

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

Nos. 98-0912-CR, 98-0913-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GEORGE F. PASSARELLI,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Pepin County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Fine, J.

PER CURIAM. George Passarelli appeals a judgment convicting him of two counts of second-degree sexual assault, contrary to § 940.225(2)(a), STATS., and a judgment convicting him of one count of battery and one count of disorderly conduct. He argues that (1) the trial court erroneously instructed the jury; (2) he was denied effective assistance of counsel; and (3) he is entitled to a

new trial in the interests of justice. We reject his contentions and affirm the judgments.

D.J. testified at trial that she was formerly married to Passarelli. She testified that on nearly a daily basis during their marriage, Passarelli would scream at her, call her names, and hit her with his fist. He often threatened to kill her. He told her that if she left him he would hunt her down and kill her. He told her she was crazy. He never let her go anywhere by herself. He made her quit her job. On almost a daily basis, he forced her to perform oral sex.

One night when she was laying in bed, Passarelli came into the bedroom and touched her legs. She told him no. He began to call her names. He told her to perform oral sex. She refused. He told her that he would not take her rejection and began throwing things. He threw a wooden bowl full of objects against the wall over her head. He stood right next to the bed and threw other objects. D.J. was hit in the face and the bridge of her nose was cut. She also had bruises on her cheek and lip and bruises in the shape of fingerprints on her neck.

In the morning Passarelli told her to finish what she was supposed to have started the night before. At first she refused, but he told her "not to get him going." Because she was afraid of being hurt again, she performed oral sex. In the evening, he again requested that she perform oral sex. At first she refused. After he threatened her, she complied.

M.S. testified that she also had been married to Passarelli. The trial court instructed the jury that her testimony was admitted for the sole purpose of showing motive and intent. M.S. testified that Passarelli was physically abusive to her, threatened to kill her, and had forced her to perform oral sex. If she refused,

she was beaten. Although their relationship was ended for more than three years, she still feared Passarelli.

Passarelli testified on his own behalf.¹ He testified that he did not have a fight with D.J. on the dates in question, and that they participated in consensual sex. He testified that she was somewhat reluctant, but when he offered encouragement, she consented. He further testified that D.J. simply believed that she was beaten and controlled because she suffered from depression. He testified that he had the misfortune of marrying two depressed women who were deluded about being beaten and controlled and forced to have oral sex.

During jury deliberations the court received a written communication from the jury. The trial court first conferred with attorneys and then responded to the communication by instructing the jury as follows:

First question is, "The jurors have requested that the Court review the defendant's notes." This court has no authority to review the personal notes of the defendant or of his counsel. This is a matter of privilege under the law of the State of Wisconsin and I cannot be privy to it, all right?

No. 2, "Are the names and addresses of the jurors in the notes?" I can't answer that question because I don't know what is in his notes and I cannot find where his notes are, all right?

No. 3, "Is the same information available to the defendant?" Well, his information that he has taken in this courtroom would be available to him. I have no way of preventing that.

¹ Passarelli testified that he lives and works by the name "Gina." The record reflects that he appeared at trial dressed in women's clothing. At a conference before trial, outside the jury's presence, Passarelli explained that he was a transsexual and a lesbian. The court ruled that there was to be no mention made of Passarelli's decision to dress as a woman. It further stated: "If you are called to the stand and your attorney chooses to ask you questions about your sexual status, then you may answer that question. You are deciding that."

“The jurors are concerned about their personal safety.” All right? I'm concerned about your personal safety, my personal safety, all of the courtroom personnel's safety, all right? And—but this does not concern your decision as to the facts of guilt or innocence in this case. You must decide the facts. It is law enforcement's job to protect you and to protect me. And, remember, the instructions are you are to find the facts and not be intimidated or afraid. You understand that? That is your duty. So this is beyond the scope of my authority or your authority in this case. But I assure you that the law enforcement will have this well in mind, and I am going to order that the names and addresses and telephone numbers of the particular jurors who have served on the jury panel, you 12 people, will be sealed in this file and will not be permitted to be divulged to the public and to the defendant or his counsel. They probably already got that information; but if he doesn't, he can't at a future date go back into that file. That's the best I can do, all right?

Both the State and the defense counsel had no objection.

Passarelli argues that the trial court erred because it expanded its explanation beyond what it had advised trial counsel it would say. In conference with counsel in chambers, the trial court had advised counsel that "I'll be telling them that this is not part of their decision as finders of fact in this case and that their duty is to find the facts in the case and that the law enforcement's duty is to protect them, all right"? Neither the state nor defense counsel had any objection.

Passarelli contends that the court's instructions violated the rule set forth in *State v. Kuntz*, 160 Wis.2d 722, 735, 467 N.W.2d 531, 535 (1991), that the “Circuit courts of this state must inform counsel of changes they make to jury instructions following the instructions conference. We believe that this rule is necessary to ensure that both parties are aware of the actual content of the jury instructions.” Passarelli failed, however, to object to the trial court's supplemental instruction. As a result, we conclude that Passarelli waived his claim of error by

failing to object to the instruction in the trial court at a time when any misstatement or ambiguity could have been remedied. *State v. Schumacher*, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988); *State v. Zelenka*, 130 Wis.2d 34, 44, 387 N.W.2d 55, 59 (1986).

Our supreme court has "emphasized the importance of the rule (sec. 805.13(3), Stats.) requiring that a particularized objection be made and that the grounds for objection to both jury instructions and special verdict questions be stated on the record." *Vollmer v. Luety*, 156 Wis.2d 1, 9-10, 456 N.W.2d 797, 801 (1990). "[I]n the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review." *Id.* (citation omitted). This is but a more particularized application of the general rule that only issues raised at trial may be raised on appeal. *Id.* at 10, 456 N.W.2d at 801. "[Q]uestions not raised and properly presented for review in the trial court will not be reviewed on appeal." *Id.* at 10, 456 N.W.2d at 802.

Nonetheless, Passarelli argues that he was deprived effective assistance of counsel because defense counsel failed to object to and move for a mistrial based upon the prosecutor's and trial court's improper comments. To establish ineffective assistance of counsel, a defendant must show both the counsel's performance was deficient and that it prejudiced his defense. *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711, 714 (1985). Deficient performance measures whether counsel's performance fell below the objective standard of reasonableness. *State v. Johnson*, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986). The prejudice prong measures whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 222, 395 N.W.2d at 183 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The ultimate determination whether counsel's performance was

deficient and prejudicial are questions of law we review de novo. *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

We first address Passarelli's ineffective assistance of counsel claim based upon counsel's failure to object to and move for a mistrial based on the trial court's supplemental instruction. We conclude that the trial court handled the situation in a reasonable, although not perfect, way. We disagree with Passarelli's underlying premise that whenever a defendant frightens a jury so that it is concerned for its safety, the defendant is entitled to a mistrial. Consequently, we conclude that defense counsel's failure to object or move for mistrial does not fall below an objective standard of reasonableness. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985).

We are equally unpersuaded that, even if counsel's failure to object were deficient performance, the omission was so serious as to deprive Passarelli of a trial whose result was reasonable. As appellate counsel observes: "Some of the prejudice accrued at trial by Mr. Passarelli was of his own making." Insofar as the court's instructions are concerned, any prejudicial effect was de minimis, given the nature of the testimony, the obvious fear the witnesses exuded, and the unusual nature of Passarelli's appearance at trial dressed as a woman.

Next, Passarelli argues that defense counsel was ineffective for failing to object to a multitude of allegedly improper prosecutorial comments. At the postconviction hearing, defense counsel testified that he did not object to various remarks of the prosecutor because he did not consider them sufficiently objectionable. We are unpersuaded that counsel's failure to object to the prosecutor's remarks resulted in prejudicial error.

“The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence.” *State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). "The constitutional test is whether the prosecutor's remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoted source omitted). The prosecutor's remarks must be examined in the context of the entire trial. *Id.*

Passarelli complains that the prosecutor's opening remarks were inflammatory.² We conclude that the prosecutor's opening remarks, a graphic way of asking the jury to listen to the evidence, did not overstep the bounds of propriety.

² I want you to feel the fear that these women have for this man. I want you to be able to see it in their face, I want you to hear it in their voices.

....

[T]he testimony is going to show that he is a violent, abusive, sadistic man who has treated his wife, ... for years with abuse, both mental and physical. He degraded her, made her believe she has a mental illness, all for one purpose; to eliminate her will to resist anything he wants her to do. Through fear, humiliation, fear of both physical abuse and of mental abuse, he has created for himself what is basically sex play.

....

[His former wife is] going to tell you that he did exactly the same thing to her; word for word, act by act, the same sequence of plans It was shocking when I reviewed this case to put his prosecution together; everything is identical with regard to those women. Mr. Passarelli was married to two other ladies too, they won't be here to testify.

Passarelli next contends that the prosecutor improperly vouched for witness credibility and argued his personal opinion of guilt and the relative importance of the charges.³ In context, the prosecutor argued from the evidence, not from personal opinion. Although the prosecutor improperly distinguished the felonies from the misdemeanor counts, this reference is not prejudicial. It is within common knowledge that a second degree sexual assault is a more serious crime than a battery or disorderly conduct. Passarelli also complains that the prosecutor's reference to his *demeanor* was improper. We disagree. Any prejudice resulting from the jury's consideration of his demeanor would have been of his own making, not as a result of the prosecutor's reference.

Next, Passarelli objects to the prosecutor's closing argument, claiming that the prosecutor erroneously used "other acts" evidence by suggesting that the victimization of D.J. was consistent with a pattern of conduct.⁴ This

³ Mr. Passarelli in my estimation is guilty of all three, and I think you will come to that same conclusion when you are done. But I am more interested in the two counts of sexual assault. They are felonies, the others are misdemeanors. ... I want you to concentrate on the three elements that you need to find in order to convict Mr. Passarelli of second degree sexual assault.

....

