COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0036-CR **Cir. Ct. No. 01CF000078**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY E. SILER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Gregory Siler appeals a judgment, entered upon a jury's verdict, convicting him of two counts of first-degree sexual assault of a

child contrary to WIS. STAT. § 948.02(1).[1] Siler argues that the prosecutor's comments during closing argument violated his constitutional rights against self-incrimination, to counsel and to a fair trial. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 An amended Information charged Siler with two counts of first-degree sexual assault of a child, arising from allegations that he had sexual contact with ten-year old Savannah B. while babysitting her. Relevant to this appeal, the State filed a pretrial motion to admit other acts evidence consisting of two photographs taken from Siler's computer. The photographs depicted nude prepubescent girls evidencing, the State argued, that Siler had an attraction to young girls. The court, concluding the photographs were relevant to prove motive and their probative value was not outweighed by their prejudicial effect, denied Siler's motion to suppress the photographs.

¶3 Before the trial began, Siler presented a ***Wallerman*** stipulation providing that if the charged acts occurred, they were done with the intent to become sexually aroused or gratified.[2] The parties discussed what would happen under the ***Wallerman*** stipulation if Siler decided to take the stand and deny having contact with Savannah. The court determined that the stipulation cut both ways—if Siler decided to testify and denied touching Savannah, the State could

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] In ***State v. Wallerman***, 203 Wis. 2d 158, 552 N.W.2d 128 (Ct. App. 1996), this court held that a defendant can concede elements of a crime in order to avoid the introduction of other acts evidence.

aggressively cross-examine him, using the other acts evidence to establish his attraction to young girls. Siler did not testify and the photos were never introduced into evidence. During his closing argument, the prosecutor stated:

> So why are we having a trial? Well, we all know this. I told you this in opening statement because I knew because Officer Holley had interviewed the defendant. He denies everything. That's why we're having a trial. It takes you, ladies and gentlemen of the jury, it takes you to stick up for Savannah and find him guilty because he will not admit his guilt.

¶4 Defense counsel objected to the prosecutor's comments, noting: "There is no obligation for [Siler] to admit his guilt or anything like that. That's an impermissible argument." The trial court noted the objection and directed the prosecutor to continue. Siler was ultimately convicted upon the jury's verdict of the crimes charged. The court withheld sentence and imposed concurrent terms of twelve years' probation, with 360 days in jail as a condition of probation. This appeal follows.

DISCUSSION

¶5 Siler argues that the prosecutor's closing argument statement violated his right against self-incrimination and right to a fair trial.[3] The privilege against self-incrimination is guaranteed by Article I, § 8, of the Wisconsin Constitution and under the Fifth Amendment to the United States Constitution. *See* ***Grant v. State,*** 83 Wis. 2d 77, 80, 264 N.W.2d 587 (1978). It is improper for the State to comment upon a defendant's choice to remain silent at or before trial.

[3] In order to preserve this issue, Siler was obligated to make a contemporaneous objection and move for a mistrial. *See* ***State v. Adams***, 221 Wis. 2d 1, 18, 584 N.W.2d 695 (Ct. App. 1998). Siler concedes that he failed to move the trial court for a mistrial. We nevertheless reject this argument on its merits.

State v. Adams, 221 Wis. 2d 1, 8, 584 N.W.2d 695 (Ct. App. 1998). The test for determining whether remarks are directed at a defendant's failure to testify is whether the language used was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. ***State v. Johnson***, 121 Wis. 2d 237, 246, 358 N.W.2d 824 (Ct. App. 1984). Moreover, when a prosecutor is charged with misconduct for remarks made in argument to the jury, the test is "whether those remarks 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). Misconduct that poisons the entire atmosphere of the trial violates due process; however, "reversing a criminal conviction based on prosecutorial misconduct is a drastic step that should be approached with caution." ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996).

¶6 Here, Siler argues the prosecutor's closing argument statement was both an impermissible comment on Siler's failure to testify and an expression of personal opinion unconnected to the evidence adduced at trial. We are not persuaded. Any inference that the statement was a comment on either Siler's silence or the prosecutor's opinion of Siler's guilt is unreasonable when the statement is viewed in context of the entire proceeding.

¶7 Looking at the entire record, the prosecutor made it clear to the jury that the State had to prove Siler guilty and that Siler did not have to testify. At trial, the jury heard the investigating officer, Jon Holley, testify regarding his interviews with Savannah, and later with Siler, about the alleged incidents. Holley recounted that Siler denied the allegations. The prosecutor's comment that Siler "will not admit his guilt" is nothing more than a restatement of the evidence that Siler denied the allegations and pled not guilty. In context, the comment was not

aimed at Siler's silence, but rather at Savannah's and Siler's contradictory contentions. The prosecutor implicitly referred to facts in evidence when arguing that the jury should believe Savannah's account over Siler's denials to police. The statement was not "of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify," ***Johnson***, 121 Wis. 2d at 246, nor did the statement so infect "the trial with unfairness as to make the resulting conviction a denial of due process." ***Wolff***, 171 Wis. 2d at 167. The prosecutor properly commented on the evidence, detailed the evidence, argued from it to a conclusion and stated that the evidence convinced him and should convince the jurors. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

¶8 In any event, the court instructed the jury: "Remarks of the attorneys are not evidence. If the remarks suggest certain facts not in evidence, disregard the suggestion." With respect to closing arguments, the jury was further instructed: "Now, 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 you by the Court." We presume that the jurors acted in accordance with this instruction. ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). The drastic remedy of a mistrial was not necessary.[4]

[4] With respect to Siler's claim that the prosecutor's comment violated his Sixth Amendment right to counsel, this argument is undeveloped. This court declines to address issues raised on appeal that are inadequately briefed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

By the Court.—Judgment affirmed.

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