COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 24, 1999

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. 98-0683-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMMY GATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: BRUCE SCHMIDT, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

ANDERSON, J. Sammy Gates appeals from a judgment convicting him as a party to the crime of battery by an inmate as a repeater contrary to §§ 939.05, 939.62 and 940.20(1), STATS. Gates also appeals from an order denying his motion for postconviction relief. He raises three arguments on appeal. First, he contends his trial counsel was ineffective for failing to: (1) request a limiting instruction when "other acts" evidence was admitted, (2) object

to improper arguments raised in the prosecution's closing arguments, (3) object to the trial court's failure to read to the jury an instruction on party to the crime, (4) request a jury instruction on confessions, (5) continuously object to an improper line of questioning, (6) impeach a prosecution witness for bias, and (7) move for a change of venue for the trial because no African-Americans were in the jury pool. Second, he argues that the trial court erred by: (1) admitting uncharged acts into evidence, (2) not making a ruling specifying the purpose for or instructing the jury on the limited use for "other acts" evidence, and (3) allowing the prosecutor to use an improper line of questioning. Finally, Gates argues that the evidence was insufficient to support the verdict. We reject these arguments and affirm.

BACKGROUND

On September 29, 1996, six Oshkosh Correctional Institution inmates accosted and beat Wayne A. Jackson, another inmate. All six attacking inmates belonged to the prison gang Gangster Disciples. One of the six attacking inmates was Gates.

This attack was precipitated by an incident three days before in the prison bathroom. Jackson testified that he was in the bathroom when Gates and two other Gangster Disciples members approached him. The gang members requested sexual favors from Jackson. "They wanted me to give them, specifically they wanted me to be a queen for them, for the organization. And they wanted me to be a, prostitute myself for them." Jackson stated that when he responded negatively to this proposition, the men were upset.

Before the attack on September 29, Jackson was approached in the dining hall by Gates and two other Gangster Disciples. Jackson was told that he

could not go outside that day. Jackson retorted, "I told them I would go outside whenever I please, they are not the police. And so I proceeded out."

After leaving the dining hall, Jackson was walking on the sidewalk when he saw Gates and two other Gangster Disciples coming toward him. Meanwhile, a correctional officer in the dining hall, Sergeant Tansi McQueen, observed inmates exchanging hand signals and then leaving the building. McQueen found this behavior suspicious, so she contacted the control center and asked them to watch the camera outside of the building. The officer in the control center witnessed through the video monitor several inmates congregate on the sidewalk and begin to assault another inmate. This officer then sounded a trouble call alerting others to the disturbance.

Lieutenant Kenneth Keller interviewed Jackson immediately after the attack. Jackson identified Gates as one of his attackers. When Keller entered Gates' building, Gates was resisting an officer who was trying to handcuff him. Keller assisted in handcuffing Gates and drove him to the segregation building.

After arriving at the segregation building, Gates was questioned about the attack and shown the videotape of the attack. Gates identified himself on the videotape and admitted to being a Gangster Disciple. However, Gates stated that he was not involved in the attack and had not hit Jackson.

Gates was later charged with one count of party to the crime of battery by an inmate with a repeater enhancer per §§ 939.05, 939.62 and 940.20(1), STATS. A jury trial was held on February 27, 1997. No African-Americans were in the jury pool. The jury found Gates guilty. Gates was then sentenced to ten years of imprisonment to be served consecutively to any previous sentence.

Next, Gates filed a motion for postconviction relief. In his brief supporting this motion, Gates alleged that he was denied effective assistance of counsel and that the trial court had committed errors. A hearing on the motion was held on February 12, 1998. The motion was denied. Gates appeals.

JURY INSTRUCTIONS

Gates raises several arguments about the way the trial court and his defense counsel handled the jury instructions at his trial. First, he claims the trial court erred by not giving a cautionary instruction for "other acts" evidence. On this same point, he finds his trial counsel ineffective for not raising an objection. Second, he argues his counsel was ineffective for not rendering an objection when the trial court did not orally read to the jury the party to a crime instruction. Third, he also claims ineffectiveness of counsel because his counsel did not request a jury instruction for Gates' alleged confessions. We will address each argument separately.

