COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2006AP184-CR
2006AP185-CR

Cir. Ct. Nos. 2003CF698
2003CF2177

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN J. LUKAS,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. John Lukas appeals from judgments of conviction and an order denying his motion for postconviction relief. We affirm.

¶2 Lukas was found guilty by a jury on a number of counts relating to conduct that was directed at Julie Sternal. Two circuit court cases were tried together, and are consolidated for appeal.

¶3 Lukas first argues that the evidence was insufficient on the stalking conviction for the period covering August 27 to September 10, 2003. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶4 Lukas's arguments are directed at three elements of the charge. Each of the arguments fails to fully take into account the above standard of review. Lukas directs our attention to various pieces of evidence that could have allowed the jury to reach a different conclusion, but that is not the test. For example, Lukas argues that the evidence was insufficient to show that his course of conduct directed at Sternal would have caused a reasonable person to fear bodily injury or death to herself. To support this argument, he points to evidence about the nature of their relationship that he interprets as showing that things were going well. However, there was also other evidence, such as Lukas's past conduct and his actions toward Sternal during the charged period, that supported a finding that a fear of injury or death would be reasonable.

¶5 Lukas also points to evidence that he was in jail during the charged period, and therefore Sternal could not reasonably fear that he would take any harmful action toward her. However, Lukas's incarceration was not expected to be permanent, and therefore Sternal could have a reasonable fear of future action based on comments such as Lukas's statement from jail that if she did not take a

certain action, "there's going to be fucking hell to pay when I get out." He also argues that there was no evidence he expressly threatened to harm Sternal. However, an express threat is not required for the victim's fear to be considered reasonable.

¶6 Lukas argues that the evidence was insufficient on the element of whether his acts, in fact, caused Sternal to fear bodily injury or death to herself. This argument is again based partly on Sternal's actions that showed continued interest in their relationship. However, there were also other actions she took that showed fear. Lukas also relies on the fact that Sternal never expressly stated such fear, either at the time or in testimony. He cites no law requiring such specific evidence. Sternal testified that she was "terrified" about what Lukas might do when he got out, if she did not do what he asked her to. She also testified that she "didn't know what he would be capable of when he got out of jail." The jury could reasonably understand these as describing a fear of bodily injury or death.

¶7 Finally, Lukas argues that there is insufficient evidence that he intended at least one act in his course of conduct to place Sternal in reasonable fear of bodily injury or death. He focuses again on the fact that he made no express threat to harm her. However, his intent is sufficiently shown by other evidence. The jury could reasonably understand some of his comments from jail as being intended to cause such fear in Sternal, for the purpose of inducing her to comply with his requests.

¶8 Lukas next argues the evidence was insufficient on a conviction for obstructing an officer. The allegation was that Lukas obstructed a deputy sheriff who worked in the jail by lying to him regarding a telephone call Lukas wanted to make. According to the deputy's testimony, the deputy was working as supervisor

of a "pod" of approximately fifty inmates. In that capacity, one of his duties was to "give them general information" and "[h]elp them in any which way I can." The deputy testified that Lukas had already used his daily allotment of one pay phone call, but then contacted the deputy and asked if the deputy could assist him in making another call; that Lukas said he wanted to contact his girlfriend (Sternal) to "make arrangements for payment on his $200,000 house"; and that the deputy and Lukas discussed the various options, such as calling collect, but Lukas gave reasons for why that was not desirable. The deputy then placed the call himself and spoke with Sternal to convey Lukas's desire that she come visit him.

¶9 The jury was instructed that the crime of obstructing is committed when a person knowingly gives false information to an officer with intent to mislead the officer in performance of his or her duty while the officer is doing any act in an official capacity and with lawful authority. Lukas argues that the evidence was insufficient on the second element of the charge, on which the jury was instructed that the officer must have been doing an act in an official capacity, and that officers are acting in an official capacity if they are performing duties they are employed to perform. The jury was also instructed that "being a jail guard" is a duty of deputy sheriffs.

