COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP518-CR **Cir. Ct. No. 2008CF206**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHEENOU XIONG,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Cheenou Xiong appeals two judgments of conviction entered on a jury's verdict finding him guilty of two counts of delivery

of methamphetamine contrary to WIS. STAT. § 961.41(1)(e)2. (2009-10)[1] and an amended judgment of conviction finding him guilty of one count of delivery of cocaine contrary to WIS. STAT. § 961.41(1)(cm)3., each as a party to a crime contrary to WIS. STAT. § 939.05. In addition, Xiong appeals an order denying his postconviction motion seeking a new trial in the interest of justice because: (1) the State elicited inadmissible hearsay testimony connecting Xiong to a key figure in the case, Mai Moua; (2) the State introduced crime lab results in violation of a pretrial order and improperly failed to disclose discovery; (3) the State introduced evidence which improperly informed the jury of Xiong's conviction and probation status; and (4) the State disparaged the role of defense counsel in closing argument. For the reasons we explain below, we affirm.

BACKGROUND

¶2 The following facts are taken from the trial transcript. Detective John Lawrynk, a drug investigator for the Stevens Point police department, asked an individual named Vong Vang to obtain methamphetamine for him. Vang informed Detective Lawrynk that "he could get it from his cousin … Chewy." Vang gave Detective Lawrynk a phone number and told him "to call [Chewy] and talk to him directly."

¶3 Subsequently, on January 24, 2008, Detective Lawrynk phoned an individual who purported to be Chewy and who agreed to sell Detective Lawrynk methamphetamine. The next morning, Detective Lawrynk received a phone call from a male individual and agreed to meet him at a Walmart in Plover. The male

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

individual stated that he would be wearing a white jacket and would be standing "in front of one of the doors to Walmart underneath the word 'Always.'" Detective Lawrynk informed the surveillance team about the plan.

¶4 Upon arriving at the Walmart, Detective Lawrynk noticed an individual in a white jacket standing in front of the store entrance and informed the surveillance team. At first, Detective Lawrynk assumed that the man named Chewy was standing at the entrance, but, as he drove closer, he realized it was "a female Asian," later identified as Moua. Moua entered the vehicle and stated she had "the stuff." Moua removed from her pocket a brown paper towel, which contained a small bag of a white crystalline substance that was later determined to be methamphetamine. Detective Lawrynk purchased the methamphetamine and told Moua "to tell Chewy thanks." Moua exited the vehicle and walked toward the Walmart.

¶5 Special Agent Ronald Glaman provided surveillance from the Walmart parking lot. About an hour after Detective Lawrynk left, Agent Glaman observed Moua and an Asian male leave the Walmart and drive away in a purple Mitsubishi. Agent Glaman later obtained two still frame photographs of Moua and the Asian male from Walmart security. Agent Glaman determined that the license plate and vehicle registration of the purple Mitsubishi traced to Ka Ying Vang at 2117 Oak Street in Stevens Point. In addition, he determined the phone number that Detective Lawrynk called to arrange the transaction traced to Ka Ying Vang at that same address. Agent Glaman discovered that Ka Ying Vang is Xiong's mother.

¶6 Following this transaction, the surveillance team determined that "Chewy" was Xiong. Agent Glaman testified that this conclusion was reached

based on a review of the Stevens Point police department's in-house computer records, which showed that, in May 2007, Xiong was stopped by police while driving a purple Mitsubishi bearing the same license plate number as the Mitsubishi in which Moua and the Asian male were seen at the time of the January drug transaction. In addition, the photographs of the Asian male with Moua obtained from Walmart security following the January drug transaction matched photographs of Xiong obtained from the Wisconsin Department of Transportation (DOT) and the Wisconsin Department of Corrections (DOC).

¶7 In February 2008, Detective Lawrynk called the same cell phone number he had called to set up the January drug transaction and left a message to arrange another drug transaction. A female whom Detective Lawrynk believed to be Moua immediately returned the call. After several phone conversations, Detective Lawrynk agreed to meet Moua at the same Walmart. At the store, Moua handed Detective Lawrynk "a small ziplock baggie" that contained a substance later determined to be methamphetamine. As Detective Lawrynk drove out of the Walmart parking lot, he observed Moua and an Asian male driving away in a purple Mitsubishi.

