COURT OF APPEALS DECISION DATED AND FILED

September 16, 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. 2008AP1171-CR

Cir. Ct. No. 2004CF99

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN L. BRAYSHAW,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

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

¶1 PER CURIAM. John L. Brayshaw has appealed from a judgment convicting him of eighteen counts of failure to pay child support in violation of

WIS. STAT. § 948.22(2) (1999-2000).[1] He also appeals from an order denying his motion for postconviction relief. We affirm the judgment and the order.

¶2 On appeal, Brayshaw argues that WIS. STAT. § 948.22(2) is ambiguous, and that, as a result, the jury was improperly instructed at trial, entitling him to a new trial. Alternatively, he contends that § 948.22(2) is void for vagueness. He contends that his trial counsel rendered ineffective assistance by failing to raise these issues at trial. He also contends that other acts evidence was improperly admitted at trial, and that the prosecutor's closing argument was improper. Relying on the latter arguments, he contends that he is entitled to a new trial based on ineffective assistance of trial counsel, plain error, or in the interest of justice. The trial court rejected all of his arguments after holding an evidentiary hearing at which Brayshaw's trial counsel testified as provided in ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). We agree with the trial court that Brayshaw's arguments fail.

¶3 WISCONSIN STAT. § 948.22(2) states:

> Any person who intentionally fails for 120 or more consecutive days to provide … child support which the person knows or reasonably should know the person is legally obligated to provide is guilty of a … felony.

¶4 Brayshaw contends that WIS. STAT. § 948.22(2) is ambiguous because it contains conflicting mental state requirements: (1) an intentional provision requiring that the defendant "intentionally fails" to provide support; and (2) a negligence provision permitting conviction if the defendant "reasonably

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[1] All references to the statute under which Brayshaw was convicted are to the 1999-2000 version of the Wisconsin statutes. All other references are to the 2007-08 version.

should know" that he is legally obligated to pay support. Relying upon WIS. STAT. § 939.23, Brayshaw contends that the "intentionally fails" language mandates that a defendant has actual knowledge that he is legally obligated to pay support. He contends that § 948.22(2) is therefore ambiguous and that the ambiguity is not resolved by legislative history. He contends that the statute must therefore be interpreted under the rule of lenity to contain an intentional requirement only. Because the jury was instructed that he could be found guilty if he reasonably should have known that he was legally obligated to provide support, Brayshaw contends that he is entitled to a new trial. Alternatively, he contends that § 948.22(2) should be deemed void for vagueness, entitling him to reversal of his convictions.

¶5 As acknowledged by Brayshaw on appeal, at trial his counsel did not object to the charges and instructions on these grounds. Brayshaw's challenge to WIS. STAT. § 948.22(2) was therefore waived at trial. *See* ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). We therefore review Brayshaw's argument within the context of determining whether his trial counsel rendered ineffective assistance by failing to raise this objection at trial. *See* ***id.***

¶6 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must establish that counsel's conduct fell below an objective standard of reasonableness. ***Id.*** at 687-88. To prove 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Thiel***¸ 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305

(quoting ***Strickland***, 466 U.S. at 694). A court need not address both prongs of the ineffectiveness inquiry if the defendant makes an insufficient showing on one prong. ***State v. Maloney***, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

¶7 Appellate review of an ineffective assistance of counsel claim presents a mixed question of law and fact. ***Id.***, ¶15. A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the ultimate determination of whether counsel's performance falls below the constitutional minimum is a question of law subject to independent appellate review. ***Maloney***, 281 Wis. 2d 595, ¶15.

¶8 Review of trial counsel's performance is highly deferential and every effort is made to avoid determinations of ineffectiveness based on hindsight. ***Id.***, ¶25. The case is reviewed from counsel's perspective at the time of trial. ***Id.***

¶9 "Counsel is not required to object and argue a point of law that is unsettled." ***McMahon***, 186 Wis. 2d at 84. Because the law is not an exact science and may shift over time, it is universally recognized that an attorney is not deficient for failing to object based on an unsettled proposition of law. ***Maloney***, 281 Wis. 2d 595, ¶23. If the law can be reasonably analyzed in two different ways, it has not been settled. ***McMahon***, 186 Wis. 2d at 84.

¶10 In his appellant's brief, Brayshaw acknowledges that no published decisions of the Wisconsin appellate courts address whether WIS. STAT. § 948.22(2) is ambiguous, and that appellate courts in other states have not addressed issues

similar to the issue raised by him.[2] Brayshaw's argument that § 948.22(2) is ambiguous and must be construed to mandate actual knowledge of a legal obligation to pay support is therefore novel, and presents a point of law that was clearly unsettled at the time of trial. Under these circumstances, trial counsel was not deficient for failing to raise the issue at trial. We therefore address this issue no further. *See* ***McMahon***, 186 Wis. 2d at 84.

