

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 7, 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.

NOTICE

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No. 96-0506-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

State of Wisconsin,

Plaintiff-Respondent,

v.

Derrick L. Waller,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: LEE E. WELLS, Judge. *Affirmed.*

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

PER CURIAM. Derrick L. Waller appeals from a judgment of conviction, following a jury trial, for possession of cocaine with intent to deliver within 1,000 feet of a park. He also appeals from the trial court order denying his postconviction motion. Waller argues that the State's rebuttal closing argument denied him his due process right to a fair trial. Waller also argues that defense counsel was ineffective for not objecting to several statements

about a defense witness made by one of the police officers who testified at trial. We reject both arguments and affirm.

On January 25, 1995, undercover police officers Christopher Domagalski and Clarence Pratt observed Waller and William Jackson loitering outside a residence located on the 2900 block of North Fifth Street in the city of Milwaukee. As Officer Pratt approached, Waller and Jackson attempted to flee. Officer Domagalski caught Waller after Waller had tried to jump a chainlink fence. Officer Domagalski stated that he saw Waller throw a plastic baggie over the fence. After the baggie was retrieved, it was found to contain fifty green mini ziploc bags, which contained cocaine.

Waller denied having possessed or having thrown any cocaine. Instead, Waller claimed that he had a soda and a bag of chips in his hands when he started running and that these were knocked out of his hands when he was tackled. Waller also had two defense witnesses support his version of the facts surrounding his arrest: Mary Rogers, who was across the street, and Shonza Henderson, who was inside the residence where Waller was arrested.

In rebuttal argument, referring to Rogers and Henderson, the prosecutor stated:

The defense wants you to believe, I guess, that the trained and experienced police officers made a mistake in this case because things happened quickly and because they threw the drugs down and then find that three defense witnesses, two of whom have prior criminal convictions and are admitted cocaine users, did not make any mistakes that day.

Why are these people willing to lie for Derrick Waller? I think it's because he is their supplier. That's what I think.

The trial court overruled defense counsel's objection. In a statement made both to the jury and counsel, the trial court stated:

Obviously, each counsel is entitled to give ... their reasonable perception of the facts and the inferences that one can reasonably draw from the facts. You are not obligated to draw all the inferences as jurors that the lawyers might from the facts. Each side was given reasonable leeway to give that information and ... their inferences from the facts. There may be inferences that might support that, there may be inferences that don't support that. That will be for the jurors to conclude. The objection is overruled.

The prosecutor then went on to argue:

And I bet he's given them cocaine in exchange for letting them sell out of their yard. That's what I think. So of course they'd be willing to lie for him. Otherwise their supply is going to get cut off. Cocaine is a very addictive drug. You will do almost anything to get it. I have seen it. People lie, cheat, steal, even kill people to get cocaine.

Waller argues that because the case turned on credibility of the witnesses, the prosecutor's argument about Rogers's and Henderson's motive to lie because of a drug-related relationship was not based on any evidence or any inferences from evidence and, therefore, was improper. We disagree.

An attorney is allowed considerable latitude during closing arguments. See *State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). Nevertheless, “[t]he line between permissible and impermissible argument is thus drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury 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). It is within the trial court's discretion to determine the propriety of counsel's argument to the jury, and this court will affirm the trial court's decision absent a misuse of that discretion. *Neuser*, 191 Wis.2d at 136, 528 N.W.2d at 51. Additionally, whether counsel's arguments impermissibly affected the fairness of the trial is determined by viewing counsel's remarks in the context of the entire trial. *Id.*

The prosecutor's argument was not improper and the trial court did not erroneously exercise its discretion by overruling defense counsel's objection. As the trial court's written decision denying Waller's postconviction motion accurately points out:

[T]he evidence in this case strongly supported the facts that (1) Waller and Jackson both had drugs when arrested; (2) Waller and Jackson stood together in front of the residence and ran from police; (3) Rogers had purchased drugs from Jackson earlier that day; (4) Waller was a friend and frequent visitor to Rogers and Henderson at the same residence; and (5) Rogers and Henderson both used drugs. These facts support the state's conclusion that Waller and Jackson were street dealers who dealt drugs outside the residence of Rogers, Henderson and other potential addicts.

Further, in addition to instructing the jury at the time it ruled on defense counsel's objection, the trial court gave the jury the standard instruction that the arguments, conclusion and opinions of counsel are not evidence and that the jury was to draw its own conclusions and inferences from the evidence. *See State v. Johnston*, 184 Wis.2d 794, 822, 518 N.W.2d 759, 768 (1994) (jury presumed to follow instructions), *cert. denied*, 115 S.Ct. 587 (1994).

Waller also claims that he did not receive effective assistance of counsel due to defense counsel's failure to object to testimony from Officer Pratt regarding Rogers. Specifically, Waller first argues that defense counsel was ineffective for failing to object to Officer Pratt's statement read from his report that referred to Rogers as a "known prostitute." Second, Waller complains about defense counsel's late objection to Officer Pratt's testimony that Rogers offered to perform fellatio on him in order to clear an outstanding warrant on her. Third, Waller complains that defense counsel failed to object to Officer Pratt's testimony that Rogers had been an untruthful or unreliable informant in the past. Finally, Waller complains that defense counsel was ineffective for failing to object to Officer Pratt's testimony about Rogers "being high as a kite and a pipe head and unreliable."

In order for a defendant to prove that he or she did not receive effective assistance of counsel, the defendant must show that trial counsel's performance was deficient and that "the deficient performance prejudiced the defense." See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to show that trial counsel's performance was prejudicial, the defendant must prove that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." See *id.* In other words, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different but for the error. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In reviewing the trial court's decision, we accept its findings of fact, its "underlying findings of what happened," unless they are clearly erroneous, while we independently review "[t]he ultimate determination of whether counsel's performance was deficient and prejudicial." *State v. Johnson*, 153 Wis.2d 121, 127-128, 449 N.W.2d 845, 848 (1990). We need not address both the deficient performance and prejudice prongs if a defendant cannot make a sufficient showing on one. See *Strickland*, 466 U.S. at 697.

We do not address the performance prong here because even if we were to find deficient performance by trial counsel, we would not conclude that any of the alleged errors raised by Waller are prejudicial. The trial evidence indicates that Rogers was not a "model" citizen. Rogers admitted that she had previously been convicted of a crime and that she was a current cocaine user. The jury also learned that she had an outstanding arrest warrant. Additionally, defense counsel acknowledged in her closing argument that Rogers had not been "the m[o]st upstanding person around." Moreover, the prosecutor did not focus on Rogers's overall general character but instead focussed on the inconsistency between Rogers's version of events and the other witnesses' versions and Rogers's possible motive to lie. In sum, in light of the overwhelming evidence at trial, we do not conclude that any alleged errors in defense counsel's performance regarding Officer Pratt's testimony about Rogers were prejudicial.

Therefore, we affirm Waller's judgment of conviction and the trial court's order denying his motion for postconviction relief.

By the Court. – Judgment and order affirmed.

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