COURT OF APPEALS
DECISION
DATED AND FILED

December 26, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1156-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PATRICK GREER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Patrick Greer appeals a judgment convicting him of armed robbery as a habitual offender while concealing his identity, and a subsequent order denying him postconviction relief. He claims that the circuit court erroneously exercised its discretion when it excluded certain evidence which might have undermined the credibility of a key prosecution witness and when it

refused to declare a mistrial after another witness commented that his son had met Greer at the Huber Center. Greer also contends that he was denied effective assistance of counsel when his attorney failed to request that jury selection, opening arguments and closing arguments be recorded. For the reasons discussed below, we reject all of Greer's claims and affirm the judgment and order of the circuit court.

BACKGROUND

On November 23, 1994, two armed,[1] masked men robbed the Shelby Branch of the State Bank of La Crosse of $17,720. The stolen money was stained red by exploding dye packs which the tellers had in their money drawers to mark stolen money. When some of the red-dyed money appeared in circulation, police investigation led to Greg Libke, who admitted that he had been involved in the robbery and identified Greer as his accomplice.

Prior to trial, the court ordered evidence that Libke and Greer met while serving time in the La Crosse County Jail under the Huber program excluded. The circuit court also excluded evidence regarding a false 911 call which Libke had been convicted of making in October of 1994. Defense counsel did not request that the court reporter record *voir dire* and opening and closing arguments, but he had no independent recollection of why he did not do so.

As part of a plea agreement, Libke testified against Greer. Libke said that he and Greer had first attempted to rob a bank in another city, but changed their minds when they noticed a car following them. On their way back

[1] Apparently, carbon dioxide "paint ball" guns were used, but the bank tellers and customer thought that they were real weapons.

to La Crosse, they decided to rob the Shelby Branch instead. Libke explained that the dye packs had exploded in the money bag as they drove away from the scene. He said Greer threw the CO_2 guns and his tan coat out of the car as Libke drove. Libke claimed that they went to his parents' home, where they burned their shirts and Libke's cap, as well as the money that was most heavily stained. He also said that Greer took some red-dyed items, such as a car seat cover and carpeting, out of his car and discarded them on a hill behind the Libke home.

In addition to Libke's testimony directly implicating Greer, there were a number of items of physical evidence received at trial. These included a tan coat with red dye on the sleeve, which the police recovered from along the route from the bank to the Libke home; a pair of black shoes, one of which had red dye on it, which were recovered from Greer's home and which matched the teller's description of the robber's shoes; a hair sample matching the characteristics of Greer's hair, which was recovered from under a piece of duct tape covering the logo on the bag used to collect money during the robbery; numerous red-dye samples taken from Greer's vehicle; and the dye-stained seat cover, carpet and jeans found on the hill behind Libke's house.

When Libke's father took the stand to testify about how he had found the items near his house, he mentioned that Libke and Greer had met at the Huber Center. This was a violation of the court's pre-trial order. Defense counsel objected and moved for a mistrial, which motion was denied.

Greer's defense theory was that Libke had borrowed Greer's car and used it to rob the bank with someone else. No evidence was presented which would explain who this other unknown person was, or why Libke would want to

falsely implicate Greer. The jury found Greer guilty of committing armed robbery while masked.

DISCUSSION

Standard of Review.

The exclusion of evidence is a discretionary determination which will not be reversed if there is a reasonable basis in the record for the circuit court's determination. ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 584 (1989). However, if evidence has been erroneously excluded, we will independently determine whether that error was harmless or prejudicial. *See* ***State v. Patricia A.M.***, 176 Wis.2d 542, 557, 500 N.W.2d 289, 295 (1993).

The decision whether to grant a motion for a mistrial also lies within the sound discretion of the circuit court. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). Therefore, we will reverse the denial of a mistrial motion only on a clear showing that the circuit court erred in the exercise of its discretion. ***Id***.

Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis.2d 587, 609, 516 N.W.2d 362, 368-69 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 698 (1984)). The circuit court's findings of fact will not be reversed, unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714-15 (1985); § 805.17(2), STATS. However, ultimately whether counsel's conduct violated Greer's right to effective assistance of counsel is a legal determination, which this court decides without deference to the circuit court. ***State v. (Oliver) Johnson***, 133 Wis.2d 207, 216, 395 N.W.2d 176, 181 (1986).

911 Call.

The circuit court admitted evidence of Libke's five prior convictions, and also allowed prior bad act evidence on three of the five convictions, but it refused to allow specific testimony relating to Libke's conviction for a false 911 report. It reasoned the incident was "remote" and "irrelevant." Greer claims that the circuit court erroneously exercised its discretion in this regard, because the 911 call evidence was admissible under either § 906.08(2), STATS., or § 904.04(2), STATS.

Section 906.08(2), STATS.,[2] provides that specific instances of conduct of a witness may be inquired into on cross-examination for the purpose of attacking or supporting the witness's credibility, when the conduct is "probative of truthfulness or untruthfulness and not remote in time." Section 904.04(2), STATS., bars admission of evidence of a person's other crimes, wrongs or acts for the purpose of showing that the person acted in conformity therewith, but leaves open the possibility of offering the evidence for some other purpose. Here, Greer offered it to impugn Libke's credibility.

We agree with Greer that Libke's false 911 report was somewhat probative of untruthfulness, and that the incident, which occurred one month

[2] The full text of the subsection reads:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to [the Rape Shield Law], if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

before the robbery, was not remote in time. We also agree that the testimony regarding the 911 call would not have been precluded by § 904.04(2), STATS., because it was offered to attack Libke's credibility. However, § 904.03, STATS., allows the circuit court to exclude otherwise relevant, admissible evidence if it concludes it may result in "confusion of the issues … considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Our examination of the record leads to the conclusion that the circuit court's exclusion of this evidence was based more on the relative worth of the evidence under § 904.03 than the nature of the evidence under § 906.08, STATS., since the court did receive evidence of some of Greer's other crimes. We conclude that such a determination was within the circuit court's range of discretion. *See* ***State v. Echols***, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638 (1993).

