COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2251-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LESTER YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Lester Young appeals from a judgment convicting him of robbery with use of force, in violation of WIS. STATS. § 943.32(1) (1997-98)[1] and

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

from an order denying his motion for postconviction relief. He argues that his trial counsel was ineffective for failing to: (1) move for dismissal of the charge at the close of the State's case on grounds that the State had not established the elements of the offense; (2) object when one of the witnesses testified as to another witness's credibility; (3) object to the testimony of a doctor who, reading from the medical records of other doctors, described the patient as having been a victim of domestic abuse; (4) request a mistrial when the prosecutor argued to the jury that the victim's recantation is not unusual in domestic cases; (5) argue to the jury that there was a lack of evidence relating to the "taking" element of the charge; and (6) request a mistrial when two of the jurors approached the bailiff and expressed fear that Young might have their addresses. We reject the arguments and affirm the judgment and order.

¶2 The charge grew out of an altercation between Young and his girlfriend, Catherine Scott. Madison Police Officer Christopher Brown testified that he was dispatched to Scott's residence and, upon arrival, saw Scott lying at the foot of the stairs crying. Scott told Brown that on the previous day Young had come to her apartment asking for some of the Valium she had been taking for back pain, and that she had given him some because "she didn't want any problems." She said that when Young came back for more Valium the following day—the day of the incident—she refused and he asked whether she had money for a telephone bill. When Scott showed Young some bills, he said if he couldn't have the Valium, he'd take the money instead and bit her hand, causing her to release the money. Young then pushed Scott to the floor and left her apartment with the money. Brown testified that he saw a faint red semi-circle on Scott's thumb. Scott testified at trial that she had no memory of the events she had related to

Brown, and said that she later found the money in question in a drawer in her apartment.

¶3 A jury convicted Young of robbery with use of force and he was placed on probation for three years. Other facts will be discussed where appropriate.

¶4 The Sixth Amendment to the United States Constitution and Article I, § 7 of the Wisconsin Constitution guarantee every criminal defendant the right to effective assistance of counsel. ***State v. Felton***, 110 Wis. 2d 485, 499, 329 N.W.2d 161 (1983). We review ineffective assistance of counsel claims under the two-part test set forth in ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). The first element of the ***Strickland*** test requires the defendant to show that counsel's performance was deficient—that counsel made such serious errors he or she "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 (1990). In our analysis, we pay great deference to counsel's professional judgment and make every effort to eliminate the distorting effects of hindsight. ***Id.*** Counsel's performance is not deficient unless the defendant shows that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." ***State v. Guck***, 170 Wis. 2d 661, 669, 490 N.W.2d 34 (Ct. App. 1992). If defective representation is found, the defendant must show that counsel's deficient performance prejudiced the defense—that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Johnson***, 153 Wis. 2d at 129. Because representation is not constitutionally ineffective unless both elements of the test are satisfied, ***Guck*** at 669, we may dispose of an ineffective

assistance of counsel claim where the defendant fails to satisfy either element. ***Johnson*** at 128.

¶5 Whether counsel's actions constituted ineffective assistance presents a mixed question of fact and law. ***Strickland***, 466 U.S. at 698. The trial court's factual findings—what the attorney did (or didn't do) and what happened at trial—will be upheld on appeal unless they are clearly erroneous. ***State v. Weber***, 174 Wis. 2d 98, 111, 496 N.W.2d 762 (Ct. App. 1993). Whether the attorney's performance was deficient and, if so, whether it prejudiced the defendant, are questions of law which we review without deference to the trial court's decision. ***State v. Hubanks***, 173 Wis. 2d 1, 25, 496 N.W.2d 96 (Ct. App. 1992).

¶6 Young argues first that his counsel was ineffective for failing to move for dismissal at the conclusion of the State's case on grounds that the State had not established the three elements of the charge. We reject the argument.

¶7 WISCONSIN STAT. § 943.32, "Robbery," states, in part, that:

> (1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means is guilty of a Class C felony:
>
> (a) By using force against the person of the owner with intent thereby to overcome his or her physical resistance or physical power of resistance to the taking or carrying away of the property;

¶8 Thus, to establish its case, the State had to prove that: (1) Scott owned the money; (2) Young took the money from Scott or from the presence of Scott (that there was a "taking" or "asportation"); (3) Young intended to steal the money; and (4) Young used force against Scott with intent to overcome or prevent physical resistance to the taking. *See* WIS JI—CRIMINAL 1475 (1999). Young challenges the first three elements.

