COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1673-CR **Cir. Ct. No. 2014CF74**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EVELIO BANUELOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Evelio Banuelos appeals a judgment of conviction for second-degree sexual assault of a child. Banuelos contends that he should be granted a new trial because of a number of claimed errors and their cumulative effect, as we detail below. For the reasons discussed below, we affirm.

BACKGROUND

¶2 Banuelos was charged with second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2013-14).[1] According to the complaint, on January 9, 2010, Banuelos and thirteen-year-old G.P.S. spent the night in the apartment of Georgianna Smith, G.P.S.'s neighbor. Smith and her boyfriend went to sleep in their bedroom, and Banuelos and G.P.S. remained in the living room with Banuelos on a couch and G.P.S. in a chair. While Banuelos and G.P.S. were alone in the living room, Banuelos offered G.P.S. $40 to sleep on the couch next to Banuelos. G.P.S. accepted Banuelos's offer and lay down next to Banuelos on the couch. While G.P.S. was laying next to Banuelos on the couch, Banuelos started "to caress" G.P.S.'s bare back, and then put his hand down the back of G.P.S.'s shorts and caressed G.P.S.'s bare buttocks for approximately four to five minutes. Banuelos then put his hand down the front of G.P.S.'s shorts, at which point G.P.S. "squirmed away" from Banuelos and lay down on the floor in the middle of the room where he eventually fell asleep.

¶3 G.P.S. woke up at approximately 2:00 a.m. and found Banuelos lying very close behind him, "like a couple would lay." G.P.S. was scared and went to another room and sent a text to his cousin. G.P.S. did not receive a response and eventually went back to sleep. G.P.S. was woken by Smith, who had received a call from G.P.S.'s cousin who wanted to know if G.P.S. was okay. Banuelos was in the room with them at the time and G.P.S. did not tell Smith what

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Banuelos had done. The next day while G.P.S. was at school, G.P.S. informed a teacher what Banuelos had done to him.

¶4 Banuelos was found guilty following a jury trial. Banuelos appeals his conviction. We set forth additional facts below as necessary to address Banuelos's arguments on appeal.

DISCUSSION

¶5 Banuelos contends that he is entitled to a new trial because of numerous errors at trial. Specifically, he contends: (1) the circuit court erred in admitting other acts evidence; (2) the court erred in admitting testimony that was inadmissible hearsay evidence and that violated Banuelos's rights under the Sixth Amendment's confrontation clause; (3) the court erred in denying Banuelos's material witness warrant; (4) the court erred in sustaining an objection to a question relating to a prior inconsistent statement made by G.P.S.; (5) the court erred in failing to grant his motions for mistrial, which were based on the court's alleged lack of impartiality and on statements made by the prosecutor during closing arguments; and (6) the combination of errors was prejudicial and resulted in a miscarriage of justice. We address each of Banuelos's contentions below.

A. Other Acts Evidence

¶6 Prior to trial, the State moved the circuit court for the admission of other acts evidence that Banuelos had on two prior occasions inappropriately touched two men, D.J. and L.L., while those men were sleeping. The State argued that the other acts evidence was admissible to prove motive, intent, and the absence of mistake. The court granted the State's motion.

¶7 At trial, D.J. testified that on the evening of December 3 and December 4, 2010, he and his nephew, L.L., who had died before trial, were at the home of D.J.'s former son-in-law. D.J. testified that he and L.L. had been drinking and that they went to sleep alone in separate rooms in the basement. D.J. testified that he woke up at approximately 4:00 a.m. and found Banuelos "spooning [him] and [Banuelos] had his left hand down in the front of [D.J.'s] pants on [D.J.'s penis]." D.J. testified that he had not consented to Banuelos touching him and had "screamed no" at Banuelos, after which Banuelos left D.J. alone. D.J. testified that he went back to sleep and woke again around 6:00 a.m. D.J. testified that he was "angry" and that he "woke [L.L.] up and started to explain what had … happened." D.J. testified that L.L. "cut [him] off]" and said, "You're not [going to] believe, [Banuelos] just had his hand down my pants."

¶8 Banuelos contends that D.J.'s testimony as to Banuelos previously touching D.J. and L.L. is inadmissible other acts evidence and, therefore, the court erred in allowing the evidence's admission at trial.

