COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1684-CR **Cir. Ct. No. 00-CF-18**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT M. MADSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iron County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE C.J. Robert Madsen appeals a judgment entered on a jury verdict convicting him of attempted first-degree intentional homicide, first-degree sexual assault, kidnapping and first-degree recklessly endangering safety. He also appeals an order denying his motion for postconviction relief. Madsen first contends he was denied effective assistance of counsel because his trial counsel

did not object to testimony linking Madsen to the theft of a truck. In addition, he claims counsel should have objected to the prosecutor's improper questioning of Madsen regarding the veracity of other witnesses' testimony. Madsen also argues the court should have intervened and stopped this questioning sua sponte. Madsen argues the trial court erred when it failed to suppress DNA evidence obtained from Madsen because the warrant affidavit contained false information and failed to include exculpatory information. He also claims there was no probable cause to issue the warrant and the evidence in the application was based on an earlier, illegal search warrant.

¶2 We determine Madsen was not denied effective assistance of counsel because his trial counsel had a reasonable strategic reason for not objecting to the evidence that Madsen had stolen a truck. Further, although we determine his trial counsel erred by not objecting when the prosecutor questioned Madsen regarding the veracity of other witnesses' testimony, we conclude this error was harmless and the trial court's failure to halt this questioning sua sponte was not prejudicial. Finally, we conclude the allegations unrelated to the earlier warrant established probable cause to issue the warrant to obtain DNA from Madsen. Further, the false information was not necessary to support the issuing judge's probable cause determination, and the excluded information would not have precluded the court from finding probable cause. Therefore, we affirm the trial court's judgment and order.

Background

¶3 On April 1, 2000, Harold Schmude found a badly beaten, half-naked unconscious woman on a county road near the Town of Pence. Schmude called the Iron County Sheriff's Department and a local conservation warden who had

the woman transported to a local hospital. The doctors there concluded the woman was suffering from severe hypothermia and decided to fly her to Duluth for more specialized treatment.

¶4 The Iron County Sheriff's Department contacted the Superior Police Department to assist the investigation. Superior detective Herb Bergson went to the hospital and asked the attending physician to perform a sexual assault examination. Bergson also questioned the victim regarding her identity and eventually determined that her name was Lisa E. The next day, Lisa told police she remembered being dragged through a field and that a man positioned her on her hands and knees, but did not recall being raped. Lisa described her attacker as approximately five-foot-nine-inches tall, with shoulder-length blond hair and a white baseball cap. She recalled him telling her he was going to kill her. Lisa also said she had dreams that she was raped by a man in his twenties. Finally, she said the car in which the man drove her to the field had camel-colored leather bucket seats and that she remembered a new or redone control panel with bright lights.

¶5 While investigating the crime scene on April 1, the sheriff's department made impressions of tire tracks and footprints they discovered. Later that day, a man found Lisa's purse less than a mile from the crime scene. The police also interviewed a taxi driver who told them he had dropped off Lisa and two men at the Mahogany Ridge bar in Hurley around 10 p.m. on March 31. A bar patron recalled seeing Lisa talking to a "preppy looking" man and leaving with him around 11 p.m.

¶6 On April 5, Gary Leoni contacted the police to report that when he left for work around 2:30 a.m. on April 1, he noticed his truck had been moved and that none of his family members had been responsible. His wife Kathy also

noted that clumps of mud and grass were stuck to the truck that morning. The tire impressions made at the crime scene matched Leoni's truck tires. Sheriff's deputy Paul Samardich then contacted Leoni at work and impounded his truck. While waiting for the tow truck to come, one of Leoni's co-workers told him that another co-worker, Robert Madsen, had an automobile accident near Leoni's house early in the morning of April 1.

¶7 Leoni relayed this information to Samardich, who went to Madsen's condominium. Madsen's girlfriend Carla Bonack told Samardich that Madsen had gone to Nebraska to visit his sick father. Bonack said Madsen had come home around 2:50 a.m. on April 1 and was "freaked out" because he had just driven his car into a ditch. She said he was wet and shaking and that she helped him into the bathtub to get warm. Bonack accompanied Samardich and two other deputies to the scene of Robert's accident, where one of the deputies found Lisa's jacket on the ground.

