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DISTRICT II

October 4, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP1329-CR

State of Wisconsin v. Christ C. Robinson (L.C. # 2013CF1221)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Christ C. Robinson appeals from a judgment of conviction entered upon a jury's guilty verdicts and an order denying his postconviction motion. Robinson argues that he is entitled to a new trial due to the ineffective assistance of counsel or in the interest of justice. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm.

Robinson was charged with disorderly conduct and false imprisonment. At Robinson's jury trial, the victim testified that while she was cleaning a public restroom, Robinson rubbed his crotch, made suggestive comments, grabbed her arm, and followed her to another bathroom where he proceeded to pound on the door with such force that the victim had to use her body weight to keep the door closed. After she called 911, the pounding stopped. When she heard knocking a little while later, she opened the door, thinking it was the police. She testified that it was Robinson and that he lunged at her "with his arms outstretched like he was going to grab [her]." The State also elicited other acts evidence from two women. Both testified that while they were at work, Robinson came in to use the bathroom and openly masturbated or exposed his penis.

Before Robinson testified, the parties agreed that for purposes of impeachment, he had three prior convictions. *See* WIS. STAT. § 906.09(1) (a party may attack the credibility of a witness with evidence of prior convictions). Robinson disputed the victim's account, stating that he simply knocked on the restroom door to ask for toilet paper. He also disputed the other acts evidence, testifying that one victim had flirted with him and watched while he used the restroom, and the other had kicked open the bathroom door while he was urinating. Trial counsel did not ask Robinson about his prior convictions during direct examination, and the State did not ask about them on cross-examination. Trial counsel conducted a brief redirect examination of

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Robinson. On recross, the State asked him whether he had ever been convicted of a crime, and Robinson said he had been convicted three times. The jury found Robinson guilty of both counts.

Robinson filed a postconviction motion alleging that trial counsel provided ineffective assistance by opening the door and/or failing to object to the prosecutor's questions about his prior convictions. At a hearing, Robinson argued that after the prosecutor's cross-examination, trial counsel should have rested rather than conducting redirect because this opened the door for the prosecutor to ask him on recross about his prior convictions. In the alternative, Robinson argued that trial counsel should have objected to the prosecutor's questions as outside the permissible scope of recross. The circuit court asked postconviction counsel if trial counsel, who was present at the hearing, would testify. Postconviction counsel stated:

I guess I would leave it up to the Court as to whether, your Honor, you think it's necessary. I don't believe at this point in time that there's any dispute about what happened. I think that the—the issue to be decided is one that should be decided by the Court.

The circuit court denied the motion, determining that trial counsel's decision to conduct redirect was not objectively unreasonable and that his failure to object to the prosecutor's questions was not prejudicial.

On appeal, Robinson maintains that trial counsel provided ineffective assistance either by engaging in redirect or by failing to object to the prosecutor's questions about his prior convictions. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficiency, the

defendant must establish that counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. To satisfy the prejudice prong, the defendant must demonstrate 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. "It is a prerequisite to a claim of ineffective assistance of counsel that the testimony of the trial counsel be preserved so that the appeals court can review the reasoning behind the attorney's decisions." *State v. Mosley*, 201 Wis. 2d 36, 50, 547 N.W.2d 806 (Ct. App. 1996) (citing *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)).

We conclude that because trial counsel did not testify at the postconviction hearing, Robinson has forfeited review of his ineffectiveness claims. See *Mosley*, 201 Wis. 2d at 50 (defendant "waived" review of his ineffectiveness claim because he failed to call trial counsel as a witness). Without trial counsel's testimony "to explain the reasons underlying his handling of [the] case," we cannot determine if counsel's conduct was objectively unreasonable. *Machner*, 92 Wis. 2d at 804. See also *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) (evidentiary hearing required to give trial counsel a chance to explain his or her actions).

Further, even if we assume that counsel performed deficiently, there is no reasonable probability that the outcome of the trial would have been different had the jury not learned of Robinson's three prior convictions. There was strong evidence of Robinson's guilt in the record. *State v. Trawitzki*, 2001 WI 77, ¶45, 244 Wis. 2d 523, 628 N.W.2d 801 ("When there is strong evidence supporting a verdict in the record, it is less likely that a defendant can prove prejudice."). The victim's testimony along with the other acts evidence established Robinson's

common plan and refuted his defense of mistake. The prosecutor did not even mention Robinson's prior convictions in closing argument. Robinson has not established prejudice.

Finally, Robinson claims that he is entitled to a new trial in the interest of justice because trial counsel's conduct caused the jury to hear prejudicial evidence of his prior convictions. We disagree. First, we have already determined that trial counsel did not provide ineffective assistance. *See State v. Arredondo*, 2004 WI App 7, ¶56, 269 Wis. 2d 369, 674 N.W.2d 647 (an interest of justice claim fails if it merely relies on arguments that the court has rejected). Second, the admissible and accurate testimony about Robinson's prior convictions is not the sort of evidence which would lead us to conclude "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals