COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2793-CR

Cir. Ct. Nos. 00 CF 3728
00 CF 3779
& 01 CF 5883

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR K. JOHNSON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Victor K. Johnson appeals from judgments entered after a jury found him guilty of two counts of armed robbery, one count of attempted robbery, and three counts of bail jumping, contrary to WIS. STAT.

§§ 943.32(1)(b) & (2), 946.49(1)(b) and 939.32 (2001-02).[1] He also appeals from an order denying his motion for a mistrial. Johnson claims that his trial counsel provided ineffective assistance and that the court erroneously exercised its discretion when it denied his motion for a mistrial. Because trial counsel's performance was not ineffective, and because the trial court did not erroneously exercise its discretion in denying the motion for a mistrial, we affirm.

I. BACKGROUND

¶2 The facts giving rise to this appeal occurred on three separate occasions, but the events followed the same general pattern. Johnson entered a retail store, took several items from the store, left the store without paying for the items, and was caught by store personnel outside the store. When approached by the store personnel, Johnson produced a knife from his pocket and threatened the store employees to stay away from him. These events occurred at a Kohl's food store on April 26, 2000, a Blockbuster Video on July 23, 2000, and a Home Depot on July 24, 2000.

¶3 Johnson was charged with three counts of armed robbery and three counts of bail jumping. During his trial, Johnson was cross-examined regarding the events that occurred and how his testimony differed from the testimony of other witnesses to the events. In addition, an employee of Home Depot testified for the State that when Johnson pulled his knife, the employee told Johnson that he (Johnson) converted a retail theft into an armed robbery. The jury found Johnson guilty of two counts of armed robbery, one count of attempted armed robbery, and

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

three counts of bail jumping. Judgment was entered. Johnson filed a postconviction motion alleging that his trial counsel provided ineffective assistance and that the trial court erroneously exercised its discretion. The trial court denied the motion. Johnson now appeals.

II. DISCUSSION

A. Ineffective Assistance of Trial Counsel

¶4 Johnson claims that trial counsel was ineffective for failing to object to cross-examination questions asking Johnson whether the State's witness was lying or mistaken. Because the cross-examination questions were not improper, failure to object to the questioning was not improper; therefore, we reject this contention.

¶5 The two-pronged test for ineffective-assistance of counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. There is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id.*** To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. The defendant must show 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." ***Id.*** at 694.

¶6 Our standard for reviewing an ineffective assistance of counsel claim involves a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Findings of fact will not be disturbed unless clearly erroneous. ***Id.*** The legal conclusions as to whether counsel's performance was deficient and prejudicial, however, are questions of law that we review *de novo*. ***Id.*** at 128. Lastly, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Strickland***, 466 U.S. at 697.

¶7 Johnson alleges that trial counsel was ineffective for failing to object to cross-examination questions asking Johnson whether the State's witness was lying or mistaken about the events that occurred at Blockbuster Video. The relevant portion of the testimony at issue includes the following:

> Q And do you agree with Ms. Zahn that there was a table where they have the resale videos that is up near the front where the checkout area is?
>
> A No, ma'am, I do not agree with that.
>
> Q What area did you say you were in?
>
> A I was on the shelves on the right side of the store.
>
> Q Did you go over to that table?
>
> A I don't remember, ma'am.
>
> Q So what you recall of the incident on July 23rd is not crystal, it is just --
>
> A It is crystal, but I would stay away from the table because the tables had three dollar movies and they wouldn't sell so I wouldn't steal them.
>
> Q So when Ms. Zahn says she picked up the remnants from this table and they were movies that were on sale at that table, she is mistaken?
>
> A I don't -- I can't say. I can't call no one a liar, but I tell you I had remnants all over the store. As I moved, I picked and choose [sic]. I pierced the cellophane and

> tossed the cardboard and I stuffed them in my bag. So I left remnants, as you say, all over the store.
>
> ….
>
> Q And now you are starting to go out the door just kind of at a regular pace because nobody stopped you yet. Do you remember Ms. Zahn asking you what was in the bag before you hit the security buzzer?
>
> A That is not true at all.
>
> Q That just didn't happen?
>
> A That just didn't happen.
>
> Q So she is lying about that?
>
> A That is her version, ma'am, I can't call her a liar.
>
> Q She is just not telling the truth, correct?
>
> A If you want to insist, that didn't happen.

¶8 The State responds that this line of questioning is allowed as a way to point out inconsistencies in testimony. The State contends that the prosecutor's questions focused on impeaching Johnson's testimony because he could not explain the differences in testimony.

¶9 To support his position that the line of questioning was improper, Johnson relies on ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Kuehl***, 199 Wis. 2d 143, 545 N.W.2d 840 (Ct. App. 1995). ***Haseltine*** explains that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. ***Kuehl*** explains that cross-examination is improper under ***Haseltine*** when it is "more than an attempt to explain witness discrepancies." ***Kuehl***, 199 Wis. 2d at 149. In relying on ***Haseltine*** and ***Kuehl***, Johnson rejects the holding of ***State v. Jackson***, 187 Wis. 2d 431, 523 N.W.2d 126

(Ct. App. 1994). ***Jackson*** explains that if the purpose and effect of the testimony is to impeach a witness's credibility or highlight inconsistencies in testimony, such testimony does not violate ***Haseltine***. ***Jackson***, 187 Wis. 2d at 437-38. Johnson recognizes the conflict between ***Kuehl*** and ***Jackson***, and alleges that ***Jackson*** was improperly decided because it conflicts with ***Haseltine***. He contends that ***Kuehl*** overruled ***Jackson***. Although overruling ***Jackson*** clearly was intended by ***Kuehl***, ***Jackson*** and ***Kuehl*** are both Wisconsin Court of Appeals cases; therefore, ***Kuehl*** cannot overrule ***Jackson***. Only the Wisconsin Supreme Court has the authority to overrule ***Jackson***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