¶8 On April 6, the sheriff's department searched Madsen's condominium and seized, among other things, a shotgun, which Madden was prohibited from possessing because he is a felon. On April 8, Madsen was arrested in Nebraska for possession of a firearm as a felon. On April 14, the State Crime Lab found semen on a swab taken from Lisa's rectal area as a result of the sexual assault examination.

¶9 The police obtained another search warrant on April 24 to obtain blood, hair and saliva samples from Madsen. The crime lab concluded Madsen was the source of the semen found during Lisa's examination, and he was further charged with attempted first-degree intentional homicide, first-degree sexual assault, kidnapping, and first-degree recklessly endangering safety.

¶10 Before trial, Madsen moved to suppress the results of both searches. He argued the April 6 search was invalid because the warrant was issued after the search was conducted. Because this search led to his arrest and because his arrest led to the April 24 search, he argued the results of the latter search must also be suppressed. Madsen also argued the affidavit submitted in support of the April 24 warrant did not establish probable cause and that the State failed to include information in the affidavit that would have rendered the application insufficient. The court agreed that the April 6 search was illegal because of the invalid warrant; however, it concluded that the April 24 warrant application contained enough evidence independent of the April 6 search to establish probable cause. In addition, the court concluded the excluded information was either neutral or supported a finding of probable cause and it was therefore irrelevant whether it should have been excluded.

¶11 At trial, Leoni testified regarding the movement of his truck. As he began to relate what he was told about Madsen's accident, he said, "Well, the informer told me something about, well, maybe Rob had it." Madsen's counsel objected on hearsay grounds and the State withdrew the question. The State then elicited the name of the "informer," Leoni's co-worker David Sivula, and asked Leoni what Sivula had told him. When Madsen's counsel objected again, the State withdrew the question and made no further attempt to elicit the information.

¶12 Madsen also testified. During cross-examination, the State repeatedly summarized the testimony of other witnesses and asked Madsen if these witnesses were lying or mistaken. Madsen's counsel did not object. In addition, during closing the State drew attention to Madsen's responses that the other witnesses were mistaken or lying.

¶13 The jury convicted Madsen on all counts. The court sentenced him to forty years in prison and twenty years' extended supervision on each count of attempted homicide and sexual assault, to be served consecutively. In addition, the court sentenced him to twenty years in prison and forty years' extended supervision on the kidnapping charge, and five years in prison and five years' extended supervision on the endangering safety charge, both concurrent to the other two sentences. Madsen filed a motion for postconviction relief raising the same issues he now raises on appeal, which the court denied. He now appeals.

Discussion

A. Ineffective assistance of counsel

¶14 We first address Madsen's claim he was denied effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that trial counsel's performance was deficient and that this performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To make this showing, the defendant must prove that a reasonable probability exists that but for defense counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. Trawitzki***, 2001 WI 77, ¶40, 244 Wis. 2d 523, 628 N.W.2d 801. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). If the defendant fails to establish prejudice, we may dispense with the inquiry into whether counsel's performance was deficient. ***Id.*** Whether a person has been deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact. ***Id.***, ¶19. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.*** We review whether defense counsel's performance was deficient and prejudicial de novo. ***Id.***

¶15 Madsen argues he was denied effective assistance of counsel because trial counsel failed to object to (1) the prosecution's repeatedly asking Madsen whether he thought the other witnesses were lying, wrong, or mistaken in their testimony; (2) the prosecution's reference to this line of questioning and the conflicting testimony in its closing arguments; and (3) the evidence suggesting Madsen stole Leoni's truck.

¶16 Madsen relies on ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), to support his claim that trial counsel's failure to object to the prosecution's questioning of Madsen regarding the veracity of other witnesses' testimony was deficient. There, we determined "no witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** at 96. The State admits that the prosecution's questioning was improper under ***Haseltine*** and ***State v. Kuehl***, 199 Wis. 2d 143, 149, 545 N.W.2d 840 (Ct. App. 1995), where we reaffirmed ***Haseltine***, determining it established a bright-line rule. ***Id.*** at 151. Consequently, the State also concedes Madsen's claim that trial counsel was deficient for failing to object, and we agree.

