COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1242-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID E. WALKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront, and Deininger JJ.

¶1 VERGERONT, J. David Walker was convicted of kidnapping and first-degree sexual assault while armed, contrary to WIS. STAT. §§ 940.31(1)(b)

(1997-98)[1] and 940.225(1)(b), respectively. Walker appeals the judgment of conviction and the order denying his motion for postconviction relief on three grounds. He contends the trial court improperly excluded evidence of the complaining witness's fiancé's past physical abuse of her—evidence that would have showed the jury that she had a motive to falsely accuse Walker of sexual assault rather than admit to having consensual sex with him. Walker also argues the trial court erroneously refused to instruct the jury on the lesser included offense of second-degree sexual assault. Finally, Walker contends his trial counsel was ineffective for failing to proffer crime lab results that, he argues, corroborated his testimony and tended to undermine the complainant's testimony.

¶2 We conclude the trial court did not erroneously exercise its discretion in excluding the evidence of the complaining witness's fiancé's prior abuse of her; the trial court correctly refused to instruct the jury on the lesser included offense because a reasonable view of the evidence did not support an acquittal on the greater charge and a conviction on the lesser charge; and trial counsel's failure to proffer the crime lab results was not prejudicial. We therefore affirm.

BACKGROUND

¶3 At Walker's jury trial the complaining witness, Lorinda S., testified that Walker, who was her stepsister's boyfriend, unexpectedly came to her house on September 26, 1997. She was home alone with her four children. Lorinda said that Walker grabbed her by the wrists and she told him to "stop playing" and he

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

said "bitch, I'm not playing." He grabbed her by the neck, bit her on the cheek and hit her. He also grabbed a hammer that was sitting on a table and threatened to hit her with it as he said, "You know what I want." Lorinda testified that she told him to stop and grabbed the metal part of the hammer so he would not hit her with it, but he forced her into her bedroom and told her to perform oral sex on him. When she refused, he hit her, then forcibly pulled up her dress. He pulled the crotch of her panties aside, but was not able to pull them off because she held onto them. He rubbed his penis on her vagina.

¶4 Lorinda testified that during the assault she told her oldest child, eight-year-old Shontaya B., to call 911, and Shontaya did. Shontaya testified that she saw Walker hit, push and grab her mother, while her mother was saying "stop," and "go" meaning "leave." She saw her mother crying and she saw Walker pick up a hammer and try to hit her mother with it. After Walker pushed her mother into the bedroom, Shontaya went upstairs to call 911. The transcript of the 911 tape reveals that Shontaya told the dispatcher that a man was in her house, her mother was crying and her mother told her to call 911. Shontaya said she heard a lot of "bumping" and when the dispatcher asked if the man was hitting her mother, she answered "Yes." Shontaya did not mention a hammer to the 911 dispatcher.

¶5 After Walker left, Lorinda went down the street to try to find out where he went and what his last name was. She then called 911 and told the dispatcher that Walker had tried to rape her, he bit her and he tried to hit her with a hammer. She also called her fiancé, Clifton Keeler, who arrived at her house before the police did.

¶6 In contrast, Walker testified that Lorinda invited him to come to her house and they had consensual sex.

DISCUSSION

Exclusion of Evidence

¶7 Walker sought to introduce evidence of four prior incidents, related in police reports, in which Keeler had been physically violent to Lorinda. The most recent occurred on October 23, 1996, and the others occurred three to four years before the incident with Walker. Walker contended that this evidence was relevant for two purposes: truthfulness and motive. As to truthfulness, his argument was that on the hospital report related to the incident with Walker, next to the question "Hit or threatened in the past year," there was a check next to "no"; this was evidence that she had lied to hospital personnel in not disclosing the October 23, 1996 incident with Keeler. As to motive, Walker argued that these prior incidents of violence by Keeler showed that Lorinda had a motive to falsely claim she had been raped rather than admit she had engaged in consensual sex in order to avoid being beaten by Keeler again. Keeler would know something had occurred because of the bite mark on Lorinda's cheek and other bruises, Walker argued, so that explains why Lorinda had to tell him.

¶8 The trial court ruled the evidence was not admissible. Concerning impeachment by evidence of Lorinda's prior alleged untruthfulness, the court applied WIS. STAT. § 906.08(2) which provides:

> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if

> probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

The court first observed, consistent with that statute, that credibility could not be attacked by means of extrinsic evidence of specific instances of conduct. The court then stated that there were many possible explanations for the "no" answer on the hospital form and therefore concluded it was not probative of truthfulness or untruthfulness and so could not be inquired into.[2]

¶9 Concerning motive, the court ruled that Walker's theory was based solely on speculation, because there was no evidence that the prior beatings by Keeler occurred because she was having consensual sex with someone else. The speculative nature of the connection between the prior beatings by Keeler and the remoteness in time made the probative value of the incidents of prior beatings insufficient to outweigh the prejudicial effect, the court ruled.

