COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3306-CR **Cir. Ct. No. 02CM000466**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK L. AUGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Mark Auger, pro se, appeals a judgment of conviction for disorderly conduct with a domestic abuse assessment and an order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

denying his postconviction motions. Auger raises numerous challenges, but this court rejects the challenges and affirms the judgment and order.

Background

¶2 In February 2002, Auger and his wife Farzaneh got into an argument in their two-year-old son's room as Farzaneh tried to put the child to bed. Auger had been in the next room, but heard his wife yelling at the child. He went into the room and claims to have seen Farzaneh shaking the child. Farzaneh testified she was agitated because the child did not want to go to sleep.

¶3 Auger states he tried to convince his wife to put the child down but she refused and kicked at him. Auger says he then tried to calm the situation by approaching Farzaneh from behind and holding her wrists. Farzaneh testified both that his grip hurt and that she asked him to leave her alone but he would not. She apparently put the child down, then tried to hit Auger while he still held her wrists. According to Auger, when that failed, she bit his hand. Farzaneh admitted she scratched him.

¶4 The argument then migrated to the living room, where Farzaneh allegedly complained of depression and threatened to take her son back to Iran with her. Auger "held her a couple of times" during this confrontation. Farzaneh then retrieved the car keys. Auger told her she was free to leave but demanded the keys, blocking her attempt to exit. She instead turned to the kitchen and, standing near a set of knives, allegedly threatened to kill Auger and commit suicide. Auger grabbed her "loosely from behind" and pulled her away from the kitchen. She then turned around and began pinching at him, causing bruises and breaking the skin. After she refused to stop, Auger admits to "giving her a measured hit on the

head with his knuckles." He then called 911 to file a report, but Farzaneh apparently pulled the phone or cord from the wall.

¶5 Police responded, but did not arrest either party that evening. Later, the district attorney charged Auger with misdemeanor disorderly conduct, contrary to WIS. STAT. § 947.01.[2] The case was tried to a jury, which convicted Auger. The court imposed a fine, with a domestic abuse surcharge of $50, for a total of $197. Auger made numerous postconviction motions for a new trial or judgment notwithstanding the verdict, all of which the trial court denied. Auger appeals, raising a number of issues that this court will address in order.

Discussion

I. Domestic Abuse Surcharge

¶6 Auger first protests that the real controversy was not fully tried because the jury was not charged with determining whether Auger was guilty of domestic abuse.[3] However, the trial court imposed the surcharge under WIS. STAT. § 973.055, which states in relevant part:

> **(1)** If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse assessment of $50 for each offense if:

[2] WISCONSIN STAT. § 947.01 states: "Whoever, 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 a Class B misdemeanor."

[3] The State contends Auger waived this issue by not raising it first before the trial court, even though WIS. STAT. § 973.055 was referenced in the complaint. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

> (a) 1. The court convicts the person of a violation of a crime specified in s. … 947.01 …; and
>
> 2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse ….

¶7 Generally, the use of "shall" indicates an action is mandatory, not discretionary. ***Hayen v. Hayen***, 2000 WI App 29, ¶18, 232 Wis. 2d 447, 606 N.W.2d 606. Thus, if the statutory conditions are fulfilled, the court is obligated to make the assessment. Here, Auger was convicted under WIS. STAT. § 947.01, fulfilling the first prong, and the "conduct constituting the violation" involved his wife, fulfilling the second prong. Moreover, the statute explicitly grants this *sentencing* authority to the court; there is nothing for a jury to deliberate. The assessment was properly imposed.[4]

II. Farzaneh's Testimony

¶8 Auger complains the trial court improperly ordered Farzaneh to testify and asks to have her testimony stricken from the record. The State had anticipated Farzaneh would testify at trial. However, she spoke with an attorney shortly before trial, who advised her to invoke her Fifth Amendment right against self-incrimination. The record does not state explicitly why, although most likely the invocation would be necessary for Farzaneh to avoid her own charges for her conduct that evening.

