COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2777-CR **Cir. Ct. No. 2003CF31**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SKY B. BUSK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Reversed and cause remanded with directions*.

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

¶1 PER CURIAM. Sky Busk appeals a judgment convicting him of felony theft with a concealed identity and possession of a firearm as a felon. The charges stem from a bank robbery. Busk also appeals an order denying his motion

for a new trial. He argues that his counsel ineffectively represented him. We agree that Busk received ineffective assistance of counsel. Therefore, we reverse the judgment of conviction and remand for a new trial.

¶2 To substantiate a claim of ineffective assistance of trial counsel, a defendant must prove that counsel performed deficiently and that he or she was prejudiced by counsel's performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶3 Our analysis focuses on two instances in which we conclude trial counsel performed deficiently and prejudice resulted.[1] First, Busk argues that his attorney deficiently failed to object to trial testimony by Busk's estranged wife Jacqueline on grounds of the husband-wife privilege under WIS. STAT. § 905.05 (2003-04).[2] Jacqueline testified that the person in video footage taken during the bank robbery "looked like [Busk]." She also testified that, when she told her husband shortly before trial that she was going to tell the truth at trial, he said, "It might help if you lied a little bit." Jacqueline testified that, when she asked Busk what he meant, he said, "You need me on the outside to provide financially."

[1] Many arguments were raised during postconviction proceedings and on appeal. We agree with the State that several of these lack merit and focus our attention on these two arguments because they are dispositive of the case.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 Jacqueline's testimony prompted Busk to testify that, when his wife told him she was going to tell the truth at trial, he thought she was referring to the fact that he had recently had an affair. Busk testified that, while suggesting to his wife that she "lie a little bit" was inappropriate, he meant that she should not mention in front of the jury the fact that he had recently had an affair. Busk points out that his wife *never* told him she had recognized him from the videotape, a point Jacqueline did not dispute, so he could not have been asking her to lie about the identification because he was not aware of it.

¶5 The State argues that the privilege did not apply because there is an exception to the privilege for statements made by one spouse to another where one spouse is charged with a crime against "a 3rd person" and the statement is made "*in the course of committing a crime against the other [spouse].*" WIS. STAT. § 905.05(3)(b) (emphasis added). The State contends the exception applies because Busk made the statements to his wife as part of a criminal act against her: a criminal threat under WIS. STAT. § 943.30(1). We disagree.

¶6 While Busk's comments were no doubt intended to influence his wife to his advantage, his "threat" was nothing more than a likely consequence of his conviction—that a conviction would mean his incarceration, thereby rendering him unable to support his wife. Thus, counsel performed deficiently in failing to object to Jacqueline's lie-a-little-bit testimony based on the husband-wife privilege.[3]

[3] The State argues that Busk's trial counsel was not deficient because the issue of the husband-wife privilege arose just prior to the beginning of the trial. The State argues that Busk's counsel should not be found deficient for failing to research the "intricacies" of the husband-wife privilege. While we agree with the State that the husband-wife privilege is not a common objection, we disagree that the privilege is so obscure that Busk's counsel could not have lodged (continued)

¶7 We turn to the second instance of alleged deficient performance. Busk argues that his counsel should have objected to testimony that the Busks had gone through bankruptcy a year before the robbery. Again, we agree that counsel's performance was deficient. While the evidence of bankruptcy had some value as evidence tending to show that Busk was in financial need at the time of the crime, it was weak evidence. We note that the debt had already been *discharged* when the robbery was committed and, so far as the jury knew, Busk was employed and not otherwise in financial distress at the time of the robbery. The fact that someone has declared bankruptcy does not normally place them in such dire financial straits so as to indicate a motive for something as egregious as bank robbery. *See* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ….''). There is a substantial danger that some of Busk's jurors thought poorly of him because he had declared bankruptcy. Therefore, the limited probative value of the evidence was outweighed by the danger of unfair prejudice and, had Busk's attorney objected on that basis, the circuit court would have misused its discretion in permitting the bankruptcy evidence.[4]

¶8 We turn now to prejudice. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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a sufficient objection. Reasonably well-informed counsel would know that there is a statute on the topic and it would take only a short time to read the statute in order to make a sufficient objection.

