WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

Case Nos. 2015AP000451-CR and 2015AP000452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RANDALL RAY MADISON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ORDERED, AND THE ORDER DENYING MOTION FOR DISMISSAL OR A NEW TRIAL, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE LINDSEY GRADY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Is Mr. Madison entitled to relief from judgment because the prosecutor at trial erroneously misstated the date of his arrest?

   The court found that Mr. Madison is not so entitled, because the misstatement regarding his arrest had no prejudicial impact, and was appropriately remedied through a curative instruction.

2. Did the court err when it sustained an objection to a question eliciting that the victim of the case was "stalking" the defendant, in the absence of a prior "other acts" motion?

   The court found that it properly exercised its discretion in sustaining that objection.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts. Additionally, this case is not eligible for publication. *See* 809.23(1)(b)4. Accordingly, the State requests neither oral argument nor publication.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Randall Madison, the State exercises its option not to present a statement of the case. See Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

STANDARDS OF REVIEW

This court will independently determine whether error was harmless or prejudicial. *See State v. Patricia A.M.,* 176 Wis. 2d 542, 556-57, 500 N.W.2d 289 (1993). Whether the error was harmless presents a question of law this court reviews *de novo. State v. Harris,* 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996).

Whether to admit evidence at trial is within the discretion of the circuit court. *State v. Harris,* 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996). A decision to admit or exclude evidence will be reversed only when the circuit court has erroneously exercised its discretion. *Id.*

ARGUMENT

I. THE PROSECUTOR'S ERROR REGARDING DATE OF ARREST IS HARMLESS ERROR.

The prosecutor is permitted to draw any reasonable inference from the evidence in closing argument. *See State v. Nemoir*, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974). "Considerable latitude is to be allowed counsel in closing arguments, subject only to the rules of propriety and the discretion of the trial court." *State v. Nemoir*, 62 Wis. 2d 206, 213 & n.9, 214 N.W.2d 297 (1974). "'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements . . . must be viewed in context.'" *State v. Wolff*, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted).

Nevertheless, it is impermissible for an attorney to suggest that a jury should reach its verdict by considering facts that are not in evidence. *State v. Burns*, 2011 WI 22, ¶ 48, 332 Wis. 2d 730, 798 N.W.2d 166. But even if a prosecutor makes such remarks, they will not be the basis for the reversal of a criminal conviction standing alone. *Burns*, 332 Wis. 2d 730, ¶ 49. Rather, the statements must be viewed in the context of the entire trial. *Burns*, 332 Wis. 2d 730, ¶ 49. A conviction will not be reversed in the interest of justice unless the statements so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Burns*, 332 Wis. 2d 730, ¶ 49.

When the defendant makes a timely objection to a prosecutor's remarks at closing, the constitutional test is whether the prosecutor's remarks "so infect[ed] the trial with unfairness as to make the conviction a denial of due process." *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

Here, it is uncontested that the prosecutor mis-spoke when describing when Madison was arrested. The actual exchange, during the State's closing, is as follows:

> Attorney Grayson: . . . And how do we know that he was there on May 7th? How do know that he was there on the 23rd and the 12th of the prior year? He's found on scene. He's hiding.
>
> Attorney Hailstock: Your Honor, I'm going to object. Can I –
>
> The Court: No. I'm satisfied that was testified to. You may continue. It is overruled.

R1.44:55.[1] The State acknowledges that this assertion leads to the erroneous inference that the defendant was found on scene on May 7th, which was outside of the scope of evidence presented in testimony. Nevertheless, in this case, there are several reasons why the prosecutor's incorrect assertion did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process" *Burns*, 332 Wis. 2d 730, ¶ 49.

First, the prosecutor's incorrect assertion occurred at the end of the rebuttal argument and was not repeated. The remainder of the closing argument and rebuttal argument focused on the trial evidence and why that evidence established Madison's guilt (R1. 34:31-43, 53-57).

Second, the trial court instructed the jury that the "[r]emarks of attorneys are not evidence" and that "[i]f the remarks suggest certain facts not in evidence, disregard the suggestion" (R1.44:31). The court also instructed the jury that the attorneys' closing arguments and conclusions and opinions are not evidence and that the jurors should draw their own conclusions from the evidence and decide the case according to the evidence under the instructions given by the court (*Id.*).

> These instructions, which we presume the jurors followed, alleviate the likelihood that jurors placed any significant weight on the prosecutor's comments other than the weight that came from their own independent examination of the evidence.

[1] This brief cites to the record contained in 2015AP451 as (R1__) and in 2015AP452 as (R2__). When citing to documents that are contained in both files, this brief will use (R1) as a reference.

State v. Miller, 2012 WI App 68, ¶22, 341 Wis. 2d 737, 816 N.W.2d (footnote omitted).

Third, the court took substantial steps to alleviate any potential taint of misinformation through the use of a curative instruction. The court, after discussing the issue with both parties, allowed for a curative instruction that read: "The defendant was not found . . . at the 40th Street location on May 7th, 2013. No testimony (evidence) was provided to you during the trial regarding an arrest on or about May 7th, 2013." R1.44:71.

