

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1817-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00CF4799

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY MURPHY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Anthony Murphy appeals the judgment, entered after a jury trial, convicting him of aggravated battery, while armed with a dangerous weapon, causing great bodily harm, and resisting an officer, contrary to WIS. STAT. §§ 940.19(5), 939.63(1)(a)2, and 946.41 (1997-98). Murphy argues that the trial court erroneously exercised its discretion in prohibiting him from

exploring with the victim prior instances of her untruthfulness, and in failing to engage him in a colloquy to determine whether he knowingly, intelligently and voluntarily gave up his constitutional right to testify in his own defense. We affirm.

I. BACKGROUND.

¶2 Two police officers on routine patrol saw two men, one armed with a golf club, and the other with what appeared to be a pipe or stick, running out of a rooming house. When the police inquired as to what was going on, one of the men motioned towards Murphy and stated, “He just stabbed the girl.” The police then saw Murphy walking down the street with the victim, Carrie Singer. When the police approached Murphy, he ran away but, after a brief chase, was apprehended. The police observed that Singer appeared to have been beaten, as she had numerous bruises and was bloodied. Singer told the police that Murphy became angry and began swinging an iron at her, striking her numerous times. It was later determined that Singer suffered a broken nose and jaw, bleeding to the brain, several broken teeth, and numerous bruises and contusions from the beating.

¶3 Murphy was criminally charged, but before trial, Singer recanted her statement that Murphy beat her and claimed that several drug dealers named “Slim” and “Big Man” caused her injuries. Both Singer and Murphy acknowledged that they were addicted to crack cocaine. At trial, Singer again claimed that Murphy beat her. She explained that she changed her story after Murphy wrote to her and urged her to do so. During her cross-examination, the trial court ruled that Murphy’s attorney could not question Singer about prior instances when Singer made false accusations of crimes and when she failed to cooperate with a forgery investigation. Later in the trial Murphy decided not to

testify, but the trial court failed to engage him in a colloquy as to whether he was knowingly, intelligently, and voluntarily waiving his constitutional right to testify in his own defense. A jury found Murphy guilty on both counts. Murphy was sentenced on count one to fifteen years' confinement and five years' extended supervision, and on count two, nine months' incarceration consecutive to count one.

II. ANALYSIS.

A. *The trial court properly exercised its discretion.*

¶4 Murphy argues that the trial court erroneously exercised its discretion in sustaining objections made by the prosecutor to questions asked of the victim inquiring into specific instances when she previously lied to the police.

¶5 Murphy first raised the issue of Singer's prior untruthfulness in the middle of trial rather than in a pretrial motion.¹ Although not mentioned at the time the objections were sustained, Murphy now argues that, pursuant to WIS. STAT. § 906.08(2), he was entitled to cross-examine the victim about instances when: (1) she lied to the police about her role in a forgery; (2) she falsely accused a former boyfriend of battery; and (3) she made a false charge of being sexually assaulted and kidnapped.² The trial court sustained objections to these questions,

¹ The better method would have been to bring a motion *in limine* whose purpose is to "obtain [an] advance ruling on admissibility of certain evidence...." WISCONSIN JUDICIAL BENCH BOOK CV10-3 (2d ed. 2000). Had Murphy brought such a motion, he would have had an opportunity to more completely explain his rationale to the trial court and to cite WIS. STAT. § 906.08 as authority for his questions.

² Murphy also contends the trial court prohibited Singer from testifying about using a false name; however, as noted, she testified she has used an alias.

but did allow counsel to confirm with Singer that she was in custody on a probation hold, that she has used an alias in misrepresenting her identity to the police, and that she has a pattern of lying to police.

¶6 The trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). Murphy claims that the trial court "abused its discretion" and committed reversible error, requiring a new trial, in denying him the opportunity to ask Singer about these three prior instances. We disagree.

¶7 The trial court sustained an objection to each of the questions Murphy's attorney asked touching on the three specific instances of conduct. In so doing, the trial court first remarked that Murphy's counsel was violating the rule of evidence dealing with eliciting testimony from a witness about other crimes. The trial court also ruled that the questions were not relevant to the current charge against Murphy. Later, when defense counsel made a record of his objection to the ruling of the court, the trial court amplified its earlier ruling and stated that the court was concerned that the victim might have unknowingly incriminated herself had she been permitted to answer the sustained questions and that the prejudice to the victim far outweighed any probative value. While we agree that prohibiting the questioning of Singer about three instances of her untruthfulness was a proper exercise of discretion, we do so for other reasons than those relied upon by the trial court. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (stating that an appellate court may affirm a trial court's correct ruling, irrespective of the trial court's rationale, on a theory or reasoning not relied upon by the trial court).

¶8 WISCONSIN STAT. § 906.08 governs the questioning of a witness about opinion and reputation evidence of character. Section 906.08(2) reads:

(2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

¶9 Murphy contends the questions he was prohibited from asking probed the victim's character for truthfulness or untruthfulness and were not remote in time. While we agree that the statute may have authorized the questions posed by Murphy's attorney, nevertheless, we are satisfied the trial court properly prohibited the questions.

¶10 The question to be decided by the jury was whether Murphy or someone else severely beat Singer. No one disputed that Singer was seriously injured. Although Singer's past untruthfulness to the police was relevant, unlike the two times Singer allegedly falsely claimed to be a victim of a crime, here there was no suggestion that she made up the story of being beaten. Any detailed examination of Singer concerning the two times she may have falsely accused others of a nonexistent crime would have taken valuable trial time and drawn the focus of the trial away from a determination of who beat Singer. Moreover, the jury knew of Singer's pattern of lying to the police, as the trial court permitted her to answer this question. Thus, the evidence sought to be elicited from Singer was cumulative.

¶11 As to Singer's possible involvement in a forgery, again the evidence was relevant, but cumulative, as the jury knew she had been convicted of a crime because she testified she was in custody on a probation hold at the time of the trial. WISCONSIN STAT. § 904.03 permits the exclusion of relevant evidence when it is a waste of time or involves cumulative evidence.³ Here, valuable trial time would have been wasted, with little gained, by permitting Murphy's attorney to explore these prior specific acts of untruthfulness. Thus, we are satisfied the trial court properly exercised its discretion because otherwise there would have been a needless presentation of cumulative evidence and wasted time.

¶12 Inasmuch as we have determined the trial court's rulings were correct, we decline to address Murphy's next argument that he is entitled to a new trial because the trial court excluded admissible and material evidence as we have determined the questions may have been admissible, but were cumulative.⁴

B. Murphy's constitutional right to testify in his own behalf was not violated.

¶13 Murphy next submits that the absence of a colloquy between him and the trial court when he elected not to testify constituted reversible error. However, he admits that his attorney explained to the jury in closing argument the

³ WISCONSIN STAT. § 904.03 provides:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

⁴ *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, then the appellate court need not decide other issues raised).

possible reasons why Murphy may not have testified, and that the jury was given an instruction explaining that the failure of a defendant to testify cannot be held against him. Yet, he still argues that since there is no evidence that he properly waived his right to testify, he was “denied his constitutional right to testify in his own behalf.”

¶14 The State contends that Murphy has waived the right to raise this issue because he brought no postconviction challenge regarding it:

This case is appropriate for strict enforcement of the waiver rule. Murphy did not testify. Murphy did not put on a defense at all. No one objected. No one filed a postconviction motion. Murphy makes no claim that trial counsel was ineffective for proceeding as he did. Absent such a claim, this court must presume that trial counsel acted reasonably in apprising his client regarding the right to testify and in guiding his decision not to testify. *See Strickland v. Washington*, 466 U.S. 668, 687-89 (1984).

We agree with the State. Having failed to raise the issue below, Murphy cannot raise it here. *State v. Rogers*, 196 Wis. 2d 817, 826-29, 539 N.W.2d 897 (1995) (explaining that failure to raise specific challenges in the trial court waives the right to raise them on appeal). Accordingly, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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

