COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3445-CR **Cir. Ct. No. 00 CF 6309**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALVIN BRADEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Alvin Braden appeals from a judgment entered after a jury found him guilty of one count of delivery of a controlled substance, cocaine (5 grams of cocaine or less), as party to a crime and within 1,000 feet of a school, and one count of possession of drug paraphernalia, contrary to WIS. STAT. §§ 961.16(2)(b)(1), 961.41(1)(cm)1., 939.05, 961.495, 961.571(1) and 961.573

(1999-2000).[1] He also appeals from an order denying his postconviction motion. Braden claims: (1) the trial court erroneously exercised its discretion when it allowed the State to introduce "other acts" evidence; (2) he was denied due process by the State's improper closing argument; and (3) his trial counsel provided ineffective assistance by failing to object to the improper closing argument. Because the trial court did not erroneously exercise its discretion in allowing the other acts evidence; because the closing argument was not improper; and because defense counsel's failure to object during closing argument did not constitute ineffective assistance, we affirm.

BACKGROUND

¶2 On December 26, 2000, Police Officer Zebdee Wilson, while working undercover, went to the 2700 block of North Booth Street to investigate drug-dealing complaints. Wilson asked Lawrence Fox if he could "get two," meaning two corner cuts of cocaine base. Fox stated "yes," but as Wilson approached Fox, Fox asked Wilson "who he knew and what his name was." Fox then called Braden, who was nearby, to come over. Braden then took one corner cut of cocaine from Fox's mouth and gave it to Wilson. Wilson, in turn, gave Braden a $20 bill, which Braden then gave to Fox. The corner cut was tested and confirmed as cocaine, with a total weight of .30 grams.

¶3 Braden was then charged with the crimes referenced above. The case was tried to a jury. The trial court allowed the prosecutor to question Braden about his use of drugs. The jury was told that Braden smoked crack cocaine

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

frequently. The jury found Braden guilty, and judgment was entered. Braden's postconviction motion was denied. He now appeals.

DISCUSSION

A. Other Acts Evidence.

¶4 Braden contends the trial court erroneously exercised its discretion when it allowed the prosecutor to question Braden about his use of crack cocaine. We reject this contention.

¶5 WISCONSIN STAT. § 904.04(2) prohibits the introduction of evidence of "other acts" to prove a person's character in order to show conduct in conformity therewith. The statute, however, permits the admission of other acts evidence for other purposes. ***Id.*** Other acts evidence may be admitted if: (1) it is offered for an acceptable purpose under § 904.04(2); (2) it is relevant; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time or needless presentation of cumulative evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). We will not overturn the trial court's decision on this evidentiary issue unless it erroneously exercised its discretion. ***Id.*** at 780.

¶6 Braden contends that the only reason for admitting this evidence was for improper character purposes. He argues that the trial court's factual basis for admission was faulty. Part of the trial court's reasoning for admitting the evidence was Braden's testimony—that he was carrying a crack pipe when he was arrested, that the pipe was his, that he had not used the pipe that day, and that he was not under the influence of anything that day. In response to the question of whether he was under the influence, Braden stated: "No, I wasn't, just kind of depressed, my

mom is kind of sick." Braden argues the trial court improperly inferred from this statement that he was smoking crack because he was depressed over his mother's illness. Braden's theory of defense was that he was trying to help the undercover officers "bust" Fox and the nearby drug house. Therefore, he vouched for Officer Wilson when Fox confronted him, and assisted in the sale so that Wilson could arrest Fox.

¶7 In reviewing the trial court's decision, we apply the ***Sullivan*** test. First, was there an acceptable purpose for admitting the proffered evidence? The answer is yes. The evidence could be admitted on the issues of motive, intent, knowledge or absence of mistake. Braden's theory was that his only intent in this incident was to help the officers take down the drug house. However, he had to explain the presence of a cocaine pipe on his person. When the State questioned him about the pipe, he said it was not his intention to use the pipe at that time. He testified that if he smoked later, he would use the pipe. Then the State asked if he smoked a relatively large amount of crack cocaine. He answered, "No, I don't."

¶8 In questioning Braden on his use of cocaine, the State was trying to refute his stated intention as to his involvement in this incident. Braden claimed his intent was solely to assist police. The State theorized his intent was to be helpful to Fox because he wanted to buy cocaine from Fox later. Establishing that Braden was a frequent user was relevant to refuting Braden's stated intent and motive. It was also relevant to the purpose or knowledge—to prove the element that Braden was aware that this transaction involved cocaine. Braden testified that he was not sure whether the substance involved was cocaine. Therefore, cross-examining him as to his familiarity with the substance was relevant to his knowledge. The evidence could also be offered to establish absence of mistake,

to refute any innocent purpose for carrying around a cocaine pipe in his pocket. Thus, there were several acceptable purposes for allowing the proffered evidence.