[4] The judgment of conviction describes Auger's offense as "Disorderly Conduct (968.075 Domestic Abuse Incident)." WISCONSIN STAT. § 968.075 is the statute defining domestic abuse within the criminal code. To the extent Auger challenges the notation as adding domestic abuse as an element of disorderly conduct, the judgment of conviction correctly notes his actions were a violation of WIS. STAT. § 947.01, *not* § 968.075.

¶9 The trial court has the authority to order incriminating testimony be given. WIS. STAT. § 972.08(1)(a). The trade-off is that the incriminating testimony cannot then be used as evidence against the witness. ***Id.*** Consequently, the witness's Fifth Amendment right is not violated. ***State v. Blake***, 46 Wis. 2d 386, 389, 175 N.W.2d 210 (1970). The court properly ordered Farzaneh's testimony.

¶10 Auger does not fully explain how this infringes on any of his rights, nor does he provide any citation to legal authority to support his request to have her testimony stricken from the record. We do not consider arguments made without legal support. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

III. Self-Defense Instruction

¶11 Auger claims that the jury should have been given a self-defense instruction. He believes the facts support an inference that he was acting not only in his own defense but his son's defense as well.

¶12 Failure to object to jury instructions constitutes waiver. WIS. STAT. § 805.13(3). An objection may be based on the incompleteness of the instructions. ***Id.*** Auger never objected to the instructions in the trial court.

¶13 Additionally, even though the trial court apparently decided before the instruction conference that the self-defense instruction would have been improper, it allowed Auger to testify he was acting in self-defense. Thus, the jury was not precluded from considering Auger's theory.

IV. Selective Prosecution

¶14 Auger claims he was the one charged in this case because he was the male. A selective prosecution claim is not a defense to the criminal charge, but an independent assertion that the prosecution has brought the charge for unconstitutional reasons. ***State v. Kramer***, 2001 WI 132, ¶15, 248 Wis. 2d 1009, 637 N.W.2d 35. A defendant has the initial burden of presenting a prima facie case of discriminatory prosecution before he or she is entitled to an evidentiary hearing. ***Id.*** A prima facie case is established when facts presented sufficiently raise a reasonable doubt as to the prosecution's purpose. ***Id.***, ¶16.

¶15 This means, however, that the complaint must be first raised in the trial court because only it, and not the court of appeals, exercises a fact-finding function. *See* ***id.*** Auger did not raise this claim in the trial court, so this court could consider it waived. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

¶16 To the extent that Auger claims he has made a prima facie case, however, it is not enough for him to claim "a reasonable person, free of sexual prejudice" would conclude Farzaneh had been the aggressor. Rather, Auger must have some proof that he "is a member of a class being prosecuted solely because of race, religion, color or other arbitrary classifications, or that he alone is the only person who has been prosecuted under this statute." ***Sears v. State***, 94 Wis. 2d 128, 135, 287 N.W.2d 785 (1980). He offers no such proof.

V. Prosecutorial Misconduct

¶17 Auger complains "the state's questioning, arguments and strategies [were] inappropriate and/or misleading." He complains the State's arguments were "fundamentally false," "foul blows."

¶18 The only actions for which he provides record cites are in the closing arguments.[5] Auger never contemporaneously objected to these statements, nor did he move for a mistrial. Failure to do both is a failure to preserve the objection. ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717.

¶19 Nonetheless, addressing his substantive complaints, Auger first complains the prosecutor "misstated the evidence." The record belies his claim. It is the license and duty of an attorney, including a prosecutor, to say what the evidence tends to prove, that it convinces him or her, and that it should convince the jury as well, as long as the attorney does not stray from the evidence on record. ***Embry v. State***, 46 Wis. 2d 151, 161, 174 N.W.2d 521 (1970). Auger's complaint is basically that the State argued a conclusion with which Auger disagreed. That the prosecution's characterization of the evidence differs from Auger's is hardly unusual and certainly not misconduct.

