COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1636-CR **Cir. Ct. No. 2004CF7440**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY MONTRELL MUSKIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, P.J. Jeremy Montrell Muskin appeals a judgment of conviction for two counts of armed robbery with threat of force as a

party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05 (2005-06).[1] Muskin also appeals the trial court's order denying his motion for postconviction relief without a hearing. Muskin challenges the judgment of conviction on multiple grounds. First, he contends a colloquy with the trial court was improper and compromised the voluntariness of his waiver of the right to testify. Second, he asserts the trial court should have prohibited a police detective from giving opinion testimony. Third, he maintains his right to due process was denied by the prosecutor's repeated references at trial to the race of the victims and by the prosecutor's failure to disclose exculpatory information. Finally, he contends that several errors of trial counsel denied him his right to effective assistance.

¶2 We conclude as follows: (1) the record supports the trial court's finding that Muskin knowingly and voluntarily waived his right to testify; (2) the trial court erroneously admitted opinion testimony of the detective, but the error was harmless; (3) the prosecutor's multiple unnecessary references to race constituted prosecutorial error, but these references did not deny Muskin his right to a fair trial; (4) the State did not wrongfully withhold exculpatory evidence; (5) counsel's instances of alleged deficient performance were not prejudicial, and the cumulative effect of these purported deficiencies does not warrant a new trial. We therefore affirm.

BACKGROUND

¶3 Muskin and four coactors were charged with armed robbery of a man and a woman walking together on a Milwaukee street. The four coactors

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

entered pleas of guilty or no contest, while Muskin went to trial on two counts of armed robbery with threat of force as a party to a crime. Prior to trial, Muskin moved to suppress a signed confession he had given to investigators. The trial court denied the motion after a ***Miranda-Goodchild***[2] hearing.

¶4 In March 2005, Muskin's case went to trial. At the close of the State's case, the court conducted a colloquy with Muskin regarding his decision about whether to testify. Muskin ultimately decided to waive his right to testify. The trial resulted in a hung jury.

¶5 Muskin was retried in May 2005. He waived his right to testify at this trial as well. At the second trial, the male victim, James Kearns, testified that he and his female companion were walking near the intersection of West Medford and 27th Streets at approximately 7:30 p.m. when they were robbed at gunpoint by a group of young men. Officers recovered stolen property from the robbery at the home of two of Muskin's coactors while investigating another robbery.

¶6 All four coactors, Willie Wilson, Montrelle L., Quinn L.,[3] and Quintelle N., confessed to their involvement in the robbery and testified against Muskin at the second trial. Additional facts are presented in the discussion section as necessary.

[2] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether the police properly advised a suspect of his rights to counsel and against self-incrimination under ***Miranda v. Arizona***, 384 U.S. 436 (1966), and whether any statement the suspect made to police was voluntary under ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

[3] Quinn L. is an adult. We have redacted his last name to preserve the anonymity of Montrelle L., who is Quinn's minor brother.

¶7 The jury in the second trial found Muskin guilty on both counts of armed robbery with threat of force as a party to the crime. Muskin moved for a new trial. The trial court denied his motion without a hearing. Muskin appeals.

DISCUSSION

¶8 Broadly speaking, Muskin makes four arguments on appeal. He contends that: (1) he did not knowingly and voluntarily waive his right to testify at trial; (2) certain evidentiary rulings of the trial court were erroneous; (3) he was denied his due process right to a fair trial; and (4) his attorney's performance constituted ineffective assistance of counsel.

¶9 We address Muskin's arguments in the following order. First, we consider Muskin's claims of trial court error. These are as follows: (1) the trial court's colloquy regarding his right to testify was defective and compromised the voluntariness of his waiver of the right to testify; and (2) the trial court made erroneous evidentiary rulings concerning hearsay testimony about the coactors' confessions, and opinion testimony of a police detective.

¶10 Second, we examine Muskin's claims of error by the State. These include that he was denied his right to a fair trial because: (1) the State made thirty-two references to the race of the victims and of the coactors at trial; and (2) the State withheld exculpatory information. Finally, we address Muskin's various claims of ineffective assistance of counsel.