¶9 We review the circuit court's denial of a motion to dismiss at the conclusion of the prosecution's case under the following rule:

> … A motion to dismiss is addressed to the proposition of whether the evidence taken most favorably to the prosecution is sufficient to support a finding of guilt beyond a reasonable doubt. Since the motion to dismiss comes at the conclusion of the State's case, it is the obligation of the trial court to determine whether the jury, acting reasonably and construing the evidence then available in favor of the prosecution, could find guilt beyond a reasonable doubt. Two concepts deserve emphasis: (1) That the only evidence considered is that adduced during the State's case; and (2) that that evidence must be construed most favorably to the prosecution.

Bere v. State, 76 Wis. 2d 514, 523, 251 N.W.2d 814 (1977).

¶10 Considering the facts adduced during the State's case-in-chief in light of that standard, we are satisfied that had Young's counsel made such a motion, the trial court would have denied it. The word "owner" as used in WIS. STAT. § 943.32(3) is "a person in possession of property whether the person's possession is lawful or unlawful"; and the element of "taking" merely requires the "slightest movement" of the stolen goods. ***State v. Johnson***, 207 Wis. 2d 239, 246, 558 N.W.2d 375 (1997). And the defendant's "intent" may be inferred from "[his or her] conduct, including … words and gestures taken in the context of the circumstances." ***State v. Webster***, 196 Wis. 2d 308, 321, 538 N.W.2d 810 (Ct. App. 1995). Scott's possession of the money when Young inquired about the phone bill plainly satisfies the element of ownership. Similarly, when Scott testified that Young told her that if he could not have the pills, he would take the money instead, that he then bit her hand, causing her to release the money, pushed her to the floor and fled with the money, the elements of an intentional taking were met. On that evidence, the jury could have determined Young's guilt beyond a

reasonable doubt. We conclude, therefore, that his counsel's failure to move for dismissal was neither deficient performance nor prejudicial to the defense.

¶11 Young next argues that counsel was ineffective for failing to object to certain testimony of Officer Brown which, Young says, improperly commented on the credibility of another witness (Scott). At trial, the prosecutor asked Brown about his conversations with Scott at the time she gave her first account of the events at issue, including questions such as whether there was "anything about her that appeared to be evasive to you," or "[a]nything about her [that appeared as if] she was fabricating [her] story?; or whether she had "change[d] her story" or was "inconsistent." Brown's answer to all such questions was "No." Young, referring us to the well-known line of cases holding that one witness may not testify as to another's credibility,[2] argues that Brown's responses to the questions—and the prosecutor's reference to that testimony in his closing argument—was improper because it "clearly communicated to the jury Brown's own opinion that Scott was telling the tru[th] when she told Brown about the robbery."

¶12 Without deciding whether counsel's performance was deficient for failing to object to the questions, Young has not persuaded us that counsel's conduct prejudiced his defense. This wasn't a case of one witness commenting on the veracity of another witness's trial testimony. It was simply a police officer describing the factors which, to him, rendered Scott's accusations of Young sufficient to pursue charges against him. The jury surely must have known that both Brown and the district attorney found Scott to be credible and believed her story. If they hadn't, Young would never have been charged with the offense.

[2] *See* ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984), and ***State v. Jensen***, 147 Wis. 2d 240, 249 432 N.W.2d 913 (1988).

These factors, coupled with the court's instructions admonishing the jurors that they are the sole judges of the credibility of the testimony, negates any likely prejudice resulting from the officer's testimony.

¶13 Young's next claim of ineffectiveness is based on counsel's failure to object—for lack of foundation—to the testimony of a physician, Dr. James Svenson, who at one point in his testimony read a passage from another physician's treatment record indicating that, after being taken to the hospital, Scott told the other doctor that she had been hit or "thrown to the floor" by Young. Svenson could not say for sure, however, whether the other doctor actually took that information directly from Scott, or whether it came from other hospital personnel. As a result, says Young, Svenson's testimony is inadmissible for lack of foundation. Again, we disagree. We are satisfied that, had counsel objected to the admission of Svenson's testimony or the records upon which he relied, the objection would have been overruled because both are admissible as exceptions to the hearsay rule. Under WIS STAT. §§ 908.03(4) and (6), the following are not considered hearsay: Those subsections provide as follows:

> **(4)** STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment ….
>
> ….
>
> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶14 It is undisputed that Scott's statement to medical personnel at the hospital relating to the cause of her injury was made for the purpose of medical diagnosis or treatment within the meaning of subsection (4). Similarly Svenson's use of the other physician's report is permissible under subsection (6). He testified, for example, that such an entry in the hospital admission records would have been made in the course of regularly conducted practices and procedures at the hospital, and that both the supervising physician and the resident would have interviewed Scott in the process. Thus, even though Svenson was not the person who made the entry into the medical record about which he was testifying, and despite the fact that he had no personal knowledge as to whether the reporting physician spoke directly with Scott prior to making the entry, or whether he simply noted into the record certain information relayed to him from a resident or nurse, his testimony and the medical records are admissible under WIS. STAT. § 908.03 and Young's counsel was not deficient for failing to object.

