

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2012

Diane M. Fremgen
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. 2011AP1765-CR

Cir. Ct. No. 2009CF1576

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY DARNELL LITTLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and MARY E. TRIGGIANO, Judges.¹ *Affirmed.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¹ The Honorable David L. Borowski entered the judgment of conviction and imposed sentence. The Honorable Mary E. Triggiano entered the order denying Little's postconviction motion.

¶1 PER CURIAM. Anthony Little appeals a judgment of conviction and an order denying his postconviction motion. Little contends that: (1) there was insufficient evidence to support the jury's verdict finding Little guilty of intimidation of a victim; and (2) Little's trial counsel was ineffective by failing to raise the issue of the victim's drug use and by failing to object to the State's introduction of evidence of other acts of violence by Little against the victim. We reject these contentions, and affirm.

Background

¶2 In March 2009, Little was charged with misdemeanor battery and intimidation of a victim. The charges stemmed from a report by an adult woman that, while the woman was at Little's apartment, Little had stated to the woman that she was not going back to her husband, had taken the woman's keys and cell phone so that she could not leave or call for help, and had threatened her life if she got Little into trouble with law enforcement. The woman reported that Little would not allow her to return home for the next several days and that, during that time, he threatened her, punched her, slapped her, and threw her against a wall, causing injuries. The woman testified consistently with those allegations at trial, and also testified as to additional prior acts of violence against her by Little. Little testified in his own defense that he had not harmed the woman or restrained her in any way, and implicated the woman's husband as the source of her injuries. The jury found Little guilty of intimidation of a victim but not guilty of battery.

¶3 Little filed a postconviction motion, arguing that his trial counsel was ineffective by failing to impeach the woman with evidence of her drug use during the time of the alleged abuse and by failing to object to the woman's testimony as to prior instances of abuse against her by Little. Little also argued

that he was entitled to a new trial based on insufficiency of the evidence to support the jury verdict finding him guilty of intimidation of a victim. The circuit court held a hearing on the motion, and Little's trial counsel testified as to counsel's trial strategy. The circuit court denied the motion. Little appeals.

Discussion

Sufficiency Of The Evidence

¶4 Felony intimidation of a victim is committed by one who attempts to prevent or dissuade the victim of a crime from reporting the crime to law enforcement by use or threat of violence. *See* WIS. STAT. §§ 940.44 and 940.45 (2009-10).² We sustain a jury's guilty verdict if it is supported by any credible evidence as to each element of the charged offense. *See Morden v. Continental AG*, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We will not disturb a jury's determination as to witness credibility unless the witness's testimony was "inherently or patently incredible," that is, "'in conflict with the uniform course of nature or with fully established or conceded facts.'" *Simos v. State*, 53 Wis. 2d 493, 495-96, 192 N.W.2d 877 (1972) (citation omitted). We review de novo whether evidence was sufficient to support a jury verdict. *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶5 Here, Little contends that the woman's testimony was not credible and, thus, the jury's verdict was not supported by credible evidence. Little points out that he and the woman testified as to different versions of the events leading

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

up to the charges and that the woman's credibility was in question: she admitted she had been having an adulterous affair with Little and was lying to her husband, and had motivation to lie about Little's actions to gain sympathy from her husband.

¶6 The problem with Little's argument, however, is that it questions the credibility determinations made by the jury, which we must defer to on appeal. *See Simos*, 53 Wis. 2d at 495-96. While Little contends that the woman's testimony was incredible, Little has not set forth an argument that the woman's testimony was *inherently* incredible such that the jury was not entitled to rely on it.

Ineffective Assistance Of Counsel

¶7 A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient—that is, that counsel made errors outside the range of professionally reasonable conduct—and that the deficient performance prejudiced the defense—that is, there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687, 689-91, 694 (1984); *State v. Thiel*, 2003 WI 111, ¶¶18-20, 264 Wis. 2d 571, 665 N.W.2d 305. We review a claim of ineffective assistance of counsel under a two-part standard of review: first, we review the circuit court's factual findings under the clearly erroneous standard; second, we review the legal standards for ineffective assistance de novo. *State v. Manuel*, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811.

¶8 Little first contends that his counsel was ineffective by failing to question the woman as to whether she was using cocaine during the reported period of time. He argues that, because this case was essentially a question of the

credibility of the witnesses, it was deficient performance for his counsel to fail to question the woman's credibility by raising the issue of her cocaine use.

¶9 At the postconviction motion hearing, Little's trial counsel testified that he decided not to question the woman as to her cocaine use because he determined that any evidence that the woman was using cocaine may have caused the jury to infer that Little was using cocaine as well, since Little and the woman were romantically involved. Little argues that his trial counsel's explanation of his failure to question the woman as to her drug use was not reasonable because there was no reason to believe the jury would infer that Little used cocaine simply because the woman did. We disagree. We conclude that Little's trial counsel's explanation is reasonable.

¶10 Little next contends that his trial counsel was ineffective by failing to challenge the State's introduction of other acts evidence through the woman's testimony of previous acts of violence against her by Little. Little argues that the failure to challenge the other acts evidence was deficient performance and prejudicial because it allowed the State to introduce the evidence without having to establish its admissibility and it allowed the jury to consider additional alleged acts of violence outside the scope of the charges. He argues that there was not overwhelming evidence against him and, thus, the other acts evidence caused the jury to dislike him and find that he acted in conformity with those acts, leading to the guilty verdict.³ Again, we disagree.

³ As further indication of prejudice, Little points out that the court at sentencing referenced the woman's testimony as to the prior acts of violence against her. However, the comments Little points to are not a reference to prior acts, but rather to "behavior" the jury found him guilty of and behavior toward the woman and her children. Moreover, that argument goes to
(continued)

¶11 Assuming that counsel's failure to object to admission of the other acts evidence was deficient, we conclude that it was not prejudicial. As Little notes, this case hinged on the credibility of the witnesses. The fact that the woman testified to additional acts of violence by Little against her would not have reasonably affected the jury's credibility determinations. Thus, we are not persuaded that there is a reasonable probability of a different outcome had counsel objected to the admission of the woman's additional allegations of violence.⁴ We affirm.

By the Court.—Judgment and order affirmed.

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

sentencing, an issue not raised on appeal, rather than to whether counsel's performance was deficient at trial.

⁴ Little argues in his reply brief that, because the jury found Little not guilty of battery, the only evidence that the woman had been the victim of a crime to support the intimidation of a victim charge was her testimony of Little's prior acts of violence against her. We reject this argument because it is raised for the first time on appeal in the reply brief. Moreover, the intimidation of a victim jury instruction required only that the jury find that the woman was the victim of a battery, not that Little committed the battery. Here, Little implicated the woman's husband as having committed a battery against the woman, which would have also supported the intimidation of a victim charge.

