COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2009AP1143-CR **Cir. Ct. No. 2001CF1166**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

OLIVER PENTINMAKI,

DEFENDANT-APPELLANT.

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

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Oliver Pentinmaki appeals a judgment, entered after a jury verdict, convicting him of four counts of failure to support a child for

more than 120 days, contrary to WIS. STAT. § 948.22(2) (1999-2000).[1] Pentinmaki also appeals the order denying his motion for postconviction relief. Pentinmaki argues that the circuit court erroneously exercised its discretion by admitting other acts evidence. Pentinmaki also claims that his counsel was ineffective for failing to object to what he describes as other inflammatory evidence and testimony. Finally, Pentinmaki contends that he is entitled to a new trial in the interest of justice. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In June 2001, the State charged Pentinmaki with four counts of failing to provide child support to his minor children during periods encompassing January 1, 2000, to May 22, 2001. An arrest warrant was issued, and Pentinmaki was ultimately arrested in October 2006. The matter was set for trial. Prior to jury selection, the court heard arguments regarding the admissibility of other acts evidence that the State sought to introduce: (1) Pentinmaki's 1992 conviction for failure to pay child support, arising from the same court-imposed support obligation; (2) records showing Pentinmaki was making payments for a period of time, but then stopped; and (3) evidence of Pentinmaki's failure to appear at a 1999 contempt and motion hearing, along with evidence of his eventual arrest on a cruise ship in 2006.

¶3 The court ultimately admitted all of the proffered evidence, except that of Pentinmaki's cruise ship arrest. With respect to the arrest, the court

[1] All further references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

concluded that it was irrelevant unless Pentinmaki opened the door with an inability-to-pay defense.

¶4 At trial, the State presented three witnesses: Wayne Pfister, Clare Altschuler, and Pentinmaki's ex-wife, Mary Volker. Pfister, a Dane County records custodian, was called to certify the divorce judgment in which Pentinmaki was ordered to pay $1250 per month in child support, commencing November 1, 1990. Pfister also identified an April 1993 letter to Pentinmaki from the Milwaukee County Fiscal and Management Director indicating that Pentinmaki owed over $14,000 in child support. In turn, Altschuler, Assistant Corporation Counsel for Dane County, testified that, pursuant to the divorce judgment, Pentinmaki had been ordered to pay monthly child support and the order had never been modified. Altschuler testified that Pentinmaki made no payments after August 10, 1999. Altschuler further testified that Pentinmaki made no payments during the four charged periods of the complaint, and calculated that each of those periods were more than 120 consecutive days.

¶5 Volker testified that she and Pentinmaki were married on May 2, 1981, and had two sons during the marriage—Oliver (born April 16, 1983) and Robert (born April 23, 1985). Volker further testified that she and Pentinmaki divorced in October 1990, and that Pentinmaki was ordered to pay $1250 in monthly child support. Although Volker could not remember exactly when payments stopped, she believed it was around September 29, 1999. Volker, however, confirmed that she received no payments during the four charged periods of the complaint. Pentinmaki did not testify at trial and did not present any witnesses. During closing arguments, defense counsel argued that Volker's inability to remember exactly when payments ceased established reasonable doubt as to Pentinmaki's alleged failure to pay during the charged periods.

¶6 Pentinmaki was convicted upon the jury's verdicts, and the court imposed consecutive sentences totaling four years of initial confinement followed by one year of extended supervision. Pentinmaki filed a motion for postconviction relief alleging ineffective assistance of trial counsel and alternatively seeking a new trial in the interest of justice. The court denied Pentinmaki's motion for postconviction relief, and this appeal follows.

DISCUSSION

¶7 The court must engage in a three-step analysis to determine the admissibility of other acts evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Sullivan***, 216 Wis. 2d at 772. After ascertaining whether the other acts evidence is offered for a permissible purpose under § 904.04(2), the analysis turns to whether the other acts evidence is relevant and, finally, whether its probative value outweighs the danger of unfair prejudice. ***Sullivan***, 216 Wis. 2d at 772-73.