¶8 In April 2008, Detective Lawrynk placed another phone call using the same phone number and arranged to meet Moua at the Walmart. At the store, Moua approached Detective Lawrynk and handed him a bag that contained a white substance. Detective Lawrynk purchased the substance and expressed "interest[] in buying more." After making a phone call, Moua told Detective Lawrynk that, "he will call you in a few minutes." Within a few minutes, Detective Lawrynk received a phone call from a male individual believed to be Chewy who instructed him to go to a Menards in Plover. At the Menards, Moua sold Detective Lawrynk a bag containing a white substance that was determined to be cocaine.

¶9 In May 2008, the officers obtained a warrant to search Xiong's mother's Oak Street residence. Detective Robert Kussow, among others, entered the residence and discovered an "elderly female" and two Asian males, one of whom was identified as Xiong. Detective Kussow searched what was believed to be Xiong's bedroom. In the bedroom, Detective Kussow found a cell phone that was determined to be the same cell phone that Detective Lawrynk called to set up the drug transactions. Detective Kussow also discovered a silver briefcase underneath the bed and a black Brinks box in the closet. Later, at the police department, the following items were discovered in the briefcase: (1) a letter addressed to "Chee N Xiong, 2117 Oak Street, Stevens Point, Wisconsin"; (2) other papers addressed to Xiong; (3) a bank envelope which contained seven $100 bills that matched the serial numbers of the buy money used in the April drug transactions; and (4) a key that contained a number that matched the lock number on the Brinks box. The Brinks box contained several baggies of a substance that Detective Kussow believed to be methamphetamine.

¶10 Based on this and other evidence, a jury found Xiong guilty. Xiong filed a postconviction motion requesting a new trial. The court denied the motion, concluding that Xiong received a fair trial. Xiong appeals.

DISCUSSION

¶11 Xiong contends that, pursuant to WIS. STAT. § 752.35, we should exercise our discretionary reversal power on the ground that the real controversy has not been fully tried. To establish that the real controversy has not been fully tried, Xiong must persuade us that "certain evidence which was improperly received clouded a crucial issue in the case." ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543 (citations omitted); *see also* ***State v.***

Burns, 2011 WI 22, ¶24, 332 Wis. 2d 730, 798 N.W.2d 166. Our discretionary reversal power is formidable and therefore we exercise it "sparingly and with great caution." ***State v. Watkins***, 2002 WI 101, ¶79, 255 Wis. 2d 265, 647 N.W.2d 244; ***State v. Hicks***, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996) (providing that we exercise our discretionary reversal power only in "exceptional cases").

¶12 As stated above, Xiong contends that the real controversy has not been fully tried because of the following alleged errors: (1) the State elicited inadmissible hearsay testimony connecting Xiong to Moua; (2) the State introduced crime lab results in violation of a pretrial order and improperly failed to disclose discovery; (3) the State introduced evidence which improperly informed the jury of Xiong's conviction and probation status; and (4) the State disparaged the role of defense counsel in closing argument. We address each argument in turn.

A. Hearsay

¶13 At the core of Xiong's argument on appeal is his contention that the real controversy has not been fully tried because of Detective Lawrynk's hearsay testimony establishing that Xiong and Moua had a romantic relationship at the time of the investigation. Detective Lawrynk testified that he "checked police records and located several reports that indicated Cheenou Xiong's girlfriend was Mai Moua." Detective Lawrynk further testified that, "there was some talk that [Xiong's] girlfriend, Mai Moua, stayed in [Xiong's bedroom] once in a while with him." The State submitted this evidence to support the view that Xiong was a party to these drug deliveries. Xiong contends that the jury may have concluded that the admission of evidence showing that Xiong and Moua had a romantic relationship made it "substantially more likely" that the jury would find that the

two were "involved in other significant activities together, including [Moua's] drug sales."

¶14 While the State does not dispute that the relationship evidence was inadmissible hearsay, the State contends that the real controversy was tried because "plenty of other evidence connected [Xiong] to the drug transactions." We understand the State to be arguing that the admission of Detective Lawrynk's hearsay testimony that Xiong and Moua had a romantic relationship did not cloud a critical issue because, regardless of that evidence, the jury would have found that Xiong was a party to the drug deliveries.