The witnesses that testify for the prosecution will be telling you the truth. If this man testifies, by what you know of him just by his demeanor in the courtroom, you think to yourself if he's going to tell you the truth. You think to yourself if his side of the story is right or not.

⁴ He raped [his former wife] on their wedding night, right there began identical to what he did to [D.J.]. Everything right down to the specific sexual assault, the specific type. He made her perform oral sex on him. How did he do it? He humiliated her, he degraded her, told her he was going to kill her, he physically abused her, the whole thing. What do you suppose the chances are of one person meeting two women, marrying two women, that imagine exactly the same events? What do you suppose the chances of that are? Not very good.

(continued)

argument was more in the nature of a challenge to credibility in view of Passarelli's testimony that his former wives' mental illnesses caused them to imagine the abuse. To the extent the argument could be characterized as a propensity argument, in the context of the evidence supporting the convictions, any error would have been harmless.

Additionally, Passarelli claims that the prosecutor asked the jury to consider factors other than evidence adduced at trial.⁵ "Argument on matters not

....

We heard from [his former wife] that he would strangle her. I asked her if that ever left finger marks, bruises on her neck. She said yes, it did. Exactly the same kind of conduct that Mr. Passarelli engaged in.

....

The truth in this matter is clear. This man sexually assaulted [D.J.] twice in the same day, in the same fashion, by use of threat or violence. Same thing he had done with women he had known in the past. That's what the truth is here. When you come to that conclusion, I'm certain that you will return verdicts of guilty on all of these counts.

⁵ [W]e have to make special arrangements so that [D.J.]'s protected and safe while this is going on, she doesn't sleep at night.

....

[His former wife]'s terrified. We had to make special arrangements for her safety too during the conduct of this trial. ... She came back to tell the truth and she did it.

....

[Witness] same thing. ...[Defense counsel objects] ... She didn't want to testify either.

....

He told her he'd bash her head in

....

(continued)

in evidence is improper." *Neuser*, 191 Wis.2d at 142, 528 N.W.2d at 54 (quoting *State v. Albright*, 98 Wis.2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980)). In view of the evidence admitted, the prosecutor's remarks, while in error, were not critical. We note that counsel did object at one point and the court sustained the objection and cautioned the prosecutor. The trial court gave model jury instructions dealing with trial counsel's arguments. In context of the entire trial, the evidence admitted, the witnesses' obvious fear and reluctance, as well as Passarelli's unconventional choice of attire, we are not persuaded that the prosecutor's comments so infected the trial with unfairness resulting in a denial of due process.

Finally, Passarelli contends that he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. When a claim of error has been waived, this court may review the contention under the interest of justice standard found in § 752.35, STATS. This court will exercise its power of discretionary reversal only in exceptional cases. *Vollmer*, 156 Wis.2d at 10, 456 N.W.2d at 802.

We may order a new trial in the interests of justice for one of two reasons: (1) the real controversy has not been fully tried, or (2) it is probable that justice has for any reason miscarried. *Id.* at 19, 456 N.W.2d at 805. Under the first standard, when the real controversy has not been fully tried, an appellate court may exercise its power of discretionary reversal without finding the probability of a different result on retrial. Under the second standard, however, an appellate

[His former wife] testified that it took some convincing to get her to come here, even though she knows that Mr. Passarelli is a violent and dangerous man, that he needs to be incarcerated.

court must first find a substantial probability of a different result on retrial before exercising its discretionary reversal power. *Id.*

Passarelli argues under the first standard that the real issue in controversy has not been fully tried and therefore makes no attempt to demonstrate that there is a substantial probability of a different result on retrial. In addition to situations involving the erroneous evidentiary rulings, this court may reverse judgments under the first standard where an error in jury instructions occurred but was waived. *See id.* at 20, 456 N.W.2d at 806.⁶ "In a case where an instruction obfuscates the real issue or arguably caused the real issue not to be tried, reversal would be available in the discretion of the court of appeals under sec. 752.35, Stats." *Id.* at 22, 456 N.W.2d at 807. Thus, we turn to Passarelli's argument that the trial court's expanded jury instruction, the prosecutor's improper comments, and the ineffective assistance of counsel prevented the real controversy from being fully tried.

Fairly read, the court's comments conveyed a concern with the safety of all those associated with the court and not that it personally regarded the defendant as a threat. The court did not incite the fears in any way. Instead, the court directed the jury to focus its efforts on deciding the issues based upon the facts presented. It advised that law enforcement was the appropriate agency to be concerned with the protection of the court, jury and personnel. While the supplemental instructions could have been stated more carefully, there is no suggestion that the court was fearful and concerned for the immediate safety of itself and others, as Passarelli contends. We are also unpersuaded that the

⁶ The State's brief implies that our review under the "real controversy not fully tried" category is limited to review of evidentiary rulings.

prosecutor's comments or defense counsel's lack of objection obscured the crucial issue. The evidence supporting the verdict is compelling. Based on the record as a whole, we conclude that the real issue in controversy was fully and fairly tried.

By the Court.—Judgments affirmed.

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

