COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2011-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER K. ENGLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed*.

¶1 DEININGER, J.[1] Christopher Engles appeals a judgment convicting him of disorderly conduct and an order denying postconviction relief. Engles contends that he was denied the effective assistance of counsel because his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

trial attorney failed to object to irrelevant and prejudicial testimony given by the victim and the victim's mother. Engles also requests a new trial in the interests of justice because the real controversy was not fully tried. We conclude that Engles's trial counsel was not ineffective, and we decline to exercise our authority to grant a discretionary reversal. Accordingly, we affirm the appealed judgment and order.

BACKGROUND

¶2 The State charged Engles with disorderly conduct based on his actions during an encounter with thirteen-year-old Elsa M.[2] Elsa testified at trial that she was walking along a Madison street early one evening when a car pulled up next to her. Engles leaned out of the passenger window and asked her if she wanted a ride. Elsa responded, "No." According to Elsa, the car then followed her down the street. Engles again asked her if she wanted a ride, and Elsa again responded, "No." At this point, Elsa testified that she turned off the street onto a bike path, and Engles asked once more if she "want[ed] a lift." After Elsa again declined, the car drove off. When Elsa turned to observe the departing car's license plate number, she said that Engles waved back at her.

¶3 Engles presented a different version of the encounter. He testified that he initially approached Elsa because he thought she was an "old friend." He immediately recognized that "it wasn't her," but because his "lungs [were] full of air," he nonetheless asked Elsa if she wanted a ride. Engles denied that he

[2] Under WIS. STAT. § 947.01, "[w]hoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance" is guilty of committing "disorderly conduct."

repeated this offer, and also denied waving to Elsa. According to Engles, he only "felt the air to see if it was a cool breeze or not."

¶4 After the car drove away, Elsa returned home and reported the incident to her parents. Elsa's father called the police and gave them the license number Elsa had memorized. The police traced the number to the car's owner and sent an officer to the owner's home. The officer found Engles there, and informed him that Elsa had filed a complaint against him. Engles eventually admitted that he had asked Elsa for a ride, but maintained that he had only wanted to be helpful.

¶5 The jury found Engles guilty of disorderly conduct, and the court placed him on eighteen months probation with ten days in jail as a condition. Engles moved for a new trial on the grounds that he was denied his rights to a fair trial and to the effective assistance of counsel. He also requested a new trial "in the interests of justice." The trial court denied Engles's motion and Engles appeals.

ANALYSIS

¶6 Engles first contends that his trial counsel was ineffective because counsel failed to object to damaging "victim-impact" testimony given by Elsa and her mother. During the State's case-in-chief, Elsa testified that the encounter with Engles had upset her:

> Q Later on you heard that they caught [Engles], right?
>
> A Um-hum.
>
> Q How did you feel then?

> A Um, I was glad that they caught [him] because I didn't want [him] to get away…
>
> Q Now, when you think about that incident, do you still get upset or are you pretty much over it?
>
> A I sometimes get upset and – yeah, sometimes I get upset and sometimes I kind of think, well, I'm okay now, so maybe I should try and put it behind me.

Elsa's mother also testified that the incident had affected both Elsa and herself:

> Q How has Elsa been since the incident?
>
> A Um, she has waves of – of feeling concerned about it. She does not want to be downstairs at all alone at night. She does not – she wants someone with her, but overall she's – looks to be most of the time stable, but there are certain things that have changed.
>
> Q How have you been since the incident?
>
> A Um, I am still, um, trying to stay balanced and objective about it, um, but it's a life-altering experience.

Engles asserts that this testimony was irrelevant to the charge of disorderly conduct and defense counsel should have objected to it at trial. He contends that the admission of this testimony was prejudicial to his defense and that he was consequently denied the effective assistance of counsel. We disagree.

