

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP525-CR

Cir. Ct. No. 2003CF1327

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VIRGIL MARZELL SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Virgil Marzell Smith appeals from a judgment entered after a jury found him guilty of kidnapping and second-degree sexual assault with the use of force, contrary to WIS. STAT. §§ 940.31(1)(a) and

940.225(2)(a) (1999-2000).¹ He also appeals from an order denying his postconviction motion. Smith claims the prosecutor committed misconduct by asking questions during Smith's cross-examination, which caused him to comment on his right to remain silent and the truthfulness of other witnesses. He asserts that he should be afforded a new trial as a result of the prosecutor's questions because the conduct constitutes plain error, warrants discretionary reversal, or constitutes ineffective assistance of trial counsel (because his trial counsel did not object during the prosecutor's questioning). Because the prosecutor's questioning did not unfairly comment on Smith's right to remain silent or violate *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), we affirm.

BACKGROUND

¶2 On October 17, 2000, the victim, Angela C., reported to police that a man had accosted her and physically and sexually assaulted her. The police collected evidence from the scene, but no suspect was identified. In March 2002, the police connected Smith to the scene via his DNA evidence. Blood found on a knife used during the crime matched Smith's DNA. Smith's blood was also identified as that which was on the bra Angela wore on the night she was assaulted. Angela identified Smith from a lineup.

¶3 Smith was charged with the crimes noted above and the case was tried to a jury. Smith testified in his own defense, telling the jury that his encounter with Angela on the night in question was a consensual prostitution arrangement gone awry. He testified that he saw Angela go under a bridge, but

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

did not see her come out. He approached her and saw her pulling up her pants, assuming she had gone to the bathroom. He asked her what she was doing and she responded she was trying to make some money. He pulled out his money and asked her for oral sex. She said she was tired, so “why don’t you just f--- me” or something to that effect. When she pulled down her pants, he suggested they go somewhere more secluded and agreed that he would pay her \$20. When Angela dropped her pants, Smith said she smelled and he did not want to catch any diseases. He testified she then became upset and pulled a knife on him. She demanded her money and came at him with the knife, cutting his hand and slashing him near his elbow. They struggled until he was able to throw the knife down. During the struggle, he ripped her shirt. He then lifted his shirt to show her he had a gun and threatened to kill her. She then ran off.

¶4 Angela’s account differed substantially from that of Smith’s account. Angela testified that she had watched a movie with a man she knew as “D” at his residence. D then said he would give her a ride home, but on the way he stopped at a gas station and asked her to go inside to buy him a soda. When she came out, D was gone. She walked towards a bus stop and, after waiting awhile, decided to walk home. She testified that as she was walking under an overpass, a man ran up behind her and put a large knife to her neck. He told her to shut up and then said that she was going to “suck his dick or he was going to f---” her. He led her toward a secluded parking lot at knifepoint.

¶5 Angela said that the area where he took her was lit up and she could see his face. She was scared and thought he was going to kill her. She said the man sat her down, exposed his penis and told her to “suck his dick.” The man threatened to kill her if she bit him. She said she almost escaped twice. The man held the knife between them and she grabbed it, bent it down, and threw it.

Angela said she cut her hand and the man's hand during the struggle. The man ripped her shirt during the struggle. She started to run away, but he grabbed her by her hair and dragged her back. The man threw her against a warehouse garage door and told her he was going to kill her.

¶6 Next, the man asked, "Are you going to suck my dick?" She said she felt she could not struggle any more and told him, "Why don't you just f--- me?" She said she would "rather have did that than do that mouth stuff with him." The man responded that he did not want to get any diseases. The man then threatened to kill her if she did not give him oral sex. She proceeded to do so and he ejaculated into her mouth. The man then told her to go. She grabbed the knife and ran.

¶7 She ran to the nearest restaurant, told the people inside she had been raped, and asked for help. The police were called and Angela gave the knife, which she had taken from the scene, to the police when they arrived. Angela took the police to the scene, where they took pictures and recovered her shoes, shirt, and a soda bottle. Angela was then examined at a hospital and found to have abrasions on her lip, her cheek bone, dried blood on her head, lacerations on her hand, and a laceration on her flank.

¶8 The next day, Angela looked at photos at the police department, but did not pick out a suspect. Eight days later, she was brought to the station for a police lineup. She told police her assailant was not in the lineup. The police told her they had exhausted all leads. Then, in 2002, the police contacted her and advised her that the computer made a "cold hit" and matched Smith's DNA to the blood on the knife and her clothes. She came in and picked Smith out of a photo array and a lineup.

