

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

David R. Schanker
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. 2008AP1911-CR

Cir. Ct. No. 2006CF410

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JULIOUS WALLACE, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. Julious Wallace II appeals from a judgment convicting him of two counts of solicitation of first-degree intentional homicide

contrary to WIS. STAT. §§ 940.01(1)(a) and 939.30(2) (2005-06)¹ and from an order denying his postconviction motion. Wallace was convicted of soliciting two inmates to murder his former companion and her current boyfriend. We reject Wallace's claims that the circuit court erroneously admitted other acts evidence and that his trial counsel was ineffective. We affirm.

¶2 The amended criminal complaint alleged that Wallace solicited the murder of his former companion and her current boyfriend because they were the victim and witness, respectively, in a criminal case against him alleging multiple counts of second-degree sexual assault, threats to injure and battery, all as a habitual offender.

¶3 Wallace complains that the circuit court erroneously admitted the following other acts evidence. One of the individuals whom Wallace solicited, Dennis O'Brien, testified that while he and Wallace were in the Kenosha county jail, Wallace told him that on several occasions, he sexually assaulted and battered his former companion. The former companion testified that her relationship with Wallace ended when he became drunk and abusive and that he sexually assaulted her and threatened to kill her. She also testified that her current boyfriend was aware of Wallace's conduct toward her and that Wallace hated her boyfriend. The current boyfriend testified that Wallace's former companion told him that Wallace abused her, sexually and otherwise.

¶4 We disagree with Wallace's characterization of this evidence as "other acts." We conclude that the evidence was part of the panorama of evidence

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

that explained why Wallace solicited the murders of his former companion and her boyfriend. The evidence was necessary to put the homicide solicitation into context. *State v. Johnson*, 184 Wis. 2d 324, 349-50, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, P.J., concurring); *see also State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) (“Testimony ... for the purpose of providing the background or context of a case is not prohibited by § 904.04(2), STATS.” (citation omitted)).²

¶5 Finally, the jury was instructed to consider this evidence only to the extent that it provided a context for Wallace’s motive to solicit the murders of his former companion and her boyfriend. The jury was specifically instructed not to treat the evidence as proof of bad character. Juries are presumed to follow the court’s instructions. *State v. Smith*, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992).

¶6 Because this evidence was properly admitted, Wallace’s trial counsel did not perform deficiently when she failed to object to it. *Cf. State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be faulted for not bringing a motion that would have failed); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient and prejudicial).

¶7 Wallace next argues that his trial counsel was ineffective for failing to object during trial to several references to his status as a habitual offender. Wallace points out that “a defendant charged under a repeater statute has the right

² Postconviction, the circuit court observed that this evidence placed Wallace’s conduct toward his former companion and her boyfriend in context.

to have all evidence of any prior conviction kept from the jury trying the instant offense. Prejudicial error is committed when such information is given to the jury.” *Mulkovich v. State*, 73 Wis. 2d 464, 468, 243 N.W.2d 198 (1976). *Mulkovich* does not end our analysis. Because the claim arises in the context of ineffective assistance of trial counsel, we must evaluate counsel’s conduct.

¶8 During his testimony, Wallace admitted that he had two prior convictions. Under examination by his counsel, Wallace elaborated that the first conviction was for battery and disorderly conduct against his former companion. Wallace then related the charges he faced arising out of conduct against his former companion and which the State alleged was the impetus to solicit the murders. The circuit court then intervened to clarify the exact charges Wallace faced. In the course of clarifying the charges previously described by Wallace, the court advised the jury that Wallace was charged as a habitual offender on each count. Wallace’s trial counsel did not object to the circuit court’s recitation of the various charges and Wallace’s habitual offender status. Prior to instructing the jury, the circuit court again informed the jury of these charges and Wallace’s habitual offender status.

¶9 Postconviction, Wallace’s trial counsel testified that she did not object to the circuit court’s habitual offender references because she did not want to give the jury the impression that she was trying to hide information. In addition, by permitting the charges to be described in full to the jury, counsel believed that Wallace could then argue that he was overcharged because those charges were later reduced in number and severity as a result of a plea agreement. The reduced charges could bolster Wallace’s case by showing that the prosecution had doubts about the former companion’s credibility. Trial counsel testified that

she and Wallace discussed Wallace's strategy that the jury should know that he pleads guilty when guilty and goes to trial when innocent.