¶10 At trial, Walker renewed his motion concerning the October 23, 1996 incident with Keeler, bringing to the trial court's attention the statement attributed to Lorinda in the report that Keeler became upset thinking she was involved with another man based on some telephone calls she placed to friends.

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[2] The court stated:

> [t]his is [not] a situation in which anybody could argue this victim lied. It very well may be that she assumed the question was asking whether there was an abuse history with this particular assailant. It very well may be that she forgot about this other incident which occurred about a year prior, that she didn't have the dates accurately in mind as to when it occurred. There are many possible explanations for the way she answered the question the way she answered it in the aftermath of the incident alleged in this case. And, therefore, I don't believe this is evidence of untruthfulness of the witness.

Defense counsel pointed out that this incident, unlike the others, was within a year of the incident with Walker. The prosecutor's argument in opposition emphasized the fact that Keeler was at work when the incident with Walker occurred and learned about it because Lorinda called him in tears and begged him to come home, and that it was her child who called the police after witnessing assaultive conduct by Walker toward Lorinda.

¶11 Referring to its previous analysis, the court again ruled that under WIS. STAT. § 906.08 the police report was not admissible as extrinsic evidence to impeach Lorinda's credibility, and the incident of the prior beating by Keeler was not, in itself, probative of Lorinda's untruthfulness since Lorinda had never denied that she had been beaten by Keeler. The court also concluded, as it had earlier, that Walker's theory on motive was too speculative and the prior beating by Keeler was therefore not relevant. The court referred to the lack of evidence that Lorinda had ever manufactured a sexual assault to avoid a beating by her fiancé, the presence of a witness to the "physical assault component" of Walker's conduct, and the evidence of physical injuries as factors that made this theory too speculative.

¶12 Walker argues the trial court erroneously exercised its discretion in excluding the evidence of the prior assaults by Keeler because they are relevant to

Lorinda's motive, and that his constitutional right to confront witnesses was violated.[3]

¶13 Generally, cross-examination to elicit evidence for impeachment purposes is permissible if the evidence is relevant to credibility. *See* ***Rogers v. State***, 93 Wis. 2d 682, 688-89, 287 N.W.2d 774 (1980). Showing the bias of a witness is one of the methods of attacking the credibility of a witness. *See* ***id.*** at 689. "The bias … of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978).[4] Evidence of a witness's bias must be relevant, that is, have a logical and rational connection to the fact of the bias of the witness, and, even if relevant, the evidence may be

[3] We do not understand Walker to be challenging the court's rulings under WIS. STAT. § 906.08(2) that the hospital report was not admissible and that defense counsel could not ask Lorinda on cross-examination about the "no" answer on that report. However, in the event that Walker did intend to challenge this ruling, we conclude that the trial court properly exercised its discretion. This evidence is properly analyzed under § 906.08 because it is an attempt to show that Lorinda has been untruthful in the past and is therefore being untruthful in her trial testimony on other matters—that is, the assault by Walker. The hospital report is clearly extrinsic evidence, and the trial court's analysis of the probative value of the "no" answer was a rational application of the correct legal standard to the facts and produced a reasonable result.

We observe that the argument and ruling in the trial court regarding use of the evidence of prior violence by Keeler to prove motive was at times not clearly separated from use to prove general untruthfulness under WIS. STAT. § 906.08(2), and we are not certain whether, on appeal, Walker contends that § 906.08(2) is applicable to this evidence. We agree with the trial court that evidence that Keeler assaulted Lorinda on four prior occasions is not evidence that Lorinda was untruthful in the past. We therefore analyze Walker's challenge within the framework appropriate for impeachment of a witness through evidence of a motive for lying about the charged offenses.

