COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1033-CR **Cir. Ct. No. 02CF003911**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAURIUS S. FLUKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. Taurius S. Fluker appeals from a judgment entered on a jury verdict convicting him of intentionally causing harm to a child, *see* WIS. STAT. § 948.03(2)(b), as an habitual criminal, *see* WIS. STAT. § 939.62, and from

the trial court's order denying his motion for postconviction relief.[1] He claims that his trial was unlawfully infected by a part of the prosecutor's rebuttal closing argument. We affirm.

I.

¶2 Fluker and Joseph J. M., who was then sixteen years old, were involved in an automobile accident. Joseph J. M. was driving north on North 76th Street in Milwaukee County when, according to him, a car going east on Green Tree Road ran a red light and hit him. Fluker was the driver of that second car. Christopher Sampson, who was with Fluker, and who was originally a defendant in the case, testified that Joseph J. M. ran the light and hit their car.

¶3 According to Joseph J. M., Fluker went over to him after the accident and beat him up. Fluker testified and denied that, claiming that he ran away right after the collision because he did not have a driver's license. Sampson also told the jury that Fluker left the scene. Sampson further claimed that when he tried to talk to Joseph J. M., "we begin to [*sic*] fighting." Although Joseph J. M. testified that he was "positive" that it was Fluker who hit him, he was confronted

[1] The jury also found Fluker guilty of unlawfully ignoring his duties after striking an occupied car, *see* WIS. STAT. §§ 346.67(1), 346.74(5)(a), and the trial court orally imposed a fine, costs and surcharges, and a restitution order. The only judgment of conviction in the record, however, is that adjudging Fluker guilty of the child-abuse charge. That judgment is dated April 30, 2004, and it is that judgment from which Fluker has appealed. Accordingly, although we affirm both the judgment appealed from and the order denying Fluker's motion for postconviction relief, and this embraces the duty-upon-striking conviction, we remand so the record can be corrected by entry of an amended judgment that includes Fluker's conviction on the duty-upon-striking charge. Pursuant to WIS. STAT. § 808.04(8), Fluker's notice of appeal automatically encompasses the duty-upon-striking conviction. Section 808.04(8) provides: "If the record discloses that the judgment or order appealed from was entered after the notice of appeal was filed, the notice of appeal shall be treated as filed after such entry and on the day thereof."

on cross-examination with his testimony at the preliminary examination where he identified Sampson as the culprit. On re-direct examination by the prosecutor, Joseph J. M. testified about his possible confusion:

> Q Now, is it possible that you have confused whether it was Mr. Fluker or Mr. Sampson who was the first person to [your] car; or is that not possible? I need to know.
>
> A You know, what I would say it's not possible. I don't believe that I could have that confused.
>
> Q Is it at all possible you have that confused?
>
> A It is a remote possibility but I do not believe that to be possible.
>
> Q There is little chance that it might be Mr. Sampson that actually was the first person that came up to the car and punched you?
>
> A There is a slight, but very, very slight.
>
> Q You can't say you're absolutely certain if it was Mr. Fluker who first approached the car, is that true or not true?
>
> A Personally, I can say yeah, I'm absolutely positive that Fluker was, but I guess there is a remote possibility. So, I guess, I can't say that I'm 100% sure.

Joseph J. M. then told the jury that even if he was mistaken about whether Sampson or Fluker came up to him first, Fluker "was certainly one of the people in [Fluker's] car hitting me."

¶4 There was no doubt but that Joseph J. M. was hit by someone, and the focus of the trial was whether it was Fluker. Accordingly, in her closing argument to the jury, Fluker's lawyer referenced news items about persons convicted on identification testimony who were ultimately exonerated by DNA evidence:

> When you think about DNA cases and rape cases I know all of you have read articles in the newspaper talking

> about people who have been wrongly convicted based on eye-witness identification specifically in rape cases. Sometimes ten to 15 years later DNA evidence proves that that person did not commit the rape, and those convictions were based on eye-witness identification. Eye-witness identification is a very questionable thing at best. There are conditions which create confusion, which create horror. Mr. M[.] described himself in a state of shock.
>
> ….
>
> And in closing I would like to say I don't know how many of you have ever been in a classroom or a group setting where a person has a stranger run through the classroom, and the teacher or the person who's running the group asks every person in that room to write down a description of the person who ran through that room.[2] If any of you have ever been involved in a situation like that, you know eye-witness identification is a not a [*sic*] precise science.

(Footnote added.) In rebuttal, the prosecutor told the jury:

> Probably 95 percent of my job is spent prosecuting sexual assaults. That's what I am, is a sexual assault prosecutor. I very rarely do cases like this one. So I know

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[2] Fluker's lawyer appears to be describing one of the experiments that grew out of one done at the turn of the Twentieth Century that demonstrated the fragility of eyewitness identification:

> Before the early 1900's, with the advent of psychology as a science, the accuracy of eyewitness identifications was seldom challenged. But in 1902, a professor of criminology in Berlin staged a gunfight in his classroom that appeared real, and then called on his students to reconstruct the events they saw.
>
> The results of the experiment were staggering. Although the issue for the students was what happened, not who did it, most students were 80 percent wrong in their recollections; the most accurate were about 25 percent wrong. And those numbers are about the same today, according to experts.