¶10 In ruling on this ineffective assistance claim, the circuit court agreed with trial counsel that if she had objected to the references to Wallace's habitual offender status, some of the jurors would have suspected that Wallace was trying to conceal information. Wallace made a strategic decision not to object so that he could argue that he had been overcharged. The court found that trial counsel had a strategic reason for not objecting to the clarification of the charges and habitual offender references.

¶11 The circuit court obviously found credible trial counsel's explanation for her failure to object to the references to Wallace's habitual offender status. This credibility determination was the circuit court's to make. *See State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. The court determined that trial counsel had a strategic reason for not objecting to the reference to Wallace's alleged status as a habitual offender. The court's finding regarding trial counsel's strategy is not clearly erroneous based on this record. *State v. Knight*, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Moreover, Wallace's own testimony indicated that he had prior convictions, so references to Wallace's status as a habitual offender did not provide the jury with information it did not already have.

¶12 Wallace argues that his trial counsel was ineffective for failing to call another Kenosha county jail inmate, Timothy Puhr, to testify that John Aprile,

the other inmate whom Wallace solicited, would have done anything to get out of jail, and that Aprile was illegally purchasing fellow inmate O'Brien's medications.

¶13 Postconviction, trial counsel testified that the theory of defense was that Wallace did not solicit the murders and that he had a reasonable explanation for any evidence that suggested solicitation. Counsel was aware that Puhr offered to testify that one of the solicited inmates would do anything to get out of jail. Counsel and Wallace discussed whether to call Puhr as a witness and determined that the relevant evidence Puhr could offer could be obtained on cross-examination of the solicited inmates, O'Brien and Aprile. Counsel believed that evidence of the inmates' motivation was presented through their own testimony; O'Brien and Aprile testified that they were looking for leniency with regard to their own situations.³ After the inmates testified, counsel and Wallace again discussed whether Puhr's testimony was necessary, and they concluded that it was not because the inmates' motivation had been explored on cross-examination. In addition, counsel made a strategic decision not to have any inmates testify on Wallace's behalf to avoid associating him with such individuals.⁴

¶14 The circuit court's finding that counsel made a strategic decision not to call Puhr as a witness is the result of the circuit court's credibility determination and is not clearly erroneous. Evidence of the solicited inmates' desire for leniency

³ O'Brien also testified that he was concerned about the safety of Wallace's intended victims and that he had not received any consideration for his testimony. Aprile testified that he was hoping for leniency on his pending charges but had not received any consideration for his testimony.

⁴ Although the circuit court did not make clear findings on the question of whether counsel performed deficiently by failing to present Puhr's testimony, the court nevertheless denied Wallace's ineffective assistance claim in its entirety. Therefore, we assume the circuit court concluded that trial counsel was not ineffective with regard to Puhr's testimony.

as a result of their cooperation in this case was before the jury via their own testimony.

¶15 Wallace argues that trial counsel did not investigate Puhr. However, Wallace does not suggest what such an investigation would have revealed. Therefore, we do not address Wallace’s complaints about trial counsel’s lack of investigation. *State v. Flynn*, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994) (ineffective assistance claim must show what investigation would have revealed and why it would have altered the outcome of the case).

¶16 Wallace alleges that trial counsel was ineffective for not offering evidence that O’Brien and Aprile were engaged in a criminal enterprise of selling medications. Trial counsel cannot be faulted for failing to offer inadmissible and irrelevant evidence. *Simpson*, 185 Wis. 2d at 784.

¶17 Evidence of medication transactions would not have been admissible under WIS. STAT. § 906.08(2). Section 906.08(2) bars extrinsic evidence that seeks to show a specific instance of conduct for purposes of attacking the witness’ credibility. *Id.* “[The] statute forbids use of extrinsic evidence to impeach a witness’ credibility on a collateral matter. A matter is collateral if the fact as to which error is predicated could not be shown in evidence for any purpose independently of the contradiction.” *State v. Rogrud*, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990) (citations omitted).

¶18 Evidence of medication transactions was also irrelevant to the question of whether Wallace solicited O’Brien and Aprile to commit two murders. *See* WIS. STAT. § 904.01 (relevant evidence has a tendency to make the existence of a fact of consequence to the determination of the action more or less probable).

By the Court.—Judgment and order affirmed.

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