A. TRIAL COURT ERROR ARGUMENTS

In reviewing the claims of trial court error, we will apply the following standards to the case. We allow a trial judge to exercise great discretion in selecting jury instructions based on the facts and circumstances of the case. *See* ***State v. Sartin***, 200 Wis.2d 47, 52, 546 N.W.2d 449, 451 (1996). However, the court's discretion must be used to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." ***Id***. at 52-53, 546 N.W.2d at 451 (quoted source omitted). When reviewing the court's exercise of this discretion, we evaluate whether the trial court correctly instructed the jury. *See* ***id***. at 53, 546 N.W.2d at 451. This question is one of law which this court reviews de novo without deference to the lower court. *See* ***id***.

1. Transactional Evidence

Gates contends that the trial court erred by not giving the jury an instruction limiting the purposes for which the jury could consider the "other acts" evidence[1] that was admitted. Also, Gates claims that this evidence should not have been admitted. Specifically, Gates delineates the following evidence as "other acts" evidence: (1) the solicitation of Jackson in the prison bathroom three days prior to the attack, (2) Gates' resistance to being handcuffed after the assault, and (3) Gates' statement to Jackson prior to the attack that he should not leave the building. He claims that this evidence was highly prejudicial and because there was no limiting instruction given to the jury, the jury must have assumed he was a person of bad character on the basis of this evidence. We disagree with these contentions.

We reject Gates' argument that a limiting instruction should have been given to the jury because "other acts" evidence was admitted at trial. On the contrary, we determine that the evidence in question is not classified as "other acts" evidence; rather, it is admissible evidence that supports the State's theory of the case.

The evidence of the proposition in the bathroom, Gates' warning that Jackson should not leave the building, and Gates' resistance to being handcuffed is all a part of the panorama of evidence needed to completely describe the

[1] Section 904.04(2), STATS., prohibits the admission into evidence of "other crimes, wrongs, or acts" if used to demonstrate a person's character and propensity to act according to this character. The statute does allow exceptions for evidence offered for the purposes of proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** Gates asserts on appeal that the trial court erred by not giving the jury a cautionary instruction that the only purpose the evidence in question could be used for was to prove one of these exceptions.

transaction or, in this case, the crime that occurred. This evidence pertains to the preparation of the crime by Gates, the carrying out of the crime by Gates and others, and the apprehension of Gates immediately after the crime. When evidence is offered to complete the story of the crime charged, place the crime charged into context or generally explain the crime charged, it is admissible because such evidence is inextricably intertwined with the crime. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1606 (1994) (discussing the FED. R. EVID. 404(b), which governs the admissibility of other crimes, wrongs or acts).

For example, in ***United States v. Hattaway***, 740 F.2d 1419, 1425 (7th Cir. 1984), the defendants kidnapped the victim to keep her quiet about the murder of her boyfriend. The Seventh Circuit deemed evidence of the boyfriend's murder and the defendants' "lifestyle" as necessary to fill chronological and conceptual voids and fully depict the victim's ordeal. *See* ***id.***

> [Defendants] argue that the district court improperly admitted evidence of the Outlaws' lifestyle, including information about their sexual activities, drug use, gang paraphernalia, nicknames, and other "socially unacceptable" activities. We conclude that all this evidence was relevant to provide an accurate description of [the victim's] ordeal.

Id. In conclusion, the court stated, "The evidence was not admitted to prove bad character; rather, it was intricately related to the facts of this case." ***Id***.

Likewise in the present case, the evidence of the proposition in the bathroom, Gates' warning that Jackson should not leave the building and Gates' resistance to being handcuffed completes the story of the crime charged and is "intricately related to the facts of this case." ***Id.*** Here, the State theorized that

Jackson was assaulted because he rejected the Gangster Disciples' proposition to be their gang's "queen." We determine that this evidence pertained to the transaction—the attack on Jackson—that took place and is therefore relevant evidence.[2] Accordingly, a jury instruction limiting the purposes for which this evidence could be considered was not necessary.

B. INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENTS

The remaining issues are predominately claims that Gates' trial counsel's performance failed to meet the constitutionally-established standards for effective representation. Therefore, we will review these claims according to the following principles.

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 v. Washington***, 466 U.S. 668, 684-86 (1984); ***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. *See* ***Strickland***, 466 U.S. at 687. The defendant has the burden of proof on both components of the test. *See* ***id.*** When a defendant fails to prove either prong of the test, the reviewing court need not consider the remaining prong. *See* ***Sanchez***, 201 Wis.2d at 236, 548 N.W.2d at 76.

[2] Because we determine that a jury instruction regarding "other acts" evidence was not required in this case, we need not address Gates' contention that his trial counsel was ineffective for failing to request such a jury instruction. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983) (if resolution of one issue is dispositive, this court need not address other issues raised).

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. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (quoting ***Strickland***, 466 U.S. at 687). A defendant must also overcome a strong presumption that his or her counsel acted reasonably within professional norms. *See* ***id.*** To satisfy the prejudice prong, a defendant usually must show that counsel's errors were serious enough to render the resulting conviction unreliable. *See* ***Strickland***, 466 U.S. at 687.

1. Party to Crime Instruction not Read Orally to the Jury

At the conclusion of Gates' trial, the jury was given a thirty-page packet titled, "Jury Instructions." Included in this packet was WIS J I—CRIMINAL 400, titled "PARTY TO CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED THE CRIME CHARGED."[3] This document is two pages long. The trial court read

[3] WISCONSIN J I—CRIMINAL 400 instructs, in relevant part, the following:

> Section 939.05 of the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime may be charged with and convicted of the commission of the crime although he [or she] did not directly commit it.
>
> [Gates] is charged with being concerned in the commission of the crime of [battery by prisoners] by … intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.
>
> A person intentionally aids and abets the commission of a crime when, acting with knowledge or belief that another person is committing or intends to commit a crime, he [or she] knowingly either
>
> (a) assists the person who commits the crime, or
>
> (b) is ready and willing to assist and the person who commits the crime knows of the willingness to assist.

(continued)

aloud the instructions in the packet to the jury. However, the trial court failed to read the two-page WIS J I—CRIMINAL 400.

Gates argues that his trial counsel was ineffective for failing to object to the trial court's omission of WIS J I—CRIMINAL 400 when the court orally presented the instructions to the jury. He maintains that:

> The jury never heard the crucial language that if a person is only a bystander, he does not aid and abet and, therefore, is not party to the crime. Without having heard this language, it would be natural for the jury to erroneously conclude that, because witnesses had testified to Mr. Gates' admissions of being merely present at the scene of the assault, he was therefore, by this admission, party to the crime.

We agree that trial counsel was deficient for not raising an objection to the instruction's omission; however, we disagree with Gates' claim that counsel's performance was also prejudicial.

First, although the trial court did not read WIS J I—CRIMINAL 400 to the jury, the essence of the instruction was conveyed to the jury in defense counsel's closing arguments.[4] Gates' theory of defense was that he was innocent

---

> To intentionally aid and abet [battery to a prisoner], the defendant must know that another person is committing or intends to commit the crime of [battery to a prisoner] and have the purpose to assist the commission of that crime.
>
> However, a person does not aid and abet if he [or she] is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist the commission of the crime.

The jury instruction proceeds to inform that, among other things, the State must prove each element of the crime beyond a reasonable doubt.

[4] Defense counsel stated the following in closing his closing arguments:

> [W]e are applying the law on Mr. Gates and those elements of the law have to be applied equally. You have heard the instructions and I want to bring home the point of party to, party to the crime of battery. I would just highlight this point, a person intentionally aids and abets the commission of a crime when

(continued)

of the crime because he was merely a bystander. Defense counsel made this argument abundantly clear to the jury by paraphrasing the standard WIS J I—CRIMINAL 400 in his closing arguments.

