

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP2747-CR

Cir. Ct. No. 2003CF320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WARREN C. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Warren C. Walker appeals from a judgment of conviction and from an order denying his motion for postconviction relief. He argues he was denied the effective assistance of counsel by trial counsel's failure to object to portions of the prosecutor's closing arguments and that his sentence

was based on incorrect information concerning pending bail jumping charges in another county. We reject his claims and affirm the judgment and order.

¶2 A jury found Walker guilty as party to the crime of attempted uttering of a forged check, obstruction of an officer, and two counts of uttering a forged check. Walker assisted his girlfriend in cashing stolen checks at a gas station. At trial, police officer Karen Barnett testified that on video surveillance tapes she observed Walker in the gas station on the days the forged checks were cashed. Officer Barnett was unable to locate the portion of the video to which her testimony related on the video shown to the jury.

¶3 Walker claims that portions of the prosecutor's closing and rebuttal arguments were objectionable because they impermissibly vouched for the credibility of the police officer. *Cf. State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (no witness may testify that another physically and mentally competent witness is telling the truth). Walker quotes the following portions of the closing argument as objectionable:

I wish that we could have shown you all three of them on this video, but that didn't happen. So here's another credibility question that you have to decide. Do you believe Officer Barnett when she, as a career police officer, testifies for you under oath that she watched that original June 10th video, and she watched the original June 14th, and she saw the same black man in both of them?

And when she walked into the Shell station on the 18th, she immediately looked at the defendant and said: Hey, he matches that description.

And lo and behold, look who he's with, Maria Ortega and Krystal Montemarano. It's clear as a bell that that's Maria Ortega in those other videos cashing those checks at the time these two checks are cashed.

Again, here's where you have to trust Officer Barnett and the other officers who have seen Maria Ortega in person and who saw the original video.

Do you believe Officer Barnett? Do you think she has absolutely any reason whatsoever to come up here and falsely accuse Mr. Walker? Of course not. Her job is to enforce the laws. She wants to protect the innocent. She wants to arrest the guilty and bring them to justice.

We don't care who the black man is; we want to get the right black man. We don't want to have a guilty party out there and an innocent person sitting in this chair.

So you have to ask yourself: Do you believe her? Can you trust her? And I submit the answer is, unequivocally yes.

¶4 The portion of the rebuttal argument that Walker claims was objectionable follows:

Talk about wanting to put a spin on the evidence. No matter how he wants to package it, Officer—Mr. Lochowicz just asked you to call Officer Barnett a liar. He asked you to disbelieve her testimony under oath and say she was not telling the truth when she testified for you: I saw the original. It was clearer. I could tell that I saw the same man on the 10th that I saw on the 14th, and that's the guy that I saw in the Shell station on the 18th, and last night when I looked at that video again I saw him again on that video.

He is asking you to call Officer Barnett a liar, no matter how he wants to package it or how he wants to phrase it, and I ask you to call her a truthful person and to believe her testimony.

She has no reason to lie. She is not going to risk her career, risk her future, provide false evidence, towards somebody she has no knowledge of or relationship with. There's no reason why she would falsely accuse Warren Walker. And she didn't. She told the truth.

¶5 Walker's trial counsel did not object to any portion of the arguments. Walker argues that trial counsel was ineffective for not objecting. We turn directly to the primary issue on appeal—whether the prosecutor's arguments

impermissibly vouched for the credibility of the police officer—because if the arguments were proper, defense counsel’s failure to object would not constitute deficient performance. See *State v. Sprang*, 2004 WI App 121, ¶13, 274 Wis. 2d 784, 683 N.W.2d 522; *State v. Johnson*, 2004 WI 94, ¶¶11-12, 273 Wis. 2d 626, 681 N.W.2d 901 (a claim of ineffective assistance of counsel requires proof that counsel’s performance was deficient and that the deficient performance was prejudicial; whether counsel’s performance was deficient depends on whether an objection should have been made).

¶6 “[A] prosecutor is permitted to comment on the credibility of witnesses as long as that comment is based on evidence presented.” *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). “The line between permissible and impermissible argument is drawn 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. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The prosecutor’s argument is to be viewed in context. *Id.*

¶7 Having read the prosecutor’s argument in its entirety, we conclude, as the circuit court did, that the arguments were not improper. The prosecutor was discussing and comparing the credibility of all the witnesses, including their motives to give false testimony. The prosecutor was pointing out which version of the events presented itself as more credible. Nothing suggested that the jury should arrive at the verdict on facts outside of the evidence presented at trial.