¶15 We agree with the State that there was strong admissible evidence tying Xiong to the drug deliveries. We provide a few examples. Detective Lawrynk testified that he witnessed an Asian male transport Moua to and from the drug deliveries in a purple Mitsubishi. Agent Glaman testified that he conducted surveillance for the April drug transaction and observed the same purple Mitsubishi parked in front of Xiong's mother's residence for two hours. A couple minutes after learning that Detective Lawrynk placed a phone call to initiate a drug transaction, Agent Glaman observed an Asian male drive away in the purple Mitsubishi. Agent Glaman followed the purple Mitsubishi to the Walmart parking lot. After learning that Detective Lawrynk arranged to meet at Menards for another drug transaction, Agent Glaman followed the purple Mitsubishi to Menards. In addition, the purple Mitsubishi was traced to Xiong's mother, and Xiong received a traffic ticket on an earlier date while driving the same vehicle.

¶16 Detective Kussow's testimony regarding the search of the residence provided additional links in the chain of evidence connecting Xiong to the drug deliveries. While Xiong emphasizes that there was no direct evidence establishing

that the bedroom that Detective Kussow searched belonged to him, a briefcase was discovered in that bedroom that contained mail addressed to Xiong. Inside the briefcase, Detective Kussow discovered money that was traced back to the April drug transaction and a key that contained the same number that appeared on the lock of the black Brinks box found in the bedroom closet. Detective Kussow testified that, inside the box, he discovered several baggies containing a "white crystallized substance."

¶17 Accordingly, we conclude that the hearsay testimony that Xiong and Moua had a romantic relationship was neither necessary nor the primary evidence used to convict Xiong. Much more damaging was evidence showing that Xiong's mother's vehicle was used in the transactions and that the bedroom, plainly tied to Xiong, contained the cell phone used to arrange the drug transactions, buy money and a substance believed to be methamphetamine. While the testimony indicating that Xiong and Moua had a romantic relationship may have added another piece to the puzzle, "[t]he rational juror would take into account the entire picture presented by the evidence in ascertaining guilt or innocence. Such a juror would not find any single piece of evidence determinative." ***State v. Smith***, 2012 WI 91, ¶36, 342 Wis. 2d 710, 817 N.W.2d 410. Accordingly, we decline to exercise our discretionary reversal power on the ground that the admission of hearsay testimony that Xiong and Moua had a romantic relationship so clouded a critical issue as to prevent the real controversy from being tried.[2]

[2] Alternatively, Xiong contends that counsel was ineffective for failing to object to the hearsay testimony that Xiong and Moua had a romantic relationship. To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient and that the deficiency so prejudiced him or her as to create a "probability sufficient to undermine the confidence in the outcome." ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999) (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)). For the same reason (continued)

¶18 We observe, and Xiong mentions in footnotes in his brief-in-chief, that the State elicited other hearsay testimony to which defense counsel did not object at trial.[3] In general, unobjected-to hearsay is admissible for its truth. ***State v. Heredia***, 172 Wis. 2d 479, 482 n.1, 493 N.W.2d 404 (Ct. App. 1992); ***Caccitolo v. State***, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975) ("Hearsay evidence, although it may be objected to, is nevertheless probative; and if it is admitted without objection, the judge and jury have the right to rely on it."). This is because, when testimony is not objected to at trial, the parties are denied "a fair opportunity" to address the objection "in a way that most efficiently uses judicial resources." ***State v. Kutz***, 2003 WI App 205, ¶27, 267 Wis. 2d 531, 671 N.W.2d 660. In this case, had defense counsel objected to hearsay testimony at trial, the State would have had an opportunity to address the objections and, for example,

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that we conclude that this hearsay testimony did not cloud a critical issue, we conclude that Xiong has not established that he was prejudiced by counsel's failure to object to this hearsay testimony.

[3] The following is a nonexhaustive list of hearsay testimony that was elicited by the State at trial and which supported the State's case:

(1) Detective Lawrynk testified that an individual named Vong Vang told him that, "[Vang's] cousin, Chewy, could obtain methamphetamine for [him]."

(2) Detective Kussow testified that he was informed by an unidentified source that "the person operating [the purple Mitsubishi] should have been Cheenou Xiong."

(3) Detective Kussow testified that, when he entered the Oak Street residence, he was told that the individual in the living room was Xiong and that he was not sure "if it was [Xiong's] brother that identified [Xiong] or if [Xiong] identified himself verbally."

(4) Detective Kussow testified that, during his search of the bedroom, he found a cell phone and that "the cell phone number on there had come back to the one that Detective Lawrynk had been calling when contacting Cheenou Xiong."

(5) Agent Glaman testified that Special Agent David Forsythe, who provided surveillance for the January drug transaction, told him that, "the Asian female wearing the white jacket … met up with an Asian male wearing a blue knit hat."

establish the fact testified to with other admissible evidence. Because defense counsel did not object to much of the hearsay testimony, the State was not provided a fair opportunity to address hearsay issues.