Second, the omission did not prejudice Gates' defense because the jury had WIS J I—CRIMINAL 400 in its jury instruction packet while it was deliberating.

Jury instructions are not to be considered separately but, instead, should be read as a whole. *See* ***State v. Grinder***, 190 Wis.2d 541, 556, 527 N.W.2d 326, 332 (1995). When evaluating the jury instructions that were given, an error may be rendered harmless because of other correct statements of law contained in the instructions. *See* ***Moes v. State***, 91 Wis.2d 756, 768, 284 N.W.2d 66, 72 (1979). Even if the error is not rendered harmless by other portions of the instructions, there is no reversible error unless it could be said that, had the error

---

> acknowledging, with knowledge or belief, that another person is committing or intending to commit a crime, he knowingly assists the person who commits the crime.
>
> He was there, I grant you he was there. I didn't see any restraining. I didn't see any holding down of Mr. Jackson…. I didn't see him holding back when everyone could take their turn swinging at [him], is ready and willing to assist….
>
> ….
>
> As to his willingness to assist, what I saw was jumping around. Mr. Gates almost as if, what to do? I still did not, did not see on that videotape … where Mr. Gates was aiding and abetting. I would add further, pursuant to the instructions to intentionally aid and abet, Sammy Gates the defendant must know that another person is committing or intending to commit the crime of battery to prisoner and have the purpose to assist the commission of the crime.
>
> ….
>
> However … a person does not aid and abet if he is only a bystander or a spectator innocent of any unlawful intent and does not, does nothing to assist the commission of a crime.

not been made, the verdict might have been different. *See* ***id.*** In other words, the error is harmless unless it "raises a reasonable doubt about guilt … 'sufficient to undermine confidence in the outcome.'" *See* ***State v. Dyess***, 124 Wis.2d 525, 544-45, 370 N.W.2d 222, 232 (1985) (quoted source omitted).

In ***Grinder***, our supreme court addressed the situation where one of sixteen verdict forms was not orally read to the jury by the trial court. *See* ***Grinder***, 190 Wis.2d at 555, 527 N.W.2d at 331. Similar to the present case, although the jury was not read the verdict form, it had the form in its possession during deliberations. *See* ***id.*** at 556, 527 N.W.2d at 332. In determining the trial court's error to be harmless, the court stressed that the jury possessed the verdict form during deliberations, and the essence of what the not-read, not-guilty verdict form stated had been conveyed to the jury at other points in the trial. *See* ***id.*** at 557, 527 N.W.2d at 332.

We conclude that because the information in the jury instruction was presented to the jury during closing arguments and the jury had possession of the instruction, Gates' defense was not prejudiced by its omission when the other instructions were orally read to the jury. Despite the fact that his counsel was indeed deficient for failing to object to the trial court's error, this performance was not prejudicial because it cannot reasonably be stated that without the error the outcome of the trial might have been different. *See* ***Moes***, 91 Wis.2d at 768, 284 N.W.2d at 72.

2. Failure to Request Jury Instruction on Confessions/Admissions

Gates points out that two witnesses testified that he made confessions to them that he was at the scene of Jackson's attack. Therefore, Gates complains that his trial counsel was ineffective for not requesting WIS J I—

CRIMINAL 180, which informs the jury how to evaluate alleged confessions by the defendant. It is apparent from the trial transcript that counsel did not request this jury instruction.

To determine whether Gates' counsel was deficient by failing to request this jury instruction, we will first examine the content of the instruction and then consider the importance of this language to Gates' theory of defense. WISCONSIN J I—CRIMINAL 180 asks the jury to consider three things when evaluating the alleged confession: (1) whether the defendant actually made the statement, (2) if the statement was accurately restated at trial, and (3) if the statement was trustworthy.