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether trial counsel's actions constitute ineffective

assistance presents a mixed question of law and fact. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse the trial court's factual findings regarding counsel's actions at trial unless those findings are clearly erroneous. *See* ***id.*** at 634. Whether trial counsel's performance was deficient and whether that behavior prejudiced the defense, however, are questions of law which we review de novo. *See* ***id.*** In analyzing an ineffective assistance claim, this court may choose to address either the "deficient performance" component or the "prejudice" component first. *See* ***Strickland***, 466 U.S. at 697. If we determine that the defendant has made an inadequate showing on either component, we need not address the other. *See* ***id.***

¶8 We turn first to the issue of prejudice. To prove prejudice, Engles must show that trial counsel's errors had an actual, adverse effect on the defense. *See* ***id.*** at 693. He must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. Specifically, Engles must prove that the admission of Elsa's and her mother's testimony deprived him of a "fair trial, a trial whose result is reliable." ***Id.*** at 687.

¶9 We are not persuaded that the results of Engles's trial would have been different if his counsel had successfully objected to this testimony. Engles, who was forty-four at the time of the offense, did not dispute that he approached the thirteen-year-old Elsa as she was walking along a public street early one evening and asked her if she wanted a ride. Elsa testified that Engles was "hanging out of the car like a dog," that the car crept along next to her for two or three minutes, that Engles repeated his invitation of a ride, and that Engles's behavior "really scared" her. If the jury believed Elsa's version of the encounter, or even the better part of it, it could easily have concluded that the conduct Engles

engaged in "unreasonably offends the sense of decency or propriety of the community," and that it was "of a type which tends to cause or provoke a disturbance, under the circumstances as they then existed." *See* WIS JI—CRIMINAL 1900.

¶10 The jurors were also instructed that conduct "which might disturb an oversensitive person" was not culpable. *See* ***id***. Defense counsel told the jurors during his opening statement that "[t]his is a case about perceptions," and further that:

> you are going to hear people were upset. Elsa was scared witless. She ran home. She told her parents, you know, about this horrible thing. Perceptions. They were relying on her perceptions.

Engles's counsel returned to the "perceptions" theme in his closing argument, contending that Elsa, her parents, and the police all over-reacted to a well-intended gesture on Engles's part.[3] The testimony given by Elsa and her mother regarding the impact of Elsa's encounter with Engles was at least as helpful to the defense's theory of the case as it may have been to the State's. More importantly, the brief and non-inflammatory testimony did not so taint the fact-finding process as to deprive Engles of "a trial whose result is reliable." *See* ***Strickland***, 466 U.S. at 687. We conclude that Engles has failed to show that he was prejudiced by the inclusion of this testimony, and thus, his claim of ineffective assistance of counsel fails.

[3] Engles doe not claim on appeal that counsel was ineffective for pursuing this theory of defense.

¶11 Next, Engles argues that he is entitled to a new trial in the interests of justice. WISCONSIN STAT. § 752.35 gives this court the discretion to "remit the case to the trial court … for a new trial" if "the real controversy has not been fully tried" or "it is probable that justice has for any reason miscarried." There are two circumstances under which the "real controversy" may be said to have not been fully tried: (1) when the jury was erroneously denied the opportunity to hear important testimony which bears directly on an important issue in the case, and (2) when the jury heard improperly admitted evidence which so clouds a critical issue in the case that a fair and just result cannot be reached. *See* ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). Engles contends that the real controversy in this case was not fully tried because both of these circumstances occurred at his trial.

¶12 Engles contends first that the jury should have been made aware of a prior statement made by Elsa. At trial, Elsa testified that Engles asked her three separate times if she wanted a ride. On the night of the incident, however, Elsa had told the police that Engles had asked only twice. The police report containing this inconsistency was never admitted at trial, and Engles's counsel failed to ask Elsa about the discrepancy during cross-examination. Engles's counsel referred to the inconsistency during his closing argument, however, stating, without objection from the State:

> And then, although she only told the police about two offers; now, there is a third one. Today she somehow remembered a third one. Now, that wasn't what she told the police officers that day. She told the police officers that he had rolled down the window, he has said, "Do you want a ride?" Her testimony is that she said, "No," and then still moving along he says, "Can I give you a lift," and that's what she told the police officers on that day, just like that.… Now it's become a two-minute encounter, and now

> there is a third part to it, you know. He asked yet once more.