¶19 Moreover, having reviewed the record, we believe that it was reasonable for defense counsel not to object to hearsay testimony establishing a fact that the State could have by other means properly proven. Although defense counsel stated that his general defense strategy was to object wherever possible, we do not understand defense counsel to mean that his defense strategy was to object to hearsay testimony establishing a fact that was not in dispute and that the State could have proven with admissible evidence if forced to do so. We illustrate this point with two examples. First, Detective Lawrynk testified at trial that Vang told him that he could purchase methamphetamine from Vang's cousin, Chewy. Had defense counsel objected to this hearsay, the State may have been able to call Vang as a witness. Second, Detective Kussow testified at trial that, when he searched the Oak Street residence, he discovered a cell phone in the bedroom that was determined to be the same cell phone that Detective Lawrynk called to set up the drug transactions. While this is hearsay testimony, the State may have been able to lay a proper foundation for its admission. For instance, the State may have been able to produce cell phone records establishing that Detective Lawrynk called the cell phone found in the bedroom.

¶20 In sum, so far as the record before us discloses, the State likely could have successfully addressed the hearsay issues had they been timely raised and, therefore, Xiong has not persuaded us that the admission of hearsay testimony so clouded the critical issue of whether Xiong was a party to the drug deliveries that it prevented the real controversy from being tried.

B. Pretrial Order and Discovery Violations

¶21 Xiong contends that the real controversy has not been fully tried because: (1) the State violated a pretrial order barring crime lab test results establishing that the substance found in the bedroom of the residence was methamphetamine; (2) the State failed to timely disclose photographs used to identify Xiong; and (3) the State failed to disclose evidence related to the buy money used in the drug transactions. We address and reject each complaint below.

¶22 First, Xiong complains that Detective Kussow violated a pretrial order barring the admission of crime lab results establishing that the substance found in the bedroom was methamphetamine. Specifically, Detective Kussow testified at trial that, during the search of the residence, he discovered "several baggies of what I believed to be methamphetamine, which later was determined to be methamphetamine." Defense counsel immediately moved for a mistrial on the ground that Detective Kussow's testimony violated the pretrial order and was "highly prejudicial." The court denied the motion but instructed the jury to disregard Detective Kussow's testimony that the substance "later was determined to be methamphetamine." At the end of the first day of trial, defense counsel renewed its motion for a mistrial based in part on this testimony, which the court also denied.

¶23 Second, Xiong complains that the State failed to disclose to the defense before trial the two still frame photographs obtained from Walmart security and never disclosed the DOT and the DOC photographs that were used to identify the Asian male in the Walmart photographs as Xiong. After the State disclosed the two Walmart photographs on the day of trial, defense counsel moved

to bar their admission, which the court granted. The next day, defense counsel asked Agent Glaman on cross-examination whether he was in possession of the photographs from the DOT and the DOC. Although neither the State nor defense counsel had seen the photographs before, Agent Glaman pulled the photographs out of his pocket. Defense counsel proceeded to question Agent Glaman about the photographs. Outside the presence of the jury, the State requested the court to admit the Walmart photographs that it previously barred because defense counsel "opened the door" to the question of how "Chewy" was determined to be Xiong. The court reversed its earlier ruling and allowed the State to question Agent Glaman about the Walmart photographs used to identify Xiong.

¶24 Third, Xiong complains that the State destroyed the photocopies of the buy money and failed to record the serial numbers of the buy money used in the January and February drug transactions. At trial, Detective Glaman testified that the photocopies of the buy money were destroyed in accordance with police practice and Detective Lawrynk testified that he could not recall whether he recorded the serial numbers for the buy money used in the January and February drug transactions. At the close of evidence, defense counsel moved to dismiss, based in part on the State's failure to disclose this evidence. The court denied the motion.

¶25 Based on our reading of Xiong's brief-in-chief, we understand Xiong to be arguing that the court erroneously exercised its discretion in denying a motion for a mistrial based on the violation of the pretrial order and the discovery violations described above. However, there are at least four problems with his argument.

¶26 First, and most importantly, Xiong does not employ the correct standard of review. To establish that the court erroneously exercised its discretion, Xiong is required to frame an argument explaining how, in light of the entire proceeding, "the claimed error is sufficiently prejudicial as to warrant a mistrial." ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). Given the strong circumstantial evidence admitted at trial connecting Xiong to the drug deliveries, Xiong does not explain why the claimed errors are sufficiently prejudicial as to warrant a mistrial.