[4] "[A] matter is collateral if it does not meet the following test: 'Could the fact as to which error is predicated have been shown in evidence for any purpose independently of the contradiction?'" ***McClelland v. State***, 84 Wis. 2d 145, 159, 267 N.W.2d 843 (1978) (citation omitted). Generally, impeachment of a witness on the basis of collateral facts introduced by extrinsic evidence is forbidden. ***Id.*** In a general attack on credibility through prior specific instances of untruthfulness, the facts of the prior instances are collateral and, hence, extrinsic evidence of those facts is prohibited by WIS. STAT. § 906.08(2).

excluded if the probative value is substantially outweighed by the danger of unfair prejudice. *See* ***id.*** at 384-85. The scope of cross-examination for impeachment purposes is committed to the trial court's discretion, *see* ***Rogers***, 93 Wis. 2d at 689, and the weighing of the probative value of the proffered evidence against its prejudicial effect is part of the discretionary determination, *see* ***Williamson***, 84 Wis. 2d at 385.

¶14 Although the Sixth Amendment right to confrontation grants defendants the right to effective cross-examination of witnesses whose testimony is adverse, that right is not unlimited: it grants defendants the right to present only relevant evidence that is not substantially outweighed by its unfairly prejudicial effects. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 645-46, 456 N.W.2d 325 (1990). Therefore, if the trial court properly exercised its discretion in deciding that the probative value of the evidence of the prior assault by Keeler was outweighed by its prejudicial effect, that ruling did not violate Walker's Sixth Amendment right to cross-examination. A trial court properly exercises its discretion if it applies the correct law to the facts of record, and uses a rational process to arrive at a reasonable result. *See* ***State v. Robinson***, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988).

¶15 We conclude that the trial court's ruling precluding inquiry on cross-examination into the prior assaults by Keeler and excluding the police report comports with this standard. Although Walker refers on appeal to the four incidents of prior assaults by Keeler, as we understand the record, only the police report of the most recent one, October 23, 1996, contained a statement that Keeler assaulted Lorinda because he believed she was involved with another man. Since Walker does not present an argument that the three earlier incidents are relevant to

Lorinda's motives to lie about Walker, we confine our analysis to the October 23, 1996 incident.

¶16 The trial court reasoned that the relevance of the October 23, 1996 incident to Lorinda's motive to fabricate the nonconsensual nature of sex with Walker was minimal. The court noted the evidence that Lorinda called Keeler in tears and told him that Walker had assaulted her, she had her daughter call 911, her daughter witnessed Walker's physically assaultive behavior, and Lorinda had a bite mark on her cheek from Walker. Given this evidence, the trial court could reasonably consider Walker's theory tying the October 23, 1996 incident to a motive to lie about Walker to be too speculative. The court also expressed a concern about the effect of stereotype, which we understand to mean that the trial court was concerned about the effect on the jury of evidence suggesting that Lorinda had previously had consensual sex with another man besides her fiancé. It is likely that if Walker introduced evidence of the October 23, 1996 incident, whether Lorinda had been involved with another man would become a focus at trial. That would be irrelevant to the charges against Walker, but distracting and potentially unfairly prejudicial to the State's case. We conclude that the court could reasonably decide that there was a minimal logical connection between the October 23, 1996 incident with Keeler and Lorinda's motive to lie about Walker, and that any probative value the October 23, 1996 incident might have was substantially outweighed by the danger of unfair prejudice.

¶17 For the same reason, the police report of the October 23, 1996 incident was properly excluded. Although evidence of the bias of a witness is not precluded merely because it is extrinsic evidence, *see* ***Williamson***, 84 Wis. 2d at 383, the extrinsic evidence must meet the test of relevancy to bias and the

probative value must not be substantially outweighed by the danger of unfair prejudice, *see* ***id.*** at 384.

Lesser-included Offense

¶18 Walker was charged with first-degree sexual assault under WIS. STAT. § 940.225(1)(b) which requires proof that the defendant engaged in sexual contact or intercourse with another person without consent by use or threat of use of a dangerous weapon. At the close of the evidence, both the State and the defense requested that the jury be instructed on the lesser included offense of second-degree sexual assault, which requires proof of sexual contact or intercourse without consent, by use or threat of force or violence, but does not require proof of use or threat of a dangerous weapon. *See* § 940.225(2)(a). The trial court denied this request, concluding that either the jury would believe Walker completely, in which case there was consent and no crime; or it would believe Lorinda and her daughter completely, in which case there was sexual assault by use of a hammer.

¶19 Walker contends that the trial court erred in declining to instruct on the lesser included offense because the case law does not require that the jury accept or reject all of Walker's testimony. According to Walker, the jury could have disbelieved Walker's testimony that the sexual encounter was consensual but believed his testimony that he did not use a hammer. We conclude that the trial court did not err in declining to give the lesser included offense.