Gates' defense was that he was an innocent bystander to Jackson's attack and that he did not participate or assist in preparations for the attack. We have been presented with no evidence that Gates made an issue of these alleged confessions at trial. On the contrary, his defense focused on his lack of involvement in the assault. Gates does not contest his presence at the scene of Jackson's attack. An alleged confession of being at the attack scene actually coincides with the defense's theory that Gates was present but not involved in the attack. Therefore, we conclude that trial counsel was not deficient for not requesting the instruction.

ADDITIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. Hannah's Testimony

Gates raises several arguments about the effectiveness of his trial counsel's performance in response to the prosecution's cross-examination of a defense witness, inmate Willie Hannah. In particular, Gates claims that counsel's performance was constitutionally ineffective because counsel failed to

continuously object to the prosecution's questioning of Hannah, did not seek a mistrial as a result of this questioning, and made no objection to prosecutorial comments on the subject during closing arguments. Finally, Gates asserts that the trial court erred in allowing this line of questioning.

Hannah resided in the same prison building as Jackson, but he was not a member of the group that attacked Jackson. However, Hannah was one of the inmates exchanging hand signals in the dining hall immediately prior to Jackson's attack, and in a statement to a correctional officer, he referred to himself as the "governor" or head of the Gangster Disciples. Jackson testified that Hannah was part of the group which propositioned him in the prison bathroom to be the gang's "queen" and warned him not to leave the building on the day of the attack.

Testifying at trial as a defense witness, Hannah contradicted the testimony of two correctional officers and Jackson. During direct examination, Hannah denied giving any signals prior to Jackson's attack or being a member of the Gangster Disciples.

On cross-examination, the prosecution asked Hannah if the three witnesses with whom his testimony differed had been "lying." The prosecutor had the following exchange with Hannah on cross-examination:

> Q. So you're telling us today that you're not a Gangster Disciple?
>
> ….
>
> A. I am not a Gangster Disciple.
>
> Q. We heard some testimony a little while ago from Captain Schroeder and he said that you personally told him … that not only were you a gang member and a member of the Gangster Disciples, but that you were the leader.
>
> A. That is not correct.

….

Q. So then if he came into court here … and said that you told him you were the leader of the Gangster Disciples at Oshkosh Correctional, would he be telling a lie?

A. [He] would be lying ….

….

Q. Likewise, Wayne Jackson came into this courtroom and testified that three days before he was assaulted you … propositioned him to have sex for the Gangster Disciples?

A. That is a lie.

….

Q. Wayne Jackson came in here and said that on the very date he was assaulted you … told him that he could not go outside anymore?

….

Q. So was he telling a lie about that as well?

….

Q. I'm asking you if he testified to that, did he tell a lie about that?

[DEFENSE COUNSEL]**:** Asking whether he tells a lie or not, is purely argumentative.

THE COURT**:** He's answered.

Later during this cross-examination, the prosecutor asked Hannah about the discrepancies between his testimony and that of McQueen.

Q. [D]id some inmate come out of a bathroom and make a signal to you by nodding his head to the right towards the door?

A. No.

Q. Never happened?

A. No.

Q. So if Sergeant McQueen came here and said she saw that, and that you responded to it by nodding your head, would she be lying as well?

[DEFENSE COUNSEL]**:** Objection again, Your Honor.

THE COURT**:** Overruled, you may —

A. Did anyone come out of a bathroom and nod their head to me?

….

Q. [I]f she testified that those things happened and that you nodded back, would she be lying about that?

A. If she said I nodded to them, yes.

Q. Would she also be lying if she said that you then gave a signal to several people around you to go out?

….

Q. My question to you is simple, if Sergeant McQueen said that those things happened, would she be lying about that?

A. Yes.

Gates argues that the prosecutor's questions about whether other witnesses were lying were improper because such questions violate § 906.08(2), STATS.[5] Relying on ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Kuehl***, 199 Wis.2d 143, 545 N.W.2d 840 (Ct. App. 1995), Gates argues that this type of questioning should not have been permitted. He concludes that his counsel's performance was ineffective because he was unaware of ***Kuehl***[6] and also failed to continuously make objections to the court about this line of questioning. As a result, he urges this court to reverse his judgment of conviction.