¶20 Auger also complains that the prosecution improperly suggested he had reason to lie in his testimony. The State explained to the jury various factors it "should assess when judging credibility" of the witnesses. Addressing Auger's testimony, the State commented: "Does he have a reason to testify falsely? Does

[5] Arguments about events unsupported by record citations are not reviewed because it is not this court's job to sift the record to find support for the appellant's arguments. ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964).

he have a reason to gloss over the facts? Of course. He is trying to save himself from a conviction." The State then proceeded to explain why the evidence simply did not comport with Auger's defense. The record reveals that this argument was made in rebuttal to Auger's closing argument, which asked the jury to consider "the truth of his testimony." This is essentially invited error, which this court normally declines to review. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936) (appellant cannot complain of errors induced by appellant).

¶21 Finally, Auger complains the "prosecutor posed questions and inserted comments designed to appeal to prejudices that the jury may have about an older man with a Middle Eastern wife." Auger provides no citation to any portion of the transcript to prove that the State made an issue of Farzaneh's nationality or the couple's age disparity. The citation provided references only Auger's larger physical size and his control of the couple's finances.

VI. Ineffective Assistance of Counsel

¶22 There is a strong presumption that counsel acts reasonably and within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Actions constituting a reasonable trial strategy are virtually unassailable. *See* ***State v. Nielsen***, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. Therefore, "[i]t is a prerequisite to a claim of ineffective assistance of counsel that the testimony [of 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); *see* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

¶23 On June 25, 2003, Auger filed motions for a new trial and judgment notwithstanding the verdict, alleging ineffective assistance of counsel.[6] A hearing on the motions was held September 22, 2003. This evidently was meant to be a ***Machner*** hearing, but Auger did not subpoena or otherwise secure the presence and testimony of his trial counsel. The trial court ultimately denied the motions and concluded Auger could not demonstrate ineffective assistance. Auger did not subsequently raise the issue of counsel's effectiveness, even though he filed additional motions for a new trial and judgment notwithstanding the verdict. In any event, without the testimony of trial counsel, this court cannot review the matter. ***Mosley***, 201 Wis. 2d at 50.

VII. Jurisdiction

¶24 Auger asks the case be removed to federal court for a new trial because he is a Canadian national. This argument is made without citation to legal authority and is therefore not developed for appellate review. ***Pettit***, 171 Wis. 2d at 646.

¶25 Moreover, WIS. STAT. § 939.03(1)(a) gives Wisconsin courts jurisdiction when a "person commits a crime, any of the constituent elements of which takes place in this state, " and state courts have exclusive jurisdiction over offenses against state laws. 22 C.J.S. *Criminal Law* § 160 (1989).

[6] The motions were received by the trial court on June 25, 2003, and filed with the clerk of courts on August 12, 2003.

VIII. New Trial in the Interests of Justice

¶26 Under WIS. STAT. § 752.35, the court of appeals has the power of discretionary reversal if "it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried …. " Auger asks this court to exercise that power. This court concludes neither prong applies in this case, particularly because Auger's preceding arguments fail to bring the verdict into question.

¶27 Auger has, at every juncture and through every vehicle he can conceive of, asserted his innocence. However, his abiding belief in his innocence and his attempts to establish it even outside the courtroom cannot transform the role of this court. The jury heard his defense, evaluated his demeanor, and convicted him. The trial court was also in a position to evaluate the evidence and implicitly, by denying Auger's postconviction motions, determined that Auger's behavior supported the disorderly conduct conviction, Farzaneh's conduct notwithstanding.

¶28 This court cannot substitute its view of the evidence for the view of the fact-finder. The "standard we employ in reviewing a jury's verdict requires us to look at the evidence in the light most favorable to the prevailing party and determine whether there is any credible evidence to support the verdict." ***Burch v. American Fam. Mut. Ins. Co.***, 198 Wis. 2d 465, 476, 543 N.W.2d 277 (1996). Auger does not directly challenge the sufficiency of the evidence and, indeed, Auger's repeated restraint of Farzaneh and his admitted measured hit to her head could constitute violent or abusive conduct that would provoke or tend to provoke a disturbance. There is no basis upon which to grant Auger appellate relief.

By the Court.—Judgment and order affirmed.

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