A. CLAIMS OF TRIAL COURT ERROR

1. Voluntariness of Waiver of Right to Testify

¶11 Muskin argues that his waiver of his right to testify was not knowing and voluntary because the trial court's colloquy upon which he relied in deciding whether to waive his right to testify misled him about the potential consequences of testifying. The question of whether a defendant's waiver of the right to testify was voluntary requires the application of constitutional principles to the trial court's factual findings. ***State v. Weed***, 2003 WI 85, ¶13, 263 Wis. 2d 434, 666 N.W.2d 485. We review this question in two parts, upholding the trial court's findings of historical fact unless they are clearly erroneous and examining de novo its application of those facts to constitutional principles. ***Id.***

¶12 The right to testify on one's behalf in a criminal case is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution. ***Id.***, ¶37. This right is personal to the defendant and can only be waived by the defendant. ***State v. Flynn***, 190 Wis. 2d 31, 49, 527 N.W.2d 343 (Ct. App. 1994) (citation omitted). A criminal defendant's waiver of the right to testify must be knowing, intelligent and voluntary. ***Weed***, 263 Wis. 2d 434, ¶41. In ***Weed***, the state supreme court imposed an affirmative duty on circuit courts to conduct an on-the-record colloquy to ensure that a defendant's waiver of the right to testify is knowing, intelligent, and voluntary. ***Id.***

¶13 To understand Muskin's argument concerning the validity of his wavier, some additional background is necessary. Prior to the first trial, Muskin moved to suppress a confession he gave while in custody. At a ***Miranda-Goodchild*** hearing on the motion, Muskin testified that his interrogator, Detective

Peter Panasiuk, did not read him his ***Miranda*** warnings in their entirety, and that he was not aware of his ***Miranda*** rights. On cross-examination, the State noted that Muskin had been arrested several times as a juvenile and questioned Muskin about these arrests to demonstrate that, in at least some of the prior arrests, Muskin was read his rights and therefore likely understood them this time. The State's questioning elicited the names of the offenses for which Muskin had been arrested, which included retail theft, driving without owner's consent, possession of cocaine, theft, and robbery. At the close of the hearing, the trial court found that Muskin's testimony at the hearing was not credible, and denied his motion to suppress the confession.

¶14 Some of the issues aired in the ***Miranda-Goodchild*** hearing resurfaced during the first trial in the context of Muskin's decision about whether to testify. When the court first raised the question of whether Muskin would be testifying on his own behalf, Muskin indicated that he intended to do so. The trial court then conducted a colloquy to determine whether Muskin's intended waiver of the right *not* to testify was knowing and voluntary.[4] During the colloquy, the court informed Muskin that if he reasserted at trial his claim, first expressed in the ***Miranda-Goodchild*** hearing, that he did not understand his ***Miranda*** rights, the prosecutor might be permitted to cross-examine him about his prior arrests for the purpose of demonstrating that, because he had been read ***Miranda*** rights on prior

[4] ***State v. Weed***, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485, requires that trial courts conduct a colloquy when a defendant waives the right to testify, but is silent on whether courts must also conduct a colloquy when the defendant waives the right *not* to testify. We conclude, however, that this issue is not presented in this case. The fact that the improper colloquy concerned an initial attempt to waive the right not to testify is irrelevant. What matters are the alleged misstatements of law from the first colloquy, and whether they influenced Muskin's waiver of the right to testify at the second trial and thus rendered his waiver involuntary and unknowing.

occasions, he likely understood his rights here when he gave his confession. Muskin, seeming less certain of his decision to testify, then asked the court a series of questions to clarify the scope of the State's ability to cross-examine him on his previous adjudications. The court again explained in greater detail that the prosecutor would be permitted to cross-examine Muskin on the nature of the adjudications to impeach Muskin's credibility should Muskin testify that he did not understand the ***Miranda*** warnings.

¶15 In light of Muskin's questions, defense counsel asked the court to give her client the night to reconsider his decision to testify. The next morning, Muskin's attorney informed the court that Muskin had decided to waive his right to testify. The trial court then conducted a second, much briefer colloquy with Muskin regarding his decision not to testify. In the second trial, Muskin also waived his right to testify, and the court again conducted a short colloquy.

¶16 Muskin contends that the trial court's statements about the consequences of his testifying were misleading because the court, while informing him that, if he testified that he did not understand his ***Miranda*** rights when he made his confession, he would be subject to cross-examination about his prior arrests and adjudications, failed to inform him that his attorney could have moved to limit the scope of the State's cross-examination. Muskin argues that because the court failed to provide him with this information, and gave an overly long colloquy that focused on "worst-case scenarios" if Muskin chose to testify, this colloquy affected his later decision in the second trial not to testify, rendering his waiver of the right to testify unknowing and involuntary. We are not persuaded.

¶17 First, Muskin suggests no reason why the prosecutor would not have been permitted to attempt to impeach him if he attempted to persuade the jury that

statements he made to the police were made without an understanding of his ***Miranda*** rights. Wisconsin's rules of evidence permit a party to impeach the credibility of a witness. *See* WIS. STAT. § 906.07.[5] Indeed, Muskin concedes that impeaching him by showing that he had been previously *Mirandized* would have been permissible. We see nothing wrong with permitting the State to impeach Muskin's credibility by presenting evidence that Muskin had been read the ***Miranda*** warnings on previous occasions.

