

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-3365-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01 CM 764

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NICOLLA DODD,

DEFENDANT-APPELLANT.

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

¶1 WEDEMEYER, P.J.¹ Nicolla Dodd appeals from a judgment entered after a bench trial, wherein she was found guilty of retail theft, party to a crime, as a habitual criminal, contrary to WIS. STAT. §§ 943.50(1m)(b) & (4)(a),

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2001-02).

939.05 and 939.62 (2001-02).² She also appeals from an order denying her postconviction motion. She claims: (1) the trial court erroneously exercised its discretion in admitting certain evidence; (2) trial counsel provided ineffective assistance of counsel; and (3) she is entitled to a new trial in the interests of justice. Because any evidentiary admissions error was harmless, because Dodd failed to establish the prejudice prong under the ineffective assistance of counsel test, and because there is no reason to reverse this matter in the interests of justice, this court affirms.

I. BACKGROUND

¶2 On January 25, 2001, Dodd, Kimberly Carter and Delonda Davis went to the Stein Mart store on west Brown Deer Road. At the checkout counter, Dodd indicated that Carter would be paying for all the merchandise. After the clerk had filled one bag with merchandise, Dodd grabbed the bag and left the store. Shortly thereafter, Carter's tendered check was rejected. Carter grabbed the check back from the cashier and left the store. Carter and Dodd drove away. Davis, however, paid cash for her items and when she left the store, she discovered that Carter and Dodd had left the premises.

¶3 Stein Mart's loss prevention officer, Peter Ramsay, advised police that he recognized this group of women—that they had written bad checks on prior occasions at the store. He tracked down several of the prior bad checks to assist police in locating Dodd. Dodd was located and charged with retail theft, party to a crime, as a habitual criminal. Initially, Dodd attempted to enter a no

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

contest plea. She claimed she was innocent but, given her previous criminal history, felt a jury would never believe her story. The trial court rejected the attempted plea and the case was set for a bench trial.

¶4 On August 6, 2001, the case was presented to the court. It was Dodd's theory of defense that she believed Carter was going to pay for her merchandise and she did not know that Carter's check was rejected. In support of her theory, Dodd stated that when Carter returned to the car, she gave Carter \$100 in cash as partial payment for the merchandise. The trial court found Dodd's version to be incredible and returned a guilty verdict. Dodd was sentenced to two years in prison. Dodd filed a postconviction motion claiming the trial court erred in allowing in certain evidence. The trial court denied the motion, reasoning that any objectionable evidence was not prejudicial to the ultimate determination. Dodd now appeals.

II. DISCUSSION

A. Hearsay Evidence.

¶5 Dodd first claims the trial court erroneously exercised its discretion when it allowed a police officer to testify regarding Davis's statement. Davis made a statement to police approximately one hour after the incident. During trial, the police officer recounted Davis's statement, over Dodd's objection, that the statement was inadmissible hearsay. In essence, the statement indicated that Davis was still in the store when Dodd grabbed a bag of merchandise and left and that Dodd had left the store when the clerk advised Carter her check had been rejected. The State argued that the recounting was admissible as a present sense impression exception to the hearsay rule. The trial court allowed the testimony and acknowledged it might also be admissible because Davis was unavailable. This

court need not decide whether the statement was erroneously admitted because the statement constituted harmless error.

¶6 In reviewing evidentiary matters, this court will not disturb a trial court's ruling unless it erroneously exercised its discretion. *State v. Johnson*, 118 Wis. 2d 472, 481, 348 N.W.2d 196 (Ct. App. 1984). As long as the trial court applied the pertinent facts, the correct law, and reached a reasonable conclusion, this court must conclude that discretion was properly exercised. *Id.* Moreover, this court applies the harmless error rule to evidentiary matters. *See State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (an error is harmless if there is no reasonable possibility that the error contributed to the result in the case).

¶7 Here, the trial court states in its postconviction order that it did not rely on Davis's testimony in rendering its decision. The trial court also points out that Davis's testimony was cumulative to that of Peter Ramsay's testimony. Accordingly, even if Davis's testimony should have been excluded as inadmissible hearsay, this error was harmless. There is no reasonable possibility that the police officer's testimony recounting Davis's statement contributed to the result in this case.

B. Other Acts.

¶8 Dodd next contends that the trial court erroneously exercised its discretion in admitting three bad checks, which she had written at the Stein Mart store on prior occasions. She argues that this constituted "other acts" evidence, which was used solely to impugn her character in violation of WIS. STAT. § 904.04(2). The State responds that the checks were not proffered to attack Dodd's character, but rather to identify her. This court concludes that the trial

court did not erroneously exercise its discretion in allowing the three bad checks into evidence.

¶9 The record reflects that the checks were admitted in order to identify Dodd, which is an acceptable purpose under WIS. STAT. § 904.04(2). (“This subsection does not exclude the evidence when offered for other purposes, such as proof of ... identity”) The State explained that the checks were used as a means of locating Dodd. The trial court clearly stated that it understood the purpose for which this other acts evidence was being proffered. The trial court indicated that it did not consider the other acts evidence as a reflection on Dodd’s character or in determining whether Dodd was guilty of retail theft.

¶10 Based on the foregoing, this court concludes that Dodd was not prejudiced by the admission of the other acts evidence.

C. Ineffective Assistance of Counsel.

¶11 Dodd contends that her trial counsel was ineffective with respect to the advocacy related to the two evidentiary issues discussed above. In order to succeed on an ineffective assistance claim, Dodd must prove: (1) that counsel’s performance was deficient; and (2) that counsel’s deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶12 A lawyer’s performance is not deficient unless he committed errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* In order to show that counsel’s performance was prejudicial, Dodd must prove that the errors committed by counsel were so serious that they deprived Dodd of a fair trial, a trial whose result is reliable. *See id.* In other words, in order to prove prejudice, Dodd 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." *Id.* at 694.

¶13 In assessing Dodd's claim that her counsel was ineffective, this court need not address both the deficient-performance and prejudice components if she cannot make a sufficient showing on one. *See id.* at 697. The issues of performance and prejudice present mixed questions of fact and law. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of historical fact will not be upset unless they are clearly erroneous, *id.*, and the questions of whether counsel's performance was deficient and, if so, whether it was prejudicial, are legal issues this court reviews *de novo*. *Id.*

¶14 Here, this court has already concluded that Dodd was not prejudiced by the two alleged evidentiary errors. Accordingly, Dodd has failed to demonstrate the second prong of the ineffective assistance of counsel test and her claim fails.

D. Interests of Justice.

¶15 Dodd makes a final plea that because of a culmination of errors, the real controversy was not tried and this court should reverse her conviction and order a new trial in the interests of justice. This court is not persuaded. Her alleged errors have all been resolved in favor of upholding the judgment and order. Dodd has not presented any further evidence to convince this court that justice was not served in this case.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)4.

