**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 27, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-1422-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JAMEEL A. ALI,**

**Defendant-Appellant.**

APPEAL from judgments and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Jameel A. Ali appeals from the judgments of conviction for second-degree sexual assault of a child and from the order denying his motion for postconviction relief. Ali argues that the trial court erred in responding to the jury's question of whether the jurors could consider his conduct during jury selection. He also argues that the prosecutor allegedly

engaged in "prejudicial misconduct" that deprived him of a fair trial. We reject his arguments and affirm.

## I. THE JURY INSTRUCTIONS

This was a credibility case. The victim, T.S., was a fourteen-year-old girl who testified that on March 9, 1994, Ali, her mother's boyfriend, rubbed her vagina as he was waking her up for school. Ali testified that the victim made false allegations of sexual contact against him because she disliked him and the household rules that he tried to impose.

While deliberating, the jury sent out a note asking, "Can we use behavior observed in Mr. Ali observed prior to the selection and swearing in of the jury in our deliberation?" Nothing in the record or the appellate briefs establishes what behavior was of concern or significance to the jury. The parties and the trial court agreed that Ali's behavior was not "evidence" from "trial." *See* WIS J I—CRIMINAL 103 ("evidence defined"); ***State v. Miller***, No. 95-0129-CR (Wis. Ct. App. 1995, publication ordered Nov. 28, 1995) ("trial" begins when jury is sworn). The State, however, argued that because his demeanor was observable by the jury, it was "not appropriate" to ask the jury to ignore Ali's behavior, particularly because he testified at trial.

Initially, the trial court answered the jury's question, "Please continue your deliberations based on the instructions you have been given." Subsequently, however, the trial court instructed:

> The evidence in this case consists only of the testimony of the witnesses and the exhibits received in evidence.
>
> In assessing the credibility of witnesses, you may consider what you observed in the courtroom during these proceedings, including the conduct and demeanor of the witness. Keep in mind, however, that there may be many explanations for a person's demeanor or conduct at any particular point in time.

> You must read all of the instructions I have given you together, and apply them as a whole to the evidence.

A trial court has broad discretion in instructing the jury. ***State v. Higginbotham***, 110 Wis.2d 393, 403, 329 N.W.2d 250, 255 (Ct. App. 1982). If the jury instructions, when viewed as a whole, present a correct statement of the law, the jury's verdict will not be interfered with on appeal. ***State v. Pettit***, 171 Wis.2d 627, 637, 492 N.W.2d 633, 638 (Ct. App. 1992); *see also* ***State v. Petrone***, 161 Wis.2d 530, 560-561, 468 N.W.2d 676, 688 (if overall meaning of jury instructions is correct, "then any erroneous part of the instruction is harmless and not grounds for reversal"), *cert. denied*, 502 U.S. 925 (1991).

Here, the jury instructions, read in their entirety, do not misdirect the jury. The trial court instructed the jury as to what evidence and testimony it could consider. The trial court also instructed the jury that the defendant's "testimony should be weighed as the testimony of the o[th]er witnesses; considerations of interest in the outcome, appearance, demeanor and other matters bearing upon credibility apply to the defendant in common with the other witnesses in this case." We cannot conclude that the trial court's supplemental jury instructions in response to the jury's query misdirected the jury.

## II. PROSECUTORIAL MISCONDUCT

Ali also argues that the prosecutor engaged in prejudicial misconduct that deprived him of a fair trial. Ali claims that the State "sought to bolster" T.S.'s credibility by eliciting testimony from the investigating City of Milwaukee police officer, Cynthia Lozano, that the testimony of T.S. and the teacher to whom T.S. initially reported the sexual contact was consistent with their initial statements to him. Ali also claims that the State improperly elicited responses from the officer that referred to T.S. as "the victim." Finally, Ali contends that the State impermissibly shifted the burden of proof and discussed facts not in evidence during its closing argument. Defense counsel failed to object to any of these matters. On appeal, Ali argues "plain error," "new trial in

the interests of justice" under § 752.35, STATS., and, alternatively, ineffective assistance of counsel.

