COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2731-CR **Cir. Ct. No. 00 CM 7195**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTIONE HUNTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 FINE, J. Antione Hunter appeals from a judgment entered on a jury verdict convicting him of unlawful use of a telephone, *see* WIS. STAT. § 947.012(1)(a), as an habitual criminal, *see* WIS. STAT. § 939.62, and from the trial court's order denying his motion for postconviction relief. The essence of his appeal is that the trial court erroneously exercised its discretion in admitting evidence. We affirm.

I.

¶2 WISCONSIN STAT. § 947.012(1)(a) makes it unlawful for a person "[w]ith intent to frighten, intimidate, threaten, abuse or harass, [to] make[] a telephone call and threaten[] to inflict injury or physical harm to any person or the property of any person." The alleged victim in this case, Angela Walker, had dated Hunter for several months some six years before the trial and for a brief time in the year of the trial. She told the jury that Hunter called her while he was incarcerated at the Milwaukee House of Correction, and that during one of the calls he read to her from a police report concerning what she testified was "a different case" and accused her of ratting on him:

> He said, "Don't you see, now man I'm facing 22 years and 6 months, man," and he just went into, "You did this to me," and I was just, whatever, and he said, "Well, you are the only person that knew all of this stuff. You are the only person that knew all of this, Angela."

(Quotation marks and some punctuation added for clarity.) Walker then told the trial court that Hunter knew where she lived and that he threatened her: "He said, 'All right. All right. Then, you know where I'm at. If anything happened to you, I can't get blamed for it,' and he hung the phone up." (Internal quotation marks and some punctuation added for clarity.)

¶3 Hunter claims that he was denied a fair trial because the jury learned through Walker's testimony that he was facing more than twenty-two years in prison for another crime, and, in a related argument, that his trial lawyer was ineffective for both not objecting specifically to the admission of that evidence and, in the alternative, for not asking the trial court to instruct the jury on how it should consider the evidence.

II.

¶4 A trial court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "'in accordance with accepted legal standards and in accordance with the facts of record.'" ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted). Whether the challenged evidence is admissible is an issue of law that we review *de novo*, ***State v. Sharp***, 180 Wis. 2d 640, 649–650, 511 N.W.2d 316, 320–321 (Ct. App. 1993), and we will affirm the trial court if it reached the right result but for the wrong reason, ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985).

A. *Admissibility of the evidence.*

¶5 The trial court admitted the evidence of Hunter's statement that he was facing more than twenty-two years in prison because it viewed the statement as either "other acts" evidence under WIS. STAT. RULE 904.04(2), or evidence of "consciousness of guilt."[1] Hunter argues that it falls under neither rationale. We agree. But this does not help Hunter.

¶6 First, although Hunter's statement about the exposure he faced in the context of his threat against Walker might have been "consciousness of guilt" in

[1] WISCONSIN STAT. RULE 904.04(2) provides:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

connection with the crime for which he believed he faced more than twenty-two years of potential incarceration, it was not "consciousness of guilt" in connection with the unlawful-use-of-telephone charge. *Cf.* ***State v. Bauer***, 2000 WI App 206, ¶¶4–7, 238 Wis. 2d 687, 689–691, 617 N.W.2d 902, 904 (threat to kill witnesses to crime); ***State v. Winston***, 120 Wis. 2d 500, 505, 355 N.W.2d 553, 556 (Ct. App. 1984) (flight).

¶7 Second, Hunter's statement about his twenty-two year exposure was not an "other act"; it was part of the crime for which he was prosecuted. *See* ***United States v. Buckner***, 91 F.3d 34, 36 (7th Cir. 1996). It not only revealed his motive for the call and his intent in making both the telephone call *and* the threat but, as the trial court recognized, it gave teeth to that threat—a threat by one facing substantial time in prison because of being informed-on by the object of the threat is more believable (and thus more threatening) than a similar threat by someone facing a *de minimis* sanction, like, for example, a five-dollar forfeiture. [27:19] Thus, the statement was admissible.

B. *Ineffective assistance of counsel.*

¶8 Every criminal defendant has a Sixth Amendment right to the effective assistance of counsel, ***Strickland v. Washington***, 466 U.S. 668, 686 (1984), and a coterminous right under Article I, § 7 of the Wisconsin Constitution, ***State v. Sanchez***, 201 Wis. 2d 219, 226–236, 548 N.W.2d 69, 72–76 (1996). In order to establish a violation of this right, a defendant must prove two things: 1) that his or her lawyer's performance was deficient; and, if so, 2) that "the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; *see also* ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76. In assessing a defendant's claim that his or her counsel was ineffective, a court need not address both the

deficient-performance and prejudice components if the defendant does not make a sufficient showing on one. ***Strickland***, 466 U.S. at 697; ***Sanchez***, 201 Wis. 2d at 236, 548 N.W.2d at 76.

1. *Failure to object.*

¶9 As noted, Hunter claims that his trial lawyer was ineffective for failing to object specifically to the admission of Hunter's statement about his twenty-two-year exposure in connection with the crime for which he believed Walker had fingered him. As we have explained, however, the evidence that Hunter told Walker that he faced twenty-two years of incarceration because of something he believed she did was admissible. Thus, Hunter has not shown prejudice under the ***Strickland/Sanchez*** analysis.

2. *Limiting instruction*.

¶10 Hunter also claims that his trial lawyer gave him ineffective representation because he did not ask for an instruction under WIS. STAT. RULE 901.06, telling the jury what they could, and what they could not, consider the evidence for.[2] In his brief on appeal, Hunter argues that his trial lawyer should have requested the following instruction, from WIS JI—CRIMINAL 275:

[2] WISCONSIN STAT. RULE 901.06 provides:

> **Limited admissibility.** When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

> You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

As Hunter recognizes on this appeal, however, this instruction is designed for use when evidence is admitted under WIS. STAT. RULE 904.04(2)—the "other acts"-evidence provision, which, as we have seen, prohibits the use of other acts to prove a person's propensity to act in a certain way. Thus, the instruction would have made little sense in the context of this case because it would have told the jury not to consider "with respect to" the unlawful-use-of-telephone charge any character trait revealed by the twenty-two-year exposure. But the twenty-two-year exposure had nothing to do with any propensity by Hunter to make threatening telephone calls.

¶11 Moreover, a properly framed limiting instruction, which Hunter has not proposed, would have been less-than-helpful to him: You may not consider that Hunter said he faced twenty-two years of potential incarceration because of something that he believed Walker did as evidence that Hunter is a bad person because he may have committed another crime; you may, however, consider his statement for all of the following: his intent in calling Walker, if you find that he did call her; his motive to threaten her, if you find that he did threaten her; and, also, as evidence of how serious any such threat was.

¶12 In light of the above, Hunter has not carried his burden of showing that his lawyer's failure to request a limiting instruction properly tailored to the facts of this case deprived him of a trial whose result was reliable. *See* ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993) ("prejudice" component of ***Strickland*** "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair");

State v. Flynn, 190 Wis. 2d 31, 48, 527 N.W.2d 343, 349–350 (Ct. App. 1994) (defendant who alleges that lawyer was ineffective because the lawyer did not do something, must show with specificity what the lawyer should have done and how that would have either changed things or, at the very least, how the failure made the result of the trial either unreliable or fundamentally unfair).

By the Court.—Judgment and order affirmed.

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