COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1815-CR **Cir. Ct. No. 2003CF7**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE T. PRESLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: ANDREW P. BISSONNETTE, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Lee Presley appeals a judgment convicting him of throwing or expelling bodily substances, as a prisoner and as a habitual criminal. He also appeals an order denying his motion for postconviction relief. Presley

contends that the jury did not hear evidence critical to his defense and that we should therefore vacate his conviction and order a new trial. We affirm.

¶2 We first note that Presley's brief is deficient on its face. He does not present a developed argument. Instead, he lists general principles that are applicable in the abstract, and then argues the facts in a very summary fashion. He does not apply the law to the particular facts of this case. The general rule is that we will not review issues that have been inadequately briefed. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998). However, we will not apply that rule to Presley because the State has taken the time to develop Presley's arguments for him.

¶3 Presley argues that he received ineffective assistance of trial counsel because his counsel failed to offer into evidence a conduct report pertaining to an incident that occurred earlier on the day of the crime at issue in this case. We reject this argument for several reasons.

¶4 First, Presley never told his attorney about the earlier incident prior to trial, nor did he provide his attorney with a copy of the conduct report issued in that case. Because Presley failed to tell his counsel about the conduct report and failed to provide counsel with a copy of the report or other documentation, which was within Presley's control to do, we conclude that Presley's attorney did not provide ineffective assistance in failing to discover and use the information about the earlier altercation in Presley's defense. *See* ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325 ("This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel.").

¶5 Second, Presley has not adequately explained why the conduct report, which is hearsay, would have been admissible; that is, Presley has not explained what exception to the hearsay rule would apply.

¶6 Third, Presley has not shown that the report would have called Officer DeVries' credibility into question. Officer DeVries testified that he did not recall having any problems with Presley earlier on the day that the assault occurred. The report makes no mention of Officer DeVries, so the report does not contradict this testimony. As for Officer Walters, the report mentions Walters in only one sentence where it says: "Approximately 15 minutes later c/o 2 Walters was able to close inmate Presley's trap." The report does not suggest that there was any motivation for Walters to falsely accuse Presley later in the day.

¶7 In sum, we reject Presley's argument that he received ineffective assistance of trial counsel because his counsel failed to offer into evidence information about an incident that occurred earlier on the day of the crime at issue in this case.

¶8 Presley next argues that he received ineffective assistance of trial counsel because his counsel did not successfully argue for admission of evidence from an incident the prior year involving Officer DeVries and another prison inmate. The evidence was: (1) an incident report prepared by Officer DeVries, and (2) a letter from the warden notifying DeVries that DeVries was suspended for one day without pay for failing to follow prison procedures when he left an inmate's trap door open contrary to prison rule and later kicked the trap door shut, injuring the inmate. The warden's letter said: "Due to the nature of the inmate's injuries, there is some question as to the reasonableness of your account that the inmate's arm was on its way out the trap door as you were kicking it shut."

¶9 Presley's attorney argued that the evidence should be admitted on the grounds that there was similarity between the two incidents and because the prior incident showed DeVries' poor handling of confrontational situations with inmates. The circuit court noted that DeVries was disciplined in the prior incident for negligently leaving open an inmate's trap door, which had little similarity to the incident here. The circuit court refused to allow the evidence because the court concluded that it was not relevant.

¶10 Presley contends that his trial counsel was ineffective for failing to argue that the evidence was admissible to undermine DeVries' credibility because the evidence showed that DeVries had been untruthful during a prior incident. We first note that the documents themselves were not admissible to impeach DeVries' credibility because they are "extrinsic evidence" of DeVries' conduct. *See* WIS. STAT. § 906.08(2) (2005-06)[1] ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence."). Although Presley's attorney could have inquired into the incident on cross-examination, Presley did not call DeVries at the postconviction motion hearing. *See* ***id.*** (specific instances of conduct "if probative of truthfulness or untruthfulness … [may] be inquired into on cross-examination of the witness"). Presley cannot show prejudice because we do not know what DeVries would have said on cross-examination. As aptly explained by the State, "[o]nly by ascertaining the nature of [what DeVries would have said] can one determine whether absence of the cross-examination could have possibly prejudiced Presley."

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶11 Even if we assume for the sake of argument that DeVries had been thoroughly cross-examined about the prior incident and the one-day suspension he received, Presley would be unable to show prejudice because there is nothing about the prior incident that substantially undermines DeVries' credibility. The warden's letter stated, "there is some question as to the reasonableness of your account," but the warden did not say that DeVries had lied, nor did the warden explain the details that led him to suspect that DeVries had not been candid. The warden's letter does not substantially undermine DeVries' credibility.

¶12 Presley next argues that the evidence was admissible to show how DeVries conducted himself at the time of the crime for which Presley was tried in this case. Presley contends that the evidence shows that DeVries does not handle conflict with inmates well. Presley argues that the circuit court erroneously exercised its discretion in denying his motion to admit the evidence for this purpose and that his trial counsel was ineffective for not making a better argument in favor of admission.

¶13 Other acts evidence is admissible only if it is relevant. ***State v. Sullivan***, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998). To be relevant, the evidence must tend to make a fact of consequence more or less probable. ***State v. Veach***, 2002 WI 110, ¶79, 255 Wis. 2d 390, 648 N.W.2d 447. "'The measure of probative value in assessing relevance is the similarity between the charged offense and the other act.'" ***State v. Hunt***, 2003 WI 81, ¶64, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted). "Similarity is demonstrated by showing the 'nearness of time, place, and circumstance' between the other act and the alleged crime." ***Id.*** (citation omitted).

¶14 Presley contends that the evidence would have made more probable "that Devries was capable of the motivation and intent to … bait an inmate in the context of a trap door." What Presley describes as baiting is more aptly described as passively providing an opportunity for an inmate to misbehave. In the prior incident, DeVries left a trap door open, which allowed the inmate to throw food out of that trap door. In the current incident, Presley seems to suggest that DeVries deliberately left a door open to allow Presley to throw something at DeVries.[2] The prior incident does not have the degree of similarity to the present incident sufficient to render evidence relating to it admissible. This case did not involve an inmate throwing or expelling things through a trap door that DeVries had improperly left open. Instead, Presley expelled saliva onto DeVries while DeVries was standing in the open door of the cell into which DeVries and Walters were attempting to place Presley.

¶15 Turning to Presley's contention that the evidence of the prior incident would have shown DeVries' "motivation and intent … [to] manipulate the system by filing a disingenuous, if not false, conduct report," there is nothing about the prior incident that suggests that DeVries lied about the other inmate's bad conduct in the prior incident. As explained by the State, the falsity, if any, in DeVries' report lay in DeVries' attempt to mitigate his culpability for the injury to the inmate's arm when DeVries kicked the trap door shut. That was not the situation here. The circumstances were not sufficiently similar to those presented in this case to render evidence regarding the prior incident relevant.

[2] We note that this case involved a cell door, not a trap door.

By the Court.—Judgment and order affirmed.

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