---

[5] Section 906.08(2), STATS., provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence. They may … be inquired into on cross-examination … of a witness who testifies to his or her character for truthfulness or untruthfulness.

[6] On February 12, 1998, during the hearing on Gates' motion for postconviction relief, trial counsel admitted that he did not know if ***State v. Haseltine***, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984), was still good law and that he was unfamiliar with ***State v. Kuehl***, 199 Wis.2d 143, 545 N.W.2d 840 (Ct. App. 1995).

We agree with Gates that the ***Haseltine*** court held it is improper to question one witness about another witness's veracity. *See* ***Haseltine***, 120 Wis.2d at 96, 352 N.W.2d at 676. In that case, we stated: "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Id.*** Functioning as a virtual "lie detector in the courtroom," it is the jury's role to weigh witnesses' conflicting testimony and determine the truthfulness of each witness. *See* ***id.*** Accordingly, when the prosecutor began inquiring of Hannah if other witnesses were lying, trial counsel had an obligation to raise an objection.

Gates does not argue that trial counsel did not object at all, but that he should have continuously objected. We disagree. As previously quoted in the colloquy at trial, trial counsel raised two objections during the prosecutor's questioning and was overruled. It is not necessary for counsel to continuously and repeatedly object. *See* ***Baxter v. Krainik***, 126 Wis. 421, 426, 105 N.W. 803, 805 (1905). With such behavior, counsel would run the risk of appearing obstructive to the jury. Furthermore, we determine that because the trial court had already ruled that Hannah's testimony was properly admitted, trial counsel was not required to raise an objection when such testimony was commented upon in the prosecution's closing arguments. As a result, we determine trial counsel's performance not to be deficient.

This brings us to Gates' final argument regarding Hannah's testimony. Gates claims the trial court erred by allowing the prosecutor to question Hannah about other witnesses' veracity. Based on the foregoing analysis, under ***Haseltine,*** such questioning should not have occurred.

Having determined that error occurred, we next consider whether the improper questioning was prejudicial error. "An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction." ***State v. Pettit***, 171 Wis.2d 627, 639, 492 N.W.2d 633, 639 (Ct. App. 1992). A reasonable possibility is one "which is sufficient to undermine confidence in the outcome of the proceeding." ***State v. Patricia A.M.***, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). We must consider the totality of the record. *See* ***id.*** at 556-57, 500 N.W.2d at 295.

Given the evidence of the videotape depicting Gates' actions at the scene of Jackson's attack, we are confident in the outcome of this proceeding even in light of the improper cross-examination. It was apparent to the jury that Hannah's testimony presented a vastly different depiction of events than the other witnesses. But it is important to note who was the subject of this conflicting testimony—it was Hannah, not Gates. Hannah disputed the other witnesses' versions of *his* actions, not Gates'. A reasonable juror would have concluded that one of the conflicting testimonies was a fabrication. Because the improper questioning of Hannah did not even concern Gates' actions, there is no reasonable possibility that it contributed to Gates' conviction. It was harmless error.

B. Failure to Impeach a Witness

Dempsey Coborn, a fellow inmate, was a witness for the State at Gates' trial. On the day before the trial, Coborn informed the authorities that he had some significant evidence, even though up until trial he had denied having any pertinent information. At trial, Coborn testified that he had spoken with Gates while they were both in segregation. He testified that when he asked Gates why he participated in Jackson's assault, "Gates basically told me that he had to do it, otherwise it would have been done to him." On cross-examination, Gates' counsel

emphasized the fact that Coborn had not revealed this information until the day before the trial, thus implying that the story was recently created.

Now, Gates asserts that his trial counsel's cross-examination of Coborn was deficient because counsel did not impeach Coborn for bias. Gates contends that bias could have been demonstrated on cross-examination by questioning Coborn about his sexual relationship with .Jackson. However, the record reveals that defense counsel did introduce proof of this relationship through another witness, Timothy Collins. Collins, who was also in the group of inmates that assaulted Jackson, testified:

> Well, I know the reason I was going to beat [Jackson] up, because his boyfriend, Dempsey and this dude named Anthony Gibson, offered me some money to beat the homosexual up because he messed up some of the money that they was making selling their reef and cocaine … in the institution.