It is presumed that juries follow admonitory instructions. *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399; *State v. Searcy*, 2006 WI App 8, ¶ 59, 288 Wis. 2d 804, 709 N.W.2d 497; *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985). And absent a repetitive pattern of egregious misconduct, instructions such as those given in this case can neutralize any influence on the jury of an argument improperly suggesting the existence of facts not in evidence. *State v. Pitsch*, 124 Wis. 2d 628, 644 n.8, 369 N.W.2d 711 (1985), *aff'd*, 2005 WI 57, 280 Wis. 2d 277, 695 N.W.2d 783; *State v. Delgado*, 2002 WI App 38, ¶¶ 16-17, 250 Wis. 2d 689, 641 N.W.2d 490; *Hoppe v. State*, 74 Wis. 2d 107, 120-21, 246 N.W.2d 122 (1976). *See Hoppe v. State*, 74 Wis. 2d 107, 120-21, 246 N.W.2d 122 (1976).

In that regard, the fact that the jury acquitted Mr. Madison for each of the charged offenses that related the May 7 incident is significant (R1.34:73, R2.44:73). That indicates that the jury decided the case based on the evidence rather than any prejudicial effect of the prosecutor's misstatement. *See State v. Marcum*, 166 Wis. 2d 908, 926, 480 N.W.2d 545 (Ct. App. 1992) ("the jury's acquittal of Marcum on four counts shows that 'the jury was not so prejudiced by the improper information that it controlled their deliberative process'"). The acquittals, here, serve as unequivocal evidence that the jury was not influenced by the prosecutor's brief misstatement of a fact. The court's order should therefore be affirmed.[2]

[2] Madison seeks either "dismissal of all convictions or a remand for a new trial." (Brief of Defendant-Appellant at 10.) As argued herein, it is the State's position that Madison is not entitled to any relief. It is further the State's position however, that were any relief to be warranted, such would

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING TESTIMONY REGARDING MS. MADISON'S SUPPOSED "STALKING" BEHAVIOR

On appeal, defense argues that Mr. Madison should have been allowed to testify as that L.M. "stalks" him. Madison' Br. at 8. Defense argues that,

> if the defendant testified that the victim was actively stalking the defendant, that obviously impacts not only the jurors' perception of a key witness, but also the trial strategy of the defendant.

Brief of Defendant-Appellant at 8-9. The defense brief offers no law in support of this assertion. Furthermore, the record is bereft of either a motion *in limine* seeking admission of L.M.'s supposed "Other Acts" or any other argument, oral or written, as to why such evidence should have been admit at trial. *See* R1.9, R2.21.

Any evidence of L.M.'s behavior towards the defendant falls clearly within well-established law regarding "Other Acts." "In Wisconsin the admissibility of other acts evidence is governed by Wis. Stat. §§ (Rules) 904.04(2) and 904.03." *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). Other acts evidence "is not admissible to prove the character of a person in order to show that the person acted in conformity" with that character. Wis. Stat. § 904.04(2)(a). Other acts evidence may, however, be admitted to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* "This list is not exhaustive or exclusive." *Sullivan*, 216 Wis. 2d at 783.

To determine whether other acts evidence should be admitted, courts employ a three-step analysis. *Id.* Courts ask (1) whether the evidence is offered for a permissible purpose under § 904.04(2); (2) whether the evidence is relevant under § 904.01; and (3) whether the probative value of the evidence

---

be in the form of a new trial. The State is aware of no authority-- and Madison presents none--for the proposition that errors of the sort that Madison alleges could result in dismissal.

outweighs any prejudice or confusion, as contemplated by § 904.03. *See Sullivan*, 216 Wis. 2d at 783-90.

Madison's evidentiary challenge is meritless for several reasons. Madison sought to put in evidence that L.M. "stalks" him. This would have been permissible under Wis. Stat. § 904.04(2) if there was merit to Madison's theory. However, there is no support in the record for Madison's contention that stalked him or engaged in any sort of threatening behavior. Additionally, Madison's brief fails to offer any sort of proof, be it documentary or otherwise, as to what "stalking" occurred. Without any evidentiary support for Madison's theory, the contention that L.M. was purportedly stalking Madison is both not permissible under § 904.04(2) and not relevant under Wis. Stat. § 904.01.

Furthermore, such evidence fails to satisfy the third prong under *Sullivan*. Any introduction of L.M.'s "stalking" behavior would have been highly prejudicial and furthermore confusing to the jury absent substantial context, and the court correctly exercised sound discretion in excluding such evidence. Although the court neglected to memorialize the sidebar regarding the State's objection, the court effectively spelled out its rationale in its Decision and Order Denying Motion for Dismissal or New Trial, noting that

> the defendant did not file a motion to admit other acts evidence and. . . he could not offer anything to substantiate his stalking claim. . . . [T]he court would not allow the defense to put in evidence with such highly prejudicial value.

R1.29:2.

CONCLUSION

Because no actual harm resulted from the prosecutor's erroneous assertion regarding the dates of Mr. Madison's arrest, and because the trial court properly exercised its sound discretion in excluding any testimony regarding L.M.'s supposed "stalking" behavior, the court should affirm the Decision and Order of the lower court.

Dated this _____ day of June, 2015.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
William T. Berens
Assistant District Attorney
State Bar No. 1088986

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 1,978.

_____ _____

Date William T. Berens
Assistant District Attorney
State Bar No. 1088986

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____ _____

Date William T. Berens
Assistant District Attorney
State Bar No. 1088986

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.