¶11 We also reject Brayshaw's argument that he is entitled to a new trial based on the improper admission of other acts evidence. Brayshaw contends that his trial counsel rendered ineffective assistance by failing to object to the challenged evidence, that admission of the evidence constituted plain error, and that its erroneous admission warrants a new trial in the interest of justice. Brayshaw's arguments fail because the challenged evidence did not constitute other acts evidence.

¶12 Generally, evidence of other crimes, wrongs or acts is inadmissible at trial to prove a person's character and that the person acted in conformity therewith. ***State v. Hunt***, 2003 WI 81, ¶29, 263 Wis. 2d 1, 666 N.W.2d 771. However, under appropriate circumstances, WIS. STAT. § 904.04(2) allows other acts evidence to be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Hunt***, 263 Wis. 2d 1, ¶29.

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[2] In fact, the Wisconsin Supreme Court has stated that the elements of the crime under WIS. STAT. § 948.22(2) are: (1) an intentional failure to pay child support; (2) that continued for 120 or more consecutive days; and (3) actual *or* constructive knowledge of the legal obligation to pay support. ***State v. Smith***, 2005 WI 104, ¶15, 283 Wis. 2d 57, 699 N.W.2d 508.

¶13 Merely because an act may be factually classified as different in time, place or manner from the act complained, the different act does not constitute "other acts" evidence within the meaning of the law. ***State v. Bauer***, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. When evidence is admitted for a purpose other than showing a similarity between the other act and alleged act, it is not "other acts" evidence. ***Id.***

¶14 Brayshaw was charged with eighteen counts of failure to support his two children from 1997 through 2003. Evidence at trial indicated that Brayshaw and his wife, Diane, had two sons, and that Diane filed for divorce in 1995 when the boys were eight and six years old. The family court entered a temporary order that held open the issue of child support, but, among other things, required Brayshaw to pay the mortgage on the family home, and to pay real estate taxes and utilities.

¶15 The trial court entered a contempt order in 1996, finding that Brayshaw violated the temporary order by selling a tractor, failing to pay the mortgage, cashing a real estate escrow check, failing to pay the real estate taxes, failing to maintain an address and telephone number where he could be reached, and disconnecting Diane's telephone. Although the divorce proceedings were subsequently suspended during a reconciliation attempt, that attempt proved unsuccessful. During that time, Brayshaw purchased a sailboat in Minnesota, taking out a loan without Diane's knowledge. Brayshaw testified that upon his return to Wisconsin he discovered that Diane had locked him out of the home and his home business. He testified that he therefore left Wisconsin on the sailboat and, after unsuccessfully looking for work in Cincinnati, sailed to Florida, where he lived on his boat for ten years.

¶16 Evidence at trial indicated that after Brayshaw left, Diane reinstituted the divorce proceedings and obtained a divorce in March 1997. The judgment of divorce ordered Brayshaw to pay child support of $1,293.75 per month. Brayshaw did not appear for the final judgment, and a copy of the judgment was not mailed to him because his whereabouts remained unknown. A Washington County child support supervisor testified that his agency was unsuccessful in locating Brayshaw until 2006, when he was found in Florida. Evidence indicated that Brayshaw had remarried in Florida in 1997, and that he had used his new wife's name and social security number to obtain employment.

¶17 At trial, Brayshaw's defense was that he believed his marriage to Diane was over in 1996 because she locked him out and refused to communicate with him. He contended that he was also in a desperate financial state, so he left Wisconsin. He contended that he did not know he was legally obligated to pay child support and believed he had fulfilled any support obligations by leaving the house and his property to his family when he left.

¶18 Brayshaw argues that the jury was presented with inadmissible other acts evidence that he was a bad husband and father, that he violated the temporary order in the divorce case, and that he left Diane with financial difficulties. Specifically, he objects to testimony by Diane that he did not tell her he had previously been married, did not get along with her parents, did not communicate well with her, and did not make a meaningful attempt at reconciliation. He also objects to evidence that, while married to Diane, he did not attend school functions and missed important occasions with his sons, favored one child over the other, and had no contact at all with the children after leaving Wisconsin. Brayshaw also objects to the evidence regarding his violation of the temporary order, and

evidence that he fraudulently signed Diane's tax return and failed to maintain contact with his own divorce attorney after he left Wisconsin.

