COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2248-CR **Cir. Ct. No. 98 CF 23**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. DEFLIGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Robert DeFliger appeals a judgment of conviction and an order denying his postconviction motion. The issues relate to extraneous jury information, ineffective assistance of counsel, and other matters. We affirm.

¶2 DeFliger was charged with one count of sexual contact with a person who suffers from a mental deficiency, and one count of child enticement, based on an incident in "the summer of 1997." The jury found him guilty on both counts. The trial court denied DeFliger's postconviction motion that alleged several grounds for relief.

¶3 On appeal, DeFliger makes two arguments related to his claim that he should receive a new trial because the jury may have received extraneous information during trial in the form of contact in an elevator between one or more jurors and the mother of the victim. During jury deliberation, DeFliger's attorney advised the court that somebody had told him that, while sitting outside the jury room, she heard one of the jurors say the juror had had contact with the victim's mother. The court stated in response to this information that it had directed an officer to investigate, there was indeed contact as alleged, but DeFliger's attorney had not reported there was any kind of conversation between them about the case. The court stated that it did not think the issue "rises to a point of questioning the jury," and the court advised counsel that "you always have your procedures after verdict to go further into these things." DeFliger's attorney thanked the court and made no further argument.

¶4 DeFliger argues that the trial court had an independent obligation to conduct a further inquiry into whether prejudicial comments were made during this contact. He appears to argue that this obligation existed not only during trial, but at the hearing on his postconviction motion, where no jurors or the victim's mother were called to testify. DeFliger cites no authority that places this burden on the trial court, and we are not aware of any. At the postconviction hearing, the burden was on DeFliger, as the party seeking to impeach the verdict under WIS.

STAT. § 906.06(2) (1999-2000).[1] ***State v. Eison***, 194 Wis. 2d 160, 172, 533 N.W.2d 738 (1995).

¶5 DeFliger also argues that his trial counsel was ineffective for not adequately investigating the juror contact, and not presenting sufficient evidence to the court, including juror testimony. However, DeFliger fails to show prejudice because he has not demonstrated that an improper contact actually occurred. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶6 DeFliger makes two arguments based on a theory of plain error under WIS. STAT. § 901.03(4). He argues plain error because no proper objection was made at the time. First, he argues that it was plain error to allow one of the State's witnesses to testify that she believed the victim was telling the truth in making the allegation against DeFliger. Second, he argues that it was plain error to allow evidence of other acts by DeFliger without a pretrial hearing. We may review unobjected-to error if the error is obvious and substantial, and so fundamental that a new trial or other relief must be granted. *See* ***State v. Vinson***, 183 Wis. 2d 297, 303, 515 N.W.2d 314 (Ct. App. 1994). We do not regard either of DeFliger's arguments as meeting this high standard. However, he also makes these arguments in the context of ineffective assistance of counsel, and we will address them in that context.

¶7 DeFliger argues that his counsel provided ineffective assistance by not objecting that a witness was impermissibly testifying that the victim was telling the truth. We do not agree with DeFliger's description of the witness's testimony. Her testimony was not directed to the specific allegation made by the

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

victim in this case, but to his general character for truthfulness. Accordingly, DeFliger has failed to show either deficient performance or prejudice. *See* ***Strickland***, 466 U.S. at 687. We also note that DeFliger concedes that he did not raise this issue at the postconviction hearing, and thus he failed to make a record of trial counsel's testimony on this point.

¶8 DeFliger also argues that counsel provided ineffective assistance by not objecting to testimony by the victim that DeFliger had sexual contact with him on occasions other than the one charged. Assuming, without deciding, that this was deficient performance, we conclude that DeFliger has not shown prejudice. 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. ***Strickland***, 466 U.S. at 694. In the present case, the other-acts evidence was of the defendant's other contacts with this victim, not other persons. This type of evidence is less prejudicial because it does not come from a separate, independent source, and therefore does not as strongly suggest that the defendant has a propensity toward this conduct. In other words, the fact that an alleged victim testifies that the same act occurred on other occasions does not significantly bolster that victim's allegation that it occurred on one specific occasion.

¶9 DeFliger next argues that his counsel was ineffective because he failed to obtain a trial court ruling on his motion to strike a juror for bias. We conclude that there was no deficient performance or prejudice because the record does not support a finding of bias. Although the juror initially thought she might be biased because she believed a neighbor of hers was guilty of crimes similar to the allegation in this case, after further questioning she stated that she could judge DeFliger's case on its own merits.

¶10 DeFliger also argues that counsel was ineffective for then failing to use a peremptory strike to remove the juror. At the postconviction hearing counsel testified, in essence, that he used the peremptory strikes on jurors whom he felt would be worse than this one. DeFliger argues that this choice was unreasonable because none of the other jurors demonstrated bias as this one did. However, we have already concluded that this juror did not demonstrate bias, and therefore we conclude counsel's decision was reasonable.

¶11 DeFliger argues that the evidence did not support the convictions. 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). DeFliger's argument is essentially that much of the victim's testimony must be rejected because it was contrary to testimony of others. However, it is up to the jury, not this court, to determine the credibility of witnesses. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶12 Finally, DeFliger argues that we should reverse using our discretionary authority under WIS. STAT. § 752.35 because justice has miscarried for the reasons we have discussed above. Having found no merit to those arguments, we also decline to reverse on this ground.

By the Court.—Judgment and order affirmed.

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