COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

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

NOTICE

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No. 95-0938-CR-NM

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRY G. BETTS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Terry Betts appeals his conviction for first-degree sexual assault of a child, after a jury trial. The jury found Betts guilty of an April 20, 1990 sexual contact incident, after the prosecution introduced other bad acts evidence of additional uncharged sexual assaults, including a March 1990 sexual penetration incident with the same victim. Betts' counsel has filed a no merit report under ***Anders v. California***, 386 U.S. 738 (1967). Betts received a

copy of the report and has filed a response. Counsel's no merit report raises several possible arguments: (1) trial counsel provided ineffective representation in failing to poll the jury; (2) the trial court erroneously ruled in limine to admit evidence of Betts' prior convictions; (3) the jury panel was invalid; (4) the trial court wrongly limited Betts' impeachment of prosecution witnesses; and (5) various errors during the proceedings warranted a mistrial.

Betts submits several arguments of his own in his pro se response: (1) the evidence did not prove his guilt beyond a reasonable doubt; (2) trial counsel supplied ineffective representation in several respects; and (3) the trial court erroneously excluded some evidence his trial counsel attempted to introduce for the purpose of impeaching the victim's mother. On the insufficient evidence claim, Betts cites the mother's motive to influence the victim to fabricate the allegations, a doctor's failure to detect penetration, and Betts' own absence from the state near the time of the March 1990 sexual penetration incident. Upon review of the record, we are satisfied that the no merit report properly analyzes the issues it raises, that Betts' pro se issues warrant no further proceedings, and that his appeal has no arguable merit. We therefore adopt the no merit report, affirm Betts' conviction, and discharge Betts' counsel of his obligation to represent Betts further in this appeal.

Betts' appellate counsel states that Betts' trial counsel ineffectively neglected to poll the jury. According to appellate counsel, Betts insists that he asked trial counsel to take such action. We grant new trials for ineffective counsel only if the deficient performance prejudiced the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Here, we have no indication that prejudice exists. These proceedings enjoyed a presumption of regularity. ***State ex rel. LaFollette v. Circuit Court***, 37 Wis.2d 329, 344, 155 N.W.2d 141, 149 (1967). This means that the law presumes that all jurors voted in conformity with the verdict. The trial court instructed the jury that its verdict must be unanimous. Jurors are presumed to have followed such instructions. ***State v. Truax***, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989). The trial court collectively polled the jury, directing all jurors to raise their hand if guilty was their verdict. The transcript records that all jurors raised their right hand. This process cured any defect. *See* ***State v. Ritchie***, 46 Wis.2d 47, 56, 174 N.W.2d 504, 509, *cert. denied*, 400 U.S. 917 (1970). Moreover, without some indication in the record that the verdict was not unanimous, trial counsel's failure to poll the jury was not ineffective representation. *See* ***State v. McMahon***, 186 Wis.2d 68, 96, 519 N.W.2d 621, 632-33 (Ct. App. 1994). The record contains no such indication.

Under such circumstances, trial counsel may rationally choose to forgo such procedures. As a result, this issue provided no basis for a new trial. *See also* ***State v. Yang***, 201 Wis.2d 721, 742, 549 N.W.2d 769, 777 (Ct. App. 1996).

Appellate counsel also identifies several trial court rulings that were potentially erroneous. The trial court agreed to allow the State to introduce evidence of Betts' prior convictions for impeachment purposes. These were a 1983 misdemeanor public exposure of a sexual organ, a 1983 misdemeanor disorderly conduct, a 1983 felony burglary and a 1990 disorderly conduct. Betts never testified, however, and the State never introduced the evidence. Nonetheless, appellate counsel states that the pretrial ruling may have chilled Betts' desire to testify. The trial court concluded that the impeachment value of the convictions outweighed any associated prejudice. The trial court made a discretionary decision, and we see no abuse of discretion. *See* ***State v. Schaller***, 199 Wis.2d 23, 39, 544 N.W.2d 247, 254 (Ct. App. 1995). By virtue of their sheer number, the convictions raised questions about Betts' overall trustworthiness; a reasonable jury could have easily concluded that they bore upon Betts' credibility. They also would have been nonprejudicial on the trial's substantive issues. Their focus on Betts' overall trustworthiness would have posed little risk of conveying the impression to the jury that Betts also had a propensity to commit sexual assaults.

Next, appellate counsel claims that the trial court may have erroneously rejected Betts' challenge to the jury pool. We uphold the ruling. There is no indication that the State systematically excluded any class from the jury pool. *See* ***State v. Coble***, 100 Wis.2d 179, 208, 301 N.W.2d 221, 235 (1981). Rather, it contained a good mix of men and women.

Appellate counsel points out that the trial court excluded evidence Betts wanted to use to impeach the victim's mother, his former girlfriend. Betts wanted to show that the victim's mother had a history of giving police false information and of exercising vindictiveness toward former boyfriends. Betts had no right, however, to prove such character-credibility issues by extrinsic evidence of specific instances of conduct. *See* § 906.08(2), STATS.; ***McClelland v. State***, 84 Wis.2d 145, 159, 267 N.W.2d 843, 849 (1978). Moreover, the trial produced ample evidence of the victim's mother's cause for direct bias against Betts and its potential corrupting influence on her testimony. This specific bias against Betts had greater relevance to her credibility than any general antipathy

she may have had toward former boyfriends or any history of falsifying charges to police.

Appellate counsel argues that the trial court should have granted a mistrial on several grounds: (1) the State marked a small jail card with entries recording Betts' prior incarcerations as an exhibit in full view of the jury; (2) the State suggested that Betts' son had wrongly withheld exculpatory evidence from the police; (3) the prosecution introduced bad acts evidence that went beyond the discovery material the State had supplied Betts; and (4) the prosecutor made inflammatory remarks during closing argument. Trial courts have wide-ranging discretion on the issue of mistrials. ***Haskins v. State***, 97 Wis.2d 408, 419, 294 N.W.2d 25, 33 (1980). They must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant the matter's relitigation. ***State v. Grady***, 93 Wis.2d 1, 13, 286 N.W.2d 607, 612 (Ct. App. 1979). Here, the trial court correctly exercised its discretion. We see nothing sufficient to compel a mistrial when viewed in context with the trial as a whole.

The trial court found that the jail card's small size made it illegible to the jury. We have no reason to question this ruling. The jail card also seems to have had no substantive relation to the charged April 20, 1990 sexual contact incident. The prosecution seems to have offered it to corroborate the victim's mother's testimony about bail she had posted for Betts in another case. The purpose, apparently, was to counteract an intimation by Betts' counsel that the mother had committed some kind of wrongdoing over the bond, for which the jury should distrust her as a witness. In addition, by virtue of the convergence in dates between the jail card and the March 1990 sexual penetration incident, the card circumstantially lent support to the prosecution's claim that Betts had committed the uncharged sexual penetration offense. By furnishing evidence that showed Betts' in-state whereabouts at that time, it tended to refute an inference that he may have been outside the state at the time of the uncharged sexual penetration incident. Ultimately, the card's brief appearance would not have transformed the fundamental nature of the trial or confused the judgment of reasonable fact finders. The remaining evidence, including the victim's direct testimony, would have assumed a much more important role in the jury's final decision.

The prosecution had the right to point out that Betts' son withheld exculpatory evidence until the time of trial. The son's earlier silence contrasted with his trial testimony and supplied a basis for impeachment. *See* ***Fletcher v. Weir***, 455 U.S. 603, 604 n.1 (1982). Reasonable fact finders may rationally infer that any child who had bona fide guilt-refuting evidence about his father would have given the police such information at an earlier time. *See* ***id***. This in turn permitted the inference that Betts' son's testimony was untrustworthy and made the prosecution's cross-examination on the subject a valid means of impeachment.

The prosecution's new bad acts evidence was nothing more than the identification of a new time frame for the uncharged March 1990 sexual penetration incident. Due to the victim's age, Betts had cause to expect some imprecision on dates, and therefore the prosecution's modest departure from its original factual allegations would have worked no fundamental unfairness. Moreover, Betts has provided no indication of what other evidence he would have offered if he had received earlier notice. Under such circumstances, we have no reason to believe that earlier disclosure of the new bad acts evidence would have had any practical consequence to the preparation of Betts' defense.

The prosecution's summation did not require a mistrial. Betts' trial counsel objected to three prosecution remarks: (1) Betts' witnesses had nothing to say; (2) no one wants to admit to a sexual assault; and (3) Betts had a conviction for bail jumping. Trial counsel claimed the first shifted the burden of proof, the second wrongly commented on Betts' silence, and the third misrepresented a fictitious bail jumping conviction as fact. We reject this view. The first merely referred to the weight of the evidence, the second was a general comment about the pernicious secrecy of all sexual assaults, and the third was an inadvertent misnomer for the bail money issue. Moreover, the trial court curbed any prejudice potentially arising from the summation, instructing the jury that such arguments were not evidence. *See* ***State v. Medrano***, 84 Wis.2d 11, 25, 267 N.W.2d 586, 592 (1978). We have no reason to conclude that the jury disregarded this instruction or otherwise misapplied any of the prosecution's summation in reaching a verdict.