¶9 The jury convicted Smith and he was sentenced. Judgment was entered. Smith filed a postconviction motion, which was denied. He now appeals.

DISCUSSION

A. Right to Remain Silent.

¶10 Smith contends that the prosecutor committed misconduct during Smith's cross-examination. The first alleged misconduct involved questioning him about his failure to seek medical treatment or tell anyone what he claims occurred the night of the incident. The challenged excerpt included the following questions and answers between the prosecutor and Smith:

Q You never called the police about that, did you?

A No.

Q You said you were cut badly, correct?

A Yes.

Q Never went to a hospital; did you?

A No.

Q Never got treatment by any doctor?

A No.

Q Never told anybody about this; did you?

A Nope.

Q You kept all of this inside of you until you come to court today, correct?

A I had no choice. I got to prove my innocence.

This cross-examination followed Smith's testimony, wherein he told the jury his version of what happened on the night in question. Smith argues that this questioning violated his right to post-*Miranda* silence.² We cannot agree.

¶11 Whether a defendant's right to remain silent is violated is a question of constitutional fact; where the facts are undisputed, our application of constitutional principles involves an independent review. *State v. Nielsen*, 2001 WI App 192, ¶32, 247 Wis. 2d 466, 634 N.W.2d 325.

¶12 To determine whether a prosecutor has improperly violated a defendant's right to remain silent after receiving *Miranda* warnings, we utilize the following test. We must assess "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent." *State v. Cooper*, 2003 WI App 227, ¶19, 267 Wis. 2d 886, 672 N.W.2d 118. In making the assessment, we look to the entire "context in which the statement was made in order to determine the manifest intention that prompted it and its natural and necessary impact on the jury." *Id.*

¶13 Here, the prosecutor was clearly asking these questions in order to challenge the credibility of Smith's version of events. The implication was that if he was the victim on the night in question, he would have sought medical treatment for his cut, and he would have filed a police report. The logical inference from his decision to forego either alternative was that he was lying about what happened. The natural inference was that if his version of events was

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

credible, he would have sought medical treatment and reported the attempted armed robbery to the police—or at least told someone—a friend, neighbor, or family member.

¶14 Smith is correct that the prosecutor’s use of the word “never” resulted in the failure to differentiate between pre-*Miranda* and post-*Miranda* silence. However, that failure did not result in any constitutional violation. According to the aforereferenced test, our review is based on whether the language used was intended to or was of such character that the jury would see the questioning as a comment on Smith’s right to remain silent.

¶15 Our review demonstrates that, in context, the prosecutor’s statements were not improper because they were intended only as a challenge to the credibility of Smith’s version of the facts, and could not be taken as a comment on his right to remain silent. In context, none of these questions implicated his right to remain silent after he was advised of his *Miranda* rights. Consequently, because this line of questioning was not improper, it cannot form the basis for reversal on any of the grounds suggested by Smith.

B. Commenting on Truthfulness.

¶16 The second excerpt of prosecutor questioning, which Smith contends constitutes misconduct, involves questions and answers asking Smith whether other witnesses were telling the truth. The challenged excerpt provides:

Q She [Angela] didn’t have the knife with her?

A She didn’t have the knife with her. That’s why the fingerprints weren’t on there. My blood.

Q So she lied about that?

A Yes. Yes.

- Q The police lied about collecting the knife?
- A They didn't lie about collecting it but they lied about where it was.
- Q No. That's part of collecting it. Collecting is ... getting from somewhere. The police lied about that, correct?
- A Apparently so.
- Q Officer Lintonen lied about that?
- A Yes, did he [sic].
- Q Officer Lintonen has never seen you before?
- A I am pretty sure not.
- Q Detective Hall lied about that?
- A Yes.
- Q The shoes which Detective Hall saw at the scene, she lied about that?
- A Yes, she did.
- Q The soda bottle which Detective Hall found at the scene, she lied about that?
- A Yes, she did.
- Q Did she lie about taking your buccal swabs?
- A No, she didn't.
- Q But everything she found at the scene she lied about?
- A Yes. That stuff was planted there.
- Q So what you want to be believed is that [Angela] ran away and within several blocks decided to concoct this story of being raped, correct?
- A She helped her work on it.
- Q The police put her up to it; is that what you're saying?

A That's right. Her and her partner. Her boss or whoever Braunwriter was. Braunwriter false imprisoned me in '99.

Q So the police have railroaded you; is that what you're saying?

A That's what I'm saying. Braunwriter false imprisoned me in order to get this conviction to keep me from suing him. They're trying to hide me in the prison system.