Despite the lack of a proper objection, this court may review alleged claims of error under § 901.03(4), STATS., for "plain error." "Plain error is error so fundamental that a new trial or other relief must be granted." ***State v. Vander Linden***, 141 Wis.2d 155, 159, 414 N.W.2d 72, 73 (Ct. App. 1987). "Review under the doctrine of plain error is reserved for those cases where there is a likelihood that the defendant has been denied a fundamental constitutional right or the right of [a] fair trial." ***Id.*** at 159, 414 N.W.2d 73-74. Additionally, despite the lack of a proper objection, we may exercise our discretionary review under § 752.35, STATS., in the interests of justice if "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."

We first note that Ali's argument regarding Officer Lozano's testimonial references to T.S. as "the victim" is not supported by citations to authority. Therefore, we decline to address this argument. *See* ***Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642.

Similarly, we also reject Ali's argument that the State "sought to bolster" T.S.'s credibility by eliciting testimony from the investigating officer that the testimony of T.S. and the teacher to whom T.S. initially reported the sexual contact was consistent with their initial statements to him. Although Ali sets forth this issue as one of many instances of prosecutorial misconduct that "will be addressed *seriatim*" in the argument section of his brief, he fails to do so. Therefore, we decline to address this issue. *See* ***Pettit***, 171 Wis.2d at 646-647, 492 N.W.2d at 642. (inadequately briefed and undeveloped arguments need not be addressed on appeal).

The first of the alleged prosecutorial misconduct arguments that Ali does develop relates to the prosecutor's argument regarding T.S.'s testimony that Ali was "breathing hard" and "licking his lips" while touching her vaginal area. The prosecutor argued that this testimony "showed that it was done for the purposes of sexual gratification, [and] would not have been known to a fourteen year old." Ali argues that "it is error for a prosecutor to make any statement concerning facts that are neither supported by the evidence nor

properly inferable from the evidence." In its order denying Ali's postconviction motion, the trial court rejected Ali's argument, stating that "the comments appear to be a reasonable, common sense and proper closing argument."

The prosecutor's challenged statement was brief, made in the context of twice referring to the fact that it was the State's burden to prove that the sexual contact was for purposes of sexual gratification. In context, the prosecutor's brief statement that the details T.S. related were the kind of sexual details that would not be known to a fourteen year old was not commentary on evidence not of record; it was allowable argument suggesting that the jury infer T.S. was telling the truth because of the details she described. In any event, the jury was instructed that the arguments of counsel did not constitute evidence, and we thus presume the jury followed the court's instructions. *See* ***State v. Patino***, 177 Wis.2d 348, 379, 502 N.W.2d 601, 614 (Ct. App. 1993). Even aside from waiver due to Ali's failure to object, this issue does not rise to the level of plain error.

Ali also argues that the prosecutor improperly commented that T.S.'s testimony was consistent with her investigatory and pre-trial statements to the prosecutor. The prosecutor stated:

> The next day [the day after she first reported the incident] it wasn't over. She had to come down to the DA's office. She made a statement to Detective Lozano. *She had to go through it again with me which again was all perfectly consistent all the way along the line* and she had to come to court, not once but twice.

(Emphasis added.)

As the trial court accurately noted in its postconviction decision, the evidence included general references to T.S.'s prior statements to her friend, her teacher, her mother, the investigating officer and the prosecutor. The prosecutor's brief statement fails to amount to plain error.