¶27 Second, as to Detective Kussow's testimony that the substance in the bedroom was "determined to be methamphetamine," Xiong does not persuasively explain why this testimony was sufficiently prejudicial to warrant a mistrial in light of the court's curative instruction. We acknowledge that the court may have highlighted the improper testimony by repeating it in the jury instruction, but such was necessary to properly instruct the jury and it is well established that "[j]urors are presumed to have followed jury instructions." ***State v. LaCount***, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Xiong provides no reason to believe that the jury did not follow the instruction.

¶28 Third, Xiong fails to explain how the court's ruling allowing the State to question Agent Glaman about his comparison of Walmart photographs to the DOC photographs was sufficiently prejudicial to warrant a mistrial. Xiong does not dispute that defense counsel opened the door to this line of questioning. "A party who opens the door on a subject cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence." ***State v. Harvey***, 2006 WI App 26, ¶40, 289 Wis. 2d 222, 710 N.W.2d 482. Moreover, if Xiong means to argue that counsel was ineffective for opening the door to this line of questioning, he does not develop an argument that warrants

a resolution by this court. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). In any event, the court ruled, without objection, that the State may ask questions concerning the DOC photographs.

¶29 Fourth, Xiong does not explain how the State's failure to disclose photocopies or the serial numbers of buy money used in the January and February transactions was sufficiently prejudicial to warrant a mistrial. Even assuming that Xiong's residence contained no money from the January and February transactions, Xiong does not dispute that his residence contained seven $100 bills that were traced to the April drug transactions. Accordingly, Xiong fails to persuade us to exercise our discretionary reversal power based on the violation of a pretrial order and discovery violations.

C. Conviction and Probation Status

¶30 Xiong argues that the real controversy has not been fully tried because: (1) Agent Glaman testified that a criminal history check revealed that Xiong was currently on probation; and (2) the State revealed to the jury that Xiong had a prior conviction by disclosing that the source of the photographs was the Department of Corrections. Xiong contends that, after being informed that he had prior convictions and was on probation, the jury may have concluded that he "probably committed the [crime] he is on trial for also, or if he didn't, he ought to be convicted anyway because his past acts show him to be a bad and dangerous character who ought to be incarcerated." ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971).

¶31 Xiong appears to be arguing that the disclosure of his conviction and probation status so clouded the critical issue of whether he was a party to these

particular drug deliveries as to prevent the real controversy from being fully tried. However, we see four problems with this argument.

¶32 First, Xiong has not shown how Agent Glaman's testimony that Xiong was on probation clouded a critical issue. The court instructed the jury to disregard that testimony and, as established above, "[j]urors are presumed to have followed jury instructions." ***LaCount***, 310 Wis. 2d 85, ¶23. Moreover, at the close of evidence, the jury was further instructed as follows:

> Evidence has been received that the defendant was on probation. You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offenses charged in this case.

Xiong does not point to any part of the record to support a proposition that the jury did not follow the instruction.

¶33 Second, we observe that defense counsel did not obtain an order from the court barring reference to Xiong's conviction or probation status. Rather, prior to trial, defense counsel moved the court to order that Xiong "be brought to and from the courtroom without the jurors knowing he is in custody." The court ordered the State to instruct its witnesses not to disclose that Xiong was in custody. The record shows that the court did not order the State not to disclose Xiong's conviction and probation status.

¶34 Third, defense counsel did not move to bar the State from disclosing the source of the photographs, or even object when the State requested the court to allow it to refer to DOC records that were used to identify Xiong. Following the State's request, defense counsel stated:

> I guess there is reference in the reports to some Department of Corrections photograph or something of that nature, and I guess if it was just identified on that basis, I wouldn't have any objection ….

Issues that are not preserved at trial are generally not considered on appeal. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Moreover, to the extent that Xiong argues that counsel was ineffective for failing to raise a pretrial motion to preclude the State from identifying the source of the photographs, he fails to develop that argument. We decline to address an undeveloped argument. ***Pettit***, 171 Wis. 2d at 646.