Q This is a conspiracy is what you're saying?

A Pretty much.

Q It's a conspiracy in which --

A I've been deprived.

Q [Angela] is involved?

A Yes.

Q In which the police are involved, correct?

A Yes.

Q It's conspiracy to get you; is that what you're saying?

A That's what I'm saying.

Q And [Angela] actually didn't come up with the story on her own; the Milwaukee Police Department came up with it?

A They helped her with it.

Q They helped her, they assisted her?

A They assisted her.

Q They told her what to say?

A Pretty much.

Q They planted the information in her head?

A Pretty much.

Q So she's a pawn of the police department?

- A And she doesn't even know it.
- Q She doesn't even know it?
- A She doesn't even know it.
- Q She's been brainwashed?
- A I wouldn't say that. They took advantage of her lack of knowledge, should I say.
- Q And Detective Hall, who has never seen you before, is part of this conspiracy?
- A Detective Hall when she first came to see me, the first thing she said, did I know a Detective Braunwriter.
- Q And Detective Hall is sacrificing her career to conspire to get you?
- A She has what you call a conflict of interest. It should have been anybody but Detective Braunwriter's staff to come and question me about this incident.
- Q You obviously have a beef with Detective Braunwriter, correct?
- A Detective Braunwriter false imprisoned me. Because of his actions I've been held in prison illegally since '99.
- Q When did Detective Braunwriter testify during this trial?
- A He didn't testify at all here because it would have exposed him.
- Q Good answer.

¶17 Smith contends that this line of questioning resulted in the prosecutor soliciting impermissible testimony in violation of *Haseltine*, which prohibits witnesses from commenting on the truthfulness of other witnesses for the purpose of bolstering the credibility of another witness' testimony. *Id.*, 120 Wis. 2d at 96. He claims that the prosecutor's questions to him about the truthfulness

of Angela, Officer Lintonen and Detective Hall were improper. We reject his contention.

¶18 Smith's counsel did not object during any of the questioning and, therefore, this claim will be reviewed under whether his counsel provided ineffective assistance. To sustain a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶19 An attorney's performance is not deficient unless he or she made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. To satisfy the prejudice prong, appellant must demonstrate that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. In other words, there must be a showing 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." *Id.* at 694.

¶20 Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *State v. Pitsch*, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). The trial court's determination of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *Id.* at 634. The ultimate conclusion, however, of whether the conduct resulted in a violation of defendant's right to effective

assistance of counsel is a question of law for which no deference to the trial court need be given. *State v. Harvey*, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987).

¶21 *Haseltine* prohibits witnesses from testifying about whether another witness is telling the truth. *Id.*, 120 Wis. 2d at 96. The reason for this rule is that the credibility of the witnesses is the province of the jury. *Id.* In a recent line of cases, however, our supreme court clarified the *Haseltine* rule. It held that when the purpose and effect of the prosecutor's cross-examination is to impeach the defendant's credibility, rather than bolster the credibility of another witness, the questioning is permissible. *State v. Johnson*, 2004 WI 94, ¶2, 273 Wis. 2d 626, 681 N.W.2d 901.

¶22 Here, the record reflects that the prosecutor's cross-examination of Smith was for the purpose of challenging the credibility of his story. He claimed that Angela had not taken the knife from the scene, but that the police recovered the knife when Angela took them back to the scene. He claimed that Angela did not leave her shoes or soda bottle at the scene, and that the police had planted the evidence against him.

¶23 The prosecutor's questions to him about Angela and the officers were not for the purpose of attesting to the veracity of the other witnesses. Rather, the questions were intended to undermine Smith's credibility by comparing his testimony to that of Angela, who was an eyewitness to the crime, and to that of the police officers who personally gathered the evidence. Each witness was involved in the event—either directly in the event itself or the investigation of the scene shortly after the event. Thus, this testimony did not detract from the jury's role as assessor of credibility. As such, the line of questioning was not improper and therefore could not constitute ineffective assistance of counsel.

¶24 We agree with the trial court's assessment that the challenged questions here are more akin to those in the *Johnson* case, as opposed to the *Haseltine* case. Even if the questioning regarding the officers was objectionable, Smith failed to establish that any prejudice resulted from the line of questioning. There is no reasonable probability of a different outcome had his counsel objected. The jury heard Smith's version of the facts and assessed his credibility. They believed Angela. The absence of the challenged cross-examination here would not have altered the outcome. Because Smith has failed to establish that his counsel provided ineffective assistance, we reject this claim. Similarly, there is no basis in the record for this court to conclude that a discretionary reversal is warranted or to reverse based on plain error.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

