COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1095-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Gregory Robinson appeals his convictions by a jury of intimidating a victim, WIS. STAT. § 940.44(1), criminal damage to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

property, WIS. STAT. § 943.01(1), and disorderly conduct, WIS. STAT. § 947.01.[2] He also appeals an order denying postconviction relief. In his postconviction motion, Robinson raised and again raises on appeal, three arguments. He claims he was denied due process and a fair trial and the effective assistance of counsel because the State elicited and exploited, without objection, opinion testimony as to witnesses' truthfulness. Robinson further contends that the omission of a cautionary jury instruction regarding the permissible use of evidence of his prior convictions denied him a fair trial and effective assistance of counsel. Finally, he asserts that he was denied due process, the right to present a defense and effective counsel because the trial court precluded him from presenting evidence of the complainant's possible economic motive to fabricate or exaggerate the charges. We affirm the judgment and order.

BACKGROUND

¶2 Robinson was charged as a result of a February 29, 2000, domestic dispute involving Robinson and his wife, Stephanie. There were no witnesses to the incident. Robinson's and Stephanie's respective allegations concerning what occurred that day are lengthy and conflicting. Essentially, Stephanie accused Robinson of being verbally and physically abusive toward her. Robinson denied any physical abuse, but admitted that each was verbally abusive to the other. He also admitted to the investigating officer, deputy Gordon Foiles, that at one point

[2] The jury acquitted Robinson on a second count of disorderly conduct and one count of battery. WIS. STAT. § 940.19(1).

during the incident he threw a table onto the floor, breaking it.[3] Each claimed, both to Foiles and at trial, that the other started the incident. Robinson claimed that Stephanie became angry with him because he told her he was leaving the marriage. Stephanie stated that the dispute first started in the morning when she refused to let Robinson use her car because he did not have a driver's license.

¶3 After Foiles discussed the incident with Robinson and verified that property had been damaged, he placed Robinson under arrest for disorderly conduct. He was not able to interview Stephanie about the incident until approximately two hours after arresting Robinson.

¶4 At trial, Robinson and Stephanie's landlord testified to the damage Stephanie reported to him and her accusation that Robinson was responsible for causing it. He also testified that their security deposit had already been fully devoted to repairing earlier damage to the residence.

¶5 Foiles testified at the trial. Robinson's trial attorney, John Bachman, devoted a substantial part of his cross-examination of Foiles to comparing the Robinsons' conflicting versions of the incident. On redirect examination, Foiles stated that he referred a charge of disorderly conduct against Robinson, not against Stephanie, because he believed Robinson was responsible for the altercation. During closing argument, the State reminded the jury of Foiles's "professional opinion" that Robinson was responsible for the incident.

[3] Robinson claimed that he did this in response to Stephanie throwing and breaking a glass candy dish. He denied throwing the table at his wife. As just one example of Robinson's and Stephanie's conflicting testimony, the latter told Foiles and the jury that Robinson threw the table at her and it broke when it hit a wall. She also stated that Robinson later followed her into her daughter's bedroom, pushed her onto the bed and threw the glass dish against a wall. She testified that the dish left a hole in the wall and that the glass shattered over her and the bed.

¶6 During Robinson's testimony, he informed the jury that he had four prior criminal convictions.[4] Bachman did not ask the trial court to instruct the jury as to the permissible use of this evidence.

¶7 Robinson testified that during the altercation, he was packing his belongings because he intended to move out. When Bachman asked Robinson if some of his belongings remained, the State successfully objected on the grounds of relevance. Following the close of testimony, Bachman made an offer of proof to the effect that Robinson would have testified that he still had a considerable amount of property at the residence, including a stereo and furniture. Bachman indicated this evidence was relevant to Stephanie's possible economic motive to testify falsely. Bachman did not request that the testimony be reopened to introduce this evidence.

¶8 During the trial court's charge to the jury, it gave the standard instruction concerning the jury's duty to determine the witnesses' credibility.[5]

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[4] The trial court had ruled that if Robinson testified, the State could impeach him with four prior convictions.

[5] WISCONSIN JI—CRIMINAL 300, Credibility of witnesses, provides:

> It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.
>
> In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:
>
> - whether the witness has an interest or lack of interest in the result of this trial;
>
> - the witness' conduct, appearance, and demeanor on the witness stand;

(continued)

¶9 As indicated, the jury convicted Robinson of intimidating a victim, criminal damage to property, and disorderly conduct. He filed a postconviction motion, which the trial court denied, and Robinson appealed.

