

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 31, 1997

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.

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

No. 96-2571-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON L. JORGENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. MC ALPINE, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Jason Jorgenson appeals from a judgment convicting him of physical abuse to a child, contrary to § 948.03(2)(b), STATS. The issue is whether Jorgenson is entitled to a new trial because the State made prejudicial statements during its closing argument. Because Jorgenson failed to timely object to all but one nonprejudicial statement, we affirm.

Jorgenson was charged with physical abuse to a child. The victim was a girl who had sustained bruises on her buttocks. The case was tried to a jury and the evidence consisted, in part, of photographs taken by the attending physician, Dr. Patterson, which showed that hand-shaped bruises had been inflicted on the victim.

At the close of evidence, counsel gave their closing arguments. During the State's discussion of the hand-shaped bruises, the prosecutor stated that "[y]ou could tell it was a right handed hit." Jorgenson objected to the prosecutor's statement. The court overruled his objection.

After the jury retired to deliberate, Jorgenson moved for a mistrial on the following grounds: (1) that the prosecutor's statement about a "right-handed hit" and his speculative remarks on why the victim had difficulty in testifying were comments on information not in evidence; (2) that much of the prosecutor's closing argument was improper personal opinion; and (3) that the prosecutor's closing statements that the victim needed justice and that Jorgenson needed criminal sanctions were improper and inflammatory. The court denied the motion.

The jury found Jorgenson guilty. Jorgenson appeals, contending that the prosecutor's improper statements denied him his due process right to a fair trial.

Jorgenson objected only once during the prosecutor's closing argument. "Failure to object at the time of the alleged improprieties in the closing argument ... waives review of that alleged error." *State v. Goodrum*, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). Therefore, we confine our review to the single statement to which Jorgenson objected.

Jorgenson objected when the prosecutor referenced the bruises on the victim and stated that “[y]ou could tell it was a right handed hit.” Jorgenson contends that, because there was no evidence that the bruise was inflicted by a right-handed hit, the prosecutor’s statement suggested that the jury should consider factors other than evidence to reach a verdict. The statement, he argues, was so prejudicial that it denied him a fair trial.

A motion for a mistrial is committed to the sound discretion of the trial court. *State v. Bunch*, 191 Wis.2d 501, 506, 529 N.W.2d 923, 925 (Ct. App. 1995). We draw the line between permissible and impermissible argument 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. Draize*, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). “Argument on matters not in evidence is improper.” *State v. Albright*, 98 Wis.2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980). But, we will not restrain the advocate with unreasonable restrictions so long as the comments relate to the evidence. *Draize*, 88 Wis.2d at 456, 276 N.W.2d at 790.

The State submitted into evidence photographs of the victim’s injuries taken the day the victim was examined and the day after. Dr. Patterson described the bruises depicted in the photographs. He characterized them as hand-shaped and alluded to the outline of a hand print and two or three fingermarks. When the prosecutor stated that “[y]ou could tell it was a right handed hit,” he suggested what might be inferred from the photographs. Therefore, the prosecutor’s closing statement related to the evidence, and the trial court properly exercised its discretion when it denied Jorgenson’s motion for mistrial.

By the Court.—Judgment affirmed.

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