[4] We stress that this second instance of deficient performance, relating to the bankruptcy testimony, would not by itself be cause for reversal. Rather, we conclude that it likely had some unfairly prejudicial effect on the jury, and we consider it in combination with the lie-a-little-bit evidence.

Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***; *accord* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985)).

¶9 The prejudicial effect of the erroneously admitted lie-a-little-bit testimony is readily apparent. First, we think it most likely that the jury took it for what it was—a forceful request that his wife act in her own financial best interest by saying whatever might be necessary to help Busk avoid conviction. We add to this the prejudicial effect of the bankruptcy testimony. By itself, the bankruptcy testimony would not be sufficient for reversal. But, when we view the effect of these two errors in combination, it undermines our confidence in the verdict.[5] If the evidence we have just described had not been admitted, the jury would have been left with identification and circumstantial evidence that is far from compelling.

¶10 There was weak eyewitness identification by Anthony Honore. Honore saw the perpetrator leaving the bank with a mask on, which the perpetrator briefly pulled back, giving Honore a view of his face. Honore testified at trial that he narrowed the pictures in the photo array down to two pictures and then chose Busk's photo.[6] Honore explained that he used "objective thinking" to decide

[5] In closing argument, the prosecutor pointed to the bankruptcy evidence as motive evidence.

[6] Honore testified at trial that he believed there were eight photos in the array. There were only six photos in the array.

which of the two pictures was of the perpetrator, which is problematic because it suggests that Honore believed that one of the six photos was the perpetrator and he was trying to figure out which one, rather than simply looking through photos to see if he recognized the man he saw leaving the bank. The probative value of Honore's identification is also weakened by the fact that Honore was shown a different suspect the day of the robbery and told police that *that* person could be the perpetrator, though he was not sure. Finally, we note that Honore's description of the perpetrator did not match Busk in some respects. At trial, Honore described the perpetrator as having eyes that were "[v]ery striking, blue, very striking." Busk's eyes are green or gray. Honore testified that the perpetrator was ten to twenty pounds heavier than the photo of Busk. In sum, no reasonable juror would have placed much weight on Honore's identification.

¶11 In addition to Honore, Busk's estranged wife identified Busk as the perpetrator. She looked at a videotape of the masked robber taken at the bank and concluded that the robber "looked like Sky." However, she did not recognize the jacket the robber had on and did not otherwise explain why she believed it was her husband in the video. Since the robber was masked and Jacqueline gives no reason why she could identify him, nor explain her level of certainty, we conclude that no reasonable juror would have accorded her testimony much weight.

¶12 Apart from the weak identification evidence, the primary evidence linking Busk to the crime is that, about two minutes after the robbery, Busk was seen pulling out of the parking lot a few blocks from the bank and the parking lot was located in a place consistent with where the robber might have been when fleeing the scene. Witness Honore saw the perpetrator run from the bank in the direction of the lot where Busk's car was parked. Honore saw the perpetrator run from the bank to and into a garage a couple of blocks away. Honore lost sight of

the robber when the robber entered that garage. On the other side of the garage is a parking lot. Police responding to the silent bank alarm, two minutes after it sounded, saw a man, later identified as Busk, standing next to and then driving away in a car. Busk was identified because the responding police officers stopped and recorded Busk's license plate number. Because of the timing and because of the location, the jury could have reasonably inferred that Busk was getting into a car and leaving the area at about the same time and place that the robber would have been doing the same. Also, Busk is roughly the same height as the perpetrator. Finally, Busk had a handgun in the trunk of his car and the robber did say, "[t]his is a stick-up," although the robber did not display a gun or otherwise indicate that he had one.

¶13 Our review of this evidence and all of the other admissible evidence leads us to conclude that Busk probably robbed the Fort Atkinson First Federal Bank. But a conclusion that the verdict is probably correct is not sufficient under ***Strickland***. We must be confident that the verdict is correct and a critical standard in a criminal trial is the requirement that a defendant be found guilty beyond a reasonable doubt. Our "confidence" in the verdict under the ***Strickland*** prejudice test must be considered in light of that high standard. *See* ***Strickland***, 466 U.S. at 694 ("A reasonable probability [that the result would have been different] is a probability sufficient to undermine confidence in the outcome."). Because the errors at trial undermine our confidence in the jury's verdict, we reverse the judgment and remand for a new trial.

By the Court.—Judgment and order reversed and cause remanded with directions.

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