Moreover, even if the circuit court did exclude evidence of the 911 call under an erroneous view of the law,[3] we conclude that such an error was harmless under the facts of this case. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231 (1985). First, the jury heard, among other things, that Libke had five criminal convictions; that he had shoplifted the carbon dioxide guns used in the robbery; that he had initially lied to the FBI about where he got the stained money; that he had driven Greer's car on the day of the robbery without a license; that he had falsely told his mother that he was using a frequent flyer ticket to fly to Colorado; and that he had exchanged stolen bills at a bank under the pretense that he wanted larger bills. Second, the jury was aware of Libke's plea agreement. In light of all of this evidence, Libke's credibility was hardly unchallenged.

[3] It is unclear from the circuit court's decision whether it considered the 911 call to be remote in time, or only remote in nature from the type of crime at issue.

Moreover, the physical evidence linking Greer to the crime was extensive. In addition to the irrefutable fact that his car was used in the robbery, there was bank dye on one of his shoes and a coat resembling one he had, and one of his hairs was on the bag used to collect money during the robbery. There is simply no reasonable probability that the outcome of the trial would have been any different had the 911 evidence been received.

Huber Center.

When asked who his son said had robbed the bank with him, Libke's father testified:

> And that he said it was Pat. And I said Pat who? And he said Pat Greer. And I asked him if that was the person that he met over at the Huber Center.

The defense promptly objected and the circuit court struck the answer and instructed the jury to disregard it. The parties then conferred out of the presence of the jury, and the circuit court determined that the testimony was a mistake, and not a deliberate violation of the court's order not to mention the Huber Center.

In ruling on a mistrial motion, the circuit court must decide, in light of the entire facts and circumstances, whether the claimed error is sufficiently prejudicial to warrant a mistrial. ***State v. Grady***, 93 Wis.2d 1, 13, 286 N.W.2d 607, 612 (Ct. App. 1979). A curative jury instruction is presumed to eliminate prejudice. ***State v. Jennaro***, 76 Wis.2d 499, 508, 251 N.W.2d 800, 804 (1977).

In this case, the court declined to declare a mistrial, since it did not believe that the jurors would recognize the Huber reference, and therefore Greer would not suffer any significant prejudice from the remark. The court also reasoned that, even if a juror were to make a connection between Huber and jail,

that the court's instruction to disregard the testimony was sufficient to cure the error. The court's reasoning represents a rational application of the applicable law to the facts. This was an isolated remark in a three-day trial, certainly no more harmful than the circuit court's reference to a criminal defendant as "the prisoner" in ***State v. Grinder***, 190 Wis.2d 541, 554, 527 N.W.2d 326, 331 (1995), which was held to be non-prejudicial. We conclude that the circuit court properly exercised its discretion when it refused to grant a mistrial and offered Greer the opportunity to have a more detailed curative instruction if he so desired.

Failure to Record.

The right to effective assistance of counsel stems from the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution, which guarantee a criminal defendant a fair trial. *See* ***Strickland***, 466 U.S. at 684-86; ***State v. Sanchez***, 201 Wis.2d 219, 227-28, 548 N.W.2d 69, 72-73 (1996). The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. ***Strickland***, 466 U.S. at 687. The defendant has the burden of proof on both components of the test. ***Id***. at 688.

To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. (Edward) Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (citing ***Strickland***, 466 U.S. at 687). The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. ***Id***. To satisfy the prejudice prong, the defendant usually must show that "counsel's errors were

serious enough to render the resulting conviction unreliable." ***Strickland***, 466 U.S. at 687.

Greer failed to satisfy the first prong of the ineffective assistance test. First of all, as the circuit court noted, attorneys commonly waive reporting of opening and closing arguments. This practice is supported by Supreme Court Rule 71.01, which provides in relevant part:

> (2) The following activities or proceedings shall be reported:
>
> …
>
> (d) Opening statements and closing arguments in any action *upon request of a party* or upon order of the court. A request to report opening statement or closing argument shall be made on the record before either has commenced. Failure to request reporting is a waiver. [Emphasis added.]

It can hardly be considered deficient performance for an attorney simply to exercise an option which the court rules specifically reserve. Furthermore, there is no *per se* rule that the lack of a complete transcript mandates a new trial. ***State v. Perry***, 136 Wis.2d 92, 105 n.5, 401 N.W.2d 748, 754 n.5 (1987). Rather, a defendant must show some "colorable need" or "that there is some likelihood that the missing portion would have shown an error that was arguably prejudicial." ***Id***. at 103, 401 N.W.2d 748, 753. At the postconviction hearing in this case, trial counsel could identify no prejudicial remarks made during opening or closing arguments. Similarly, he could point to no specific problem with the jury selection. Therefore, appellate counsel's somewhat circular contention that prejudice arises simply due to the difficulty which new counsel might have in assessing the prejudicial impact of any other errors which might have occurred is without merit. Absent some showing that a right of the defendant

may have been prejudiced in the unreported sections of the proceedings, we will not conclude that the failure to record the portions of a trial which were omitted here constitute deficient performance.

CONCLUSION

Taking into account the nature and amount of evidence against him, Greer was not prejudiced by the exclusion of evidence that the State's key witness had made a false 911 call or the testimony that he had met the other bank robber at the Huber Center. Nor has Greer shown that he was denied effective assistance of counsel when his attorney declined to request that jury selection and opening and closing arguments be recorded.

By the Court.—Judgment and order affirmed.

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