¶9 We likewise conclude that the proffered evidence was relevant. As noted, Braden argued that his purpose for assisting in the transaction was benevolent, that he did not know whether the substance involved was cocaine, and that although he was carrying around a personal crack pipe, he was not using cocaine or assisting in the transaction for reasons related to his own use. As a result of his testimony, questioning him to establish his frequent use of crack cocaine was relevant to the intent element of the crime and to demonstrate his familiarity with the substance. Further, the evidence was relevant to refute Braden's stated innocent explanation for his act. *See* ***State v. Roberson***, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990). Accordingly, the second part of the ***Sullivan*** test was satisfied.

¶10 Finally, we consider whether admitting the evidence caused unfair prejudice. We conclude that it did not. The trial court charged the jury with a cautionary instruction, which limits any prejudicial effect. *See* ***State v. Mink***, 146 Wis. 2d 1, 17, 429 N.W.2d 99 (Ct. App. 1988). Moreover, Braden opened the door to this testimony by indicating that the cocaine pipe was his and, although he had not smoked that day, he was depressed over his mother's illness. The trial court's inference that his smoking was linked to his depression was not unreasonable. Further, the inference was supported by Braden's subsequent testimony that he smoked cocaine because of "a lot of problems," including taking care of his sick mother. He testified that as a result, he did not get out of the house as much as he used to and therefore does most of his "partying" at home.

¶11 Because the ***Sullivan*** test is satisfied, the trial court did not erroneously exercise its discretion when it admitted the testimony concerning Braden's frequent use of cocaine.

B. Improper Closing Argument.

¶12 Next, Braden contends the prosecutor engaged in improper closing argument by repeatedly inviting the jury to consider Braden's status as a crack addict, his use of crack cocaine, and the fact he had previously been convicted of a crime. We reject this contention.

¶13 Counsel enjoys wide latitude in closing arguments, subject to discretionary limitation by the trial court. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). "The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***Id.*** (citation omitted). When a claim of prosecutorial misconduct is raised, the test is whether the allegedly improper remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Wolff***, 171 Wis. 2d 161, 167, 491 N.W.2d 498 (Ct. App. 1992) (citation omitted).

¶14 Here, that standard was not met. Braden argues the prosecutor's statements that Braden "smokes crack all the time" and is a "crack addict" were improper. We cannot agree. Braden testified that he was a frequent user of crack cocaine and smoked ten to fifteen rocks per week. The prosecutor's statement therefore constitutes a fair comment on the evidence. The substance of the statement was to refute Braden's theory that his involvement in the incident was merely to assist the undercover officer. Moreover, the prosecutor's reference to

prior convictions was for the acceptable purpose of trying to convince the jury that Braden's story was not credible.

¶15 Taken in context, the next challenged statement regarding Braden's use of "crack ten, fifteen times a week" clearly was an attempt to refute Braden's claim that he was simply trying to be a "Good Samaritan" and assist the police in cleaning up the neighborhood.

¶16 The prosecutor's comments were tied to a legitimate attack on Braden's credibility or other acceptable purpose to refute his theory of defense. They did not render the trial unfair or make the resulting convictions unreliable. Moreover, the jury was instructed that the closing arguments are not evidence and the jurors are presumed to follow this instruction. *See* ***Draize***, 88 Wis. 2d at 456. Accordingly, we cannot conclude that the challenged statements made by the prosecutor during closing argument constituted prosecutorial misconduct or violated Braden's due process.

C. Ineffective Assistance.

¶17 Braden's final claim is that his trial counsel was ineffective for failing to object to the above referenced comments made by the prosecutor during closing argument. We are not persuaded.

¶18 In order to establish that he did not receive effective assistance of counsel, the defendant must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Sanchez***, 201 Wis. 2d 219, 548 N.W.2d 69 (1996). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Even if a defendant can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." ***Id.*** Stated another way, to satisfy the prejudice-prong, "'[a] 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.'" ***Sanchez***, 201 Wis. 2d at 236 (citation omitted).

¶19 The issues of performance and prejudice present mixed questions of fact and law. ***Sanchez,*** 201 Wis. 2d at 236. Findings of historical fact will not be upset unless they are clearly erroneous, ***id.***, and the questions of whether counsel's performance was deficient or prejudicial are legal issues we review independently. ***Id.*** at 236-37.

¶20 Here, we have concluded that the challenged statement did not constitute improper closing argument. Accordingly, the statements were not the proper subject for an objection. Therefore, trial counsel's failure to object was not unreasonable and did not constitute deficient performance. Moreover, because the statements were fair comments on the evidence, if objections would have been interposed, they would not have been successful, and therefore failure to object was not prejudicial. Braden's claim of ineffective assistance fails.

By the Court.—Judgment and order affirmed.

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