COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1759-CR **Cir. Ct. No. 2008CF862**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BENJAMIN A. SILVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: STEPHEN A. SIMANEK and ALLAN B. TORHORST, Judges. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. A jury found Benjamin Silver guilty of burglary as a habitual offender. Silver appeals the judgment of conviction and the order denying his motion for postconviction relief. He contends that prosecutorial

misconduct in the form of inappropriate rebuttal argument prevented the real controversy from being tried and that defense counsel's failure to object amounted to ineffective assistance. We disagree and affirm.

¶2 Charles Albee discovered that copper piping was cut and removed from a vacant rental property he owned. The complaint alleged that the bloodstains found at the scene returned a DNA databank "hit" on Silver.

¶3 Silver denied taking the piping. Based on information from Silver, defense counsel proceeded on the theory that Silver was on the property at the invitation of an acquaintance, Robert Bergevain; that Bergevain was either a friend of Albee's or a tenant at that property; and that Bergevain was the culprit. Silver testified that he scrapped metal and that Bergevain called him to come over to look at an old washer and dryer. Silver said he saw copper pipe lying on the basement floor; that Bergevain was on a ladder reaching into the ceiling of the basement bathroom; that he cut himself on the saw Bergevain asked him to hand up to him; and that he washed the blood off in the bathroom sink.

¶4 In line with Silver's account, Albee told the jury there had not been a forced entry; that there may have been a "junk" wash machine in the basement; that he was acquainted with Bergevain and his brothers; and that he suspected they "did a similar thing" at another rental property he owned. At odds with Silver's defense theory that Albee somehow condoned Bergevain's presence on the property, Albee testified that he "would not rent to [Bergevain], because I know that family, and I've had problems with them." Undercutting Silver's testimony, Albee testified that the drops of blood on the floor "follow[ed] the piping" throughout the basement and a police officer testified that the sample of blood sent to the crime lab was taken from a ceiling t-bar bracket.

¶5 The record indicates that the defense intended to call Bergevain as a witness.[1] So as to catch the prosecution unawares, defense counsel did not divulge either that Bergevain would corroborate Silver's theory of defense or that he discovered before trial that Bergevain had died.

¶6 During rebuttal, the prosecutor asked the jury to consider why Bergevain was "some person we're hearing about now for the first time. This other person didn't come and tell you anything today on the stand." She argued that Silver did not mention Bergevain to the investigator who took his DNA sample or "go down to the police department" and tell one of the other investigating officers; rather, his account was "a story that Mr. Silver created this morning for you." Defense counsel, Attorney Milton Childs, did not object to these statements. The jury found Silver guilty, the trial court denied his motion for postconviction relief, and Silver appeals.

¶7 Silver first asserts that the prosecutor's rebuttal argument was so punctuated with comments that were untrue or outside the evidence that the real controversy—his veracity and credibility—was not tried. Reversal is warranted for alleged prosecutorial misconduct when what the prosecutor does has "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) (citation omitted). The statements are assessed in the context of the entire trial. ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. Because Silver did not object at trial to the prosecutor's argument, he has forfeited his right to review other than in the context of ineffective assistance of counsel.

[1] The State asserted that it never received a witness list; the record does not contain one.

See ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31; *see also* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining "forfeiture" and "waiver" distinction). We examine his claims through that prism.

¶8 To prove an ineffective assistance of counsel claim, a defendant must show both that trial counsel's performance was deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel if either ground is not proved. ***Id.*** at 697. We review the denial of an ineffective assistance claim as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). We will not reverse the trial court's factual findings unless they are clearly erroneous, but we review the two-pronged determination of trial counsel's performance independently as a question of law. ***Id.*** at 127-28.