¶18 Second, Muskin's argument is based on a mischaracterization of the colloquy. According to Muskin, the circuit court told him what the prosecutor *would* be permitted to do and, Muskin argues, depending on the circumstances, the prosecutor might not have been permitted to do everything the court talked about. However, read in context, it is apparent the circuit court was informing Muskin of *possible* lines of impeachment. To the extent that Muskin is arguing that the court was obligated to inform Muskin on the possible ways by which his counsel might have limited the scope of the State's impeachment, Muskin points to no authority for this proposition. Similarly, Muskin fails to support his assertion that the court erred because the court did not first determine whether, in fact, the prosecutor had a "good-faith" basis for believing that Muskin had been previously *Mirandized*.

¶19 In sum, the circuit court simply informed Muskin of possible consequences of testifying. Of course the court could not say with any certainty what Muskin would testify to or what questions the State might be permitted to ask. Consequently, the best the court could do was to warn Muskin of possible

[5] WISCONSIN STAT. § 906.07 states: "The credibility of a witness may be attacked by any party, including the party calling the witness."

scenarios. The court was not obligated to discern all the possible variations, should Muskin testify, and inform Muskin with precision how each possible variation would play out.

2. Admission of Opinion Testimony

¶20 The next issue concerns the admissibility of Detective Henschel's testimony indicating that she believed Wilson was telling the truth when he gave his confession. A trial court's decision whether to admit or exclude evidence is a discretionary decision that we will uphold if the trial court examined the relevant facts, applied the proper legal standard, and reached a reasonable conclusion using a demonstrated rational process. *See* ***State v. Mayo***, 2007 WI 78, ¶31, 301 Wis. 2d 642, 734 N.W.2d 115. Muskin contends that the trial court erroneously exercised its discretion in allowing this testimony. We agree.

¶21 Detective Henschel testified that Wilson denied involvement in the robbery at the start of the interview, but then later admitted that he had been lying to Henschel, and ultimately confessed to participating in the crime. The State asked Henschel if "[w]hen he changed his story in … the second part of your interview, was there a change in demeanor, in your opinion, of Mr. Wilson?" Henschel responded: "In my opinion, it seemed like he was more relieved that now he was telling the truth." Muskin's counsel objected to Henschel's testimony on grounds that it called for a conclusion "with regard to … how he appeared and what those—how those appearances should be interpreted." The trial court overruled the objection.

¶22 We conclude that the trial court erroneously admitted the part of Henschel's statement in which she asserted that Wilson was telling the truth. Opinion testimony by lay witnesses is "limited to those opinions or inferences

which are rationally based on the perception of the … issue." WIS. STAT. § 907.01. Testimony about the credibility of witnesses is not permitted because it encroaches on the jury's role as "lie detector in the courtroom." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (*quoting* ***United States v. Barnard***, 490 F.2d 907, 912 (9th Cir. 1973)). "No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96.

¶23 However, we conclude that the error was harmless. A trial court error is harmful when it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). It would have come as no surprise to the jury that Henschel believed Wilson was being truthful. Henschel took Wilson's confession, and, by the time Henschel testified that she thought that Wilson's confession was "truth[ful]," the jury had already heard Wilson testify about his confession and accept responsibility for his role in the crime. In addition, as we detail later *infra* ¶¶44-45, the weight of the evidence against Muskin was substantial. We therefore conclude that there is no reasonable doubt that a jury would have found Muskin guilty absent this error.

B. CLAIMS OF STATE ERROR

1. Prosecutor's Thirty-Two Unnecessary References to Race

¶24 Muskin contends the prosecutor's repeated references to the race of the victims (white) and to Muskin's race and that of the coactors (black) at trial denied him his due process right to a fair trial under the United States and Wisconsin Constitutions. The question of whether a defendant was denied the due

process right to a fair trial is a question of law that we review de novo. ***State v. Hoover***, 2003 WI App 117, ¶29, 265 Wis. 2d 607, 666 N.W.2d 74.

¶25 Muskin asserts that each of the prosecutor's references to race was irrelevant and "raises the specter of a verdict returned by a primarily white jury based on stereotypes and fears rather than evidence." The State does not deny that the prosecutor made repeated, unnecessary references to race throughout the trial. Rather, the State argues that Muskin waived this argument because he failed to object to the prosecutor's references during the trial and raises the issue for the first time on appeal. While we agree with the State that Muskin's counsel failed both to object to the prosecutor's references to race during the trial and to argue in his postconviction motion that the references to race violated Muskin's right to a fair trial, we choose to address this argument because our failure to do so would diminish the seriousness of this matter. *Cf.* ***State v. Freymiller***, 2007 WI App 6, ¶17, 298 Wis. 2d 333, 727 N.W.2d 334 ("The waiver rule … is a rule of judicial administration, and, we may, in our discretion, decide to disregard a waiver and address the merits of an unpreserved issue.").

