COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1121-CR **Cir. Ct. No. 98-CF-175**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH E. NEWTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Joseph Newton appeals a judgment convicting him of second-degree reckless endangerment and fleeing an officer, both as a habitual

criminal, contrary to WIS. STAT. §§ 941.30(2), 346.04(3) and 939.62.[1] Newton also appeals the denial of his postconviction motions. Newton argues that his trial counsel was ineffective for failing to (1) request jury instructions on self-defense and defense of another and (2) object to the admission of other acts evidence. He also claims reversible error for the trial court's admission of Newton's prior convictions and for what he contends was improper judicial fact-finding. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 In December 1998, Newton was charged with fleeing a police officer by increasing the speed of his vehicle, recklessly endangering the safety of a police officer and recklessly endangering the safety of his sixteen-month-old son. Each count included a penalty enhancer based upon Newton's June 1998 conviction for felony escape from custody.

¶3 On November 27, 1998, Shawano Police officers Judy Johnson and Michael Wizner attempted to execute three outstanding warrants for Newton's arrest. At the time, Newton was sitting in the driver's seat of a car parked in the driveway of his girlfriend's grandmother's home. Officer Johnson parked her squad car behind Newton's car in the driveway and approached Newton's car on foot. Although there is a factual dispute as to when the officer's guns were pulled and shots were ultimately fired, it is undisputed that after the officers directed Newton to exit his vehicle, Newton backed his car into the squad car, did a U-turn and accelerated into the street. It is also undisputed that Newton's sixteen-month-

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

old son, who had been seated in the car, was shot in the foot. A high-speed chase ensued and Newton was eventually apprehended and arrested by tribal police on the Menominee Indian Reservation.

¶4 Following a jury trial, Newton was acquitted of recklessly endangering the safety of a police officer, but convicted on the remaining two counts. Newton was sentenced to six years' imprisonment on each count. His motions for postconviction relief were denied and this appeal followed.

ANALYSIS

I. Ineffective Assistance of Counsel

¶5 Newton argues that his trial counsel was ineffective for failing to request jury instructions on self-defense and defense of another and for failing to object to the admission of other acts evidence. The test for ineffective assistance of counsel claims requires defendants to prove both deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. A defendant will fail if counsel's conduct was reasonable, given the facts of the particular case, viewed at the time of counsel's conduct. ***Id.*** We will "strongly presume" counsel to have rendered adequate assistance. ***Id.***

¶6 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. ***Id.*** at 687. In order to succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If this court concludes that the defendant has not proven one prong, we need not address the other prong. ***Id.*** at 697. On appeal, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, proof of either the deficiency or the prejudice prong is a question of law that this court reviews independently. ***Id.***

A. Jury Instructions on Self-Defense and Defense of Another

¶7 Pursuant to WIS. STAT. § 939.48(1), a defendant is permitted *to threaten or intentionally use force* in self-defense if: (1) the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; (2) the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and (3) the defendant's beliefs were reasonable. *See* WIS JI—CRIMINAL 800 (emphasis added). As for the privilege of defense of another, the defendant must reasonably believe that the third person would be privileged to act in self-defense against someone unlawfully interfering with the third person and that the defendant's intervention is necessary for the protection of the third person. ***State v. Jones***, 147 Wis. 2d 806, 814-15, 434 N.W.2d 380 (1989). *See* WIS. STAT. § 939.48(4).

¶8 The privileges of self-defense and defense of another do not disprove or negate any of the elements of the charged offenses, but rather, provide a defense to prosecution for conduct that would otherwise be criminal. *See* ***State v. Dundon***, 226 Wis. 2d 654, 662, 594 N.W.2d 780 (1999). An instruction on self-defense is required only when "a reasonable construction of the evidence,"

viewed in a light most favorable to the defendant, would allow a jury to find that the defendant acted in self-defense. ***Jones***, 147 Wis. 2d at 816.

¶9 Here, because Newton's conduct did not involve the use of force against a person, the privileges of self-defense or defense of another were not applicable to defend against either fleeing an officer or recklessly endangering his sixteen-month-old son.[2] As this court recognized in ***State v. Olsen***, 99 Wis. 2d 572, 579-80, 299 N.W.2d 632 (Ct. App. 1980), "those defenses justify an individual's use of force." The ***Olsen*** court further concluded that "[i]n the absence of an allegation or evidence that defendant used force, the trial court was correct in ruling that the defenses of self-defense and defense of others were not available to defendant." ***Id.*** Likewise, because Newton did not use force in either fleeing an officer or in defense of his son, these privileges were not available to him.[3] Because the law does not support Newton's claims of self-defense or

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[2] Newton, citing ***State v. Brown***, 107 Wis. 2d 44, 318 N.W.2d 370 (1982), nevertheless argues that self-defense and defense of another are available despite the lack of a use of force. In ***Brown*****,** our supreme court used the term "defense of legal justification" to include self-defense, defense of another, coercion, necessity and police misconduct by entrapment. There the defendant was convicted of speeding contrary to WIS. STAT. § 346.57(4)(h) (1979-1980), and argued on appeal that the trial court had erred by refusing to instruct the jury on these legal justifications. ***Id.*** at 48. The court held that

> where a violation of WIS. STAT. § 346.57(4)(h) (1979-1980), occurs, the actor may claim the defense of legal justification if the conduct of a law enforcement officer causes the actor reasonably to believe that violating the law is the only means of preventing bodily harm to the actor or another and causes the actor to violate the law.

