COURT OF APPEALS
DECISION
DATED AND FILED

November 10, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2557-CR **Cir. Ct. No. 2007CF1391**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN H. FISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. John H. Fisher appeals from a judgment convicting him of first-degree recklessly endangering safety while using a dangerous weapon. Fisher contends the trial court erred in ruling that a witness' prior incompetency

determination could be placed before the jury and that the jury could hear that he was on probation at the time of the offense. We disagree with Fisher and affirm.

¶2 The State charged Fisher with attempted first-degree intentional homicide after he stabbed and seriously wounded Leonard Herron. Fisher and Herron both testified at trial. They gave divergent accounts of the altercation, each basically fingering the other as the aggressor. Herron testified that he was walking with his girlfriend, Laneatha Slocum, when Fisher drove up. The men argued, he and Fisher exchanged blows and Herron realized he had been stabbed.

¶3 Fisher testified that he and Slocum were in his car talking about possibly rekindling their relationship. Slocum was using a knife to hollow out a cigar to make a "blunt." Herron came by on his bicycle, pounded on Fisher's car, grabbed Slocum by the neck and told her to get out of the car. Herron punched Fisher through the car window. Fisher found the knife Slocum had used and stabbed Herron in self-defense. Fisher eventually turned himself in.

¶4 Slocum was interviewed on the night of the incident and again later. Initially she denied seeing a weapon and being in a relationship with Fisher but later could describe the knife in some detail and admitted being involved with Fisher. City of Racine Police Officer Bruce Larrabee spoke to Herron and Slocum at the hospital two days after the stabbing. Larrabee testified at trial that he could recall one discrepancy between Herron's and Slocum's versions but, for the most part, their stories were "very consistent." The trial court allowed the jury to hear only the fact, not the substance, of the variation between their stories.[1]

[1] Fisher does not challenge that ruling on appeal.

¶5 The defense wanted Slocum to testify from her perspective as an eyewitness. Twenty months earlier, Slocum was found to be incompetent to stand trial and was referred for a WIS. STAT. ch. 51 (2007-08)[2] commitment. The trial court ruled here that if Slocum were called to testify, the fact of that earlier incompetency finding could be exposed on cross-examination. The defense opted not to call her as a witness. After a three-day trial, the jury found Fisher guilty of the lesser-included offense of first-degree recklessly endangering safety while using a dangerous weapon. Fisher appeals.

¶6 Fisher first contends the trial court misused its discretion by ruling that the prior finding of Slocum's incompetence could be placed before the jury. Fisher posits that Slocum's testimony would have pointed out inconsistencies not just with Herron's statement to police but between her own stories. He argues that the inconsistencies alone would have sufficiently cast doubt on her credibility. The court's ruling, he asserts, would have decimated her credibility with the jury and he thus effectively was deprived of his right to present a complete defense.

¶7 On review of a trial court's evidentiary ruling, we consider whether the trial court exercised its discretion in accordance with the facts in the record and accepted legal standards. ***State v. Sorenson***, 143 Wis. 2d 226, 240, 421 N.W.2d 77 (1988). This court will not find an erroneous exercise of discretion if the trial court had a reasonable basis for its rulings. ***Id.*** We determine as a matter of constitutional fact whether exclusion of evidence offered by a defendant violated the constitutional right to present a defense. ***State v. Muckerheide***, 2007 WI 5,

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶18, 298 Wis. 2d 553, 725 N.W.2d 930. We review questions of constitutional fact independently, while benefitting from the trial court's analysis. ***Id.***

¶8 It came to light that Slocum had been found incompetent to stand trial in her own criminal trial in May 2007. After the State rested, the court and the parties discussed the examining doctor's conclusions from that competency evaluation, including a diagnosis of "mental retardation," that her substantial limitations made her incapable of becoming competent, and that she was unable to understand court proceedings but probably could "blindly follow" her attorney's suggestions if put on the stand. The prosecutor told the court that the "victim witness" had spoken to Slocum that morning and found her mentality to be "that of a child."

