

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-2588-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. MONTGOMERY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. James A. Montgomery has appealed from a judgment of conviction of theft, fraudulent use of a financial transaction card as a party to the crime, conspiracy to commit forgery, and battery, all as a repeat offender. He also appeals from an order denying his motion for postconviction relief. We affirm both the judgment and the order.

The convictions arise from the theft of a wallet belonging to Carol Baker. The wallet contained Baker's credit cards, an insurance card and other items. Evidence at trial indicated that Montgomery had his accomplice, Lisa Carter, use the stolen cards to purchase clothes for him and in other attempts to obtain goods or money using the cards. The State theorized that Montgomery coerced Carter into assisting him by threatening and beating her. Baker's wallet was ultimately found in Montgomery's bedroom during the execution of a search warrant. In addition, her insurance card was found in Montgomery's wallet.

Montgomery's first argument is that he is entitled to a new trial based upon newly discovered evidence indicating that Carter had nine prior convictions rather than three prior convictions as she testified at trial. A defendant who seeks a new trial based on newly discovered evidence has the burden of establishing a right to relief by clear and convincing evidence. *See State v. Brunton*, 203 Wis.2d 195, 198, 552 N.W.2d 452, 454 (Ct. App. 1996). He or she must establish: (1) that the evidence came to his or her knowledge after trial; (2) that he or she was not negligent in seeking to discover it; (3) that the evidence is material to an issue; (4) that the evidence is not merely cumulative to evidence that was presented at trial; and (5) that it is reasonably probable that a different result would be reached on a new trial. *See id.* at 200, 552 N.W.2d at 455. A motion for a new trial based on newly discovered evidence is addressed to the trial court's discretion. *See id.* at 201-02, 552 N.W.2d at 456.

We conclude that the trial court properly exercised its discretion in denying Montgomery's motion for relief. Initially, we agree with the State that the other convictions relied on by Montgomery are not clearly established even in the postconviction record. Montgomery contends that in addition to the three Wisconsin convictions acknowledged by Carter at trial, she also has a prior

conviction in New York and five prior convictions in Georgia. However, Montgomery failed to introduce copies of the alleged judgments of conviction into the postconviction record. Instead, the record contains a sheet of paper which purports to be an excerpt from a record in a New York court. The paper does not identify the charge or charges allegedly filed against Carter. It simply lists three dates and under “Court Action” lists various initials. While Montgomery’s postconviction counsel represented to the trial court at the postconviction hearing that New York officials told him that the initials stood for “plea of guilty” and “sentencing imposed” of nine months, this paper, standing alone, cannot be deemed clear evidence of a prior criminal conviction.

With respect to the alleged Georgia convictions, Montgomery produced copies of an indictment of Carter on nine counts of forgery, an application by Carter to enter a plea of nolo contendere to five counts of forgery, and an order signed by a judge providing that “it is ordered and adjudged that such plea of nolo contendere be allowed, and accepted” and stating that the application and order would be filed as part of the record in the case. However, once again, no copy of an actual judgment of conviction was filed by postconviction counsel.

The record also indicates that prior to Montgomery’s trial, the Department of Corrections employee who prepared the presentence report related to Carter’s Wisconsin convictions¹ informed the prosecutor that he could not confirm any prior convictions for Carter. The lack of corroborating evidence, in combination with the deficiencies in Montgomery’s postconviction proof of the alleged prior convictions, leads this court to conclude that Montgomery did not

¹ Before Montgomery went to trial, Carter was convicted of three charges arising from the use of Baker’s credit cards.

meet his burden of proving the existence of the six additional convictions by clear and convincing evidence.

To establish a right to a new trial based on newly discovered evidence, the proffered evidence must also be material to an issue at trial and render it reasonably probable that a different result would be reached on retrial. Neither of these prerequisites is satisfied here. While evidence regarding the existence and number of prior convictions of a witness is relevant to that witness' credibility, *see State v. Bowie*, 92 Wis.2d 192, 203, 284 N.W.2d 613, 617 (1979), evidence which merely impeaches the credibility of a witness does not warrant a new trial on that ground alone, *see State v. Machner*, 92 Wis.2d 797, 806, 285 N.W.2d 905, 909 (Ct. App. 1979). Consequently, evidence regarding additional convictions of Carter is not material evidence sufficient to warrant a new trial.