¶9 A circuit court's decision to admit or exclude other acts evidence is reviewed under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the court's decision if the court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. ***Id.*** We generally look for reasons to sustain the circuit court's discretionary decisions. ***State v. Lock***, 2012 WI App 99, ¶43, 344 Wis. 2d 166, 823 N.W.2d 378.

¶10 Other acts evidence is not, as a general rule, admissible. *See* ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967) (setting forth reasons why other acts evidence is not generally admissible). However, other acts evidence

may be used in a criminal prosecution provided the evidence is not used to show that the defendant acted in conformity with his or her character and the evidence satisfies the following three-prong test: (1) the evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2); (2) the evidence is relevant; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the jury or needless delay. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). The party seeking the admission of other acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence. ***State v. Hurley***, 2015 WI 35, ¶58, 361 Wis. 2d 529, 861 N.W.2d 174. If the first two prongs are established, the burden shifts to the party opposing the admission of the other acts evidence to establish the third prong. ***Id.***

¶11 The State offered the other acts evidence for the purposes of proving intent, motive, and the absence of mistake or accident. Banuelos concedes that the evidence was offered for permissible purposes under WIS. STAT. § 904.04(2). Accordingly, we focus our analysis on the second and third prongs.

1. Whether the Evidence was Relevant

¶12 "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" ***State v. Marinez***, 2011 WI 12, ¶33, 331 Wis. 2d 568, 797 N.W.2d 399 (quoted source omitted). There are two parts to a relevancy analysis: (1) whether the evidence relates to some fact that is of consequence to the determination of the action; and (2) whether the evidence has some tendency to make that fact more or less probable than it would be without the evidence. ***Id.***

¶13 Turning to the first inquiry, Banuelos focuses his argument on the circuit court's statement at the hearing on the State's motion to admit the other acts evidence that intent and the absence of mistake or accident are permissible purposes for admitting the evidence. Banuelos asserts that the other acts evidence is "irrelevant" to both intent and the absence of mistake or accident because Banuelos never claimed that he accidently or mistakenly touched G.P.S. As best we can tell, Banuelos additionally argues that intent is not an element of second-degree sexual assault of a child and, therefore, not relevant under the facts here.[2]

¶14 We need not and do not address whether Banuelos is correct as to whether the evidence is relevant to prove an absence of accident or mistake because we conclude that the evidence is relevant to prove intent which is an element of second-degree sexual assault of a child, and also because the evidence is relevant to prove motive. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (we may affirm for reasons different than those relied upon by the circuit court).

¶15 WISCONSIN STAT. § 948.02(2) provides: "Whoever has sexual contact … with a person who has not attained the age of 16 years is guilty of a Class C felony." "Sexual contact" is defined by WIS. STAT. § 948.01(5) as including:

> (a) Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually

[2] Banuelos argues: "Any evidence … that is proffered for the purpose of intent does not correlate with the elements of the charge against [] Banuelos. The State was simply required to prove that the defendant had sexual contact with a child and that the child was under age sixteen—nothing else needed to be proven."

> degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant:
>
> 1. Intentional touching by the defendant … by the use of any body part … of the complainant's intimate parts.

Because "sexual contact" is defined as only "intentional touching," the crime necessarily includes the element of intent. *See* ***State v. Brienzo***, 2003 WI App 203, ¶19, 267 Wis. 2d 349, 671 N.W.2d 700.

¶16 In addition, "[o]ur cases establish that when the defendant's motive for an alleged sexual assault is an element of the charged crime, other crimes evidence may be offered for the purpose of establishing motive." ***State v. Davidson***, 236 Wis. 2d 537, 566, 613 N.W.2d 606. As noted, WIS. STAT. § 948.01(5) defines "[s]exual contact" as "intentional touching … either for the purpose of sexually degrading or sexually humiliating the complainant or sexually arousing or gratifying the defendant." Banuelos's purpose or motive for touching G.P.S. was, therefore, also an element of the crime charged, and evidence of prior acts could be offered to establish motive. *See* ***Davidson***, 236 Wis. 2d at 566.

¶17 In summary, we conclude that because both intent and motive were relevant, it was reasonable for the court to conclude that the evidence relates to propositions, intent and motive, that are of consequence to the action.

¶18 Turning to the second part of the relevancy inquiry, we also conclude that it was reasonable for the court to conclude that the other acts evidence has some tendency to make Banuelos's intent and motive more or less probable than it would be without the evidence. *See* ***Sullivan***, 216 Wis. 2d at 786. "'The measure of probative value in assessing relevance is the similarity between the charged offense and the other act.'" ***Davidson***, 236 Wis. 2d at 570 (quoted source omitted). The prior acts described by D.J. are similar to Banuelos's sexual

assault of G.P.S. In the prior acts, Banuelos placed his hand inside D.J. and L.L.'s underwear while they slept and touched their penises. G.P.S. similarly asserted that Banuelos attempted to put his hand down G.P.S.'s underwear and attempted to touch G.P.S.'s penis while G.P.S. was trying to sleep.

2. Whether the Probative Value of the Evidence is Substantially Outweighed by the Danger of Unfair Prejudice

¶19 Banuelos argues that the probative value of the other acts evidence is outweighed by any prejudice from it. Evidence that is relevant may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. Unfair prejudice in this context is "not based on simple harm to the opposing party's case," but rather whether the evidence "tend[s] to influence the outcome of the case by improper means or if it appeals to the jury's sympathies, arouses [the jury's] sense of horror, provokes [the jury's] instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." ***Sullivan***, 216 Wis. 2d at 789-90, and ***Marinez***, 331 Wis. 2d 568, ¶41. The burden lies with Banuelos to establish that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. ***Marinez***, 331 Wis. 2d 568, ¶41.

¶20 The circuit court determined that although the other acts evidence involved criminal touching, it "was not so horrific that it would arouse the jury's sympathies and sense of horror" or "provoke [the jury's] instinct to punish" Banuelos. Banuelos challenges that determination, asserting that after hearing evidence, the jury was "going to have a reaction to basically punish [] Banuelos because of" the prior touching. However, this argument, such as it is, does not distinguish this case from any other case involving similar other acts evidence. Banuelos does not develop an argument as to why the jury might be particularly

inclined to punish the defendant here, as contrasted with countless other sexual assault cases in which such evidence is properly admitted. This court does not address conclusory or inadequately briefed arguments. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.

¶21 However, even if we were to address the issue, we would conclude that Banuelos has not shown that the other acts evidence was unfairly prejudicial. The other acts evidence at issue concerned Banuelos touching two adult men while they were sleeping. We disagree that evidence that Banuelos had previously touched, without consent, two adult men would provoke the jury's instinct to punish Banuelos for that conduct, in this trial charging Banuelos with inappropriate touching of a young child.

B. Inadmissible Hearsay and/or Violation of the Confrontation Clause

¶22 Banuelos contends that D.J.'s testimony as to what L.L. told D.J. about Banuelos touching L.L., which is set forth above in ¶7, is inadmissible hearsay evidence. He also argues that the testimony violated Banuelos's rights under the Confrontation Clause of the Sixth Amendment.

¶23 If this court determines "that the [circuit] court erroneously exercised its discretion in admitting or excluding evidence, we must [] 'conduct a harmless error analysis to determine whether the error affected [the defendant's] substantial rights.'" ***State v. Adamczak***, 2013 WI App 150, ¶9, 352 Wis. 2d 34, 841 N.W.2d 311 (quoting ***Martindale***, 246 Wis. 2d 67, ¶30). An error is harmless if there is no reasonable probability that the error contributed to the conviction. *See* ***id.***, ¶18.

¶24 Assuming, without deciding, that Banuelos is correct that the circuit court erroneously exercised its discretion in admitting D.J.'s testimony as to what L.L. told him Banuelos had done to L.L., we conclude that the error was harmless.

¶25 D.J.'s testimony regarding what L.L. told him was cumulative to what D.J. testified Banuelos had done to D.J. on the night of December 3 or 4, 2010. In addition, G.P.S. testified that he had truthfully described to Safe Harbor what Banuelos had done to him in this case. In the recording of G.P.S.'s interview at Safe Harbor, G.P.S. stated that he had been watching a movie at Smith's house and after Smith and her boyfriend went to their bedroom to sleep, Banuelos was laying on the couch and he was laying on the floor. G.P.S. stated that Banuelos offered G.P.S. money to lay by him and that G.P.S. agreed and lay on the floor by the couch. G.P.S. stated that while he was laying on the floor near Banuelos, Banuelos rubbed G.P.S.'s back for four to five minutes and then put his hands down G.P.S.'s pants. G.P.S. was not wearing underwear at the time and Banuelos rubbed G.P.S.'s bare buttock. G.P.S. stated that Banuelos stopped after G.P.S. said no and that G.P.S. moved to the middle of the room where he went to sleep. G.P.S. stated that he woke up to find Banuelos "close" behind him and that Banuelos's hand was inside G.P.S.'s shorts. G.P.S. stated that after he said "what are you doing," Banuelos "jumped" and returned to the couch.

