

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 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. 97-2967-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MATTHEW TYLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

WEDEMEYER, P.J.¹ Matthew Tyler appeals from a judgment entered after a jury found him guilty of one count of fourth-degree sexual assault, contrary to § 940.225(3m), STATS. He also appeals from an order denying his postconviction motion. Tyler claims: (1) he was denied due process when the

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

State presented improper argument in its closing and when the State presented false or mistaken testimony; and (2) he received ineffective assistance of trial counsel. Because Tyler was not denied due process and because trial counsel provided effective assistance, this court affirms.

I. BACKGROUND

On June 6, 1996, Tyler was giving the victim, seventeen-year-old Tirrell G., a ride home. Tyler was the coach of Tirrell's church basketball team. Tirrell alleged that Tyler stopped at Tyler's apartment to change clothes and, while in the hallway, Tyler put his hand in Tirrell's shorts, without consent or permission, and touched Tirrell's penis and testicles. Tyler denied the allegation.

The case was tried to a jury. The State's case included testimony from Tirrell and Jason Christensen. Christensen was cleaning the lobby carpet at Tyler's apartment building on the date of the alleged incident. He testified that he recalls seeing an older man and a younger boy getting off the elevator on the day in question and told them to "watch out for the hoses" that he was using to clean the carpet.

The jury convicted. Tyler now appeals.

II. DISCUSSION

A. Due Process.

Tyler asserts that his due process rights were violated in two instances: (1) when the prosecutor presented improper argument during closing; and (2) when the State presented false or mistaken testimony. This court rejects both assertions.

1. Closing.

Tyler first argues that the prosecutor made improper comments in her closing argument to the effect that, based on the conflicting testimony of the prosecution and Tyler, someone was lying.

It is within the trial court's discretion to determine whether comments made during closing argument are improper. *See State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). This court will uphold the trial court's ruling on this issue unless it constituted an erroneous exercise of discretion. *See id.* Counsel is allowed latitude in presenting closing argument to the jury. *See id.* In reviewing a charge that the prosecutor made improper comments in its closing argument, the test to be applied is whether those remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Wolff*, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) (citation omitted).

Some examples of the alleged improper remarks include the prosecutor's statements that:

This boils down to one thing: Someone here who was sworn on that stand to tell you the truth has lied. There is no way that both of them could be telling the truth. Someone has come in here and has lied to you because it's completely incompatible that they are both telling you the truth.

....

Why would Tirrell lie?

....

There is no reason Tirrell would lie.

The trial court ruled:

The claim here, of course, is that the argument that [the prosecutor] advanced was improper because she essentially told the jury that they had to pick between one version of the facts, the state's version of the facts, and the defendant's; and, of course, what the jury is there to do is to determine what the truth is and also to determine whether the state has met its burden of proof, and that they don't necessarily have to pick one or the other.

However, I have to bear in mind that [the prosecutor] never called anyone a liar, never used any kind of abusive terminology, there were no ad hominem attacks of any, of any sort.

... in some ways I think the jury really did have to pick between Tirrell's version of the facts, and the defendant's version of the facts. So looking at the totality of the circumstances of this case and the closing argument, I don't think that the closing argument here warrants a new trial.

This court's evaluation of the prosecutor's comments reveals that the trial court did not misuse its discretion. The prosecutor was doing no more than commenting on the evidence, which is in no way wrong or improper. There is no indication in the transcript of her argument that she was in any way injecting her "personal opinion" or any "assertions of personal knowledge" into the argument. In Wisconsin, a prosecutor has a right to draw all legitimate inferences from the evidence and argue from it to a conclusion. See *Embry v. State*, 46 Wis.2d 151, 160, 174 N.W.2d 521, 526 (1970). However, when an opinion is expressed, it must be clear that it is based upon the evidence in the case. See *id.* The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and instead suggests that the jury arrive at a verdict by considering factors other than the evidence. See *State v. Draize*, 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979).

Even if these comments were improper, this court is not convinced that the comments caused prejudice. The trial court instructed the jury that

arguments by counsel were not evidence and that its decision should be based upon the evidence presented at trial. Defense counsel also had the opportunity to respond to these comments in its oral argument. Therefore, this court rejects Tyler's claim.