The record also provides no basis for concluding that evidence of additional convictions would produce a different result if a new trial were held. While the jury was instructed that it could consider that a witness who had been convicted of a crime was less truthful than one who had not been convicted, the standard instruction related to impeachment of a witness by prior convictions does not refer to the number of prior convictions. *See* WIS J I—CRIMINAL 325. In addition, the jury was informed that Carter had three prior convictions, and it is

unlikely that evidence of additional convictions would have affected the jury's assessment of her credibility more than it had already been affected.²

In concluding that it is improbable that evidence regarding Carter's additional convictions would lead to a different result on retrial, we also note that other evidence presented at trial corroborated Carter's testimony and directly implicated Montgomery in the crimes. Montgomery is African-American, and although Baker could not positively identify him, she testified that her wallet was missing two days after an African-American man who matched Montgomery's general physical characteristics came to her home attempting to sell an antique radio and appeared to be scanning her house. Evidence also corroborated Carter's testimony placing Montgomery in the vicinity of Baker's home on the day the wallet was stolen.

An employee from a Citgo gas station testified that Carter came into the station on the day Baker's wallet was stolen and attempted to use one of Baker's credit cards, but left without completing the transaction when he asked her for photo identification. He testified that she departed in a car in which two African-American men were waiting. The employee recorded the license plate of the car, which was ultimately traced to Anthony Shelly, who confirmed that he drove Montgomery and a woman, later identified as Carter, to a Citgo station and Tyne machines where the woman attempted to use the credit cards. Shelly

² Montgomery contends that evidence of the alleged New York and Georgia convictions would have had a significant impact because Carter's other three convictions all arose from the events underlying this case, leading the jury to believe that Carter had no criminal record prior to her involvement with Montgomery. However, this argument is not supported by the record. The jurors were not told the nature of Carter's three prior convictions. While they were told that she had pled guilty to criminal activity in connection with this case pursuant to an agreement which resulted in dismissal of two charges, they had no way of knowing that all three of her prior convictions related to this case.

testified that Montgomery told him that the woman was his wife. Shelly testified that he also asked Montgomery whether the cards were stolen, and Montgomery told him that his wife was a nurse and the cards were hers. In fact, Carter was receiving AFDC at the time. Montgomery's lies about Carter's job, her relationship to him, and ownership of the cards thus evince a consciousness of guilt, which supports an inference that he was lying to cover up the fraudulent use of the cards and his involvement in the fraud.

In his testimony, Shelly also indicated that Montgomery was wearing new clothes and told Shelly that he had just gotten them that day. This testimony corroborated Carter's testimony that she had gone with Montgomery to a K-Mart store and used the stolen credit cards to buy him new clothes, evidence which was further corroborated by the discovery of a K-Mart receipt and K-Mart clothes tags during the search of Montgomery's home. Finally, and most importantly, when police executed a search of Montgomery's home, they found one of Baker's credit cards on the floor of the bedroom in which Montgomery was sleeping. Her wallet containing additional credit cards was also found in the bedroom, as was a wallet containing picture identification for Montgomery and Baker's insurance card. Other credit cards belonging to Baker were found in other parts of the house, as were receipts from stores at which Baker's credit cards had been fraudulently used. The evidence thus strongly implicated Montgomery in the property crimes of which he was convicted.

Carter's testimony that Montgomery battered her was also corroborated by the testimony of a medical doctor, who indicated that she had been beaten and seriously injured and that she told him that Montgomery had inflicted the injuries. The evidence that Carter had been beaten was further corroborated by photographs of her injuries and the testimony of the detective who

arrested her. In light of all of this evidence, it is not reasonably probable that evidence regarding Carter's alleged additional convictions would produce a different result if a new trial were ordered.