¶8 Walker singles out the prosecutor’s suggestion in rebuttal argument that officer Barnett risked job consequences if she gave false testimony. He points out that there is no evidentiary basis for “the dire consequences that the prosecutor

predicted would befall officer Barnett” if the jury did not believe her testimony. However, the prosecutor’s rebuttal argument simply continued laying out reasons why the testimony was credible. Walker’s closing argument focused in part on the video and the fact that the portion shown to the jury did not show Walker. The prosecutor’s rebuttal argument was a measured response to Walker’s suggestion that officer Barnett was lying and the theory of defense that the video had been tampered with. *See State v. Wolff*, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992) (the “invited reply” or “measured response” rule recognizes that where prosecutors respond reasonably in closing argument to defense counsel’s attacks it is unlikely that the jury is led astray).

¶9 Having concluded that the prosecutor’s closing and rebuttal arguments were not improper, it follows that Walker was not denied the effective assistance of counsel because counsel failed to object. We turn to Walker’s claim that at sentencing the circuit court relied on inaccurate information regarding Walker’s prior criminal record.

¶10 “A defendant has a due process right to be sentenced based on accurate information.” *State v. Groth*, 2002 WI App 299, ¶21, 258 Wis. 2d 889, 655 N.W.2d 163. The defendant has the burden of proving by clear and convincing evidence the inaccuracy of the information and that the information was prejudicial. *Id.*, ¶22. A constitutional issue is presented which we review de novo as a question of law. *Id.*, ¶21.

¶11 Walker points to the circuit court’s comments about three pending bail jumping charges in another county. The circuit court noted that it was not clear whether those charges were based on the commission of additional criminal offenses or a failure to appear in pending criminal cases. It was concerned that the

number of pending cases was indicative that “there were other charges of this sort of scheme occurring in various other places.” Walker demonstrated at the postconviction motion hearing that the pending bail jumping charges in the other county were based on his failure to appear in two misdemeanor cases in that county and that his failure to appear was because he was in custody on this case. He argues that the record does not support the circuit court’s conclusion that the existence of the bail jumping charges was evidence of a continuing forgery-uttering scheme.

¶12 Walker’s claim ignores that he explained at sentencing that the pending bail jumping charges were because of his inability to appear in the other county due to custody in this case and the lack of any order to produce him for hearings in the other county. The circuit court accepted that explanation. Therefore, the circuit court was provided the correct information regarding the pending bail jumping charges. It did not rely on inaccurate information. Moreover, the circuit court’s assessment that the pending bail jumping charges meant that criminal conduct occurred in the other county was also correct. The proof at the postconviction motion hearing was that a bail jumping charge arose from Walker’s failure to appear in a two-count misdemeanor theft case, although that theft case was ultimately dismissed.

¶13 Even if the information about the bail jumping charges was confusing or inaccurate, Walker has not demonstrated that it was prejudicial. The circuit court’s sentence was based on Walker’s entire prior criminal record, not just the three pending bail jumping charges. Walker’s record included some juvenile crimes and, starting in 1986, various charges of shoplifting, obstruction, battery, and operating after revocation. The circuit court noted that for a six and one-half year period Walker “kept his nose clean.” It also reviewed Walker’s

explanation for the prior convictions. The circuit court concluded that Walker, age thirty-eight at sentencing, had engaged rather regularly in crime since he was twenty-one years old, except for one six and one-half year gap of time.

¶14 Sentencing is left to the discretion of the circuit court, and appellate review is limited to determining whether there was an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. When the proper exercise of discretion has been demonstrated at sentencing, appellate courts have a strong policy against interference with that discretion and the circuit court is presumed to have acted reasonably. *Id.*, ¶18. The circuit court must specify the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.*, ¶40. It must also describe the facts relevant to the sentencing objectives and explain, in light of these facts, why the particular component parts of the sentence imposed advance the specified objectives. *Id.*, ¶42.

¶15 The circuit court properly exercised its discretion in sentencing Walker to consecutive terms of two years' initial confinement and four years' extended supervision on the two uttering convictions and probation on the attempted uttering of a forged check and obstruction of an officer convictions. The circuit court examined the impact the crimes had on the victims and the need to protect society from further criminal activity. It noted that Walker had failed to learn from past prison and probation sentences the importance of refraining from criminal activity. It found that Walker has an extremely high need for close rehabilitative control and the prison sentences were imposed to meet that goal. The circuit court stated adequate reasons for the sentences imposed.

By the Court.—Judgment and order affirmed.

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