¶26 "There is no place in a criminal prosecution for gratuitous references to race." ***Smith v. Farley***, 59 F.3d 659, 663 (7th Cir. 1995). Courts do not tolerate appeals to racial prejudice by prosecutors, who, under our adversarial system of justice, may strike "hard blows," but not "foul ones." ***Berger v. United States***, 295 U.S. 78, 88 (1935) (cited in ***United States v. Grey***, 422 F.2d 1043, 1045-46 (6th Cir. 1970) (prosecutor's question suggesting that a black defendant was "running around with a white go-go dancer" warranted a new trial)). As Chief Justice Alan Page of the Minnesota Supreme Court wrote: "Racial considerations … can affect a juror's impartiality and must be removed from

courtroom proceedings to the fullest extent possible." ***State v. Varner***, 643 N.W.2d 298, 304 (Minn. 2002).

> To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

Id. (quoting ***McFarland v. Smith***, 611 F.2d 414, 417 (2d Cir. 1979)).

¶27 Unnecessary references to race or ethnic heritage by a prosecutor may violate a defendant's right to due process, particularly when the evidence against the defendant is not overwhelming. *See, e.g.* ***United States v. Cannon***, 88 F.3d 1495, 1503 (8th Cir. 1996) (prosecutor's reference to African-American defendants as "bad people" in case where evidence was not overwhelming "gave [the] jury an improper and convenient hook on which to hang their conduct," resulting in due process violation); ***United States v. Doe***, 903 F.2d 16, 27-28 (D.C. Cir. 1990) (prosecutor's statement that "Jamaicans [are] ... coming in and taking over" and repeated references to "they" and "them" in a drug case involving Jamaican defendants was improper where evidence was not "overwhelming"); ***Reynolds v. State***, 580 So. 2d 254, 255-57 (Fla. App. 1991) (where black defendant was accused of sexually assaulting white woman, prosecutor's repeated references to the races of the defendant and victim denied defendant's right to a fair trial). However, courts have held that one or two isolated references to race or ethnicity by the prosecutor offered for no apparent legitimate purpose do not compel a new trial. *See* ***Smith***, 59 F.3d at 664 (citing cases).

¶28 At trial, the prosecutor called each of Muskin's four coactors to testify. The prosecutor, Milwaukee County Assistant District Attorney Terry S.

Magowan, referred to the race of the victims twenty-six times in his examination of the coactors *after each coactor had already identified the race of the victims in testimony*. Magowan asked the following questions of each coactor:

- Of Willie Wilson: "[W]hat happened when you saw the two white people?"; "How close were you to the two white people?"; "[O]nce the defendant here was pointing the gun at the—at the two white people, were you able to hear what he said?"; "So who are the two people that were the closest to the white couple?"; "So [Muskin] was within 2 feet of these white people?"; "[T]he two guys that were closest to the white couple were Quinn L[.] and [Muskin]?"; "[W]hat was going on with the white couple?"; "Was anybody—either of the white couple struck by anybody to you—that you could see?"

- Of Quintelle Noblin: "When you saw this white couple, the man and the woman, how far were they away from you when you first saw them?"; "And what was said when you saw the white people?" "Do you remember telling the detective that [Muskin] was the one that spotted the white male and the white female?"; "What happened after you saw this white couple?"; "[Was he pointing it at] [t]he white couple?"; "Did you hear [Muskin] or anybody at that point say anything to the white people?"; "How far were you away from the white couple when you heard someone say freeze?"; "And when you heard someone say freeze, how close was [Muskin] with the gun to the white couple?"; "And once [Muskin] pulled out the gun and said freeze, what did the white couple do?"

- Of Montrelle L.: "They were white?," immediately after the witness was asked what the victims looked like and he testified that "they was a white couple; one male, one female"; "What happened when [Muskin] and Willie approached the white couple?"; "Who was standing closest to the white couple when they got robbed?"; "And did you hear either [Muskin] or Willie say anything when they were next to the white couple?"; "Where was your brother, Quinn, if you know when—when [Muskin] and Willie were next to the white couple?"; "What else did you see [Muskin] do with the white couple?"; "Could you tell when [Muskin] and Willie were next to the white couple who was doing most of the talking?"

- Of Quinn L.: "What race were they?"; "And how far were they away from you when you first saw the white man and the white lady?"; "When—did you see what—what did they—did you see the white man and the white woman, did they give up anything?"

¶29 In his opening statement, Magowan referred to the race of Muskin and the coactors on four occasions:

- "[The victims] came upon two younger black males who were having a conversation."

