

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2824-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STANLEY D. SALLAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Stanley D. Sallay appeals from a judgment of conviction, and from an order denying his motion for postconviction relief. We reject Sallay's arguments that: (1) trial counsel was ineffective; (2) Sallay should have a new trial in the interest of justice; (3) reversible error occurred because the circuit court directed an element of the verdict; and (4) insufficient evidence

supports Sallay's conviction on a felony bail jumping charge. Therefore, we affirm.

BACKGROUND

On November 19, 1994, Brenda Dawson was asleep in the apartment she shared with her three children. The children's father,¹ Stanley Sallay, was sitting on the living room sofa watching television with the children. LeRoy Carter and Angela Haskins came to the apartment door. They were admitted by James, then age thirteen. Carter and Haskins asked to see Brenda. Sallay informed them that Brenda was sleeping, but Carter and Haskins persisted. Sallay and Carter got into an altercation. At trial, Sallay testified that he went to the kitchen and got a knife. Carter grabbed his hand in an attempt to get the knife. During the struggle, Carter's finger was badly cut.

Sallay was charged with one count of bail jumping and one count of causing injury by negligent handling of a weapon, each with a sentence enhancer charging Sallay as a repeater. After a jury trial, Sallay was found guilty of both charges.

DISCUSSION

Ineffective Assistance of Counsel.

Sallay brought a postconviction motion alleging that trial counsel was ineffective because counsel failed to call thirteen-year-old James as a witness. To prevail on this argument, Sallay would have to show that (1) counsel's

¹ Contradictory evidence appears in the record as to whether Sallay was the father of all three children, or of only two.

performance was deficient, and (2) that deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must scrutinize counsel's performance to determine whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. *See also State v. Ambuehl*, 145 Wis.2d 343, 351, 425 N.W.2d 649, 652 (Ct. App. 1988).

At the postconviction hearing, James testified that he had been present during the entire altercation, that he remained on the sofa the whole time, that Sallay simply held the knife while sitting on the sofa, and that Carter was injured when he grabbed the blade of Sallay's knife while Haskins jerked on Sallay's hand, causing the knife to cut Carter. Trial counsel testified Sallay never mentioned James as a possible witness. The court accepted counsel's version, specifically finding counsel more credible than Sallay. The court also noted that James's proposed testimony contradicted Sallay's. The court held that reasonable counsel would not have put on the evidence of a thirteen-year-old boy which contradicted the evidence of the defendant himself, and so no prejudice occurred.

In a trial to the court, the trial court is the ultimate arbiter of witnesses' credibility. *Fidelity & Deposit Co. of Maryland v. First Nat'l Bank of Kenosha*, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). Thus, where a trial court finds counsel's testimony credible, we must accept that determination. *See Turner v. State*, 76 Wis.2d 1, 18, 250 N.W.2d 706, 715 (1977). Further, in light of James's proposed testimony, we agree that reasonable counsel would not have put on

materially different testimony,² so no prejudice resulted. Failure to show prejudice vitiates an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687.

New Trial in the Interest of Justice.

Sallay argues that he should have a new trial in the interest of justice. Citing *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435 (1996), he argues that without James's testimony, the controversy may not have been fully tried because the jury was not given an opportunity to hear important testimony bearing on an important issue. We disagree. As stated above, Sallay failed to alert counsel to James's potential testimony. Further, the importance of James's testimony is minimal. His evidence is at material variance from every other eyewitness's testimony,³ including that of Sallay. It is unlikely that, even if an attorney would have presented such evidence, a jury would have chosen to credit a thirteen-year-old boy's testimony over that of three adult witnesses.

² Sallay argues to this court that had arrangements been made for James to testify, Sallay might well have chosen not to take the stand himself. Therefore, James's testimony would not have been materially different, because Sallay's potentially contradictory testimony would never have been heard. We reject this argument for two reasons. First, it is speculative. Sallay subpoenaed Brenda to testify, and had no reason to believe she would not appear (although she ultimately did not). Nevertheless, despite the expectation of supporting testimony from a third-party witness, Sallay chose to take the stand. Second, Haskins and Carter both testified. Although the testimony of Haskins, Carter and Sallay was inconsistent on some points, all testimony agreed that Carter and Sallay started their dispute in the kitchen, later moving to the living room, and that Sallay and Carter fell on the sofa locked together in a struggle, such that no other person could have shared the sofa with them. James's proposed testimony therefore differs materially from not only Sallay's, but from every other eyewitness's testimony.

³ See footnote 2.

Directed Verdict.

Sallay argues that the circuit court effectively directed an element of the verdict against him when it informed the jury that “the defendant was previously charged with a felony.” Sallay contends this was an element which the State had to prove against him as part of its felony bail jumping case,⁴ and that by the above quoted language, the court instructed the jury that the State had proven that element. Sallay argues that he is therefore entitled to a new trial.

We reject this argument. Counsel failed to object to the instruction as read. We require particularized objections to be made to the circuit court in order to permit that court to correct errors before the return of the verdict. Among other policies, this requirement helps avoid the necessity for appeal. *Ollinger v. Grall*, 80 Wis.2d 213, 223, 258 N.W.2d 693, 699 (1977). We do not review issues on appeal that could have been disposed of in the trial court, had they been raised there. *Gebhardt Bros., Inc. v. Brimmel*, 31 Wis.2d 581, 583, 143 N.W.2d 479, 480 (1966). Put another way, the objecting party must give the trial court an opportunity to correct its errors. *Herkert v. Stauber*, 106 Wis.2d 545, 560, 317 N.W.2d 834, 841 (1982). Failure to object constitutes waiver.

But counsel went further than simply failing to object: on the record, counsel twice offered to stipulate regarding the elements of bail jumping. Specifically, counsel stated “[w]e’re willing to stipulate to the bail jumping, I am willing to stipulate to anything the district attorney would feel is relevant or that would be appropriate so that we can move on with the matter.” Without objection

⁴ WIS J I—CRIMINAL 1795 states “[t]he first element requires that the defendant was charged with a felony. A felony is a crime punishable by imprisonment in the Wisconsin state prisons.”

from trial counsel, the district attorney replied that the offered stipulation was “to an element of an offense.” Trial counsel thus made clear that he did not contest the matter of whether Sallay had been previously charged with a felony. Having invited the error (if error it is), the appellant is estopped from coming to us now and complaining that the error occurred. *Soo Line R.R. Co. v. Office of the Comm’r of Transp.*, 170 Wis.2d 543, 557, 489 N.W.2d 672, 678 (Ct. App. 1992).

Sufficiency of the Evidence.

Sallay argues that no showing was made that he failed to comply with the terms of his bond.⁵ He argues that the underlying offense, criminal negligence, cannot form the basis for a finding of intentional noncompliance, because negligence does not require formation of intent.

We reject this argument also. While negligence does not require the formation of intent, various intentional acts may lead to negligence. *State v. Asfoor*, 75 Wis.2d 411, 428, 434, 249 N.W.2d 529, 536, 539 (1977). Here, the evidence showed that Sallay intentionally resorted to a weapon of violence to resolve a dispute. Although he was ultimately found guilty of negligence, his act of negligence resulted from an intentional act. *Id.* Therefore, we reject Sallay’s argument that his violation of bond was an unintentional violation.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5., STATS.

⁵ WIS J I—CRIMINAL 1795 (bail jumping) states “[t]he third element requires that the defendant intentionally failed to comply with the terms of the bond.”