¶10 Lukas argues that the evidence was insufficient because there was no evidence that making phone calls on behalf of inmates was part of the deputy's duties and, on the contrary, there was some evidence that making such calls was *not* normally part of their duties. This argument fails because Lukas is focusing too narrowly and on the wrong moment in time. At the time Lukas was alleged to have provided the deputy with false information, the deputy was not making the telephone call. The phone call was an act the deputy did later, in reliance on the false information. The act the deputy was performing at the time of Lukas's false

statements was listening to an inmate's request for assistance regarding telephone use. This was unquestionably an act within the deputy's general duty of assisting inmates in this unit. The crime was completed immediately upon conclusion of the false statements, and therefore it is irrelevant whether the action the deputy took later in reliance on the false information was an act within his official capacity.

¶11 Lukas also argues that the obstruction charge should be reversed because he received ineffective assistance of trial counsel on that count. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Strickland***, 466 U.S. at 697. To demonstrate prejudice, the 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. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶12 In connection with this argument, Lukas asserts that the State never identified precisely what statements by Lukas were alleged to be false. This may be true, but the State's focus can reasonably be inferred from comments the prosecutor made during closing argument. The focus was that Lukas's entire story about his reason for wanting the deputy to call Sternal was a ruse to enable Lukas to convey his desire for her visit, which he actually desired for other reasons.

¶13 Lukas claims that counsel should have used a report made by a detective about the detective's interview with the deputy about the telephone incident, shortly after it happened. According to Lukas, that report could have been used to cast doubt on the deputy's trial version of the incident. Specifically, Lukas argues that his counsel should have used the fact that the report does not include: (1) any reference to Lukas having told the deputy that Lukas might lose his job at Wells Fargo; or (2) any reference to Lukas discussing "payments" on the house, but only to him wanting to make "arrangements" about the house.

¶14 We are satisfied that Lukas has not shown prejudice. There is little reason to believe that cross-examination based on these issues would have resulted in a different verdict. First, these points are not direct contradictions of testimony by the deputy, but only a difference of testimony that goes beyond the report. At best, they could suggest the deputy was not properly recalling at trial, but such differences between reports and testimony can also result from incomplete reports or misunderstandings between the report-taker and the interviewee. They are not one of the more convincing forms of credibility attack. More importantly, neither of the differences does substantial damage to the State's main theory, which was that Lukas's story to the deputy was false in *all* of its components, not merely in these details. The report, as a whole, fully supports the deputy's testimony that Lukas told him a falsehood about making arrangements for his house.

¶15 Lukas also argues that he received ineffective assistance because his trial counsel failed to introduce or properly argue certain evidence he claims would impeach Sternal's credibility. We will not attempt to describe each of those items here. Even if we were to conclude that all of the items were deficient performance, we would further conclude that Lukas has not shown prejudice. Many of the items are collateral to the main issues of the trial, and their usefulness

at trial would have been limited to supporting a general attack on Sternal's credibility. However, the charges did not rest solely on her credibility, but were also supported by other, more objective, evidence such as recordings of phone conversations. Furthermore, the jury had the opportunity to evaluate Sternal's credibility directly during her testimony. Some of the items were also redundant to other evidence that potentially made the same point.

¶16 Finally, Lukas argues that his trial counsel was ineffective in giving information to the court and the presentence report investigator. Lukas argues that this information was a confidential communication and affected his sentence. The information was related to Lukas having contacted counsel at home, contrary to counsel's request. It was originally presented to the court by counsel in support of a motion to withdraw, and then again later through the presentence report, after the attorney was no longer Lukas's attorney.

¶17 We conclude that Lukas has failed to develop an argument as to why it was deficient performance for counsel to provide this explanation to the court for the withdrawal motion, or to discuss the incident with the presentence writer. In addition, we are not persuaded that Lukas was prejudiced by this information. In denying the postconviction motion, the circuit court stated that it would not have sentenced Lukas any differently if it had not heard this information. While it is true, as Lukas notes, that we have held that the postconviction court's assertion of nonreliance on allegedly inaccurate sentencing information is not dispositive, ***State v. Groth***, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163, we did not hold there that the postconviction court's assertion was irrelevant or not appropriate for consideration. Lukas argues that the postconviction assertion of nonreliance is refuted by the fact that the court, during sentencing, twice mentioned the calls to counsel. However, he argues nothing more than that "it is

fair to presume that they made a difference." We accept the postconviction court's assertion.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).