- "[The victims] were directed by these two younger black males to go over by this fence behind the church …."

- "[O]nce they got over by the fence they were approached by other black males and there was at least one gun and they were held up at gunpoint …."

- "Once the—turns out to be five young black males take the property from [the victims], they run off."

¶30 In his closing argument, Magowan made the following two additional references to the victims' race:

- "[Muskin and the coactors] were walking and they saw the white couple."

- "[The robbery] was done by gunpoint with the people splitting up and kind of surrounding the white couple."

¶31 We note that Magowan's references to race did not involve overt and blatant appeals to prejudice. What troubles us, however, is the number of references, thirty-two in all;[6] the fact that they appear to serve no legitimate purpose; and the potential for racial prejudice presented by the facts of this case. We do not know Magowan's purpose in making the unnecessary and repeated

[6] It should be obvious that not all references to race in a criminal proceeding are improper. A person's skin color is, of course, relevant for identification purposes, and references at trial to the race of a witness or the defendant offered for purposes of identification are, of course, legitimate and necessary. References to race are essential when racial animus is an element of the crime. *See, e.g.* WIS. STAT. § 939.645 (establishing penalty enhancer for "hate crimes" motivated by victim's race or other protected status). Moreover, a stray reference to race, or even a handful of such references, that appear to serve no legitimate purpose may not warrant judicial scrutiny. *See* ***Thomas v. Gilmore***, 144 F.3d 513 (7th Cir. 1998) (prosecutor's isolated remark in opening argument that witnesses would testify that the defendant's prior offenses involved young white women and knives did not deny defendant's right to a fair trial); ***Griffin v. Wainwright***, 760 F.2d 1505, 1512-13 (11th Cir. 1985) (five references to murder victims' race (white) did not deprive black defendant of right to fair trial where trial transcript ran 854 pages).

references to race. However, the fact that the references were unnecessary and repeated gives rise to a reasonable (but concededly not the only reasonable) inference that he intended to inject race into the proceedings.[7] Even if these references were merely a repeated (and unnecessary) means of differentiating the victims from the coactors involved in the incident, the prosecutor should have known better. This case involved the robbery of a random white couple at gunpoint by a group of five young black men. In such a case, the prosecutor should have been aware that repeated references to race might stir up the fears and prejudices of jurors.[8]

¶32 Unnecessary references to race by the State at trial, whether made out of ignorance or by design, are anathema to the notion of impartial justice. This is true whether the race of the persons involved is apparent to the jury, as it was here, or whether it is not. In either case, such references give subtle permission to jurors to allow their personal prejudices to influence their finding of guilt or

[7] The concurrence suggests that the prosecutor's repeated references to the race of the victims can be best explained by a prosecutor who "thoughtlessly got in the habit" of referring to the victims as "the white couple" rather than "the couple" or "the victims." The sheer number of the references and the context within which the references were made belie this suggestion. At some point, it would seem to appear that this was not just a "thoughtless habit."

[8] The jury in this case included nine whites, two blacks and one person of undetermined race. While the presence of a racially diverse jury in this case may have mitigated against the threat that gratuitous references to race might prejudice the outcome, having persons of color on a jury is not a panacea that automatically protects the fact-finding mission from the potentially corrosive effects of such references. Indeed, even if all the jurors were black, the prosecutor's references to race in this case would still be improper. Likewise, probing about jurors' racial bias in *voir dire*—the State, to its credit, did ask prospective jurors whether they could be impartial in a case with a black defendant and two white victims—is not sufficient protection against the potentially harmful effects of unnecessary references to race.

innocence. We therefore conclude that Magowan's repeated and unnecessary references to race were improper.[9]

¶33 However, we also conclude that Magowan's improper references to race did not so infect the trial with unfairness as to constitute a denial of Muskin's right to a fair trial. We are satisfied that the real controversy was fully tried. *See* ***Mayo***, 301 Wis. 2d 642, ¶65. We are also satisfied that, despite the possibility that the jury's mind may have been tainted with racial bias, there was not a miscarriage of justice. The evidence against Muskin was overwhelming, as we explain *infra* ¶¶44-45. We therefore conclude that it is clear beyond a reasonable doubt a rational jury would have found Muskin guilty absent Magowan's unnecessary references to race.

2. Alleged Failure to Disclose Exculpatory Information

¶34 Muskin asserts that the State failed to disclose mental heath records of Quinn L., a coactor who implicated Muskin in a confession and in-trial testimony. Muskin contends that these records were exculpatory and that the State's failure to disclose the information contained in the records, which Muskin argues could have been used to impeach Quinn L., denied him his right to a fair trial. We disagree.