STANDARD OF REVIEW

¶10 Appellate review of a trial court's conclusion regarding ineffective assistance claims involves a mixed question of law and fact. The trial court's assessment of what actually happened, the historical facts, will not be set aside unless it is clearly erroneous. WIS. STAT. § 805.17(2). The overall question whether the representation was deficient and prejudicial, however, is a question of law the appellate court reviews de novo. ***State v. Behnke,*** 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996).

- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness' testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any has been shown;
- possible motives for falsifying testimony;
- and all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then give to the testimony of each witness the weight you believe it should receive.

¶11 Whether a witness has improperly testified as to the credibility of another witness is a question of law that this court reviews independently. *See* ***State v. Davis***, 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1996).

DISCUSSION

¶12 To prove a Sixth Amendment violation of the right to effective counsel, the defendant must show that counsel's performance was deficient and that counsel's errors or omissions prejudiced the defense. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Deficient performance falls outside the range of professionally competent representation and is measured by the objective standard of what a reasonably prudent attorney would do in the circumstances. ***Id.*** at 636-37. To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id.***

¶13 Prejudice results when there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. ***Pitsch***, 124 Wis. 2d at 642. To satisfy the prejudice prong, the defendant must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶14 Because the defendant must show both deficient performance and prejudice to succeed in establishing ineffective assistance, the court need not address both components if the defendant makes an insufficient showing on either one. *See* ***id.*** at 697; *see also* ***Johnson***, 153 Wis. 2d at 128.

A. FOILES'S CULPABILITY OPINION

¶15 Robinson claims he was denied due process, a fair trial and the effective assistance of counsel because the State elicited and exploited without objection, Foiles's opinion as to Robinson's and Stephanie's truthfulness. Although he refers to due process and a fair trial in his statement of the issues, he does not precisely develop these arguments. Moreover, he tacitly concedes that because Bachman did not object to Foiles's opinion evidence or the State's reference thereto during closing argument, his objections are waived. Robinson focuses his appellate efforts primarily on his ineffective assistance of counsel argument. This court does the same.

¶16 Robinson argues that Foiles's testimony violates the principle that it is improper for a witness to comment on the truthfulness of another witness's statements or testimony, citing several cases, including ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). He further contends that Foiles's testimony improperly expressed his opinion of Robinson's guilt. *See* ***Roe v. State***, 95 Wis. 2d 226, 248, 290 N.W.2d 291 (1980). Robinson argues that Bachman was ineffective because he failed to object to Foiles's opinion testimony[6] and that this evidence was "particularly prejudicial, because it suggest[ed] the police possess specialized knowledge or additional undisclosed information supporting defendant's guilt." Robinson asserts that the prejudice was further exacerbated because there were only two witnesses to the event and their accounts conflicted

[6] Bachman acknowledged, and the trial court found, that his failure to object did not have a strategic purpose.

on most major points. He contends that, "the jury's role in weighing the credibility of these two witnesses was tainted when the prosecutor effectively placed Deputy Foiles' finger on Stephanie Robinson's side of the scale." This court concludes that Foiles's testimony did not constitute an impermissible opinion on either truthfulness or guilt. Therefore Robinson has failed to demonstrate prejudice.

¶17 In ***Haseltine***, this court stated that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96. This type of testimony usurps the jury's role to determine the witnesses' credibility and is therefore improper. ***Romero***, 147 Wis. 2d at 278.

¶18 This court, however, rejects Robinson's argument because it is based upon the faulty premise that Foiles's testimony was effectively opinion evidence on truthfulness or guilt. The testimony in question is distinguishable from the testimony found to be inadmissible in ***Haseltine*** and ***Romero***. In ***Haseltine***, the complainant alleged that her father had sexually assaulted her, and an expert testified that there "was no doubt whatsoever" that the complainant was an incest victim. ***Id.*** at 95-96. In ***Romero***, a police officer testified that the victim "was being totally truthful with us," and a social worker testified that the victim "was honest with us." ***Id.*** at 277. Thus the witnesses in ***Haseltine*** and ***Romero*** expressly vouched for the truthfulness of another witness. By comparison, Foiles did not expressly testify as to Robinson's truthfulness, or lack thereof, or his guilt.

¶19 This court concludes that Foiles's testimony did not effectively attest to truth or guilt. This is primarily so because the jury could have naturally drawn an inference concerning Foiles's opinion about who was culpable from the fact

that Robinson was the one who was charged and on trial. Indeed, the jury was aware of Foiles's perspective because it heard testimony that Foiles arrested Robinson before he even interviewed Stephanie. Thus the jurors would have known what Foiles's opinion was without him explicitly telling them. At most, Foiles's testimony merely described the process that led to Robinson's arrest and later trial. Finally, that the jury acquitted Robinson on the battery charge suggests that Foiles's testimony did not tip the scales in Stephanie's favor but, rather, that the jury made its own determination of credibility as it was instructed to do. This court concludes that Robinson was not prejudiced by the admission of this evidence.