¶15 Young next challenges counsel's effectiveness on grounds that he failed to object to the comment made by the prosecutor during his closing argument that "[d]omestic cases happen each day and it is not unusual for victims to recant the[ir] testimony." He argues that the prosecutor's argument, which extended beyond reasoning from the evidence and in fact suggested that the jury arrive at its verdict by considering factors other than the evidence—i.e., that domestic abuse victims recant their stories—was impermissible and warranted a mistrial.

¶16 Young's trial attorney testified that he affirmatively decided against objecting to the prosecutor's statement because he didn't think it was "worth" pursuing under the circumstances. He said he "was making his own argument" and "didn't feel that [he] needed to object." In reviewing counsel's performance,

we give great deference to the attorney's strategic choices and make every effort to avoid making determinations based on hindsight. ***Johnson***, 153 Wis. 2d at 127. And we cannot say here that counsel's failure to object to the prosecutor's comment was a representational deficiency "so serious that [he] was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." ***Id.***[3]

¶17 Next, Young argues that counsel was deficient because, in his closing argument, he didn't "impress[] the jury with the fact that there was very little evidence that Young committed the robbery." According to Young, counsel should have placed greater emphasis on various inconsistencies in Scott's recounting the event to various people—particularly the fact that she never told any of the medical personnel at the hospital that she had been robbed, but only that she had been physically assaulted. Young also says that counsel should have argued that none of the medical reports received as exhibits noted any claim on her part that Young had robbed her, and should have placed greater emphasis on Scott's testimony that she later found the money in a drawer. We are not persuaded.

¶18 First, the fact that the medical records didn't reflect that Scott mentioned the robbery doesn't mean that she didn't tell any of the hospital personnel about the robbery or the reason she was attacked. It is entirely possible that the medical staff did not record any mention of the robbery because, unlike the assault, the taking of the money was not relevant to the history of Scott's injury, or its diagnosis or treatment. What was relevant—and what is included in the reports—is

[3] Here, too, we are unable to ascertain prejudice. In our view, the prosecutor's statement is unlikely to have been prejudicial in view of the court's instruction to the jurors that they are not to consider counsel's arguments as evidence in the case. Had counsel objected, we doubt the trial court would have done more than remind the jury of that rule.

that Scott complained of back pain after being pushed to the floor by Young. Beyond that, we note that Young's counsel did mention in his closing argument that the money was later found in a drawer. We see no deficient performance here.

¶19 Finally, we believe Young's final argument—that counsel was ineffective for failing to request a mistrial when, during a recess in the trial proceedings, two jurors inquired to the court whether Young had access to their addresses—is similarly unavailing. When the jurors made their inquiry, counsel expressed his concern to the court as to whether the two jurors could still be fair and impartial, and the court responded that, in its view, conducting a *voir dire* examination of the jurors would do more harm than good. Instead, the court instructed the jurors that Young had no personal information about them; and we think that handling the matter in this way was well within the circuit court's discretion. We are similarly satisfied that, even had counsel made a more formal request to the court, the result would have been the same.[4]

[4] Young also requests a new trial in the interest of justice. A new trial is appropriate when the real controversy has not been fully tried or will not likely produce the same result. ***State v. Von Loh***, 157 Wis. 2d 91, 102, 458 N.W.2d 556, 560 (Ct. App. 1990). For the reasons already discussed, we do not believe a new trial would produce a different result, and therefore deny Young's request. We also find Young's argument that the real controversy was not tried unavailing. While we have the power to order a new trial on that basis under WIS. STAT. § 752.35, that power is discretionary, and should be exercised only in exceptional cases. *See* ***State v. Betterley***,183 Wis. 2d 165, 178, 515 N.W.2d 911 (Ct. App. 1994). The nature of the disputed statements in this case is minimal. Even if we were to find that the testimony was impermissibly admitted (which we do not), it was not so prejudicial as to prevent the real controversy from being tried. As we have noted, the police officer's statement as to whether or not he had the impression that the victim was fabricating her story merely amplified a fact which was already implicit in the charge: that the police believed the victim. And as stated above, the testimony based on medical records was admissible under a hearsay exception. For these and all the reasons stated in the body of this decision, we decline to exercise our discretion to reverse under § 752.35.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.