Katherine E. Finkelstein, *When Justice Hinges on What Is Seen, and Believed*, N.Y. TIMES, Dec. 4, 2000, *available at* http://www.crimelynx.com/justseen.html; *see also* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY ch. 4 (1979), *available at* http://www.softdevlabs.com/Eyewitness_Testimony/Eyewitness_Testimony.html.

> a lot about DNA evidence and I know about misidentification. I can tell you that, yes, you've probably read in the media about many cases being overturned on DNA evidence because of eye-witness identification problems. I can tell you that that has never happened in Milwaukee County. It hasn't happened because jurors like yourselves, Milwaukee County jurors are very careful and I want you to be careful in this case, too. I don't want you to return a verdict of guilty unless you're convinced beyond any reasonable doubt that Mr. Fluker was one of the people who threw a punch.
>
> That is what I want you to do. When you go into the jury room I want you to find the truth.

¶5 Fluker did not object to the prosecutor's comment. In his motion for postconviction relief, however, he claimed that what the prosecutor said was over the line and that a new trial was required. The trial court rejected that contention and so do we.

II.

¶6 As the State points out, and as Fluker concedes, lawyers are given great latitude in closing arguments, and, in criminal cases, "[w]hen a defendant alleges that a prosecutor's statements constituted misconduct, the test we apply is whether the statements 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis. 2d 537, 579, 613 N.W.2d 606, 626 (quoted source omitted). "A defendant's failure to move for a mistrial before the jury returned its judgment constitutes a waiver of his objections to the prosecutor's statements during closing arguments." ***Id.***, 2000 WI 91, ¶86, 236 Wis. 2d at 578, 613 N.W.2d at 625. Because Fluker neither objected nor moved for a mistrial before the jury returned its verdict, the issue on appeal is whether Fluker's lawyer was "ineffective." *See* ***State v. Erickson***, 227 Wis. 2d 758, 777, 596 N.W.2d 749, 759–760 (1999).

¶7 To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance, and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.***, 466 U.S. at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.***, 466 U.S. at 687. Thus, in order to succeed on the prejudice aspect of the ***Strickland*** analysis, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***, 466 U.S. at 694.

¶8 Our review of an ineffective-assistance-of-counsel issue involves mixed questions of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990). Findings of fact will not be disturbed unless they are clearly erroneous. ***Ibid.*** We review *de novo*, however, whether a lawyer's performance was deficient and prejudicial. ***Id.***, 153 Wis. 2d at 128, 449 N.W.2d at 848. Finally, we need not address both ***Strickland*** prongs if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697. Fluker has not shown prejudice. *See* ***Erickson***, 227 Wis. 2d at 777, 596 N.W.2d at 760 (defendant must establish that he or she was prejudiced by the prosecutor's comment). Accordingly, we do not discuss whether his lawyer gave him deficient representation by not objecting to the prosecutor's rebuttal argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶9 Putting aside whether, as the trial court ruled in denying Fluker's motion for postconviction relief, Fluker's lawyer opened the door to or invited the prosecutor's rebuttal argument, the prosecutor's comments were not prejudicial. First, although the prosecutor tried to rebut Fluker's attempt to analogize this case to prosecutions for sexual assault where DNA evidence established that a victim's identification was wrong, this case neither concerned a sexual assault nor DNA evidence. Rather, the jury had to decide whether to credit Joseph J. M.'s assertion at trial that it was Fluker who hit him, especially in light of Joseph J. M.'s identification of Sampson at the preliminary examination as his attacker. Indeed, Joseph J. M. told the jury, in response to the prosecutor's questions on re-direct examination, that he could not say that he was "100% sure" that Fluker hit him—thus retreating from his earlier contention that he was "absolutely positive" that Fluker attacked him.

¶10 Second, and more significant, although the prosecutor should not have referenced matters outside the record (that is, his experience as a sexual-assault prosecutor, or whether DNA evidence exonerated persons convicted of a sexual assault in Milwaukee County—an assertion that Fluker disputes), it is patent from the prosecutor's remarks that he was not asking the jury to draw the syllogism Fluker posits; the prosecutor did not ask the jury to base its decision on his vouching for the efficacy of the Milwaukee Country criminal-justice system's handling of sexual assault cases (or, although Fluker does not argue this, the efficacy of the district attorney's charging accuracy), or on what other juries may have done in other cases. Rather, the prosecutor was telling the jury: (1) other juries have been careful; (2) I want you to be careful also; and, therefore (3) "I don't want you to return a verdict of guilty unless you're convinced beyond any reasonable doubt that Mr. Fluker was one of the people who threw a punch."

¶11 Asking the jury "to find the truth," as the prosecutor did, did not prejudice Fluker. Fluker has not satisfied his burden under ***Strickland*** to show that his lawyer's failure to object undermined confidence in the jury's assessment of the evidence.

By the Court.—Judgment and order affirmed.

Publication in the official reports is not recommended.