B. FAILURE TO REQUEST CAUTIONARY JURY INSTRUCTION

¶20 Bachman did not request that WIS JI—CRIMINAL 327[7] be given to the jury to limit the effect of the prior convictions evidence. At the postconviction hearing, he acknowledged that he did not have a tactical reason for not requesting the instruction. Robinson contends that Bachman's failure in this regard constitutes ineffective assistance. He argues that, "there is a reasonable possibility that one or more jurors unwittingly misused evidence of Mr. Robinson's prior convictions to resolve any doubt as to his guilt." This court again concludes that

[7] WISCONSIN JI—CRIMINAL 327, Impeachment of defendant as a witness: Prior to conviction or juvenile adjudication, provides:

> Evidence has been received that the defendant (name) has been [convicted of crime(s)] [adjudicated delinquent]. This evidence was received solely because it bears upon the credibility of the defendant as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a criminal conviction at some previous time is not proof of guilt of the offense now charged.

Robinson was not prejudiced by his attorney's failure to request WIS JI—CRIMINAL 327.

¶21 Robinson relies on ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971), for the proposition that evidence of prior convictions "has a great potential for abuse." He bases his speculation concerning the effect the prior convictions evidence possibly had on the jury on the following passage from ***Nicholas***:

> The court is aware that the jury might well take such evidence to mean a good deal more than the mere fact that the defendant is a person of doubtful veracity. The jury may conclude that if he has committed all those other crimes, then he probably committed the one he is on trial for also, or if he didn't, he ought to be convicted anyway because his past acts show him to be a bad and dangerous character who ought to be incarcerated.

Id. The ***Nicholas*** court, however, went on to state that:

> The likelihood of this reaction by the jury is increased when the state is allowed to expatiate on the nature and details of the past crimes. In view of this and in order to mitigate the potentially prejudicial impact of prior conviction evidence, this court has held that the 'nature' of prior crimes may not be brought out on cross-examination. The party conducting the cross-examination may ask the witness only two questions, to wit: Has he ever been convicted of a crime; and, if so, how many times? … Frequently a party's own attorney will elicit this information on direct examination in the hope that the impact of this information on the jury will be less if it is brought out on direct instead of on cross-examination.

Id. at 688-89.

¶22 The ***Nicholas*** court thus recognized that the potential for prejudice arising from this evidence is relative and that the procedure for limiting the inquiry mitigates such potential. ***Nicholas*** did not hold that a trial court is required to give

WIS JI—CRIMINAL 327 every time a witness is impeached with evidence of a prior conviction. Nor did it conclude that counsel is ineffective and an impeached defendant prejudiced as a matter of law if the instruction was not given. Indeed, despite the concerns it expressed, the ***Nicholas*** court held that after the defendant admitted to prior convictions and testified that he could remember four, it was permissible for the district attorney to demonstrate on cross-examination that defendant had a record that listed eleven criminal convictions, and to mention such convictions by name. ***Id.*** at 689-90.[8] This court concludes that ***Nicholas*** does not require reversal.

¶23 Ultimately, Robinson's entire argument constitutes speculation as to the possible influence the prior convictions evidence may have had on the jury. This seems an open admission that Robinson has not and cannot demonstrate a reasonable *probability* that had the instruction been requested and given, the result of the proceeding would have been different. *See* ***Pitsch***, 124 Wis. 2d at 642. For this reason alone, this court cannot conclude that the conviction was unreliable. ***Strickland***, 466 U.S. at 687.

¶24 This conclusion is reinforced by two circumstances. As Robinson candidly admits, the State informed the jury that:

> In regards to the defendant's four convictions, by Wisconsin law, that's evidence of whether or not someone is credible. That can be used in determining whether or not that person is credible as a witness. In other words, those convictions by themselves have some impact on credibility.

[8] ***Nicholas v. State***, 49 Wis. 2d 683, 183 N.W.2d 11 (1971), does not indicate whether the trial court gave an appropriate limiting instruction.

Robinson contends that these remarks did not delimit the use of the prior convictions to determining Robinson's credibility. He also points out that the jury was advised that the trial court instructs the jury on the applicable law. This court is not persuaded. The State advised the jury three times as to the proper use of the prior convictions evidence. While it would certainly have been preferable if the court had so advised the jury, the critical fact is that the jury was properly informed. Moreover, while the State did not expressly exclude other possible uses of such evidence, its argument strongly suggested that its proper use was limited to evaluating Robinson's credibility.