Montgomery also premises a claim of ineffective assistance of counsel on the evidence regarding additional prior convictions, arguing that trial counsel rendered ineffective assistance by failing to adequately investigate Carter's prior convictions. To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. See *id.* Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. See *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). The case is reviewed from counsel's perspective at the time of trial, and the burden is placed upon the appellant to overcome a strong presumption that counsel acted reasonably within professional norms. See *id.* at 127, 449 N.W.2d at 847-48. The appropriate measure of attorney performance is reasonableness, considering all the circumstances. See *State v. Brooks*, 124 Wis.2d 349, 352, 369 N.W.2d 183, 184 (Ct. App. 1985).

Even if deficient performance is found, a judgment will not be reversed unless the defendant proves that the deficiency prejudiced his or her defense. See *Johnson*, 153 Wis.2d at 127, 449 N.W.2d at 848. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. See *id.* The defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding

would have been different. *See id.* at 129, 449 N.W.2d at 848. A reasonable probability constitutes a probability sufficient to undermine confidence in the outcome. *See id.*

The question of whether there has been ineffective assistance of counsel is a mixed question of law and fact. *See State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994). An appellate court will not overturn a trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy unless the findings are clearly erroneous. *See State v. Knight*, 168 Wis.2d 509, 514 n.2, 484 N.W.2d 540, 541 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See id.*

Because postconviction counsel has not presented clear proof of Carter's out-of-state convictions, trial counsel cannot be deemed to have rendered deficient representation by failing to do so. In addition, even if trial counsel was deficient for failing to conduct a more thorough investigation into the prior convictions, his representation cannot be deemed prejudicial. For the reasons already discussed, the new evidence regarding the convictions is not sufficiently material to the case as to undermine our confidence in the outcome. Moreover, in light of the remaining evidence corroborating Carter's testimony and establishing Montgomery's guilt, the result of the trial was clearly reliable.

Montgomery's next argument is that trial counsel rendered ineffective assistance when he failed to object to testimony by Carter indicating that she had been diagnosed with battered women's syndrome and suffered from "toxic shame." Montgomery contends that this testimony constituted inadmissible hearsay because it constituted testimony as to what a professional told Carter

regarding her condition. Montgomery further contends that this led to the admission of expert testimony which violated *State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984).

In response to a question by the prosecutor on direct examination as to why she appeared to be somewhat unemotional, Carter testified that she was in treatment for three months at a place called Independent House and “worked on battered women’s syndrome” and that her “core issue” was “toxic shame.” On cross-examination, Montgomery’s trial counsel then characterized Carter’s testimony as indicating that she had been diagnosed with “toxic shame,” to which Carter responded that she was diagnosed with battered women’s syndrome and suffered from “toxic shame.” Montgomery’s trial counsel testified at the postconviction hearing that he did not object to this testimony because he did not believe that Carter was coming across convincingly to the jury, and he viewed her response to the prosecutor’s question about her lack of emotion as contributing to her lack of believability.

The trial court found that trial counsel’s decision not to object was strategic and did not constitute deficient performance. Based upon the trial court’s finding that the failure to object was strategic and trial counsel’s description of his reasons for this strategy, we cannot conclude that trial counsel’s decision was unreasonable, particularly in light of the highly deferential standard of review which must be applied when reviewing counsel’s strategic decisions. *See Strickland*, 466 U.S. at 689. Moreover, as already discussed, Carter’s testimony regarding Montgomery’s involvement in the property crimes and his battery of her was corroborated. Based upon all of the evidence, even if trial counsel’s failure to object to Carter’s reference to a “diagnosis” of battered women’s syndrome could be deemed deficient performance, it does not undermine our confidence in the

outcome of this trial and therefore does not establish that the deficiency prejudiced Montgomery's defense.

We also reject Montgomery's argument that Carter's testimony laid the foundation for the testimony of the State's expert regarding the characteristics of battered women. Unlike the situation in *Haseltine*, 120 Wis.2d at 95-96, 352 N.W.2d at 675-76, the State's expert did not testify that Carter was a battered woman or that she was telling the truth. In fact, the State's expert never mentioned Carter. As permitted under *State v. Bednarz*, 179 Wis.2d 460, 465, 507 N.W.2d 168, 171 (Ct. App. 1993), the expert merely testified about the characteristics of battered women, including staying in relationships with their batterers even in the face of the battering. This testimony was relevant and admissible based upon Carter's testimony that Montgomery beat her and defense counsel's questioning during cross-examination concerning Carter's ability to escape from Montgomery's control during the time period in which the property crimes were committed. The expert testimony was not admitted based upon Carter's statement on cross-examination that she was diagnosed with battered women's syndrome.

Montgomery's next argument is that trial counsel was ineffective for failing to object to testimony regarding his probation status. The testimony occurred during the prosecutor's questioning of a detective. In response to a question as to whether the detective took Montgomery into custody after he completed his search of Montgomery's home, the detective stated: "I contacted his probation officer, and she told us to take him into custody."

The State concedes that the testimony regarding Montgomery's probation status, although inadvertently elicited by the prosecution, constituted

error. However, trial counsel testified at the postconviction hearing that he decided to forgo an objection to the testimony because he did not want to highlight Montgomery's status as a probationer for the jury. He testified that he believed that an objection could have prejudiced Montgomery by calling attention to the fact that he was on probation.

The trial court concluded that counsel's failure to object constituted deficient, but not prejudicial, performance. However, as previously discussed, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. *See Knight*, 168 Wis.2d at 514 n.2, 484 N.W.2d at 541. We conclude that trial counsel's decision to forego an objection was a reasonable strategic decision. *See State v. Marcum*, 166 Wis.2d 908, 926, 480 N.W.2d 545, 554 (Ct. App. 1992); *see also State v. Williamson*, 84 Wis.2d 370, 391, 267 N.W.2d 337, 347 (1978). In addition, we again hold that even if counsel's failure to object could be deemed deficient performance, admission of the testimony regarding Montgomery's probation status does not undermine our confidence in the verdict and did not prejudice the defense. The detective's single short reference was not exploited by the State and was the only reference made at trial to Montgomery's probation. In light of the remaining evidence of Montgomery's guilt, including Carter's testimony and the evidence corroborating that testimony, the information presented to the jury regarding Montgomery's probation status did not render the verdict unreliable.

Montgomery's next challenge is to Carter's testimony that he "had been beating my son for that whole week." Montgomery contends that this testimony constituted inadmissible other acts evidence and that trial counsel's failure to object to it constituted ineffective assistance.

The trial court concluded that the evidence would have been admitted even if a timely objection had been made and that failure to object therefore did not constitute ineffective assistance. We agree. Other acts evidence is admissible when it furnishes part of the context of the crime or is necessary for a full presentation of the case. *See State v. C.V.C.*, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). One of the bases of the State's case against Montgomery with respect to the property crimes was that Carter committed them at the direction of Montgomery because she was afraid of him. Evidence that Montgomery had beaten Carter's son before or during the time period in which the crimes were committed was clearly relevant to show that Montgomery was intimidating Carter as a means to induce her to act at his behest. It was thus relevant to whether he was a conspirator or party to the crimes directly committed by Carter, and it was necessary to a full presentation of the case. *See State v. Shillcutt*, 116 Wis.2d 227, 236, 341 N.W.2d 716, 720 (Ct. App. 1983), *aff'd*, 119 Wis.2d 788, 350 N.W.2d 686 (1984). Because the evidence was relevant and material for a purpose other than showing bad character and because, as implicitly determined by the trial court, the evidence would not have been excluded on the ground that its prejudicial nature outweighed its probative value, trial counsel's failure to object to the evidence was neither deficient nor prejudicial.