¶35 In ***Brady v. Maryland***, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the prosecution has a duty to disclose evidence that is

[9] As explained, we cannot determine on the current record whether Magowan intentionally tried to inject race into the trial. However, the high number of racial references and the fact that, in our view, nearly all were unnecessary, are sufficient grounds on which to conclude that Magowan's conduct was improper.

favorable to the defendant. "***Brady*** requires production of information which is within the exclusive possession of state authorities. Exclusive control will not be presumed where the witness is available to the defense and the record fails to disclose an excuse for the defense's failure to question him." ***State v. Sarinske***, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979). This duty applies to both exculpatory and impeachment evidence. *See* ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737.

¶36 The evidence in question are court ordered mental health examinations reports conducted of Quinn L. in connection with the separate criminal complaint brought against him for his role in the robbery. Psychiatrists examined Quinn for the purposes of determining Quinn's competency and his criminal responsibility, respectively. The psychiatrist's report regarding his criminal responsibility concludes Quinn did not have a viable insanity defense, but states that he suffered from black outs and hallucinations resulting from alcohol and marijuana abuse. The report further states that Quinn indicated that he did "not remember anything that happened" on the date of the robbery because he "was just so drunk." The psychiatrist notes that Quinn's assertion that he could not remember what happened was inconsistent with his prior statements about the robbery to investigators. The psychiatrist concludes that Quinn's assertions of faulty memory were "most likely due to an effort to minimize culpability."

¶37 We note that Muskin does not dispute that both psychiatric reports were available in the criminal case file in Quinn L.'s case. Therefore, even if we accept Muskin's argument the report is exculpatory, we must conclude that the State's nondisclosure of the report did not violate ***Brady*** because Muskin has failed to demonstrate that the State had exclusive control over the report.

C. CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

¶38 Muskin argues that his trial counsel was ineffective on several grounds. A claim of ineffective assistance requires proof that counsel's performance was deficient, and that counsel's deficiencies prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** A presumption exists that the defendant's counsel acted reasonably and within professional norms. ***State v. Johnson***, 2004 WI 94, ¶11, 273 Wis. 2d 626, 681 N.W.2d 901. To prove prejudice, "a defendant must show that, but for his or her attorney's errors, there is a reasonable probability the result of the proceeding would have been different." ***Id.***, ¶11 (citations omitted). Because a defendant must establish both deficient performance and prejudice to prove a claim of ineffective assistance, we need not address both prongs of the analysis if the defendant's showing is insufficient as to one. ***Strickland***, 466 U.S. at 697.

¶39 We address Muskin's several claims of ineffective assistance as follows. First, we consider his claim that his counsel's failure to object to questions regarding Muskin's status as a probationer under the prong of deficient performance, and conclude that his counsel's performance was not deficient in this regard. Second, we assess Muskin's remaining claims of ineffective assistance under the prejudice prong, evaluating them in light of the strength of the case against him. We conclude that, absent these alleged instances of counsel error, no reasonable probability exists that the outcome of the trial would have been different.

1. Deficient performance

a. Failure to Object to Questions Regarding Muskin's Probationary Status

¶40 Muskin argues that his counsel was ineffective in eliciting testimony from a witness that revealed to the jury that Muskin was on probation at the time of his arrest. The State responds that testimony about Muskin's probationary status was brought to light by trial counsel for reasons of trial strategy. The State argues that trial counsel elicited testimony from Quintell N. and other coactors to establish that Muskin turned himself in on outstanding warrants. Trial counsel did so, the State contends, to bolster Muskin's character, and to establish that the coactors believed they could pin most of the blame on Muskin because of his probationary status. We agree with the State.

¶41 Trial counsel first elicited information about Muskin's outstanding warrants in cross-examination of Quintell N. When counsel asked Quintell N. whether Muskin had told him that he had an outstanding warrant, Quintell N. testified that Muskin said that his "P.O.," or probation officer, was looking for him. Trial counsel later posed questions about Muskin's decision to turn himself in on the outstanding warrants in questions to coactors Montrelle and Quinn, and Detective Panasiuk.

¶42 Trial counsel's closing argument leaves little doubt that testimony about the existence of outstanding warrants and Muskin's probationary status was brought out for strategic reasons. The defense's theory of the case, as revealed to the jury in trial counsel's closing argument, was that the coactors conspired either to frame Muskin or to falsely cast him as the primary figure in the robbery, thereby minimizing their own roles. Trial counsel reminded jurors that Muskin

went to the police station "to check and see if there were any outstanding warrants or any problems with his probation officer…. He wasn't run in or brought in by the police," which counsel argued "show[ed] something [of his] character." Counsel argued that if Muskin had committed the robbery, he would not have turned himself in to police days later on the outstanding warrants. Counsel then argued that, after Muskin was taken into custody on the warrants, the coactors decided to pin the crime on him. Based on the foregoing, we conclude that testimony about the outstanding warrants and Muskin's probationary status was elicited for reasons of sound trial strategy, not as the result of deficient performance. *See* ***State v. Arrendondo***, 2004 WI App 7, ¶27, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted) (we will uphold a strategic decision of counsel if it was rationally based on the facts of the case and the law).