2. False Testimony.

Tyler next claims he was denied due process because the State proffered a witness who testified falsely. This claim is based on Tyler's assertion that the independent witness, Christensen, testified at trial inconsistent with a statement he had given when he was interviewed shortly after the incident. More specifically, at trial, Christensen testified that he saw Tyler and Tirrell getting *off* the elevator at Tyler's apartment and in his prior statement, Christensen said he saw the two getting *on* the elevator.

This court disagrees with Tyler's claim in this regard. The fact that a typewritten report recording Christensen's observations the day following the incident included the word "on" rather than "off" does not mean that Christensen's testimony at trial was false or mistaken. This discrepancy could be a typographical error either by a transcriptionist or by the officer who took the statement. It does not rise to such a level to compel this court to conclude that it forms the basis of a due process violation.

B. Ineffective Assistance.

Tyler claims he received ineffective assistance of trial counsel because: (1) trial counsel failed to impeach Christensen with his prior inconsistent statement; (2) trial counsel failed to pursue the admission of a statement given by a second carpet cleaner who was present at Tyler's apartment on the date of the

incident; and (3) trial counsel failed to impeach Tirrell with his prior statement to the police that did not mention the assault at Tyler's apartment. The trial court concluded after conducting a *Machner* hearing, that Tyler received effective assistance.² This court agrees.

In order to establish that he did not receive effective assistance of counsel, Tyler must prove two things: (1) that his lawyer's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A lawyer's performance is not deficient unless he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Even if Tyler can show that his counsel's performance was deficient, he is not entitled to relief unless he can also prove prejudice; that is, he must demonstrate that his counsel's errors "were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* Stated another way, to satisfy the prejudice-prong, a 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." *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996) (citation omitted).

In assessing Tyler's claim, this court need not address both the deficient performance and prejudice components if he cannot make a sufficient showing on one. See *Strickland*, 466 U.S. at 697. The issues of performance and prejudice present mixed questions of fact and law. See *Sanchez*, 201 Wis.2d at

² See *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

236, 548 N.W.2d at 76. Findings of historical fact will not be upset unless they are clearly erroneous, *see id.*, and the questions of whether counsel's performance was deficient or prejudicial are legal issues that this court reviews independently. *See id.* at 236-37, 548 N.W.2d at 76.

1. Failure to impeach Christensen.

Tyler asserts his trial counsel was ineffective for failing to impeach Christensen with his prior inconsistent statement. The trial court concluded this did not constitute ineffective assistance. This court agrees.

The prior statement was recorded by a police officer and was not handwritten by Christensen himself. Trial counsel spoke with Christensen and determined that he was a credible and attractive witness. The trial court, having heard Christensen's trial testimony, agreed with that assessment. Moreover, Christensen offered testimony that was helpful to the defense; that is, he did not observe any inappropriate behavior between Tyler and Tirrell. Therefore, trial counsel's strategic decision not to impeach Christensen with his prior statement was reasonable and not ineffective assistance.

2. Pursuing admission of second carpet cleaner's statement.

Tyler also asserts that trial counsel should have sought to admit the statement of a second carpet cleaner who was present at Tyler's apartment on the date in question. This individual was not available to testify at trial because he had moved out of the state. He did, however, give a statement to police the day after the incident where he said that he saw two men getting off the elevator. He saw the older man go towards the lobby to get his mail or check an apartment number and then saw both men go down the hallway. Tyler argues that this

statement would have supported Tyler's version of events and helped to bolster his credibility. The trial court concluded that the failure to seek admission of this statement did not constitute ineffective assistance. This court agrees.

Trial counsel testified at the *Machner* hearing that pursuing the second carpet cleaner would not be worth the time or expense. Whether this decision was reasonable is irrelevant because the second carpet cleaner's statement was essentially cumulative to Christensen's testimony. Therefore, any failure of trial counsel to seek admission of the second carpet cleaner's statement was not prejudicial.

3. Impeaching Tirrell.

Finally, Tyler contends trial counsel's failure to impeach Tirrell regarding his statement to police that did not mention the apartment assault was ineffective assistance. The trial court concluded this was not ineffective assistance. This court agrees.

Trial counsel explained that she elected not to impeach Tirrell in this manner because she was unsure how he would respond. Counsel was concerned that such questioning would be detrimental to the defense in that it would highlight the information in the prior statement describing how Tyler assaulted Tirrell at another location. Counsel's decision that impeaching Tirrell in this manner would be more harmful than helpful to the defense was a reasonable strategy. Thus, the decision does not constitute ineffective assistance.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