¶9 The defense wanted Slocum to testify to expose inconsistencies in her statements and between hers and Herron's. The court found that the nature of Slocum's mental condition—its permanence and her susceptibility to suggestion and inability to understand court proceedings—made the incompetency finding "clearly relevant." It concluded that if Slocum were to testify, in fairness the prosecution should be allowed to raise the incompetency finding so the jury could consider whether her limitations accounted for her inconsistent statements. It recognized that Slocum's credibility likely would be "very much at issue." The court said it would not "deprive [Fisher] of a defense," but emphasized that it was for the defense to decide "how far you want to push it."

¶10 Fisher argues that the trial court wrongly decided on its own that Slocum was incompetent to testify. We agree that it could not do so. *See* ***State v. Hanson***, 149 Wis. 2d 474, 476, 439 N.W.2d 133 (1989) and ***State v. Dwyer***, 149 Wis. 2d 850, 855-56, 440 N.W.2d 344 (1989) (companion cases holding that

under WIS. STAT. § 906.01 a witness' competency to testify is a credibility issue to be dealt with by the trier of fact). The trial court did not, however. Rather, it determined that if Fisher wanted to use Slocum to undermine Herron's version of the events, her permanent cognitive limitations were relevant. Her mental capacity would be a proper subject of inquiry for the jury in determining her credibility. *See* ***Sturdevant v. State***, 49 Wis. 2d 142, 148, 181 N.W.2d 523 (1970).

¶11 Fisher did not necessarily want the jury to believe Slocum, and he does not contend that her testimony would have validated his. His trial counsel acknowledged that Slocum's testimony was not even central to the defense:

> The only testimony that is really relevant from our standpoint with regard to Miss Slocum is that of as a witness to this event; that she gave different versions of the attack regarding the knife and her relationship with John Fisher. We are not attempting to introduce that to prove any of those things and we can do it without her.

We therefore conclude that Slocum's testimony would have been of only limited use. Further, Fisher himself determined not to call Slocum as a witness. He was not precluded from presenting a full defense. The court's well-explained ruling was properly supported by the facts and the law.

¶12 Fisher next complains that he was unfairly prejudiced when the trial court allowed the jury to hear on cross-examination that he was on probation at the time of the offense. Again, we review evidentiary rulings for whether the court exercised its discretion in accordance with the facts of record and accepted legal standards, supported by a reasonable basis. *See* ***Sorenson***, 143 Wis. 2d at 240.

¶13 Fisher testified on direct examination that in the days after the stabbing he tried on two occasions to surrender to police. Both times, he said, an officer told him he could not do it because there was no outstanding warrant for

him and when he specifically asked for Officer Larrabee he was told Larrabee was not in. On cross-examination, to counter Fisher's testimony about trying to cooperate with police, the prosecutor was permitted to elicit that Fisher and Larrabee spoke on the telephone, Larrabee directed him to report to his probation officer where Larrabee would meet up with him, and Fisher did not show. Fisher contends the prejudice inherent in "probation" outweighed its probative value because it tipped the scales against him in this credibility battle. Further, he claims, the State could have made its point by simply asking Fisher if Larrabee told him to meet "at a particular place" and then asking Fisher if he complied.

¶14 We agree with the trial court's determination that, by seeking to portray himself as cooperative, Fisher opened the door for the prosecutor to put in rebuttal evidence about his willingness to work with the authorities. *See* WIS. STAT. § 904.04(1)(a); *see also* ***State v. Pulizzano***, 155 Wis. 2d 633, 658, 456 N.W.2d 325 (1990). Fisher's direct testimony implied that if he went to the police—twice—he must be innocent. We agree with the trial court that the questions on cross-examination were relevant to rebut that implication by showing that he failed to report as directed to someone with authority over him.

¶15 Although this trial pitched Fisher's credibility against Herron's, any prejudice was slight. Fisher appeared in street clothes and testified that he had two prior convictions. Herron, in orange jail garb, admitted he had six. As the trial court noted in allowing the State to pursue its line of questioning, "[I]t's not like we're putting Mr. Fisher against a choir boy, you know." The trial court's evidentiary rulings demonstrated a proper exercise of discretion.

By the Court.—Judgment affirmed.

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