At the ***Machner***[7] hearing, Gates' trial counsel stated that he chose to introduce evidence of Jackson and Coborn's sexual relationship through Collins' testimony because prior to the trial Coborn had adamantly denied the relationship to him. Counsel assumed that Coborn would do the same at trial and therefore opted to introduce the evidence in another manner. This was a sound strategic choice. Gates' trial counsel was not deficient for choosing not to question Coborn about his relationship with Jackson. Rather, counsel chose a method of introducing this evidence without allowing Coborn the opportunity to deny it. This choice was advantageous to Gates' defense; therefore, counsel was clearly not ineffective in this regard.

[7] ***State v. Machner***, 101 Wis.2d 79, 303 N.W.2d 633 (1981).

C. Change of Venue

Gates contends that his trial counsel was ineffective because he failed to move the court for a change of venue "on the basis of underrepresentation of African Americans in the Winnebago County Jury Pool." He claims that he was denied a trial by a fair and impartial jury as required by the United States and Wisconsin Constitutions. In support of this claim, Gates states he will demonstrate two things: (1) that African-Americans are an identifiable group, and (2) that this group is being systematically excluded resulting in a jury pool that does not represent the community. However, in Gates' brief and at the ***Machner*** hearing, he demonstrates neither of these assertions. Gates only makes the following conclusory statements:

> In the instant case, the defendant is an African American. African Americans are underrepresented on the jury pool in Winnebago County. No African Americans were in the pool of persons from which the jury was selected.

Gates offers no statistical or demographic evidence in support of his claim that African-Americans are underrepresented, that such individuals are systematically excluded from jury pools in the county, or that the jury pools do not fairly represent the community from which they are drawn. Because Gates is merely making assertions without presenting any evidentiary support, we need not address this argument any further. *See* ***Grube v. Daun***, 173 Wis.2d 30, 64, 496 N.W.2d 106, 118 (Ct. App. 1992) (stating that if an argument is inadequately briefed, it will not be addressed on appeal).

SUFFICIENCY OF THE EVIDENCE

Gates presents a final contention that his conviction is not supported by the evidence. In support, he argues that "[t]he jury's verdict was undoubtedly based on improperly admitted evidence of Mr. Gates' unsavory lifestyle,

seemingly bad character, and poor conduct towards prison officials, rather than on hard evidence."

When reviewing the sufficiency of the evidence to support a conviction, this court will not substitute its judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 755 (1990). If a reasonable possibility exists that the jury could have adduced guilt from the evidence presented at trial, this court may not overturn the verdict. *See* ***id.***

After a review of the evidence, we find plenty of "hard evidence" to support the jury's guilty verdict. Gates argues that the only evidence the jury could have relied on was the "other acts" evidence, and this evidence was improperly admitted. On the contrary, we have previously concluded that this evidence was properly-admitted, relevant evidence. Furthermore, Gates overlooks other witnesses' testimony and the videotape of the assault. We conclude that this evidence is substantial enough to support Gates' conviction and accordingly, dismiss this argument.

CONCLUSION

In summary, we determine that Gates had effective representation by his trial counsel and the trial court did not commit any prejudicial errors. The evidence Gates terms "other acts" evidence is, in fact, relevant, transactional evidence that is necessary to adequately convey the complete story of the crime. Regarding the prosecution's improper questioning of defense witness Hannah, trial counsel properly raised objections that were erroneously overruled by the court.

This error is deemed harmless because of substantial outcome-determinative evidence in the record. We also determine that trial counsel was deficient for neglecting to object when the trial court omitted reading one instruction orally to the jury; however, this performance was not also prejudicial. Likewise, we reject Gates' arguments that his trial counsel's performance was ineffective for not raising continuous objections, directly impeaching a witness for bias or requesting a change of venue. Lastly, we discern that the evidence sufficiently supports a guilty verdict.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.