COURT OF APPEALS DECISION DATED AND FILED

October 13, 2011

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. 2010AP2898-CR

Cir. Ct. No. 2007CM193

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA P. O'KEEFE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Joshua O'Keefe appeals a judgment of conviction for one count of domestic abuse, contrary to WIS. STAT. § 968.075, and one count of battery, contrary to WIS. STAT. § 940.09, and an order denying his motion for a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

new trial. He contends that the circuit court erred in denying his motion for new trial because: (1) his right to confrontation was denied; (2) other acts evidence was improperly admitted; and (3) his trial counsel was ineffective. O'Keefe also contends that this court should remand this case for a new trial in the interest of justice because the real controversy was not fully tried. For the reasons discussed below, this court affirms.

BACKGROUND

¶2 In 2007, O'Keefe was charged with two counts of battery and one count of disorderly conduct, all domestic related. The complaint alleged that on December 30, 2006, O'Keefe got into an argument with his then-wife, Laurie Bannach, and that during the course of that argument, O'Keefe: broke items in the house; hit Bannach in the stomach; grabbed Bannach and threw her against a wall; grabbed her and threw her over the arm of a couch; pushed Bannach's daughter, Deanne Wanta, to the floor; and used Bannach's body to push Wanta out of O'Keefe and Bannach's house.

¶3 All charges were tried before a jury, which found O'Keefe guilty of disorderly conduct and battery as to Bannach, but not guilty of battery as to Wanta. O'Keefe moved the court for a new trial on the basis that: (1) his right to confrontation had been violated; (2) the court had improperly admitted irrelevant and unduly prejudicial character evidence; and (3) his trial attorney was ineffective in failing to correct a misstatement by the prosecution regarding self-defense, O'Keefe's affirmative defense. O'Keefe also claimed in his motion that he was entitled to a new trial "in the interest of justice." Following a ***Machner*** hearing, the circuit court denied O'Keefe's motion. O'Keefe appeals.

¶4 Additional facts will be discussed as necessary below.

DISCUSSION

¶5 O'Keefe contends he is entitled to a new trial because: (1) his right to confrontation was violated when two witnesses read medical reports which stated that Bannach and Wanta had sustained injuries from "domestic abuse" and/or "assault"; (2) the circuit court erroneously exercised its discretion by admitting certain character evidence regarding O'Keefe; (3) O'Keefe's trial counsel was ineffective for failing to respond to an argument by the prosecution that O'Keefe had forfeited his right to assert self-defense as an affirmative defense; and (4) the real controversy was not tried. We address each argument in turn below.

A. Right to Confrontation

¶6 At trial, Bannach was asked by the State to read aloud the "Diagnosis" portion of a medical report prepared by the doctor she saw when she sought medical treatment following the December 30, 2006 incident. O'Keefe, who had waived his right to counsel at the time and was representing himself with his court appointed attorney acting as stand-by counsel,[2] objected on the basis that such evidence was hearsay. The court sustained the objection, not on the basis of hearsay, but instead on that basis that the doctor's report was not in evidence. Once the report was properly admitted, Bannach testified without further objection that the report stated: "[m]ultiple contusions, secondary to domestic abuse; assault by the patient's husband." Wanta was also asked by the State to read aloud the "Diagnosis" portion of a medical report prepared by the doctor she saw when she

[2] O'Keefe waived his right to representation by an attorney only for the first day of trial.

too sought medical treatment following the December 30 incident. Wanta testified that the report stated: "[l]eft elbow contusion and low back strain, contusion, domestic abuse."

¶7 O'Keefe contends that the circuit court erred in admitting the testimony of Bannach and Wanta in which they read to the jury the "Diagnosis" portion of the medical reports because O'Keefe was not afforded an opportunity to cross-examine the doctors who prepared the reports, and was thus denied his right to confrontation. He concedes, however, that he did not raise this objection at trial. Nor, in fact, did he raise any objection to that evidence, other than a hearsay objection to Bannach's testimony, which the court sustained because the report was not yet in evidence. The failure to object to the admissibility of evidence constitutes a forfeiture of the right on appellate review. ***State v. Edwards***, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. O'Keefe does not argue that the admission of this evidence was plain error, an exception to the forfeiture rule. *See* WIS. STAT. § 901.03(4). He has thus forfeited his right to claim on appeal that the evidence was erroneously admitted.

B. Character Evidence

¶8 At trial, O'Keefe called witnesses to offer their opinions on O'Keefe's character for non-violence and/or his reputation for truthfulness. The State sought to elicit testimony to the contrary. During cross-examination of one of O'Keefe's witnesses, Jon Blair Ward, the State asked Ward whether O'Keefe had ever disposed of marital property in violation of a court order. Over a relevancy objection by O'Keefe, Ward testified:

> [Prosecutor]: Is it correct that on the date there was a hearing scheduled in [O'Keefe's] divorce action, while he did not appear for court he

met with you and sold you produce from his farm, actually beef from his farm out of the trunk of his car?

