COURT OF APPEALS
DECISION
DATED AND RELEASED

June 6, 1996

NOTICE

No. 95-0147-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH GILMORE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Iowa County: JAMES P. FIEDLER, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Sundby, JJ.

GARTZKE, P.J. Joseph Gilmore appeals from a judgment of conviction for arson, § 943.02(1)(a), STATS., and obstructing an officer, § 946.41(1), STATS., and from an order denying his postconviction motion. The first issue is whether Gilmore should have a new trial because the trial court excluded evidence regarding the credibility of the principal witness for the State. We conclude the court properly excluded the evidence. The second issue

is whether the court's error in responding to the jury's question on the obstruction charge was harmless. We conclude that it was. We therefore affirm.

I. FACTS

On March 30, 1991, Joseph and Florence Gilmore leased a house. Dixie Nangle, also known as Kille Nagle, the daughter of Florence Gilmore, wrote a check to cover the first month's rent and security deposit. Joseph and Florence moved into the house. Ms. Nagle's account contained no funds to cover her check. On April 20, 1991, the landlord gave the Gilmores notice to quit or pay the rent within five days. The next day, April 21, 1991, a fire occurred at the home, and six months later Joseph was charged with arson. Ms. Nagle, the State's only witness directly linking Gilmore with the alleged arson, testified that he admitted to her that he had intentionally set the fire.

II. EVIDENTIARY ISSUE

Gilmore moved the court for

> an Order allowing the defendant to impeach the State's principal witness, Kelly [sic] Nagle, concerning prior bad acts for which she was involved but for which she was not charged including defrauding her Worker's Compensation insurance company .... See sec. 906.08(2), Stats.; ***State v. Boehm***, 127 Wis.2d 351, 358, 379 N.W.2d 874 (Ct. App. 1985).

Section 906.08(2), STATS., provides in pertinent part that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, ... may not be proved by extrinsic evidence. They may, however, ... if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness ...." The ***Boehm*** court held that it was proper to cross-examine a criminal defendant about a previous fraud she had committed. ***Boehm***, 127 Wis.2d at 358, 379 N.W.2d at 878.

At the motion hearing, Gilmore's counsel stated he proposed to call Judy Jarchow, an employee of the worker's compensation insurance carrier, to prove that she had been involved in an insurance fraud. The trial court denied the motion. As an offer of proof, counsel submitted a letter by an investigator who had interviewed Jarchow. According to the letter, Jarchow told the investigator that Ms. Nagle's worker's compensation claim was for a leg injury. Medical personnel did not understand why her wound was not healing. They eventually cultured the substance in the wound, found that it was fecal material and found that the fecal material matched that of Ms. Nagle. From that point on, Ms. Jarchow denied Ms. Nagle's claim.[1]

The trial court properly denied Gilmore's proposal to show Nagle's fraud through witness Jarchow. Gilmore did not argue that he proposed to cross-examine Ms. Nagle regarding her insurance fraud. Rather, he proposed to show through Ms. Jarchow that Nagle had defrauded the worker's compensation carrier. While the ***Boehm*** court held that it is proper to cross-examine a defendant about the defendant's previous fraud, the court did not validate direct or cross-examination of a third person about a fraud the defendant committed.

Gilmore contends on appeal that the trial court based its ruling on the State's objection to using confidential medical reports to establish Nagle's fraud. That was not the case. The prosecutor referred to Gilmore's proposal as one to admit other acts evidence under § 904.04(2), STATS. The trial court disabused the prosecutor of that misunderstanding by stating that the proposal was concerned with § 906.08(2), STATS. The ensuing discussion between counsel and the court pertained to the hearsay exception in § 908.03(6m), STATS., on health care provider records. However, the basic question remained: whether Gilmore could attack Ms. Nagle's credibility under § 906.08(2) through the testimony of Ms. Jarchow. That was not possible. For that reason, we need not discuss the admissibility of the insurance company's medical records pertaining to Nagle.

If, however, the trial court indeed based its ruling on the medical records issue, we may affirm the ruling on a different basis. ***State v. Holt***, 128

[1] The letter also states that when the interviewer asked Ms. Jarchow whether she believed Ms. Nagle is a truthful individual, she replied no. Whether Ms. Jarchow could testify to her belief regarding Ms. Nagle's truthfulness was not the subject of the motion.

Wis.2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985). Gilmore concedes on appeal that § 906.08(2), STATS., prohibited him from impeaching Nagle's credibility with Jarchow's testimony.

Notwithstanding his concession, Gilmore argues the trial court's ruling precluded him from cross-examining Nagle about her worker's compensation claim. Because Gilmore did not advise the court that he wished to pursue that line of inquiry, and he made no offer of proof, he may not predicate error on the ruling. Section 901.03(1)(b), STATS.

Gilmore argues the trial court's ruling precluded him from examining Jarchow's reputation for truthfulness, a proposed inquiry contained in his offer of proof. We agree with the State that Gilmore waived this issue because he never made a separate motion to admit the evidence, or a separate argument on the admissibility of it, and never asked the circuit court to make a separate ruling on its admissibility. His motion in limine did not raise this potential line of inquiry to Jarchow. Once the court denied Gilmore's motion to impeach Nagle, it was incumbent upon Gilmore to ask for a separate ruling on whether he could examine Jarchow with respect to Nagle's reputation for truthfulness. His failure to do so, and to argue the matter separately to the court, prevented the court from correcting its error, if error it was. He cannot raise it now.

III. CONSTITUTIONAL ERROR

During its deliberations the jury sent a note to the trial court inquiring, "Can obstructing an officer mean physically obstructing [sic] officer and lying to the officer?" Gilmore and his counsel were not present. The court returned the note to the jury with "Yes" written on the same page. The State concedes that the trial court erred but contends the error was harmless.

Constitutional error is harmless only if an appellate court may declare itself satisfied beyond a reasonable doubt that the error did not contribute to the conviction. ***State v. Burton***, 112 Wis.2d 560, 570-71, 334 N.W.2d 263, 268 (1983). The ***Burton*** court applied that test to the very type of constitutional error before us: a communication outside the presence of a defendant and defendant's counsel between the court and a jury during its

deliberations. We are satisfied, beyond a reasonable doubt, that the constitutional error did not contribute to Gilmore's conviction.

Gilmore asserts that he would have objected to the response to the jury's question because it permitted the jury to reach its verdict without being unanimous by allowing some jurors to find he had physically obstructed an officer while the others would have found that he lied to an officer. Gilmore is wrong.

No evidence was presented that Gilmore had physically obstructed an officer. It is unreasonable to infer that any juror believed that Gilmore had physically obstructed an officer. Evidence was presented that he had lied to an officer, and that was the only evidence supporting the verdict on obstruction.

No reasonable juror could have found that Gilmore had physically obstructed an officer, and all the jurors heard testimony that he had lied. The jury was instructed that all twelve had to unanimously agree before a verdict could be returned. Jurors are presumed to follow their instructions, and because the jury convicted Gilmore of obstructing in the complete absence of physical obstruction evidence, they must have agreed that he was guilty of obstructing for having lied. *See* ***State v. Pitsch***, 124 Wis.2d 628, 644-45 n.8, 369 N.W.2d 711, 720 (1985) (jury presumed to follow instructions). The constitutional error could not have had any effect on Gilmore's conviction for obstruction.

IV. CONCLUSION

We conclude that the judgment of conviction and the order denying postconviction relief must be affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.