¶10 Thus, in deciding this case, we must address the conflict and determine which case to follow. Because of ***Cook***, ***Kuehl*** was without authority to overrule ***Jackson***; as a result, ***Jackson*** is still good law. In fact, we agree with the State that ***Jackson*** is consistent with ***Haseltine*** and offers a reasonable limitation of the scope and extent of the ***Haseltine*** rule. ***Jackson*** and ***Haseltine*** state that no witness can give an opinion about whether another witness is telling the truth. However, ***Jackson*** provides a clarification to that rule when the purpose and effect of the testimony is to impeach the credibility of a witness or highlight inconsistencies in the testimony of witnesses. ***Jackson***, 187 Wis. 2d at 437. *See* ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992).

¶11 The challenged testimony here fits squarely into the ***Jackson*** clarification category. In cross-examining Johnson, the State was simply seeking to impeach Johnson's credibility. ***Haseltine*** did not prohibit such questioning; rather, it held that an expert witness could not testify as to the veracity of another witness's testimony. ***Haseltine***, 120 Wis. 2d at 96. The ***Haseltine*** court explained

"the credibility of a witness is ordinarily something a lay juror can knowledgeably determine without the help of an expert opinion." ***Id.***

¶12 The facts here and in ***Jackson***, however, are distinguishable from ***Haseltine***. The testimony challenged in ***Jackson*** and in the present case involved witnesses who were not experts testifying to the occurrence or non-occurrence of an event. Instead, the witnesses testified about their recollection of the events in question, and their recollection contradicted the testimony of another witness. In both cases, each witness was involved in the event and the purpose of the questioning was to highlight inconsistencies in testimony. This testimony did not detract from the jury's role as fact finder. Instead, it pointed out inconsistencies in testimony, allowing the jury to decide what testimony to believe. Thus, the facts in the present case, like in ***Jackson***, are clearly distinguishable from those in ***Haseltine*** and not violative of its holding.

¶13 Based on this analysis, we conclude that the cross-examination was not improper; therefore, defense counsel was not deficient in failing to object to the questioning, and Johnson's claim for ineffective assistance of counsel on that basis fails. Because Johnson failed to prove deficient performance, we need not consider the prejudice prong of the ***Strickland*** test. Nevertheless, it is clear that Johnson was not prejudiced by counsel's conduct. The evidence against Johnson was overwhelming. He was caught in the act at all three stores. According to the State, the only issue in dispute at trial was whether Johnson brandished the knife to assist in his escape with the stolen property, making it an armed robbery, or whether he brandished the knife to assist in his escape after he had already relinquished the stolen property to the employees, making Johnson's crime only retail theft. Johnson failed to reply to the State's position, and therefore concedes the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec.***, 90 Wis. 2d 97,

109, 279 N.W.2d 493 (Ct. App. 1979). The overwhelming amount of evidence against Johnson supports his conviction, and there is no reasonable probability that the result would have been different had Johnson's counsel objected to the cross-examination.

¶14 For these reasons, we agree with the trial court and conclude that Johnson failed to establish that his trial counsel's performance was deficient and prejudicial.

B. Erroneous Exercise of Discretion

¶15 Johnson claims that the trial court erroneously exercised its discretion when it denied his motion for a mistrial. Johnson's motion for a mistrial was based on testimony from a Home Depot employee that Johnson converted a retail theft into an armed robbery when he pulled the knife out of his pocket. The trial court has discretion in deciding motions for mistrial. ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). The trial court's decision will be reversed only if the trial court erroneously exercised its discretion. ***Id.*** Because we conclude the trial court did not erroneously exercise its discretion, we reject Johnson's claim.

¶16 Johnson claims that the Home Depot employee's testimony was improper and prejudicial because it stated his opinion on the legal effect of Johnson's actions. The relevant portion of the testimony at issue includes the following:

> Q About how many people, security people were around the defendant when he was making this motion of waving the knife back and forth?
>
> A Approximately, three or four.

> Q And what happened next?
>
> A I basically told him, you really screwed up, you just turned this from retail theft into armed robbery; and he said, I don't care.

¶17 Johnson claims that the testimony is improper because it states a legal conclusion in the presence of the jury. The State responds that the witness was not providing his opinion of the law; rather, he was testifying as to the discussion that took place between Johnson and him in the parking lot of Home Depot. The State also claims that the statement is relevant to establish the context of the crime and that Johnson's response, "I don't care," is relevant to establish his intent and state of mind.

¶18 If Johnson was opposed to the statement, the proper objection should have been made following the testimony. Such an objection was not made. Instead, counsel chose to wait, see what would happen, and make his record later. Counsel then objected to the questioning after all the testimony and requested a mistrial. When the trial court decided a curative instruction would properly explain to the jury that they are the ultimate finders of fact and that they should disregard the legal conclusions of any witnesses, counsel again failed to object. We hold that the testimony was not improper. Counsel had an opportunity to object to the testimony and to the curative instruction. Because counsel failed to object, he waived his right to appellate review of the issues. ***Haskins v. State***, 97 Wis. 2d 408, 424, 294 N.W.2d 25 (1980). Accordingly, we affirm.

By the Court.—Judgments and order affirmed.

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