¶19 The evidence challenged by Brayshaw was relevant to show that he intentionally failed to stay in contact with his family and intentionally avoided paying child support. It constituted evidence that he reasonably should have known he was legally obligated to pay support, and rebutted his defense. It was not introduced to show that he acted in conformity with his prior acts, and thus was not other acts evidence subject to analysis under WIS. STAT. § 904.04(2).

¶20 Like the evidence that Brayshaw had no contact with his sons after leaving Wisconsin, evidence that Brayshaw had little interest in or interaction with his children before the divorce was relevant to whether his failure to support them after he left Wisconsin was intentional. Evidence regarding his relationship with his wife and children was also relevant to whether he left Wisconsin to shirk his responsibilities and hide from his family, rather than for the reasons expressed by him at trial. Evidence that he was subject to a temporary court order requiring him to make payments for the benefit of his family was relevant to whether he reasonably should have known that a support order would be issued when he left Wisconsin. Similarly, evidence that he sold a tractor but failed to comply with provisions in the temporary order requiring him to make payments for the benefit of his family was relevant to whether his subsequent failure to support his children was intentional. Likewise, evidence that he failed to maintain contact with his divorce attorney after leaving Wisconsin was relevant because it showed that he deliberately made his whereabouts unknown to avoid being contacted regarding support or served with a support order.

¶21 Evidence that Diane became liable for the sailboat loan when Brayshaw left Wisconsin, like the evidence that she needed assistance to pay the mortgage and had to sell the home and move into an apartment, also belied Brayshaw's defense that he believed he had provided for his children by leaving the house and other property. Evidence that Diane was left with a $44,000 bill for the sailboat and a mortgage she could not pay constituted evidence that Brayshaw knew he had not financially provided for his family, particularly in light of the lengthy period of time that passed before he was located in Florida.

¶22 The evidence challenged by Brayshaw was thus evidence that he reasonably should have known he was legally obligated to pay support, and that his failure to pay support was intentional. It also belied his defense that he believed he had financially provided for his children. Consequently, it was evidence of criminal conduct under WIS. STAT. § 948.22(2), not other acts evidence. *See* ***Bauer***, 238 Wis. 2d 687, ¶7 n.2. Brayshaw's contention that admission of the evidence was error therefore fails, as does his contention that his trial counsel was ineffective for failing to object to it or request a limiting instruction.

¶23 Brayshaw's final argument is that the prosecutor's closing argument was improper. However, contrary to Brayshaw's contention, the prosecutor's argument regarding Brayshaw's failure to comply with the temporary divorce order, his failure to communicate with his divorce attorney, and his leaving Diane with the sailboat loan were permissible. As already discussed, evidence was properly admitted on these topics. The prosecutor therefore was entitled to rely on this evidence as proof that Brayshaw intentionally failed to pay support that he

reasonably knew he had a legal obligation to provide. To the extent that the prosecutor may have exceeded the limits of permissible argument,[3] nothing in the argument can be deemed to have infected the trial with unfairness so as to constitute a denial of due process and plain error. *See* ***State v. Jorgensen***, 2008 WI 60, ¶24 n.8, ¶40, 310 Wis. 2d 138, 754 N.W.2d 77. For these same reasons, no basis exists to conclude that the real controversy was not fully tried or that a new trial would likely produce a different result. Brayshaw therefore is not entitled to a new trial in the interest of justice based on any deficiencies in the closing argument. *See* ***State v. Neuser***, 191 Wis. 2d 131, 140-41, 528 N.W.2d 49 (Ct. App. 1995).

¶24 As determined by the trial court, trial counsel also did not render ineffective assistance by failing to object to the prosecutor's closing argument. Trial counsel's testimony indicated that he chose not to object because he did not think he would prevail on his objections, and because objecting would have highlighted the prosecutor's comments to the jury. As already determined, trial counsel correctly concluded that most of the prosecutor's argument was permissible and unobjectionable. Moreover, this court will not second-guess a trial attorney's considered selection of trial tactics or the exercise of professional judgment in the face of alternatives that have been weighed by trial counsel. ***State v. Elm***, 201 Wis. 2d 452, 464, 549 N.W.2d 471 (Ct. App. 1996). A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***Id.*** at 464-65. Because trial counsel's decision

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[3] Among other things, the prosecutor said "shame on you" to Brayshaw and emphasized the hardships suffered by Brayshaw's family. The trial court concluded that the prosecutor may have come "close to the line" in his argument, as acknowledged by trial counsel in his postconviction testimony.

to refrain from objecting to avoid highlighting the argument constituted a reasonable, strategic decision, no basis exists to conclude that trial counsel performed deficiently.

By the Court.—Judgment and order affirmed.

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