2. Prejudice

¶43 To ascertain whether an alleged instance or instances of trial counsel error may have affected the outcome of a criminal proceeding, we consider the alleged error in light of the totality of the circumstances at trial. ***State v. Thiel***, 2003 WI 111, ¶62, 264 Wis. 2d 571, 665 N.W.2d 305. We therefore begin our prejudice analysis below by detailing the evidence presented against Muskin.

¶44 The jury in Muskin's case heard four coactors testify about Muskin's involvement in the robbery. Specifically, each gave testimony that put Muskin at Montrelle L. and Quinn L.'s house when the plan was hatched to commit a robbery. Each testified that Muskin and Wilson stopped the victims in the street and robbed them while the other young men served as lookouts. Some coactors

provided more detailed testimony than others, and some inconsistencies emerged among their stories.[10] However, all four coactors gave substantial testimony implicating Muskin as a key figure in the robbery. Each of the four coactors had already been adjudicated for their respective parts in the robbery, and, significantly, each testified that he had not received any promises or threats from the State in exchange for his testimony.

¶45 Muskin's signed confession was also before the jury. Muskin confessed to participating in the robbery, stating that he and the coactors spotted a couple around 27th Street and Wright St. and decided to rob them. Muskin stated that he had a gun that he received from Montrelle L., which he gave to Wilson, who used it to hold up the victims. He also stated that Wilson and Quinn L. stopped the victims, and that he, Montrelle and Quinn N. then joined the robbery in progress. Muskin stated that he took the female victim's backpack off her back, and pulled $10 out of her pockets.

¶46 Having detailed the evidence presented at trial, we now turn to Muskin's remaining allegations of ineffective assistance to determine whether, in light of the strength of the State's case, a reasonable probability exists that these alleged counsel errors prejudiced the outcome of the case.

a. Failure to Inform Muskin that the Defense Could Have Taken Steps to Mitigate Negative Consequences if Muskin Testified

¶47 Muskin contends that his trial counsel rendered ineffective assistance in failing to explain to him that, as his counsel, she could have taken

[10] For example, Montrelle L. said he did not see Muskin with a gun, but the other three coactors testified that Muskin had a gun and pulled it on the victims during the robbery. Wilson testified that the robbery was Muskin's idea, while Quinn L. said it was Wilson's.

actions to limit the scope of the State's cross-examination if he chose to testify. Specifically, Muskin asserts that counsel failed to inform him that she could have moved to limit the scope of the State's cross-examination to ensure that the jury would have never learned of the nature of his prior adjudications. (Counsel might have also advised Muskin that his prior adjudications would not be revealed as long as he did not bring up at trial the claims he made in the ***Miranda-Goodchild*** hearing.)

¶48 We assume for purposes of this analysis that counsel failed to so advise Muskin, and thereby rendered deficient performance. We further assume that this advice would have made a difference to Muskin, causing him to decide to testify. We nonetheless conclude counsel's purported failure did not prejudice the outcome of the trial. In his affidavit, Muskin fails to offer any details demonstrating his innocence to which he would have testified at trial that might have overcome the substantial evidence against him. Muskin provides only rote denials: "I would have denied confessing any involvement in this armed robbery," and "[m]y position has always been that I was not involved in this crime." Given Muskin's failure to provide in his affidavit any version of events that might have proved his innocence, and the weight of the evidence against him, we conclude that, despite the purported failure of counsel to properly advise him regarding whether to testify, no reasonable probability exists that his testimony would have changed the outcome of the trial.

b. Failure to Object to the Prosecutor's Repeated References to the Race of the Victims

¶49 Muskin contends that his trial counsel's failure to object to the prosecutor's numerous and unnecessary references to race constituted ineffective assistance of counsel. We assume for purposes of this analysis that trial counsel's

silence in the face of the prosecutor's thirty-two unnecessary references to race was not a matter of trial strategy.[11] Assuming, then, that counsel's failure to object was the result of deficient performance, we conclude that this failure did not prejudice the outcome of the case.