¶35 Fourth, as established above, Xiong concedes that defense counsel was the first to disclose the source of the photographs to the jury and thus opened the door to questioning about the DOC photographs. As we have already concluded, "[a] party who opens the door on a subject cannot complain if the opposing party offers evidence on the same subject to explain, counteract, or disprove the evidence." ***Harvey***, 289 Wis. 2d 222, ¶40. Moreover, even if defense counsel had not been first to disclose the source of the photographs to the jury, Xiong does not explain how the disclosure of the DOC as the source of the photographs so clouded a critical issue as to prevent the real controversy from being fully tried.

D. Closing Argument

¶36 Finally, Xiong takes issue with three statements the State made during closing argument. First, Xiong contends that the State improperly commented that, "what defense attorneys want you to do is look at things in isolation." This comment was in response to defense counsel's closing argument urging the jury to disregard Detective Lawrynk's testimony because he signed an

affidavit stating that he was present at the search when he was not present. Second, Xiong contends that the State improperly commented that defense counsel contested the reliability of the DOC records because "[t]hat's one of those things that defense attorneys like to put out there to try to create reasonable doubt." Third, Xiong contends that the State improperly commented in response to defense counsel's argument that the DOC records contained inaccurate information because of law enforcement error that, "[l]aw enforcement are still people … despite the fact that defense attorneys want to hold them to higher standards." According to Xiong, the State's improper comments "impl[ied] that defense attorneys engage in deception and trickery" and that "their arguments cannot be trusted."

¶37 When a defendant contends that the State made remarks during closing argument that constitute prosecutorial misconduct, the test is whether the remarks "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 (citation omitted). In closing argument, counsel is allowed considerable latitude. ***Burns***, 332 Wis. 2d 730, ¶48. Counsel may "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams***, 221 Wis. 2d 1, 19, 584 N.W.2d 695 (Ct. App. 1998). However, counsel may not "suggest that the jury arrive at its verdict by considering factors other than the evidence." ***Id.*** The State's remarks, even when improper, must be considered "in context of the entire trial." ***Mayo***, 301 Wis. 2d 642, ¶43.

¶38 Because both parties rely on ***Mayo***, we examine that case. In ***Mayo***, defense counsel analogized the prosecutor to Saddam Hussein and accused the State of "spinning the evidence" in closing argument. ***Id.***, ¶42. In response, the

State remarked that the role of defense counsel was to "get his client off the hook" and "not to see justice done." ***Id.*** The court determined that the State's remarks, when considered in context of the entire trial, did not so infect the trial with unfairness as to constitute a denial of due process. ***Id.***, ¶43. The court reasoned that it was unlikely the remarks had a significant influence over the jury's decision because it is common knowledge that the role of defense counsel is to advocate for the client and the court instructed the jury that opening and closing statements were not to be considered as evidence. ***Id.***, ¶44.

¶39 Xiong contends that the State's remarks here, unlike in ***Mayo***, so infected the trial with unfairness as to constitute a denial of due process. Xiong points out that in this case, in contrast to ***Mayo***, the State's improper remarks "were not invited by a defense attack." The State argues, on the other hand, that its remarks "in no way suggested that defense counsel was working to subvert justice." The State contends that it only urged the jury not to focus on certain evidence "to the exclusion of the remaining evidence that strongly demonstrated Xiong's guilt."

¶40 We conclude, assuming without deciding, that the State's remarks disparaging the role of defense counsel were improper, these remarks did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." ***Id.***, ¶43 (citation omitted). As in ***Mayo***, it is unlikely the State's assumed improper remarks had a significant influence over the jury because it is common knowledge that the role of defense counsel is to advocate for the client, at times by arguing that the State has not proven its case beyond a reasonable doubt or by scrutinizing particular details in the evidence, that is, looking at evidence "in isolation" and trying "to create reasonable doubt." Moreover, similar to ***Mayo***, the court instructed the jury that closing arguments are not evidence, and, absent a

suggestion to the contrary, we presume that the jury followed the court's admonition. *See* ***LaCount***, 310 Wis. 2d 85, ¶23. While the State may have acted improperly in making arguments that were not tied to the evidence, Xiong has failed to demonstrate how these remarks so clouded a critical issue as to prevent the real controversy from being tried.

CONCLUSION

¶41 For the reasons explained above, we conclude that the alleged errors have not clouded the critical issue of whether Xiong was a party to the drug deliveries.[4] Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.

[4] For the same reason that we conclude that the alleged errors have not prevented the real controversy from being fully tried, we also conclude that the cumulative impact of the alleged errors have not prevented the real controversy from being fully tried. *See* ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis. 2d 571, 665 N.W.2d 305.