¶9 Silver asserts that the prosecutor wrongfully argued during closing rebuttal that he failed to produce a witness that could have corroborated his theory of defense and that he passed over opportunities to tell police about Bergevain, thus showing that the story was "created this morning for you." While counsel should be afforded "considerable latitude" in arguing inferences from the evidence during closing arguments, ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979), "[a]rgument on matters not in evidence is improper," ***State v. Albright***, 98 Wis. 2d 663, 676, 298 N.W.2d 196 (Ct. App. 1980). "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). "The constitutional test is whether the prosecutor's remarks so infected the trial with unfairness as to make

the resulting conviction a denial of due process." ***Id.*** (citation omitted). The prosecutor's remarks must be examined in the context of the entire trial. ***Id.***

¶10 Childs testified at the postconviction hearing that he did not consider the prosecutor's remarks to be sufficiently objectionable. We agree. The trial court found that the facts clearly show that the prosecutor was unaware of Bergevain's death; that not disclosing Bergevain's death to the State made the absent-witness argument permissible; that the lack of objection comported with the theory of defense; and that the defense theory was well-founded between Childs and Silver. These findings are not clearly erroneous. It is somewhat disingenuous for Silver now to complain that Childs should have objected to comments that logically flowed from their agreed-upon strategy of playing the Bergevain card close to the vest.

¶11 The prosecutor also did not argue on matters not in evidence. The jury plainly knew that Bergevain did not testify. The complaint alleged that Silver's DNA was found at the burglarized property, so it is reasonable to infer that he was aware of how he became implicated. It therefore is true that he could have spoken up when police took a DNA sample a week later. While Silver literally could not have gone to the police station because he already was in custody, it also is true that he had the opportunity to make a statement to police through Childs. Saying his story was "created this morning" is but a figure of speech.

¶12 In any event, we conclude that the prosecutor's remarks were not critical. The prosecutor simply gave voice to what the jury doubtless was thinking. Further, the trial court instructed the jury that closing arguments are not evidence. We presume the jury follows the instructions given it. ***State v. Smith***,

170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992). In context of the entire trial, we are not persuaded that the prosecutor's comments so infected the trial with unfairness resulting in a denial of due process.

¶13 Next, Silver contends that Childs ineffectively failed to make clear to the jury why Bergevain did not testify. Childs testified at the postconviction motion hearing that, besides hoping to catch the State off-guard, he hoped that Albee would admit knowing Bergevain and that Bergevain possibly resided at the property and may have given Silver permission to enter. Childs conceded that he wished he had more clearly explained Bergevain's absence, even that he "forgot" to ask Silver about Bergevain's death, but at the time thought Albee's testimony had the desired effect of placing Bergevain in a negative light and making it plausible that Bergevain could have invited Silver inside.

¶14 An eleventh-hour revelation that Bergevain was dead also could have been damaging. The jury easily could have rejected a defense almost entirely dependent on validation by an utterly unavailable witness. Regardless of which would have been the better approach, relying on Albee's testimony was within the realm of reasonable representation. "If tactical or strategic decisions are made on [a rational] basis, [we] will not find that those decisions constitute ineffective assistance of counsel, even though by hindsight we are able to conclude that an inappropriate decision was made or that a more appropriate decision could have been made." ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***State v. Maloney***, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

¶15 Finally, even accepting Silver's account as fully true, the trial was not unfair because he was guilty of burglary as party to a crime. Albee testified that the property was vacant. Silver testified that he saw a single kettle and no furniture in the kitchen; no clothing or supplies in the laundry; no towels in the bathroom; and only copper piping and beer cans on the basement floor. He said he cut himself in the process of handing a saw to Bergevain, who was up on a ladder in the basement bathroom "crawling to the back" in the ceiling. It was not necessary to charge Silver under the PTAC statute in the complaint. *See* ***State v. Shears***, 68 Wis. 2d 217, 239-40, 229 N.W.2d 103 (1975).

¶16 We are unpersuaded that the prosecutor's comments or defense counsel's failure to object obscured the crucial issue. Based on the record as a whole, we conclude that the real issue in controversy was fully and fairly tried. We therefore need not reach Silver's claim that the trial court erroneously exercised its discretion in denying his postconviction motion.

By the Court.—Judgment and order affirmed.

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