[Ward]: Well I … can admit to the purchase of the beef. As far as the—that occurred on the date of a hearing, I … think that's true, but I don't have any independent verification of that.

[Prosecutor]: And that would constitute disposing of martial assets at a time when there was a court order not to do so correct?

[Ward]: I don't know.

¶9 On rebuttal, the State questioned Sonja O'Keefe, O'Keefe's ex-wife, regarding O'Keefe's "character for violence." Sonja testified that her "marriage with [O'Keefe] was a very controlling marriage" and that "[w]hen [she] would stand up to [O'Keefe] or have any type of a stance on a disagreement … [O'Keefe] would very clearly make it known that … if he loses control he doesn't know what would happen and [she] should back down." Then, over a general objection by O'Keefe's attorney,[3] Sonja testified about an incident which took place nine or ten years prior to the trial:

[Prosecutor]: And do you have any specific recollection of a specific instance of [O'Keefe] exercising physical violence against another person?

….

[Sonja]: Yes.… We had a rental that we were fixing up.… We were outside fixing up some things on the rental, painting the house.…

[3] On the second day of trial, O'Keefe ceased self-representation and the lawyer who had previously been "stand by" counsel represented O'Keefe for the balance of the trial.

> I know there were some children who were living in the home that were coming out and saying—You know, there was a mother and a father and four children, I believe, in the home; that the father was saying this and they would come out and tell [O'Keefe] that, and I seen [O'Keefe] going into the house. I heard yelling and screaming. I came into the home to get the … lady who was in the home and the children out of the house, and I don't know what instigated the whole fight, but I did see [O'Keefe] hitting the male that lived in the home.

¶10 On appeal, O'Keefe contends that the circuit court erred when it allowed the above testimony of Ward and Sonja. As to Ward's testimony, O'Keefe argues that Ward's testimony regarding the sale of beef "was objectionable ... because it lacked the foundation needed to make it relevant." Ward asserts that although evidence regarding the beef sale may have been relevant if the sale was a violation of a court order, there was no evidence that the sale had in fact been forbidden, and thus the jury was not provided a basis upon which to conclude that O'Keefe violated a court order by selling the meat. With respect to Sonja's testimony, O'Keefe argues that her testimony was inadmissible because it was elicited by the State on direct examination; however, specific instances of conduct may be inquired into only on cross-examination.

¶11 The supreme court has held that "objections to the admissibility of evidence must be made … in terms which inform the circuit court of the exact grounds upon which the objection is based." ***State v. Hartman***, 145 Wis. 2d 1, 9, 426 N.W.2d 320 (1988). "[A]n objection preserves for appeal only the specific grounds stated in the objection." ***Id.***

¶12 As to Ward's testimony, O'Keefe argues that the testimony should have been excluded because it lacked proper foundation. However, his objection at trial was based solely on relevancy, and it contained no explanation that would have alerted the court that the basis for his objection was a lack of foundation which would make the testimony relevant. By failing to object to Ward's testimony on foundational grounds, Ward has failed to preserve that objection for appeal. O'Keefe also failed to preserve an objection to Sonia's testimony by making only a general objection to it. "A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal." ***State v. Nelis***, 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619.

¶13 However, even if O'Keefe's objection had been preserved and the circuit court had erroneously exercised its discretion by admitting the testimony of Ward and Sonia, this court would nonetheless affirm because such error was harmless because there was more than enough other substantial evidence for a jury to have reached the verdict it did. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 ("[w]e review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard").

¶14 If an appellate court determines that the circuit court erroneously exercised its discretion, a new trial is not necessarily the result. ***Id.***, ¶30. Before a new trial may be ordered, an appellate court must "conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.' If the error did not affect the substantial rights of the party, the error is considered harmless." ***Id.*** (quoted source omitted).

¶15 "For an error 'to affect the substantial rights' of a party, there must be a reasonable probability that the error contributed to the outcome of the action or proceeding at issue." ***Id.***, ¶32 (quoted source omitted). A reasonable probability of a different outcome is a possibility sufficient to undermine confidence in the outcome. ***Id.*** An appellate court's confidence in the outcome is not undermined where the erroneously admitted evidence was peripheral or the outcome was supported by evidence untainted by error. *See* ***id.***

¶16 Here, there was more than enough other substantial evidence for the jury to have reached the verdict it did.