¶8 Here, Pentinmaki claims the circuit court failed to properly consider the third step of the ***Sullivan*** analysis—balancing prejudice against probative value. Our supreme court has recognized that "similarities between the other crimes evidence and the charged crime may render the other crimes evidence highly probative, outweighing the danger of prejudice." ***State v. Davidson***, 2000 WI 91, ¶75, 236 Wis. 2d 537, 613 N.W.2d 606. Further, "[n]early all evidence operates to the prejudice of the party against whom it is offered. The test is whether the resulting prejudice of relevant evidence is *fair or unfair*." ***State v.***

Johnson, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) (citations omitted). Unfair prejudice occurs when the evidence tends to influence the outcome of the case by "'improper means.'" ***Id.*** (citation omitted). We assume, without deciding, that, even if the circuit court failed to properly exercise its discretion with regard to the third ***Sullivan*** step, Pentinmaki has failed to demonstrate how admission of the challenged evidence improperly influenced the outcome of the case. Further, the jury was specifically told not to consider the other acts evidence as proof "that the defendant is a bad person and for that reason is guilty of the offense charged." We presume the jury followed the court's instructions. *See* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998). In light of other evidence of Pentinmaki's guilt, we conclude that admission of the challenged evidence did not improperly influence the outcome of the trial.

¶9 Next, Pentinmaki argues that his trial counsel was ineffective for failing to object to what he describes as other inflammatory testimony and evidence. To establish ineffective assistance of counsel, Pentinmaki must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶10 In order to establish deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. However, "every effort is made to avoid determinations of ineffectiveness based on hindsight.… [A]nd the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). In reviewing counsel's

performance, we judge the reasonableness of counsel's conduct based on the facts of the particular case as they existed at the time of the conduct and determine whether, in light of all the circumstances, the omissions fell outside the wide range of professionally competent representation. ***Strickland***, 466 U.S. at 690. Because "[j]udicial scrutiny of counsel's performance must be highly deferential … the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** at 689 (citation omitted).

¶11 The prejudice prong of the ***Strickland*** test is satisfied where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, the result of the proceeding would have been different. ***Id.*** at 694. We may address the tests in the order we choose. If Pentinmaki fails to show prejudice, we need not address whether counsel's performance was deficient. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶12 Here, Pentinmaki challenges his counsel's failure to object to evidence showing the following: (1) that Pentinmaki unsuccessfully moved for a stay of the divorce judgment and failed in his appeal of that judgment; (2) the verbatim contents of the order denying Pentinmaki's motion to stay maintenance and support; (3) that Pentinmaki had been placed on probation following his 1992 conviction for failure to support; (4) that Pentinmaki's failure to appear at a contempt hearing resulted in the issuance of an arrest warrant; and (5) that the judge at the scheduled contempt hearing was "quite angry" when Pentinmaki failed to appear. As noted above, given the other evidence of Pentinmaki's guilt, we are not convinced that any of the claimed deficiencies by trial counsel affected the outcome at trial.

¶13 Alternatively, Pentinmaki seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Pentinmaki invokes the first basis for relief, that the real controversy was not fully tried. In order to establish that the real controversy has not been fully tried, Pentinmaki must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶14 Here, Pentinmaki suggests that the admission of "unduly prejudicial evidence" so clouded a crucial issue that it may fairly be said that the real controversy was not fully tried. Specifically, Pentinmaki argues that the cumulative effect of the prejudicial evidence (both challenged and unchallenged by his attorney), combined with the repetitive presentation of that evidence by multiple witnesses, inappropriately invited the jury to punish him. As discussed above, any error in the admission of the challenged evidence was harmless in this case. Adding the evidence together adds nothing. "Zero plus zero equals zero." ***Mentek v. State***, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

By the Court.—Judgment and order affirmed.

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