¶20 The question whether the evidence permits the giving of an instruction on a lesser included offense is one of law, which this court reviews de novo. *See* ***State v. Wilson***, 149 Wis. 2d 878, 898, 440 N.W.2d 534 (1989). The submission of a lesser included offense is proper only when there are reasonable grounds in the evidence both for acquittal on the greater charge and conviction on

the lesser offense. *See* ***id.*** In viewing the evidence, we must consider it in the light most favorable to the accused that it will reasonably admit. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663, 398 N.W.2d 527 (1984).

¶21 When the defendant presents wholly exculpatory testimony as to the charged offense, and requests an instruction on a lesser included offense that is directly contrary to the defendant's version of the facts, viewing the evidence in the light most favorable to the defendant means that we must take into account the fact that the jury could reasonably disbelieve the defendant's view of the facts. *See* ***id.*** Thus, even when the defendant gives exculpatory testimony, an instruction on a lesser included offense is proper if a reasonable but different view of the evidence, other than that part of the defendant's testimony that is exculpatory, supports acquittal on the greater charge and conviction on the lesser charge. *See* ***id.*** If the testimony of the other witnesses conflicts and some of the testimony supports the lesser included offense, or if reasonable inferences from other testimony supports the lesser included offense, then that charge must be given the jury; but if none of the other evidence or reasonable inferences from the other evidence supports the lesser included offense, then a reasonable view of the evidence does not support conviction of the lesser offense and the trial court should not instruct on it. *See* ***Wilson***, 149 Wis. 2d at 900.

¶22 It is true, as Walker contends, that a defendant's testimony may be exculpatory on some points and inculpatory on others. In that case, we are to reject that part of his testimony that is exculpatory and consider the rest of the defendant's testimony and the other evidence to determine whether that evidence supports acquittal on the greater charge and conviction on the lesser charge. *See* ***State v. Simpson***, 125 Wis. 2d 375, 377, 373 N.W.2d 673 (Ct. App. 1985). However, all of Walker's testimony was exculpatory: he testified that he had

consensual sex with Lorinda. This case is therefore not like ***Walker v. State***, 99 Wis. 2d 687, 694, 299 N.W.2d 861 (1981), in which the defendant testified that he intentionally shot in the direction of the victim without intending to hit the person and also claimed the privilege of self-defense. The court there determined that the jury could find unreasonable the defendant's belief that the force he used was necessary or find he had no claim to the privilege because he provoked the attack, but still believe his testimony that he did not intend to kill the victim. *See* ***id.*** at 694-95. Thus, because the defendant himself gave inculpatory testimony—that he intentionally shot in the victim's direction—a reasonable view of his testimony supported an acquittal on the charge of attempted murder but conviction on the lesser included offense of endangering by reckless conduct. *See* ***id.***

¶23 In this case, there is no testimony from Walker that supports conviction on the lesser offense of nonconsensual sexual contact by use or threat of force or violence: if his testimony is true, he committed no crime. In this respect, this case is like ***Boyer v. State***, 91 Wis. 2d 647, 284 N.W.2d 30 (1979), which the ***Walker*** court distinguished from the facts before it for just this reason. Boyer denied any intentional act, claiming his physical contact with the deceased was accidental; therefore if the jury believed him, he committed no crime. *See* ***Walker***, 99 Wis. 2d at 694.[5]

[5] In ***Boyer v. State***, 91 Wis. 2d 647, 284 N.W.2d 30 (1979), the court held that the trial court's refusal to instruct on the lesser included offense of third-degree murder was proper. That offense required that the defendant caused the death of the victim as a natural and probable consequence of the commission or attempted commission of a felony. *See* ***id.*** at 669. The defendant's testimony was that his physical contact with the victim was accidental, which would not support conviction of that crime, and there was no reasonable view of the rest of the evidence that would support conviction on that charge and acquittal on the greater charges.

¶24 Applying the case law to this record, we must assume the jury would disbelieve Walker's exculpatory testimony—that Lorinda consented to sex. Since Walker presents no testimony that would support a conviction of the lesser included offense, we look to see if there is testimony from other witnesses, or reasonable inferences from the testimony, that would support a conviction for nonconsensual sex with use or threat of force but without use of the hammer. We conclude there is none. Lorinda testified that Walker sexually assaulted her and used a hammer to threaten her. Her daughter testified that she saw Walker hit her mother, grab her, push her, pick up the hammer and try to hit her mother with it and push her into the bedroom. We do not agree with Walker that the evidence that Lorinda's daughter failed to mention Walker's use of a hammer in the 911 call creates a reasonable inference that he did not. The call was brief, and after the child's first statement,[6] she was simply responding to the questions asked of her.

