

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 01-2534-CR
STATE OF WISCONSIN**

Cir. Ct. No. 99-CF-15

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

TIMOTHY J. KOSHAREK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed.*

Before Roggensack, Deininger, and Lundsten, JJ.

¶1 PER CURIAM. Timothy Kosharek appeals the judgment convicting him of arson and the order denying postconviction relief. The issues are whether he received effective assistance from his trial attorney and whether the circuit court erred by barring testimony from a proposed expert witness. We affirm on both issues.

¶2 The State charged Kosharek with setting his home on fire. At his jury trial, the State offered evidence of an economic motive for the arson. This included Kosharek's delinquent mortgage payments, delinquent phone bill, as well as his delinquent property and state income taxes. The evidence also showed that he had recently been denied a home equity loan because he had insufficient collateral, that he had incurred a recent drop in income and that he was terminated by his employer the day before the fire. Additionally, Kosharek's bank account showed five overdrafts in the week before the fire and that he had overdrafts dating back several months. And finally, he had recently put up for sale two other properties he owned.

¶3 Kosharek offered evidence countering the alleged financial motive, including testimony that the house was for sale and was in marketable condition before the fire, testimony from Kosharek and his wife that they did not feel economically stressed at the time, that Kosharek was not aware of some of his delinquencies, that he was not in danger of mortgage foreclosure and that his assets substantially outweighed his debts.

¶4 Kosharek had also intended to introduce expert testimony from William Retza, an accountant. That testimony was summarized as follows in Retza's written report:

Tim and Jennifer Kosharek have had financial difficulties, but they are on their way to correcting it by the time of the fire. In fact, without any additional help of insurance proceeds, they have built a new house using the proceeds from the sale of [other property]. They had the means to do it without additional help from the insurance company after the fire, thus, they must have had the means to do it previously. Keeping this in mind, I do not believe that Tim and Jennifer Kosharek had any financial motive to burn either their home or their personal property. They were not in a financial position with no way out. There

were many options available to them and they were aware of them.

¶5 However, the written report was not provided to the State until the first day of the trial, and the State moved to bar it and Retza's testimony as untimely. The circuit court granted the motion and excluded the testimony. Kosharek, by counsel, also stipulated to allow testimony that Kosharek had filed a claim and collected approximately \$40,000 from his home insurer for a fire in his garage in 1994.

¶6 The trial proceeded, and the jury found Kosharek guilty. In postconviction proceedings, Kosharek alleged ineffective assistance based on his trial counsel's failure to timely produce Retza's report and the stipulation to introduce evidence of the 1994 fire. Addressing the latter, Kosharek's attorney explained at the *Machner* hearing that he wanted testimony about the 1994 fire to support the defense theory that the investigators who found arson entered the case with an "arson bias" because of the prior insurance claim.

¶7 The circuit court concluded that Kosharek had not shown prejudice from its decision to exclude Retza's testimony and that his trial attorney reasonably stipulated to allow testimony of the 1994 fire.

¶8 We need not determine if the circuit court erred by excluding Retza's testimony or if his trial counsel was negligent in causing the exclusion. Kosharek has failed to show prejudice from Retza's failure to testify. Kosharek made no offer of proof of Retza's testimony other than the written report. We first note that Retza's opinion on Kosharek's subjective financial motivation was likely inadmissible. *See Steele v. State*, 97 Wis. 2d 72, 97-98, 294 N.W.2d 2 (1980). Regarding the remainder of the offer of proof, there are no facts contained in that

report that were not presented at trial by other witnesses. We disregard errors, or alleged errors, if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty regardless. *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶9 We also conclude that Kosharek's attorney reasonably stipulated to limited testimony on the 1994 fire insurance claim. The testimony, from Kosharek's insurance agent, established only that a fire occurred and that Kosharek received an insurance settlement. On cross-examination, counsel elicited the fact that the insurer treated the fire as accidental. The stipulation prevented additional testimony on the 1994 fire that might have implied it was arson. Additionally, the State's investigative witnesses were convinced that the second fire was arson. It was critical for Kosharek to rebut those opinions, and it was a reasonable strategy to attack them by showing a preconceived bias. Counsel is not ineffective unless the defendant shows that his or her acts or omissions were outside the wide range of professionally competent assistance. *State v. Guck*, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992). In our analysis, we pay great deference to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The professional judgment of Kosharek's attorney regarding the stipulated testimony did not fall below this standard.

By the Court.—Judgment and order affirmed.

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