¶17 Madsen then argues this line of questioning was prejudicial because the evidence establishing him as Lisa's attacker was not overwhelming and therefore his and other witnesses' credibility were central to the jury's finding of guilt. In support of his claim that his identity was in question, he points to Lisa's testimony that her attacker had long blond hair while Madsen had cropped brown hair at the time. He also relies on Lisa's general lack of memory about the assault, and that he did not confess or at any other time admit to his involvement in the assault. Because his identity was not established by overwhelming evidence,

Madsen claims witness credibility was crucial to his conviction and the prosecution's improper questioning therefore prejudiced his defense.

¶18 Despite these claims, we cannot conclude this line of questioning affected the trial's outcome. We agree with the State that these questions merely highlighted what would have been apparent to the jury; that is, Madsen had a different recollection of the events from the other witnesses, and he claimed they must be wrong. Further, we disagree with Madsen's characterization of the evidence. While it is true that certain aspects of Lisa's identification raise questions, Madsen ignores the eyewitness testimony that he and Lisa left the tavern together, that Lisa's purse and jacket were found in the area where Madsen admits he had an automobile accident on the night of the assault, and that the semen found during Lisa's sexual assault examination contained Madsen's DNA. Trial counsel's failure to object to this line of questioning was not prejudicial.

¶19 Nor did Madsen's counsel's failure to object to the prosecution's closing argument discussion of these inconsistencies constitute ineffective assistance. Madsen links the improper questioning with the closing and, for the reasons we have concluded the former was not prejudicial, we also conclude the latter was not prejudicial. Further, counsel's failure to object during closing was not deficient. Counsel is allowed latitude in closing argument. ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979). In addition, counsel is permitted to comment on a witness's credibility provided the comment is based on the evidence. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). The prosecution's closing argument drew attention to the differences in Madsen's version of events and the version presented by the State's witnesses. This is well within the bounds of acceptable advocacy, and we reject Madsen's claim that counsel's failure to object constituted ineffective assistance.

¶20 Next, Madsen argues his trial counsel was ineffective because he failed to object to Leoni's testimony that he had heard Madsen might have stolen his truck. He contends that the testimony was hearsay, violated his right to confrontation, was irrelevant, unfairly prejudicial and constituted improper character evidence. We first note that Madsen's trial counsel objected on hearsay grounds immediately after Leoni testified an informer had suggested that "maybe Rob had" Leoni's truck, and the prosecution immediately withdrew its question. Further, when the prosecution attempted to elicit the testimony again, Madsen's counsel objected before Leoni answered. The court instructed the jury before the trial began not to speculate as to the possible answers of objected to questions. Jurors are presumed to follow the court's instructions. ***Id.*** at 12. To the extent that Madsen's claim of error focuses on his counsel's failure to object to Leoni's testimony as hearsay, we conclude that no prejudice resulted because counsel timely objected.

¶21 Madsen also suggests his counsel should have filed a motion in limine regarding Leoni's truck. Although Madsen only cites to Leoni's testimony, evidence connecting Madsen and Leoni's truck also came in through the testimony of Leoni's wife and law enforcement officers, and we will assume Madsen would argue this testimony should have been included in the motion.[1] At the ***Machner***[2] hearing, however, Madsen's counsel said he did not seek to prevent the introduction of the stolen truck evidence because he thought it would help Madsen. A palm print found in the truck did not belong to Madsen, and no other

[1] Madsen's appellate counsel did address the other evidence connecting Madsen to Leoni's truck at the postconviction motion hearing.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

evidence directly linked Madsen to the truck. The trial court determined this was a reasonable trial strategy and we agree.

¶22 We will not "second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.' A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted). Here, no physical evidence connected Madsen to Leoni's truck. In fact, the police found a palm print on the truck's rear window that did not match Madsen's, Lisa's, or the Leonis'. This supported Madsen's claim that someone else assaulted Lisa, and trial counsel's decision to not seek the preclusion of its introduction reflects a rational strategic decision.

