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DISTRICT I

November 9, 2021

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

John D. Flynn
Electronic Notice

Hon. Michelle Ackerman Havas
Circuit Court Judge
Electronic Notice

Brandon Kuhl
Electronic Notice

Loryn Lange Limoges
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John Barrett
Clerk of Circuit Court
Milwaukee County Courthouse
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2019AP2259-CR

State of Wisconsin v. Elzie Isaac (L.C. # 2015CF4892)

Before Brash, C.J., Donald, P.J., and Dugan, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Elzie Isaac appeals a judgment convicting him of two felonies and three misdemeanors related to his domestic abuse of R.H. He also appeals an order denying his postconviction motion. He argues that he received constitutionally ineffective assistance from his trial counsel because his trial counsel did not object to the prosecutor's closing argument.¹ He contends that

¹ The Honorable Michelle Ackerman Havas presided over Isaac's trial and sentencing. The Honorable David A. Feiss decided Isaac's postconviction motion.

the prosecutor's closing argument compromised the fairness of the trial because the prosecutor told the jury that he was not entitled to a presumption of innocence. After review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).² We affirm.³

After a jury trial, Isaac was convicted of one count of felony false imprisonment and one count of felony intimidating a witness, both as a domestic abuse repeater and with a domestic abuse assessment. He was also convicted of three counts of misdemeanor bail jumping, two of which had domestic abuse assessments. During closing argument, the prosecutor stated:

The last thing I'll say is that it's not very easy to convict somebody of crimes. It should be very hard for you to do that. Counsel says his client is presumed innocent. **Not anymore. The evidence is closed. The presumption of innocence is gone.** Mr. Isaac committed these crimes, and it should not be easy for you to convict him, but you're not to search for doubt, you're to search for the truth, and the truth is he is guilty.

(Emphasis added).

Isaac filed a postconviction motion challenging the prosecutor's statements. Isaac argued:

Mr. Isaac was denied a fair trial because of both (1) the State's misrepresentation of the presumption of innocence during

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

³ We conclude that the circuit court reached the correct result when it denied the postconviction motion, but its reasoning was flawed. "[I]t is well-established law in Wisconsin that an appellate court may sustain a lower court's ruling 'on a theory or on reasoning not presented to the lower court.'" *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 (citation omitted).

closing arguments and (2) by his attorney's failure to object. The argument to the jury misstated the presumption of innocence by confusingly suggesting the presumption had ended after the close of evidence. The State's suggestion misled the jury and was never corrected, though the court correctly advised the jury prior to deliberations.

Nonetheless, the presumption of innocence is an essential protection against unjust conviction, and it is crucial that juries have accurate, consistent information about it. Misrepresenting the presumption of innocence to a jury might confuse them such that they are incapable of faithfully exercising their duties as is constitutionally required. The presumption is a judicially-defined means of decreasing the likelihood that innocent people are wrongfully convicted, so the risk of error is dire and the reliability and legitimacy of the results of jury trials is diminished.

Mr. Isaac's trial counsel failed to object to the State's misstatement, and he was prejudiced by the fact that his trial was unfair and, thus, unreliable.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The test for deficient performance is whether counsel's representation "fell below an objective standard of reasonableness." *State v. Carter*, 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. To show prejudice, "the 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.'" *Id.*, ¶37 (citation omitted). A reviewing court may dispose of a claim of ineffective assistance of counsel on either ground. *Strickland*, 466 U.S. at 697.

Isaac's argument that he received ineffective assistance of counsel fails because he has not shown that there is a reasonable probability that the result of the proceeding would been different if his trial counsel had objected to the prosecutor's closing argument. Isaac's allegations as to the prejudice he suffered are conclusory and speculative. He argues that the State's argument misled the jury and might have confused the jury. It is not enough for Isaac to

say that the jury might have been confused. Isaac had to show that there was a reasonable probability that, had his trial counsel objected to the prosecutor's closing argument, the jury would have acquitted him of the charges. Given R.H.'s detailed testimony about Isaac repeatedly beating her, the testimony of the police about what occurred after R.H. called 911 for help, and the circuit court's instructions to the jury, Isaac has not made this showing.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.

See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals