COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1598-CR **Cir. Ct. No. 99-CF-86**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT FECKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Robert Fecke appeals a judgment convicting him of three counts of delivering illegal articles to an inmate contrary to WIS. STAT.

§ 302.095(2) (2001-02),[1] and an order denying his motion for postconviction relief. Fecke does not dispute the basic facts underlying the charges—namely, that he received a leather prayer book cover or wallet from an inmate with the intent to deliver it outside of the prison, and on two occasions received money from another inmate with the intent to deliver the money, minus a $500 commission, to the inmate's mother outside of the prison. Fecke nonetheless claims the evidence was insufficient to support the verdict; § 302.095(2) is unconstitutionally vague; he was denied effective assistance of counsel; and his conviction should be reversed in the interest of justice. We reject each of Fecke's claims and affirm for the reasons discussed below.

Sufficiency of the Evidence

¶2 When reviewing the sufficiency of the evidence to sustain a verdict, we view the evidence in the light most favorable to the verdict. WIS. STAT. § 805.14(1); ***State v. Johannes***, 229 Wis. 2d 215, 221-22, 598 N.W.2d 299 (Ct. App. 1999). We will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of witnesses and the drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

¶3 WISCONSIN STAT. § 302.095(2) provides in relevant part:

> Any officer or other person who … receives from any inmate any article or thing whatever with intent to convey the same out of a jail or prison, contrary to the rules or regulations and without the knowledge or permission of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> the … warden or superintendent of the prison, in the case of a prison, is guilty of a Class I felony.

Fecke argues that the State failed to prove the existence of any rule or regulation that prohibited him from removing the wallet or money from the prison. The State, however, introduced a list of work rules that designated a failure to follow the DOC fraternization policy as prohibited conduct and a copy of the fraternization policy. That policy included "providing or receiving goods and/or services with or without remuneration for or to inmates" in the definition of relationships that would be considered fraternization.

¶4 We agree with the State that taking items out of the prison for an inmate—and particularly the transaction for which Fecke was to be paid $500—constitutes providing a service for an inmate in violation of the fraternization policy. Moreover, Fecke testified that taking items such as the wallet out of the prison for inmates was against prison regulations. The jury could rely on Fecke's testimony, in addition to the fraternization policy, to conclude that taking the wallet and money out of the prison for inmates violated work rules.

Vagueness

> The test of vagueness of a penal statute is whether it gives reasonable notice of the prohibited conduct to those who would avoid its penalties.
>
> …
>
> [A] statute will be held to be vague in the constitutional sense only if it is so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability.
>
> A statute must also define the crime with sufficient definiteness that there is an ascertainable standard of guilt. The statute need not meet impossible standards of specificity, however, to survive a challenge under the

> vagueness doctrine. All that is required is a fair degree of definiteness.

State v. Tronca, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978) (internal citations omitted). The vagueness doctrine must be applied to the actual conduct charged, rather than hypothetical situations. ***Id.***

¶5 Fecke contends that the cross-references between WIS. STAT. § 302.095(2), the DOC work rules and the DOC fraternization policy do not give reasonable notice that it is illegal to take items out of the prison on behalf of an inmate. More specifically, he claims it is circular to rely on a violation of the fraternization policy to establish that a rule or regulation has been contravened within the meaning of § 302.095(2), when the fraternization policy, itself, defines delivering articles to an inmate as described in § 302.095 as one of the prohibited relationships constituting fraternization.

¶6 As discussed above, however, we are satisfied that Fecke's actions violate the fraternization policy, and thus the DOC work rules, because they constitute providing a service to an inmate contrary to the relationship definitions. It is not necessary to rely on the separate work rule prohibition against delivering articles to an inmate in violation of WIS. STAT. § 302.095. A reasonable person reading the fraternization policy and the work rules would understand that taking items out of the prison for inmates was prohibited by the work rules, and thus would understand that receiving items from an inmate for that purpose was prohibited by § 302.095(2). Indeed, when confronted with evidence of his actions, Fecke told the police that he had "fucked up" and "knew it was wrong" to have taken the items from prison. We cannot conclude that the statute was unconstitutionally vague.

Assistance of Counsel

¶7 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to the effective assistance of counsel is ultimately a legal determination that this court decides *de novo*. ***Pitsch***, 124 Wis. 2d at 634.

¶8 The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. 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." ***Id.*** A defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To satisfy the prejudice prong, a defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. ***Strickland***, 466 U.S. at 687. We need not address both components of the test if a defendant fails to make a sufficient showing on one of them. ***Id.***

¶9 Here, Fecke contends that counsel performed ineffectively by failing to move for dismissal after the State failed to present evidence in its case-in-chief that Fecke had acted without the warden's knowledge. As the State points out, however, the omission could have been easily cured at that stage by reopening the

evidence. Fecke contends that the State might not have felt it necessary to reopen the evidence in response to a motion to dismiss, because certain comments by the prosecutor indicate that the State mistakenly believed it had to show either lack of permission or lack of consent, not both. Had the issue been formally raised in a motion to dismiss, however, it is highly unlikely the State would have failed to attempt to reopen its case to introduce the very testimony that it ultimately offered in rebuttal. Moreover, Fecke might have had a stronger issue for an appeal if the case had gone to the jury without evidence having been offered on the question of the warden's knowledge. Therefore, we cannot conclude that counsel performed deficiently by failing to move for dismissal at the close of the State's case in chief.

¶10 Fecke next contends that counsel should have requested clarification in the jury instruction that the State needed to prove both lack of knowledge and lack of consent by the warden. We are satisfied, however, that the instruction given was a proper statement of the law. Therefore, counsel's performance in that regard was not deficient.

¶11 Fecke also argues that counsel should have asked the jury to infer that the warden had knowledge that Fecke was going to remove items from the prison based on other employees' involvement in a sting operation. However, the warden testified that he had no knowledge of Fecke's intentions. Therefore, counsel's failure to emphasize the knowledge element to the jury was not deficient performance.

Interest of Justice

¶12 WISCONSIN STAT. § 752.35 allows this court to reverse a judgment by the circuit court "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." There are separate criteria for analysis under each of these two grounds for reversal. ***State v. Caban***, 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997). We may conclude that the controversy has not been fully tried either when the jury was not given the opportunity to hear testimony relating to an important issue in the case or when the jury had before it improperly admitted evidence that confused a crucial issue. ***Id.*** at 610. The miscarriage of justice standard requires a showing that a different result would be substantially probable upon retrial. ***Id.*** In either case, we will exercise our discretionary reversal power only sparingly. ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶13 Fecke argues that interest of justice requires a new trial here because the statute and jury instruction were ambiguous and could have led the jury to believe that it could convict even if the warden had knowledge of Fecke's intentions. The warden's statement that he did not know of Fecke's intentions was uncontroverted, however. Therefore, we see no substantial probability that a different instruction would have led to a different result. The real controversy in this case was whether Fecke had been entrapped into his misconduct by a sting operation, and the record shows that that issue was fully and fairly tried.

By the Court.—Judgment and order affirmed.

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