B. Trial court's failure to halt improper questioning

¶23 Madsen next argues the trial court erred when it failed to halt the prosecution's improper questioning under ***Haseltine***. He points to our statement in ***Kuehl*** where we suggested "trial courts exercise their superintending authority to intervene sua sponte when such questioning occurs." ***Kuehl***, 199 Wis. 2d at 151. Considering ***Kuehl***'s statement that ***Haseltine*** constitutes a bright-line rule, we agree that it would have been permissible for trial court to halt the prosecution's questioning. *See* ***id.*** Contrary to Madsen's contention, ***Kuehl*** does not place a mandatory obligation upon the trial court to intervene in every instance of improper ***Hazeltine*** questioning. Nevertheless, we conclude that even if the court's failure to do so here was error, it was harmless.

¶24 Whether a trial court's action constitutes reversible error requires a determination whether the affected party's substantial rights have been affected.

See ***Nommensen v. American Cont. Ins. Co.***, 2001 WI 112, ¶51, 246 Wis. 2d 132, 629 N.W.2d 301. For an error "to affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 547, 370 N.W.2d 222 (1985). A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome. ***Id.*** at 544-45. This test is similar to the test for prejudice under an ineffective assistance of counsel claim. Because we have concluded that Madsen's trial counsel's failure to object to this line of questioning did not affect the outcome of the proceeding, we similarly conclude the trial court's failure to halt the questioning did not undermine confidence in the trial's outcome.

C. DNA evidence suppression

¶25 Finally, Madsen argues the trial court should have suppressed the DNA samples obtained as a result of the April 24 search warrant. He claims (1) the warrant affidavit did not establish probable cause; (2) the State violated ***Franks v. Delaware***, 438 U.S. 154 (1978), in the warrant application; and (3) that the results of the April 24 search were obtained as a result of his firearm possession arrest, which resulted from an illegal search on April 6. We reject all of Madsen's claims.

¶26 A search warrant may issue only upon probable cause. Probable cause supporting a search warrant is determined by the totality of the circumstances. ***State v. DeSmidt***, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990). A finding of probable cause is a commonsense test. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of

knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517. The warrant-issuing judge may draw reasonable inferences from the facts asserted in the affidavit. ***State v. Benoit***, 83 Wis. 2d 389, 399, 265 N.W.2d 298 (1978). "The test is not whether the inference drawn is the only reasonable inference. The test is whether the inference drawn is a reasonable one." ***Ward***, 231 Wis. 2d 723, ¶30.

¶27 Appellate courts "accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***State v. Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d 54, 643 N.W.2d 437. The defendant bears the burden of proving insufficient probable cause when challenging a search warrant. ***Id.***

¶28 The specific allegations in the warrant application connecting Madsen to Lisa's attack were that (1) on April 1, 2000, Lisa was found near death in a swampy area in the Town of Pence; (2) Madsen had driven his car off the road in the Town of Kimball on or about April 1 and he had to be towed out; (3) Lisa's jacket was found in the "immediate vicinity" of the scene of Madsen's accident; (4) Lisa's purse was found nine-tenths of a mile from the scene of Madsen's accident; (5) semen had been found in Lisa's rectum; and (6) that Madsen's palm print had been found in Leoni's truck. In examining these statements, the trial court determined:

> A reasonable inference that can be drawn from all of this is that the victim [Lisa] probably was assaulted, raped and dumped in a remote location. At another remote location, I'll call it five miles away, the defendant had an accident with his vehicle, a single vehicle accident. The defendant's accident was at about the same time. One reason people

> run off the road, one reason among many why people run off the road is haste, carelessness, elevated emotions, upset, fleeing from the scene of the crime.
>
> It is a reasonable inference that in the vicinity of the defendant's accident, where the personal belongings of [Lisa] were found, where they turned up, having been discarded, that someone had deliberately discarded them there, as opposed to them falling off the back of the truck, and although, at least in the case of the jacket, it was found some days later—I don't recall about the purse, but we'll assume that was found some days later, too—it is a reasonable inference that, regardless of the fact that they were found some days later than the assault and the accident, that they were probably discarded contemporaneously with the assault and the accident.
>
> A wrecker was called to pull the defendant out of the ditch. When wreckers go to accident scenes, police often come, too. Therefore, I believe one can conclude that there is probable cause to believe that the defendant was—may have been responsible for depositing the personal effects of [Lisa] along the road, in the vicinity of his accident, in the remote location—away from the remote location where [Lisa] was found. And if that is a reasonable inference, it is also a reasonable inference that he may have been involved in the assault, the rape or the dumping of the body, or all of them.