Id. at 55-56. Because ***Brown*** dealt specifically with a violation of § 346.57(4)(h), a strict liability offense, it is inapplicable to the present facts. In any event, application of self-defense or defense of another to the facts of this case would impermissibly allow Newton to assert a privilege for resisting a lawful arrest.

[3] The State concedes that Newton could arguably have obtained a self-defense instruction to the charge of recklessly endangering officer Johnson's safety. Because the jury acquitted Newton of this charge, the jury instruction issue with respect to that charge is moot.

defense of another, Newton was not prejudiced by his counsel's failure to request these instructions.[4]

¶10 In any event, as the trial court noted at the hearing on Newton's postconviction motions, it was a reasonable defense strategy to infer self-defense, but ultimately proceed on a theory that the police, by use of improper procedure, had caused the entire incident. As this court recognized in ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996), "[a] strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel."

B. Other Acts Evidence

¶11 Newton argues that his trial counsel was ineffective for failing to object to the admission of other acts evidence. Specifically, Newton disputes the State's references to his involvement in an earlier high speed chase with Oconto County authorities.

¶12 Admissibility of other acts evidence is governed by a three-prong test. The first prong asks if the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). If the

[4] Newton also requests that this court exercise its discretionary authority under WIS. STAT. § 752.35 to order a new trial. He argues that the failure to give the self-defense and defense of another instruction resulted in the full controversy not being tried. We cannot conclude that either the self-defense or defense of another instruction would have played a significant role in the jury's verdict and we are not convinced that the defendant was denied a full, fair trial. *See* ***Air Wis., Inc. v. North Central Airlines, Inc.***, 98 Wis. 2d 301, 318, 296 N.W.2d 749 (1980). Therefore, we decline to reverse and remand for a new trial.

other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2), the analysis turns to whether the other acts evidence is relevant and finally, whether its probative value outweighs the danger of unfair prejudice. *See* ***Sullivan***, 216 Wis. 2d at 772-73. The probative value of other acts evidence depends in part upon its "nearness in time, place, and circumstance to the alleged crime or element sought to be proved." ***State v. Plymesser***, 172 Wis. 2d 583, 595, 493 N.W.2d 376 (1992). The rule is intended "to exclude evidence which is relevant only for showing a disposition [or lack of disposition] to commit a crime." ***State v. Fishnick***, 127 Wis. 2d 247, 253, 378 N.W.2d 272 (1985).

¶13 Here, Newton's prior fleeing incident could have been admitted as "necessary to a full presentation of the case" because it explained the basis for Newton's arrest warrants and also explained why the officers were concerned about his possible flight. *See* ***State v. C.V.C.***, 153 Wis. 2d 145, 162, 450 N.W.2d 463 (Ct. App. 1989). In any event, admission of this prior act would not have been used to show propensity as there was no dispute at trial that Newton ignored the officers' directions and knowingly fled the scene. Rather, the only issue at trial was whether Newton's conduct should be excused because it was precipitated by the police officers' use of improper procedure. Because Newton has failed to establish prejudice, we conclude that counsel was not ineffective for failing to object to admission of Newton's prior bad act.

II. Prior Convictions

¶14 Newton contends that the trial court erred by admitting evidence of all six of Newton's prior convictions. Specifically, Newton argues that the trial court failed to properly exercise its discretion by admitting the fact and number of Newton's prior convictions. We are not persuaded.

¶15 Whether to admit prior conviction evidence for impeachment purposes under WIS. STAT. § 906.09 is a matter within the discretion of the trial court. ***State v. Kruzycki***, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995). "When we review a discretionary decision, we consider only whether the trial court properly exercised its discretion, putting to one side whether we would have made the same ruling." ***Id.*** Nonetheless, a trial court's misapplication of the law is an erroneous exercise of discretion on which we must reverse the trial court's ruling. ***State v. Hutnik***, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968).

¶16 A trial court considering whether to admit evidence of prior convictions for impeachment purposes should consider the following factors: (1) the lapse of time since the conviction; (2) the rehabilitation or pardon of the person convicted; (3) the gravity of the crime; and (4) the involvement of dishonesty or false statement in the crime. ***Kruzycki***, 192 Wis. 2d at 525. These factors are weighed in a balancing test to determine whether the probative value of the prior conviction evidence "is substantially outweighed by the danger of unfair prejudice." WIS. STAT. § 906.09(2).