Finally, Ali argues that the prosecutor impermissibly shifted the burden of proof by arguing that he was guilty because he was "lying." In finishing up her closing argument and pointing out that the case hinged on credibility determinations, the prosecutor stated:

> Ladies and gentlemen, the jury instruction says that you are to give the defendant the benefit of a reasonable doubt. And if you can find a reason for which to not believe [T.S.], then you should find him not guilty. But there is no reason not to believe her. *He is guilty and that's a true and just verdict in this case.*

(Emphasis added.) On rebuttal, after once again arguing about the evidence of the case, the prosecutor stated:

> Ladies and gentlemen, reread the credibility instruction. When you get into the ... jury room, and it talks about the factors to consider when evaluating the credibility of a witness, and I think when you look at all those factors one-by-one, you will come to the conclusion that [T.S.] is the credible witness and not the defendant. *She's telling the truth. He's lying and he's guilty.*

(Emphasis added.)

Here, the prosecutor reiterated the correct legal standard for the burden of proof while, at the same time, encouraging the jury to apply the credibility instruction when evaluating the evidence from trial. As the State correctly notes, "it would have been preferable for the prosecutor to say that '*based on the evidence*, you should find the defendant guilty." (Emphasis added.) Nevertheless it is apparent from the totality of the prosecutor's arguments that she was arguing that Ali was guilty based on an analysis of the evidence, and not that she was asserting her personal opinion of Ali's guilt or innocence. *See* ***State v. Johnson***, 153 Wis.2d 121, 132, 449 N.W.2d 845, 850 (1990). Thus, we reject Ali's plain error argument on this issue as well.

Ali also seeks relief under our discretionary power in § 752.35, STATS. He never develops any argument relevant to the facts of this case nor does he ever clarify under which prong of § 752.35 he seeks relief. Therefore, we decline to address this issue. *See* ***Pettit***, 171 Wis.2d at 646-647, 492 N.W.2d at 642.

Finally, as an alternative argument, Ali contends that his trial counsel's failure to object to the various instances of alleged prosecutorial misconduct amounted to ineffective assistance of counsel. He argues that we should remand this case to the trial court for a ***Machner*** hearing. We also reject this argument.

Whether the trial court correctly denied a defendant's motion for an evidentiary hearing for ineffective-assistance-of-counsel claims is a question of law, which we review *de novo*. ***State v. Toliver***, 187 Wis.2d 346, 359, 523 N.W.2d 113, 118 (Ct. App. 1994). In order to receive an evidentiary hearing on an ineffective- assistance-of-counsel claim, a defendant must raise factual allegations to support the claim that the attorney rendered deficient performance and that the deficient performance was prejudicial. ***State v. Saunders***, 196 Wis.2d 45, 49-52, 538 N.W.2d 546, 548-549 (Ct. App. 1995). Here, with the possible exception of only one paragraph, Ali's motion for postconviction relief fails to "explain how he was prejudiced by whatever it was that his trial counsel was supposed to have done." ***Id.*** at 51-52, 538 N.W.2d at 549. Thus, the trial court was not required to hold an evidentiary hearing.

In one paragraph of Ali's motion, Ali argues that he was prejudiced by his trial counsel's failure to object to the prosecutor's statement during closing arguments that he "lied at trial and, therefore, he must be guilty, allowing her to shift and lower the burden of proof and eviscerate the presumption of innocence." Without deciding whether trial counsel's performance in this regard was deficient, we conclude that the asserted error was not prejudicial. *See* ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990) (either performance or prejudice prong may be decided first). Prejudice has been defined as whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***State v. Marty***, 137 Wis.2d 352, 357, 404 N.W.2d 120, 122 (Ct. App. 1987). Here, defense counsel's failure to object to the prosecutor's analysis of the evidence did not deprive Ali of a fair trial in light of the totality of the evidence presented at trial and the fact

that the prosecutor's statement was made while also reiterating the correct legal standard for the burden of proof while, at the same time, encouraging the jury to apply the credibility instruction when evaluating the evidence from trial.

In sum we reject all of Ali's arguments and affirm the judgments of conviction and the order denying his motion for postconviction relief.

*By the Court.* – Judgments and order affirmed.

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