

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP343-CR

Cir. Ct. No. 2008CF366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BARRY THORUD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Barry Thorud appeals a judgment of conviction for extortion, contrary to WIS. STAT. § 943.30(1).¹ He argues the circuit court

¹ References to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

erroneously exercised its discretion by failing to declare a mistrial after a comment made by the prosecutor during closing argument. We reject Thorud's argument and affirm.

¶2 On September 26, 2008, Todd Griffin attended a bonfire at Thorud's residence. Griffin left after finishing a bottle of rum, but returned at approximately midnight and consumed more alcohol. Griffin apparently entered the Thorud residence without permission, and awoke Thorud just prior to 3:00 a.m. by shining a cell phone light over his bed. Realizing Griffin was extremely drunk, Thorud allowed him to sleep in his house for the night.

¶3 Shortly thereafter, Thorud's daughter and her friend came to Thorud's room and told him that Griffin had touched them inappropriately. Griffin was asked to leave. Several days later, Thorud requested \$3,000 and "this would be all done." After receiving the money, Thorud gave \$1,500 to the mother of his daughter's friend. He gave his daughter \$1,400 and kept \$100 for an underage drinking citation his daughter had received.

¶4 Thorud was subsequently charged with threats to injure or accuse of a crime.² During closing argument at trial, the prosecutor told the jury "what ended up happening is those girls were prostituted." Defense counsel objected, the

² WISCONSIN STAT. § 943.30 provides:

Threats to injure or accuse of crime. (1) Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act, is guilty of a Class H felony.

circuit court conducted a bench conference off the record, and the prosecutor continued with his closing argument. After the court instructed the jury and excused them, defense counsel moved for a mistrial based upon the prosecutor's statement. Defense counsel argued the statement was inflammatory and "could have influenced the jury unfairly." The court denied the motion and this appeal follows.

¶5 Thorud argues on appeal the prosecutor's reference to prostitution "planted a seed of accusation in the hearts and minds of the jury that was far more malevolent than the threat to injure or accuse an acquaintance of a crime." He suggests the comment prompted a "visceral" reaction by the jury. We are not persuaded.

¶6 "A motion for mistrial on the grounds of improper prosecutorial conduct is addressed to the sound discretion of the [circuit] court." *State v. Camacho*, 176 Wis. 2d 860, 886, 501 N.W.2d 380 (1993) (citation omitted). We must decide whether the prosecutor's comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992). We must also review the comment in the context of the entire trial. *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

¶7 A prosecutor may not use his closing argument to inflame a jury's passions and prejudice. *United States v. Young*, 470 U.S. 1, 9 n.7 (1985). But we have also recognized that a prosecutor's closing argument is usually spoken extemporaneously and is emotionally charged. See *State v. Adams*, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). In addition, a mistrial in a criminal case remains an extreme remedy. As the Court stated in *Young*, 470 U.S. at 11, "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, only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."

¶8 Here, after Thorud's objection and the resulting sidebar, the prosecutor placed his reference to prostitution in context:

And I don't use these terms lightly. But when I looked around what I wanted to make sure that [the girls] weren't here. It's because what I think about here is that their victimization, their being a victim, their rights to be safe, to have no contact orders placed on Mr. Griffin, to have him under bond, perhaps to have him in jail were sold, sold for \$1500 apiece. And on top of that I'm going to keep \$100 too because I'm the parent, as if somehow Barry Thorud and Denise [G.] were entitled to a cut of that money because they're the parents.

¶9 We agree with the circuit court that the prosecutor's prostitution comment was "a poor choice of words" in an effort to make an otherwise valid point: that Thorud turned the victimization of his daughter into an opportunity to extort money.³ The court also properly attributed to the jury the ability to recognize an advocate's hyperbole, and to discount it in favor of the evidence of record. In this case, the prosecutor's sole comment concerning prostitution occurred during a thirteen-page closing argument. It was not repeated or dwelled upon.

³ "The elements of extortion are (1) a malicious threat to do injury to a person, property or business and (2) intent to extort money or compel another person to do any act against their will." *State v. Kelly*, 148 Wis. 2d 774, 777, 436 N.W.2d 883 (Ct. App. 1989).

¶10 In addition, the circuit court carefully instructed the jury on what it could and could not consider in deciding Thorud's guilt:

Remarks of the attorneys are not evidence. If the remarks suggested certain facts not in evidence, disregard the suggestion.

Consider carefully the closing arguments of the attorneys. But their arguments and conclusions and opinions are not evidence. Draw your own conclusions from the evidence and decide upon your verdict according to the evidence under the instructions given to you by me.

....

You will not be swayed by sympathy, prejudice or passion. You will be very careful and deliberate in weighing the evidence. I charge you to keep your duties steadfastly in mind and as upright citizens render a just and true verdict.

¶11 We presume that juries follow instructions. *See State v. Johnston*, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). Moreover, the strength of the evidence was more than sufficient, apart from the prosecutor's comment. The prosecutor's single, stray reference to prostitution did not infect the trial with unfairness.

¶12 Considering all of these factors, we conclude the circuit court's denial of the motion for mistrial was a proper exercise of discretion.

By the Court.—Judgment affirmed.

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