Then, during its deliberations, the jury sent a note to the judge which said, "We would like to know if Elsa told the police 2 or 3 times she was asked if she would like a ride."[4]

¶13 Engles contends that because the discrepancy between Elsa's trial testimony and her statement to police was never established in the record, the jury was denied the opportunity to hear important testimony which "[bore] directly on an important issue" in his case. We disagree. First, we are not convinced that the jury was "denied the opportunity to hear" that there was a discrepancy between Elsa's trial testimony and her police statement. Trial counsel commented extensively on this discrepancy, without objection, during his closing argument, and his comments implicitly questioned Elsa's credibility and cast into doubt the accuracy of her trial testimony. Although counsel's closing argument did not constitute "evidence," his remarks were nonetheless heard and contemplated by the jury, as the jury's later inquiry on the issue bears out.

¶14 More importantly, however, we are not persuaded that the jury's opportunity to focus on the relevant facts would have been enhanced if Engles's counsel had confronted Elsa on the discrepancy during her testimony. Elsa testified that the vehicle in which Engles was riding crept along next to her, while Engles leaned out toward her from the car window, and repeatedly asked her if she

[4] The court, without summoning counsel, responded to the inquiry as follows: "You should rely on your collective memory of the testimony. It would be improper for the court to answer this question." The court had responded in similar fashion to an earlier jury request to see the police report. Engles has not claimed on appeal that the court erred in responding to the jury's inquiries without his and his counsel's presence, conceding in a footnote that any error was harmless.

wanted a ride. The jury, if it believed Elsa's testimony, could reasonably have concluded that Engles's behavior offended the community's sense of decency, and was thus disorderly conduct. Whether Engles asked Elsa three times or only twice if she wanted a ride does not alter the overall picture of Engles's conduct that was painted by Elsa's testimony. And, we conclude that this minor discrepancy would be unlikely to so undermine Elsa's credibility in the eyes of the jury that jurors would have deemed her trial testimony not worthy of belief. We are to exercise our power of discretionary reversal only in "exceptional cases," and the omission in the record regarding Elsa's prior statement to police does not render this such a case. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990).

¶15 Finally, Engles contends that the real controversy was not fully tried because potentially prejudicial testimony was improperly admitted at trial. Prior to trial, the court granted Engles's motion to exclude any "police observations" about the man who was driving the car on the night of the encounter with Elsa, including any reference to the fact that the police had found a bloody knife in the driver's possession. While cross-examining a police officer at trial, however, Engles's counsel asked the following question, which elicited the following response:

> Q Okay. What do you remember exactly of that night?
>
> A This was a fairly memorable case. There were a lot of odd things about it. Not only – not only had this car contacted this young woman, but a bloody knife was found on one of the suspects.

Defense counsel did not object to this response, and Engles later clarified during his testimony that the driver, and not he, had possessed the knife. Engles now

contends, however, that this testimony prevented the real controversy in his case from being tried because it "opened the door to speculation that there was a more sinister motive" behind Engles's offer. Again, we disagree.

¶16 To conclude that a new trial is warranted, we must determine that the reference to the bloody knife "so clouded a crucial issue" that a fair and just result could not have been reached. *See* ***State v. Hicks***, 202 Wis. 2d at 160. We are not convinced that this isolated reference deflected the jury from properly considering the evidence relevant to the disorderly conduct charge. The State elicited no additional testimony regarding the knife, and it made no reference to the knife in its closing argument. As we have discussed, the State produced sufficient evidence to allow jurors to conclude that Engles had engaged in disorderly conduct on the day in question. And, as with the absence of the police report, the passing reference to the fact that police found a knife on Engles's companion, did not prevent the jury from deciding the real controversy presented by the trial testimony.

CONCLUSION

¶17 For the reasons discussed above, we affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.