¶17 WISCONSIN STAT. § 906.09 indicates the intention that all criminal convictions be generally admissible for impeachment purposes. ***State v. Kuntz***, 160 Wis. 2d 722, 751-52, 467 N.W.2d 531 (1991). The statute reflects the longstanding view in Wisconsin that "one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). Furthermore, the prejudice that may accompany introducing past convictions is mitigated by the restrictions placed on the scope of the inquiry into the past convictions. *See* ***id.*** at 688-89. The examiner may only ask the witness if he has ever been convicted of a crime and, if so, how many times. ***State v. Rutchik***, 116 Wis. 2d 61, 76, 341

N.W.2d 639 (1984). If the witness's answers are truthful and accurate, then no further inquiry may be made. ***Moore v. State***, 83 Wis. 2d 285, 295, 265 N.W.2d 540 (1978).

¶18 Here, the trial court considered the lapse of time since the previous convictions as well as the basis for these convictions. The trial court recognized that it did not have to allow admission, but nevertheless concluded that admission was appropriate for impeachment purposes. We conclude that the trial court appropriately exercised its discretion. Further, given the limited inquiry into only the fact and number of Newton's prior convictions, we conclude that Newton was not unduly prejudiced by the trial court's decision to permit the introduction of this evidence.[5]

III. Judicial Fact-Finding

¶19 Finally, Newton claims the trial court improperly invaded the province of the jury by engaging in judicial fact-finding, thus depriving Newton of his right to a jury trial.

¶20 During the jury trial, Dennis Waller was called by the defense as an expert on police procedure. During direct examination of Waller, defense counsel asked: "And to your knowledge, was Deputy Wizner ever involved in a shooting

[5] Newton, citing ***State v. Smith***, 203 Wis. 2d 288, 298-99, 553 N.W.2d 824 (Ct. App. 1996), contends that the trial court impermissibly made a "blanket ruling" as to all convictions. Newton argues that the trial court should have considered each conviction separately for purposes of admissibility. ***Smith***, however, is inapplicable to the present case. In ***Smith***, the trial court did not individualize its analysis to each of the witnesses' prior conviction evidence; rather, the trial court made a blanket ruling excluding all of the witnesses' prior conviction evidence. ***Id.*** at 299. Here, the trial court considered the basis for each of Newton's six prior convictions.

where a citizen of Shawano was killed?" The State's objection to the question was sustained and the following exchange outside the jury's presence occurred:

> [Prosecutor]: Judge, if we could with regard to [defense counsel]'s last question. I think that the potential harm of that statement has to be clarified for the jury.
>
> What happened was Mr. Wizner was shot at by somebody. He never even returned any fire. And I think that that should be put on the record. And the jury should be made aware of that. I don't think telling them that they should disregard their implication that he was involved in a shooting in Shawano County. [sic]
>
> The other thing is he was an Oconto county resident. And Deputy Wizner never fired.
>
> I think it's extremely misleading. And I think the jury should be informed that Deputy Wizner was shot at by another person, and he never returned fire.
>
> [Court]: Any Comment
>
> [Defense Counsel]: Well, Your Honor, I believe that there were a lot of statements made that were misleading in this particular case. It was my understanding that Mr. Wizner was involved in a shooting and that someone was killed. And although he didn't take those shots, he was still with another person when that occurred.
>
> [Court]: What's the point of that? You're trying to make him look like some kind of a cowboy. [You're] trying to make him look gun-happy. That's really quite outrageous. That question –
>
> I don't know how to solve the problem. I tried to give a cautionary instruction, you don't think that's enough?
>
> [Prosecutor]: I don't think so, Judge. What happened in that case is Deputy Wizner was hit with something when the man shot at him. He never returned any fire. I think the jury should be made aware of that.
>
> [Court]: What do you propose I tell them?
>
> [Prosecutor]: I think that The Court could simply state to the jury that there was a question by [defense counsel] and in fact Deputy Wizner was shot at by a citizen. He was struck with something, and he never returned any fire.

> [Court]: I think I better do that in order to eliminate any potential prejudice that has been created by that question. Otherwise you're ready to proceed?

The jury was then recalled to the courtroom and instructed:

> Ladies and gentlemen, just before we quit, [defense counsel] had asked whether Officer Wizner had ever been involved in a shooting before. And I have now determined that in the prior incident, Officer Wizner was shot at by a suspect and struck. And Officer Wizner never fired his gun in that incident.
>
> Otherwise, you can completely disregard that testimony.

¶21 Trial courts have the responsibility and discretion to formulate curative instructions to reduce the risk that a jury may be adversely influenced by some error that occurred at trial. *See* ***State v. Evers***, 139 Wis. 2d 424, 447-49, 407 N.W.2d 256 (1987). Here, the trial court's statement was made in the form of a curative instruction. The statement was undisputed, factually accurate and related to a collateral matter. The trial court did not err and there is no reasonable possibility that the trial court's statement contributed to Newton's conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 370 N.W.2d 222 (1985).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.