¶25 Finally, and again, the jury's not guilty verdict on two charges demonstrates that it did not "conclude that if he has committed all those other crimes, then he probably committed the one he is on trial for also, or if he didn't, he ought to be convicted anyway …." ***Nicholas***, 49 Wis. 2d at 688. This court concludes that Robinson failed to prove that he was prejudiced by Bachman's failure to request WIS JI—CRIMINAL 327.

C. EVIDENCE OF ECONOMIC MOTIVE TO FABRICATE

¶26 Robinson asserts that he was denied his right to present a defense when, after testifying about packing his belongings to move out of the residence, he was not permitted to prove that some of his belongings remained there as of the trial date. This court concludes that this argument was not preserved for appellate review.

¶27 An appellate court will conclude that a trial court erred by excluding evidence only if its proponent made an offer of proof revealing the substance of

the rejected evidence, unless such is apparent from the questions asked. *See* WIS. STAT. § 901.03(1)(b);[9] *see also* ***State v. Echols***, 175 Wis. 2d 653, 679, 499 N.W.2d 631 (1993). The reasons for this rule are that the offer of proof gives the trial court a more adequate basis for its evidentiary ruling and makes a meaningful appellate record. ***State ex rel. Schlehlein v. Duris***, 54 Wis. 2d 34, 39, 194 N.W.2d 613 (1972); *see also* ***State v. Salter*** 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984) ("If these grounds for admissibility had been asserted when the evidentiary arguments were made, the trial court could have addressed them in its ruling.").

¶28 Near the conclusion of Robinson's direct examination, the trial court sustained the State's relevance objection to the following question: "Some of your stuff is still at [Stephanie's] house, correct?" This question certainly would not alert the trial court to the relevance of the invited answer. Moreover, while Bachman made an offer of proof after the close of testimony, it was not timely. It did not give the trial court an opportunity to reconsider its ruling that the proffered testimony was irrelevant. Nor did the trial court have an opportunity to preserve Robinson's right to present a defense, assuming that right was meaningfully compromised by the rejection of the intended line of questioning.

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[9] WISCONSIN STAT. § 901.03(1) provides in part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> ….
>
> (b) … In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

¶29 Robinson contends that Bachman was prejudicially ineffective for failing to make an offer of proof at the time the State objected to the question at issue. Robinson asserts that counsel performed defectively because he had planned to ask Robinson about the items of property remaining at the residence to prove Stephanie's motive to fabricate, and yet he did not respond to the State's relevance objection with an offer of proof explaining the defense's theory. Robinson maintains that the deficiency was prejudicial because

> there is a reasonable possibility that the proffered economic motive evidence would have raised a reasonable doubt as to Mr. Robinson's guilt. Apart from the fact that her husband was leaving her, one or more jurors may have wondered why Ms. Robinson would want to fabricate or exaggerate accusations against her husband. The excluded economic motive testimony would have provided a possible answer to that question.

¶30 This court concludes that Robinson has not proven that any deficiency for failure to make an offer of proof was sufficiently prejudicial to render the resulting convictions unreliable. ***Strickland***, 466 U.S. 687. The trial transcript demonstrates that Bachman's cross-examination of Stephanie, and in large measure, of Foiles, was directed at calling Stephanie's credibility into question. Further, not only did Bachman present retaliation for Robinson leaving the relationship as motive theory, he also pursued the very alternative economic motive to fabricate theory he raises on appeal, albeit based upon different circumstances. During his closing argument, Bachman explored with the jury the hypothesis that because of the amount of damage to the residence that Stephanie still occupied, she had an "economic motive" to blame Robinson and thereby avoid responsibility for reimbursing their landlord.

¶31 The jury heard substantially conflicting evidence and testimony that tended to corroborate or condemn both Robinson's and Stephanie's respective

versions. It was specifically invited to consider several alleged motives that Stephanie allegedly may have had to fabricate her testimony. This court is satisfied that another version of the economic motive theory would have added little if anything to a meaningful evaluation of Stephanie's credibility. Therefore this court concludes that it is not reasonably probable that had a timely offer of proof been made, the result of the trial would have differed.

INTEREST OF JUSTICE

¶32 At the conclusion of the argument on each issue, Robinson argues that he is entitled to a new trial in the interest of justice. *See* WIS. STAT. § 752.35. Because his arguments rely only on claims of error that this court has addressed and rejected on the merits, it need not address these additional arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.