In his pro se response, Betts argues that the evidence was insufficient to support his conviction. The State had an obligation to prove Betts' guilt beyond a reasonable doubt. *See* ***State v. Oimen***, 184 Wis.2d 423, 436-

37, 516 N.W.2d 399, 405 (1994). The jury, not reviewing courts, judges the credibility of witnesses and the weight of their testimony, ***State v. Wyss***, 124 Wis.2d 681, 694, 370 N.W.2d 745, 751 (1985), and resolves any conflicts in the evidence. ***State v. Daniels***, 117 Wis.2d 9, 18, 343 N.W.2d 411, 416 (Ct. App. 1983). If the jury could have drawn more than one reasonable inference from the evidence, reviewing courts must accept the inference that supports the verdict. ***State v. Alles***, 106 Wis.2d 368, 377, 316 N.W.2d 378, 382 (1982). Betts alleges several evidentiary incongruities that he believes created reasonable doubt about his guilt: (1) the State claimed multiple incidents yet charged one; (2) a doctor found no evidence of penetration; (3) the victim's mother had motives to fabricate the event and to influence the victim against Betts; and (4) Betts was outside the state at the time of an uncharged offense. None of this created a reasonable doubt over Betts' guilt.

The jury weighed the evidence of the mother's motive to fabricate facts and influence the victim. The jury could reasonably reject such a theory, having viewed the victim's and mother's respective demeanors and having weighed the probability of their testimony. The victim herself testified about the sexual contact in unequivocal terms. Her testimony had sufficient weight and credibility to support a conviction. The doctor's failure to detect penetration did not exculpate Betts. The doctor conducted the medical examination before the charged April 20, 1990 sexual contact incident. Although the medical examination took place within two weeks of the uncharged March 1990 sexual penetration incident, the doctor explained that a medical examination was fallible in terms of detecting penetration. In addition, the doctor's findings on an uncharged incident were not critical. They addressed a secondary matter and would not have been decisive as to the jury's sexual contact verdict. Betts has identified no evidence that he was outside the state at the time of the uncharged offense. In fact, Betts' son testified that Betts had returned to the state before then, and other evidence such as the jail card suggested the same. We see no reasonable doubt as to Betts' guilt.

Finally, Betts argues that the trial court improperly admitted evidence and that trial counsel ineffectively failed to call witnesses who would have exposed the mother's fabrication of testimony. To obtain a new trial, Betts must show that the trial court's rulings and trial counsel's actions were prejudicial. ***State v. McBride***, 187 Wis.2d 409, 421-22, 523 N.W.2d 106, 112 (Ct. App. 1994) (trial court rulings), *cert. denied*, 115 S. Ct. 1796 (1995); ***Strickland***, 466 U.S. at 687 (trial counsel's actions). Betts apparently refers to evidence the trial

court admitted about a sexual assault someone else had allegedly committed against the victim many years earlier. Betts' trial counsel asked the victim's mother about it, apparently in an attempt to show that the victim had some experience in making sexual assault accusations and thereby the intellectual ability to invent such incidents, in order to create doubt about the victim's current charge. Trial counsel's cross-examination made clear, however, that Betts was not the perpetrator of this prior incident. Under the circumstances, a reasonable jury would not have drawn a mistaken inference or misused the testimony. Betts' guilt did not depend on such evidence.

Betts has not explained what witnesses his trial counsel should have called or what facts they would have furnished. Criminal litigants may not base ineffective assistance of counsel claims on general allegations. *See* ***State v. Saunders***, 196 Wis.2d 45, 49-50, 538 N.W.2d 546, 548 (Ct. App. 1995); ***State v. Flynn***, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 1389 (1995); ***State v. Toliver***, 187 Wis.2d 346, 360-61, 523 N.W.2d 113, 118 (Ct. App. 1994); ***State v. Washington***, 176 Wis.2d 205, 214, 500 N.W.2d 331, 335-36 (Ct. App. 1993). Without specific information about the content of the missing witnesses' testimony, a litigant cannot demonstrate how trial counsel's failure to call witnesses caused any prejudice. Here, we cannot ascertain from Betts' nonspecific claim whether the witnesses would have provided probative testimony on pertinent issues that might have affected the outcome of the trial. We therefore have no reason to grant Betts any relief on this allegation.

In sum, we agree with Betts' appellate counsel that the jury reached a just result and that the appeal offers no issues arguably sufficient to upset the conviction. We discharge Betts' counsel of his obligation to represent Betts further in this appeal.

By the Court.—Judgment affirmed.