¶17 The jury was presented with photographic evidence and testimony by Bannach that on December 30, 2006, O'Keefe, who had become angry about not being able to understand Bannach when she spoke: broke a chair; swiped breakfast dishes off the table; broke dishes; kicked an oven door, breaking its handle; and put a hole in a cupboard door. Bannach testified that after O'Keefe damaged the couple's property, O'Keefe picked up his jacket and "whipped" it at her stomach and pushed Wanta backwards with both hands. She testified that after pushing Wanta, O'Keefe came after her and pushed her against the wall with his hands, causing the back of her head to hit the wall. Bannach testified that O'Keefe then grabbed her shirt, swung her around and threw her over the couch, causing her to bounce off the couch onto the floor. She testified that O'Keefe picked her up by her pants, held her in a "bear hug" and pushed both her and Wanta out of the house. The jury was also presented with the testimony of Wanta, who testified that she observed O'Keefe hit her mother in the stomach with his jacket, pick her mother up off the floor by her pants, and push her mother at her towards the door. The jury was also presented with evidence that Bannach sustained physical injuries as a result of the December 30 altercation.

¶18 Because there was no reasonable probability that any error in admitting the testimony of Ward and Sonja contributed to O'Keefe's conviction, any such error was harmless.

C. Ineffective Assistance of Counsel

¶19 During its closing argument, the State argued:

> If [O'Keefe] is the one who creates the situation where he feels he has to defend himself, he loses self-defense. He can't recreate the situation where he has to defend himself. That's part of the instruction the judge read to you.
>
> If you want to believe what [O'Keefe] told you, that when he returned back here to the living room, that Laurie Bannach then came at him and he had to get her off of him, he then created that situation. He created an environment where he got to use force against Laurie Bannach because had he not returned to the living room there would have been no reason for her to do what he claims she did….

O'Keefe contends that this argument by the State mischaracterized the law of self-defense by informing the jury that he had forfeited his claim of self-defense by staying in his home, and that his trial counsel was ineffective in "failing to respond to the State's erroneous argument that [] O'Keefe had forfeited his affirmative defense."

¶20 To prove ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Proof of the deficiency and prejudice prongs are questions of law, which we review independently. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Because a defendant must show both deficient performance and prejudice, this court need not address one prong if the defendant has failed to establish the

other. *See* ***Strickland***, 466 U.S. at 697. Here, O'Keefe has not shown how his trial counsel's alleged deficiency was prejudicial.

¶21 To prove prejudice, the defendant must demonstrate that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id***. at 687. The defendant must also show "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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶22 O'Keefe asserts in conclusory fashion that "counsel's failure to correct that legal inaccuracy was prejudicial to [him]" because the State had informed the jury that O'Keefe forfeited his self-defense claim. However, he has failed to demonstrate how he was prejudiced. Without facts to support it, a conclusory allegation fails to demonstrate that a defendant was prejudiced by counsel's deficiency. *See, e.g.,* ***State v. Bentley***, 201 Wis. 2d 303, 316, 548 N.W.2d 50 (1996) (allegation alone is insufficient to raise issue of whether defendant was prejudiced by attorney's alleged deficiency). Because O'Keefe has failed to establish that he was prejudiced by his trial counsel's alleged deficiency, this court cannot conclude that trial counsel was ineffective.

D. INTEREST OF JUSTICE

¶23 O'Keefe contends that this court should grant him a new trial because the real controversy, whether his actions constituted battery or were privileged as self-defense, was not fully tried. An appellate court has discretionary authority under WIS. STAT. § 752.35 to reverse a conviction in the interest of justice if we conclude that the real controversy has not been fully tried. However,

we do so "only in exceptional cases." ***State v. Hicks***, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996).

¶24 O'Keefe argues that the real controversy in this case, whether his actions constituted battery or were privileged as self-defense, was not fully tried because the jury heard: (1) doctors' conclusions that there had been "domestic abuse" and "assault"; (2) improperly admitted evidence of specific acts of bad conduct, or potentially bad conduct; and (3) an erroneous argument by the State that O'Keefe had forfeited his right to assert self-defense. Such exceptional cases are generally limited to cases in which: (1) the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue of the case, ***id.*** at 160; (2) the jury had before it evidence not properly admitted that "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried," ***id.***; or (3) the jury was erroneously instructed, preventing the real controversy in a case from being tried. ***State v. Bannister***, 2007 WI 86, ¶41, 302 Wis. 2d 158, 734 N.W.2d 892. This is not such a case here.

¶25 The jury in this case was not denied an opportunity to hear important testimony, and had before it properly admitted evidence. Furthermore, any improperly admitted evidence was harmless, and the jury was properly instructed by the court. The controversy in this case was fully tried. Therefore, this court denies O'Keefe's request that we order a new trial in the interest of justice.

CONCLUSION

¶26 For the reasons discussed above, this court affirms.

By the Court.—Judgment and order affirmed.

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