Montgomery also argues that his trial counsel's failure to object to the evidence that he beat Carter's son deprived him of a cautionary instruction limiting the jury's use of the evidence to its proper purpose. However, unlike the usual case where other acts evidence is introduced as evidence of motive, modus operandi or some other distinct issue, these alleged acts were part of the context of the property crimes with which Montgomery was charged. The evidence was offered to prove that Montgomery coerced and threatened Carter into committing

crimes for him, and thus that Montgomery was guilty of fraudulent use of a credit card as a party to the crime and of conspiracy to commit forgery. Under circumstances such as these where the other acts evidence constitutes part of the proof of the defendant's commission of the charged crimes, a limiting instruction would have little effect or purpose. Trial counsel's failure to request such an instruction therefore cannot be deemed deficient or prejudicial.

The final issues raised by Montgomery relate to the prosecutor's closing argument. He again contends that trial counsel rendered ineffective assistance, first by failing to object to the prosecutor's reference to the criminal justice system as being an "expensive resource," and second, by failing to object to the prosecutor's question, "Where is his evidence?"

Montgomery relies upon *McDonald v. State*, 193 Wis. 204, 210, 212 N.W. 635, 638 (1927), wherein the court held without discussion that the district attorney's statement that "the case had cost the county a lot of money" was improper. We note that *McDonald* is an old case which contains no discussion of the reasoning underlying the court's conclusion or of the context in which the prosecutor's comment was made. Here, rather than constituting a prosecutorial plea to convict Montgomery because the State had invested so much money in his prosecution, the thrust of the prosecutor's reference to an "expensive resource" was that the criminal justice system provides its citizens with important rights and its citizens should take pride in that system. The reference cannot be construed as an appeal to the jury to decide the case on the basis of extraneous considerations

such as the cost of the case to the State.³ Because the comment was permissible, Montgomery's trial counsel was not deficient for failing to object to it.

We also reject Montgomery's claim that trial counsel rendered ineffective assistance by failing to object when the prosecutor asked: "Where is his evidence?" Montgomery contends that the question was a comment on his failure to testify and thus violated his right to remain silent.

The test for determining whether a prosecutor's remarks are an impermissible comment on the defendant's failure to testify is whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it as a comment on the defendant's failure to testify. *See State v. Lindvig*, 205 Wis.2d 100, 107, 555 N.W.2d 197, 200 (Ct. App. 1996). However, it is permissible for a prosecutor to imply that the failure of the defendant to present evidence (other than his or her own testimony) in opposition to the State's evidence supports an inference that the State's evidence is reliable. *See State v. Patino*, 177 Wis.2d 348, 382, 502 N.W.2d 601, 615 (Ct. App. 1993). It is also permissible for the prosecutor to reply to defense counsel's argument that the absence of a particular witness or piece of evidence supports an inference that the State has not proven its case. *See id.*

In this case, the question "[w]here is his evidence?" was a response by the prosecutor to the portion of defense counsel's closing argument which challenged the State's alleged lack of evidence. It is clear from the context of the

³ Even if the argument could be construed as containing an inappropriate reference to cost, it was not prejudicial because the cost of prosecution was an obvious fact of which any reasonable jury was already aware. *See Ziegler v. State*, 65 Wis.2d 703, 709-10, 223 N.W.2d 442, 444-45 (1974), *overruled on other grounds by State v. Williquette*, 190 Wis.2d 677, 694 n.11, 526 N.W.2d 144, 151 (1995).

statement that the word “his” was a reference to defense counsel’s argument and presentation of evidence and cannot be construed as a reference to Montgomery’s failure to testify. Moreover, contrary to Montgomery’s argument, this is not a case where the only evidence that could be presented by the defense was the testimony of the defendant. The crimes alleged here occurred in public places, and more than a week passed between the theft and Montgomery’s arrest. Evidence indicated that other people were with Carter and Montgomery at the time of some of the credit card transactions or attempted transactions, or they discussed the use of the credit cards with Montgomery. It was not a case, like some sexual assaults, where no one but the defendant and the alleged victim potentially had information which might be relevant to the case. Under such circumstances, it was reasonable and permissible for the State to argue that Montgomery’s failure to present other evidence in support of a defense supported an inference that no exonerating evidence or evidence rebutting the State’s case existed. Because the argument was permissible, trial counsel did not render ineffective assistance by failing to object to it.

By the Court.—Judgment and order affirmed.

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