¶26 G.P.S. also testified on cross-examination that while he was spending the night at Smith's apartment, Banuelos "brib[ed him] with money" to come near Banuelos; that after he lay on the floor near Banuelos, Banuelos touched G.P.S.'s buttock and put his hand down G.P.S.'s shorts; that G.P.S. moved away from Banuelos and lay on the floor; and that G.P.S. woke up and found Banuelos lying next to him on the floor.

¶27 We are satisfied that D.J.'s testimony as to what L.L. told him did not contribute to Banuelos's conviction in light of the cumulative nature of that testimony and G.P.S.'s consistent testimony and safe harbor interview detailing when and how Banuelos had touched him.

C. Material Witness Warrant

¶28 Banuelos contends the circuit court erred when it denied Banuelos's request for a material witness warrant under WIS. STAT. § 969.01(3) to compel the appearance of Georgianna Smith. Section 969.01(3) provides:

> If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. If the witness is not in court, a warrant for the person's arrest may be issued ….

In denying Banuelos's request, the court determined that the testimony of Smith was not material to Banuelos's case.

¶29 Banuelos asserts that the circuit court should have granted his request because Smith "was the only person that was with [G.P.S.] throughout the incident," the sexual assault took place in her home, and Smith had stated off the record that Banuelos never gave G.P.S. money and would thus serve as an impeachment witness against G.P.S. In support, Banuelos cites this court to portions of the trial transcript in which Banuelos's trial counsel argued before the circuit court in support of the issuance of the material witness warrant. However, WIS. STAT. § 969.01(3) states in relevant part that a warrant for a witness may be issued "[i]f *it appears by affidavit* that the testimony of a person is material ….." Banuelos's material witness affidavit is not part of the record on appeal. Without

the affidavit, we are unable to ascertain whether it appeared in the affidavit that Smith's testimony was material and that it had become impracticable to secure Smith's presence by subpoena. It is the burden of the appellant to ensure a complete record is before this court on appeal. *See* ***State v. Marks***, 2010 WI App 172, ¶20, 330 Wis. 2d 693, 794 N.W.2d 547. Where the appellate record is incomplete as to an issue raised by the appellant, "we must assume that the missing material supports the [circuit] court's ruling." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). In light of this assumption, we conclude that the court did not erroneously exercise its discretion in denying Banuelos's request.

D. Objection to Prior Inconsistent Statements

¶30 Banuelos contends that the circuit court erred when the court sustained the State's objection to a question by defense counsel about a statement G.P.S. made to a friend about G.P.S.'s father inappropriately touching G.P.S.

¶31 More specifically, on re-cross examination, defense counsel asked: "[G.P.S.], did you ever tell anyone that your dad was touching you inappropriately?" The State objected to the question, arguing that the question violated the circuit court's prior order limiting defense counsel's use of other acts evidence, and that the evidence was inadmissible under the rape shield law, WIS. STAT. § 972.11(2). The circuit court sustained the State's objection.

¶32 Banuelos asserts on appeal that the question was admissible for the purpose of impeaching G.P.S. in that it related to a prior inconsistent statement, namely that G.P.S. had allegedly told his friend that his father had inappropriately touched him. However, Banuelos does not explain to this court why that prior statement was inconsistent, or why asking G.P.S. the question would impeach him.

We conclude that Banuelos's arguments are conclusory and not sufficiently developed to warrant a response. *See* ***Associates Fin. Servs. Co. of Wis., Inc.***, 258 Wis. 2d 915, ¶4 n.3.

¶33 To the extent that Banuelos also argues that the circuit court erroneously sustained the State's objection to the question on the basis that the circuit court judge had plans that evening, Banuelos misconstrues the court's ruling. In response to the State's objection, defense counsel stated that he "asked the question because [he had] a basis to ask that question…. There's no violation, there's no ethical anything going on here." The judge stated that he disagreed with defense counsel, that he had been clear that re-cross examination should not address issues not addressed earlier, and that the topic of the question "should have been vetted before" it was asked. Although the court stated that the proceedings for the day needed to be wrapped up between 4:30 and 5:00 p.m. because the judge had other obligations, a reasonable reading of the record does not suggest that the court's comment affected its decision to sustain the State's objection.

E. Mistrial Motions

¶34 Banuelos contends that the circuit court erred in failing to grant his motions for mistrial, which were based on alleged bias by the circuit court judge and improper statements by the prosecution during the prosecution's closing arguments.

¶35 A mistrial is appropriate if the circuit court determines, in light of the whole proceeding, that the claimed error was sufficiently prejudicial to warrant a new trial. ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. Whether to grant or deny a mistrial is within the circuit court's discretion. ***Id.*** For

the reasons explained below, we conclude that the circuit court did not erroneously exercise its discretion in denying Banuelos's motions for mistrial.

1. Judicial Impartiality

¶36 Banuelos contends that he should be granted a new trial because the circuit court was objectively biased and not impartial toward him.

¶37 The Due Process Clause guarantees a right to a fair trial by an impartial judge, ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385, and "a biased decisionmaker is 'constitutionally unacceptable.'" ***State v. Herrmann***, 2015 WI 84, ¶25, 364 Wis. 2d 336, 867 N.W.2d 772 (quoted source omitted). A Due Process Clause violation occurs when the judge's conduct is so egregious that the probability of actual bias rises to an unconstitutional level. *See* ***State v. Hollingsworth***, 160 Wis. 2d 883, 894-95, 467 N.W.2d 555 (Ct. App. 1991); *see also* ***Caperton v. A.T. Massey Coal Co.,*** 556 U.S. 868, 877 (2009). Whether a circuit court judge was or was not impartial is a question of law that we review independently. *See* ***Herrmann***, 364 Wis. 2d 336, ¶23.

¶38 When reviewing a claim of judicial bias, we begin with the presumption that a judge has acted fairly, impartially, and without prejudice. ***Id.***, ¶24. However, the party asserting judicial bias may rebut this presumption by showing either subjective or objective bias by a preponderance of the evidence. ***Id.***; ***Goodson***, 320 Wis. 2d 166, ¶8. Banuelos's contention is based on objective bias, which occurs: (1) when there is the appearance of bias; or (2) there are objective facts demonstrating the judge treated a party unfairly. ***Goodson***, 320 Wis. 2d 166, ¶9. As to the first form of objective bias, we have explained:

> "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and

> weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.

Id. (quoted source and internal citations omitted).

¶39 Banuelos argues that the "comments and gestures" of the circuit court judge created an appearance of bias. In support, Banuelos points to the following:

(1) In front of the jury during defense counsel's re-cross examination of a witness, the judge stated, "I don't know why counsel always want to repeat everything in the world. When exhibits are in and every e-mail is in, you don't have to re-prove it a hundred times."

(2) Outside the presence of the jury, the following exchange took place between defense counsel and the court:

> [DEFENSE COUNSEL]: Judge, I just want to put on the record the Court's statement, as the Court was making the statement, it was showing the displeasure with counsel to the jury about the manner in which he's asking the question.
>
> The State many times has repeated questions. The Judge never made any comments like that about the prosecution. I'm just doing my job, Judge. That's what I'm doing.
>
> ….
>
> THE COURT: …[Y]es, the record can reflect I am a bit displeased ….

(3) The judge had "facial expressions," which led defense counsel to request a jury instruction advising the jury that they should not

understand the judge's expressions to mean that he is siding with a particular side.

(4) The judge interrupted defense counsel during counsel's closing argument and stated: "Can we focus back on the case, please … we're getting a little far afield."[3]

(5) "The judge's demeanor reflected a lackadaisical and apathetic attitude towards the defendant…."

¶40 Banuelos points to the judge's "expressions" and demeanor as evidence of objective bias. However, Banuelos does not describe what the judge's facial expressions were, nor does he explain in what way the judge's demeanor was lackadaisical and apathetic. Accordingly, we reject these as evidence of the judge's impartiality.

¶41 As to the judge's statements, only two of the statements relied upon by Banuelos were made in front of the jury. The first statement, that the judge did not "know why counsel always want to repeat everything in the world," was made during re-cross examination by defense counsel immediately after the judge had twice stopped defense counsel from asking questions that had been addressed earlier in the trial. The second statement, in which the judge asked defense counsel to focus his closing arguments, was made while defense counsel was engaged in a discussion of how counsel was treated differently as a child because

[3] Banuelos also states that the judge "abruptly cut off defense counsel in closing argument and did not allow him to proceed." Banuelos does not provide this court with a record citation and our review of the defense's closing arguments in the transcript does not reflect that the circuit court in any way prevented counsel from proceeding with counsel's closing arguments. In fact, after the court's interruption, counsel proceeded with his closing argument.

of the color of his skin and how that affected counsel. The court did not stop counsel from continuing his closing argument, nor did the court in any way suggest that counsel could not continue with his argument as planned. We conclude that from these statements alone, a reasonable person could not conclude that the judge was biased.