¶29 We agree with the trial court's determination that the warrant affidavit supports a finding of probable cause. Madsen argues, "the fact that [Lisa's] purse was found near where the Madsen car had run off the road is too equivocal to support probable cause." This, however, is not the sole basis of the trial court's decision. The court also considered that Lisa was found within hours of Madsen's accident and also reasonably inferred that Madsen could have had an accident because he was fleeing from a crime scene and discarded Lisa's purse and jacket to hide them from the police. Madsen has not met his burden of showing the affidavit was insufficient to establish probable cause.

¶30 Madsen next argues he should have been given a hearing to determine whether the warrant affidavit violated ***Franks*** because it included the false information about his palm print being found in Leoni's truck and it failed to mention that Lisa's description of her attacker did not match Madsen's physical description. Under ***Franks***, a court is obligated to suppress evidence obtained from a search if, at an evidentiary hearing, the defendant can establish by a preponderance of the evidence that the affidavit in support of the search warrant contained false statements made intentionally or with reckless disregard for the truth and that the false statements are necessary to a finding of probable cause. ***Franks***, 438 U.S. at 156. Our supreme court extended the ***Franks*** rule in ***State v. Mann***, 123 Wis. 2d 375, 385-90, 367 N.W.2d 209 (1985), to include omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth. "For an omitted fact to be the equivalent of 'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." ***Id.*** at 388 (footnote omitted). We review a trial court's denial of a defendant's motion for a ***Franks/Mann*** hearing de novo. ***State v. Manuel***, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

¶31 We reject Madsen's claims. Although it is undisputed that his palm print was not found in Leoni's truck and that therefore the affidavit contained false information, this statement, as demonstrated by the trial court's reasoning, was unnecessary to reach a conclusion that probable cause existed. Further, we cannot conclude that the omitted information about Lisa's description of her attacker is the equivalent of a deliberate falsehood or a reckless disregard for the truth. In order to result in a ***Mann*** violation, the omitted information must prevent the judge from finding probable cause to believe the defendant committed the crime

charged. ***Manuel***, 213 Wis. 2d at 315. While Madsen seems to suggest the only possible inference from this information would be that he could not have assaulted Lisa, we disagree. As the trial court noted, it would be reasonable to infer that Lisa's attacker wore a disguise or that under the circumstances, she had difficulty recalling her attacker's appearance. The omitted information would not have precluded probable cause.

¶32 Finally, Madsen argues that the DNA evidence obtained through the April 24 warrant must be suppressed because the April 6 search was invalid. He argues that his arrest in Nebraska was illegal because it resulted from the gun seized in the April 6 search, which was conducted without a valid warrant, and that the April 24 warrant resulted from his arrest. The trial court rejected this argument, concluding that the Nebraska arrest was not illegal due to the illegal search. The court reasoned the remedy for an illegal search is suppression of the fruits of that search. While the charges against Madsen would likely be dismissed because of the suppression order, the court concluded that did not make his arrest illegal. Further, the court determined that the second warrant application's allegations established probable cause by themselves and nothing in the application had anything to do with the evidence seized in the first search.

¶33 Our review of the record leads us to agree with the trial court's latter conclusion. None of the factual allegations in the second warrant application came about as a result of either the illegal search on April 6 or Madsen's subsequent arrest. Instead, all the relevant facts were discovered independently by the police as part of their investigation into Lisa's assault. Evidence may be sufficiently distinguishable to be purged of the primary taint if "the causal connection between [the] illegal police conduct and the procurement of [the] evidence is 'so attenuated as to dissipate the taint' of the illegal action." ***United***

States v. Fazio, 914 F.2d 950, 957 (7th Cir. 1990) (cite omitted). In this case, we need not analyze whether the evidence might meet this description. The allegations in the second application were completely independent and unrelated to the illegal search and Madsen's subsequent arrest. Had these two events not occurred, the police would still have been able to obtain the warrant to take Madsen's hair and blood samples.

By the Court.—Judgment and order affirmed.

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