¶25 We also do not agree with Walker that Keeler's testimony—that before the police arrived, he found the hammer on the loveseat in the living room and put it on the top of the refrigerator in its usual place—is evidence that Walker did not use the hammer in the assault. Walker contends this testimony is "less than credible." However, in reasonably viewing the testimony of the witnesses other than the defendant, we do not disregard the testimony, or portions of the testimony, of the other witnesses. *See* ***Simpson***, 125 Wis. 2d at 382. Keeler's testimony on this point is consistent with the testimony of Lorinda and her daughter, not inconsistent. We reject Walker's suggestion that disbelief of Keeler's testimony on this point, in itself, creates a reasonable inference that the

[6] The child made this statement: "Hello, there's a man up [sic] my house. My mother's crying and I don't know what to do. She told me to call 911."

opposite is true—that the hammer was always on the top of the refrigerator and never used by Walker. *See* ***Stewart v. State***, 83 Wis. 2d 185, 193-95, 265 N.W.2d 489 (1978) (negative inference to be drawn from defendant's admission at trial that he told police a lie is not affirmative proof of elements of crime).

Ineffective Assistance of Counsel

¶26 The prosecution and the defense stipulated to evidence, which was presented to the jury: the State Crime Laboratory found a small amount of semen on the cervical and vaginal swabs and the "Woods light" swab, taken from Lorinda at the hospital in the late afternoon of September 26, 1997, but there was an insufficient amount of semen for further serological analysis. The nurse at the hospital testified, explaining the "Woods light" swabs were taken from the right inner thigh and groin. The crime lab report also contained a finding that no semen was identified on the underpants or dress worn by Lorinda, but this was not presented to the jury by stipulation or otherwise. Walker contends that defense counsel's failure to present this finding constituted ineffective assistance of counsel because it was inconsistent with Lorinda's testimony and consistent with his testimony that there was consensual sex, during which, he asserts, Lorinda's "underwear and dress would have been removed," and "the presence of a small amount of semen on the complainant's thigh is consistent with a slightly spilled condom."

¶27 The trial court denied Walker's postconviction motion for a new trial on this ground, without a hearing, concluding that Walker could not show that there was a reasonable probability the outcome would have been different had the jury been specifically informed that no semen was found on Lorinda's dress or underpants. We conclude the trial court correctly denied the motion.

¶28 In order to prevail on a claim for ineffective assistance of counsel, Walker has the burden of proving the trial counsel's performance was deficient and that the deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice occurs when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *See* ***Strickland***, 466 U.S. at 694. We reject an ineffective assistance claim if the defendant fails to satisfy either element. *See* ***Johnson***, 153 Wis. 2d at 127. In this case, we therefore consider only the element of prejudice because it is dispositive. Whether the failure to present the second crime lab finding to the jury prejudiced Walker is a question of law, which we review de novo. *See* ***id.*** at 128.

¶29 We are satisfied that there is not a reasonable probability that the outcome of the trial would have been different had the jury been presented with the finding that no semen was detected on Lorinda's dress or underpants. First, we agree with the trial court and the State that the jury had ample basis for inferring that fact. The nurse testified that she collected the swabs and Lorinda's dress and underpants to preserve as evidence and turn over "to security," and the most likely inference from the stipulation that semen was found on the swabs was that none was found on the other items taken from Lorinda as evidence—her dress and underpants.

¶30 However, even if the jury assumed, as Walker contends it could have, that no testing of the dress and underpants was done, we do not agree with Walker there is a reasonable probability the outcome would have been different had the jury been presented with the evidence that that testing had been done and showed no semen. The lack of semen on Lorinda's dress and underpants is neither inconsistent with Lorinda's testimony nor does it strengthen Walker's defense of

consensual sex. Lorinda testified that Walker pulled her dress up and pulled the crotch of her panties aside. The finding of no semen on her dress and underpants is consistent with this. Walker contends that Lorinda testified that he ejaculated and, that if he did, more semen would have been found than the small amounts on the swabs. However, as to ejaculation, we find only this ambiguous testimony by Lorinda: "… he touched me and put his stuff on me … and started moving in the motion like he was doing something, but he wasn't able to get in me, penetrate me." The lack of semen on her dress and underpants is not inconsistent with this testimony. Finally, we have been able to discover no testimony that Walker used a condom, and Lorinda testified that he did not. Thus, to the extent Walker's theory of prejudice depends upon the premise that he used a condom, it is deficient.

By the Court.—Judgment and order affirmed.

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