2. Statements by the Prosecution

¶42 During closing argument, the prosecutor stated as follows:

> A great big deal has been made about DNA. And I will remind you … the reasonable doubt instruction tells you not to speculate. And yet this entire argument pitched to you by [defense] counsel is premised in coaxing and goading you to speculate about DNA evidence.
>
> The defense didn't ask one question of [Detective Frisch] about [G.P.S.'s] shorts. Fascinating. I expected it after the big drill [defense counsel] gave to the line officer. … Why do you think that is? 'Cause he'd much rather have you speculate than get an actual answer…. [A]nd by the way, the defense has the right to call witnesses in a case. Why didn't the defense ….

Defense counsel objected, arguing that Banuelos was not obligated to call any witnesses and that the prosecutor was improperly shifting the burden of proof to Banuelos. The circuit court agreed with defense counsel that Banuelos was not obligated to call witnesses, stating "the defense does not have to call any witnesses, and the defendant does not have to testify." The circuit court denied the subsequent motion for mistrial as to the prosecution's closing argument statements, concluding that the prosecution had not improperly shifted the burden of proof to Banuelos.

¶43 When a motion for mistrial is based upon the ground that a prosecutor's statements and arguments constituted misconduct, "the test applied is

whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (quoted source omitted). The statements are to be reviewed in the context of the entire trial. ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995).

¶44 Banuelos argues that the prosecutor's statements "called upon the jury to evaluate the evidence presented by the defendant" and that the statements were "highly prejudicial" because Banuelos's trial was largely based upon testimonial evidence, the statements were made after the jury instructions had been provided, and the statements were "the last thing the jury heard before deliberation."

¶45 We are not persuaded that the prosecutor's statements "'so infected the trial with unfairness'" as to make Banuelos's conviction a denial of due process. *See* ***Mayo***, 301 Wis. 2d 642, ¶43 (quoted source omitted). Banuelos is correct that the evidence at trial was largely testimonial. However, Banuelos does not explain how, because of the testimonial nature of the evidence, the prosecutor's statement affected how the jury weighed that evidence or otherwise affected the outcome of the trial. In addition, the prosecutor's statements were not "the last thing" the jury heard before it deliberated. The single passing reference to Banuelos's failure to call witnesses was made in the midst of the prosecution's lengthy closing arguments. Furthermore, although the statements occurred after the jury had been instructed, the jury had been instructed that the State bore the burden of proving Banuelos's guilt and, after Banuelos objected to the prosecutor's statements, the circuit court advised the jury that Banuelos was not obligated to call witnesses. Accordingly, we conclude that the circuit court did not

erroneously exercise its discretion when it denied Banuelos's motion for mistrial based on improper statements by the prosecutor.

F. New Trial in the Interest of Justice

¶46 This court has the power to independently consider the record to determine whether to grant a new trial in the interest of justice. WIS. STAT. § 752.35. A defendant may be entitled to a new trial in the interest of justice when the real controversy has not been fully tried or when there has been a miscarriage of justice. ***Id.; State v. Harp***, 161 Wis. 2d 773, 779, 469 N.W.2d 210 (Ct. App. 1991). However, we exercise our discretionary power of reversal "only sparingly," ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206, and "only in exceptional cases." ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98.

¶47 Banuelos contends that he is entitled to a new trial in the interest of justice because it is likely that justice miscarried. To establish a miscarriage of justice, there must be "a 'substantial degree of probability that a new trial would produce a different result.'" ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoted source omitted).

¶48 Banuelos argues that "the likelihood of a miscarriage of justice is severe" because facts and evidence not supported by law were admitted at trial, the circuit court judge was biased and not impartial, and the prosecutor made improper statements during closing arguments. Above we have rejected Banuelos's challenges to the admission of evidence, the trial judge's impartiality and the prosecutor's statements during closing arguments. Accordingly, there is no basis for Banuelos's contention that justice miscarried nor any reason to reverse Banuelos's conviction in the exercise of our discretion.

CONCLUSION

¶49 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

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