¶50 As we explained earlier, repeated unnecessary references to race have no place in a criminal proceeding. However, this prosecutor's references to race, while objectionable, were not explicit appeals to jurors' racial prejudice. At worst, the prosecutor's repeated references to the race of the victims was an impermissible attempt to appeal to the fears and prejudices of a jury consisting of eight whites, two blacks and one person of undetermined race.[12] The prosecutor did not make direct expressions of racial animus, or explicit arguments to convict based on racial or ethnic stereotypes. *See, e.g.* ***State v. Wilson***, 404 So. 2d 968, 971 (La. 1981) (prosecutor's reference to black defendants as "animals" and other references to the defendants' race warranted new trial); ***State v. Rogan***, 984 P.2d 1231, 1238-40 (Haw. 1999) (prosecutor's statement in closing argument that it is "every mother's nightmare [to find] ... some black, military guy on top of your daughter" denied defendant right to fair trial). Moreover, as noted above, the evidence in this case pointed strongly to Muskin's guilt; four coactors implicated Muskin, and Muskin admitted his involvement in a written confession that was entered into evidence. We conclude that counsel's failure to object to repeated

[11] We note that counsel may have elected not to object on the theory that some jurors may have taken offense at the prosecutor's repeated references to the race of the victims.

[12] Again, we do not know whether Magowan's repeated, unnecessary references to race were a calculated effort to appeal to jurors' racial bias, *supra*, ¶31. But the fact that the references were *repeated and unnecessary* gives rise to a reasonable (but not the only reasonable) inference that they were intended to appeal to racial bias.

references to race did not prejudice the outcome of Muskin's case in view of the indirect nature of the references at issue, and the strength of the State's case against Muskin.

c. Failure to Uncover Medical Reports and Other Information about Quinn L.'s Mental Health

¶51 Muskin contends that his trial counsel's failure to adequately uncover information about Quinn L.'s mental health that were contained in court-ordered psychiatric evaluations constituted ineffective assistance of counsel. Assuming without deciding that counsel was deficient in failing to uncover this information, we conclude that this failure was not prejudicial. Quinn L.'s testimony implicating Muskin in the robbery was consistent with the testimony of the other three coactors. This fact severely limits the potential effectiveness of impeaching Quinn L. with information that Quinn L. experienced auditory hallucinations and other effects of alcohol and substance abuse, or with his claim to a psychiatric evaluator that he did not recall the events of the robbery because he was drunk at the time. We therefore conclude that, even if counsel had discovered this information and made use of it, there is no reasonable probability that the result of the proceedings would have been different.

d. Failure to Adequately Object to Detectives' Testimony about the Coactors Confessions

¶52 During the investigation of the robbery, all four of Muskin's coactors were questioned by a detective, and all eventually signed written confessions implicating Muskin in the robbery. At trial, the State called each of the four detectives who had interviewed a respective coactor. These detectives testified as to the contents of the confessions that they had obtained. Three of the

four detectives read verbatim the confession that he or she had obtained, and hard copies of the confessions were submitted into evidence.[13]

¶53 We note, as a preliminary matter, that Muskin casts his challenge to the detectives' testimony about the coactors' confessions as both a question of trial court error and of ineffective assistance of counsel. We address this issue under the rubric of ineffective assistance because we conclude that counsel's objections failed to preserve for appellate review the question of trial court error. Counsel's failure to raise any effective objection when each detective testified as to the contents of the confessions,[14] even when three of the four detective-witnesses recited verbatim the confessions, denied the court the opportunity to make a timely ruling on the issue. We therefore consider this issue as a matter of ineffective assistance.

¶54 Assuming without deciding that counsel rendered ineffective assistance in failing to raise timely objections to the admission of the confessions, we nonetheless conclude that this error was not prejudicial. We so conclude because, with only minor variations, the confessions simply duplicated the prior

[13] The confessions themselves do not appear to be a part of the appellate record. The blow-up copies of the confessions entered as exhibits appear not to have been transmitted on appeal, and we find no other copies of the confessions themselves in the trial court record. However, the content of the confessions of coactors Wilson, Montrelle L. and Quintelle N. are contained in the trial transcript via the detectives' reading of the confessions.

[14] Muskin notes that counsel objected the second and third time a detective read a confession verbatim to the jury, on grounds, first, that the contents of the confession was "self-evident," and later that "the document speaks for itself." Muskin appears to acknowledge that this objection is not grounded in any recognized rule of evidence, but suggests that the court should nonetheless have excluded the confessions on hearsay grounds. We disagree. "A general objection that does not indicate the specific grounds for inadmissibility of evidence will not suffice to preserve the objector's right to appeal." ***State v. Nelis***, 2007 WI 58, ¶31, 300 Wis. 2d 415, 733 N.W.2d 619.

testimony of the coactors. Each coactor testified to his own involvement in the crime, and each implicated Muskin in the crime. The effect of the confessions and the detectives' reading of the confessions was therefore cumulative; it did not expose to the jury any new information upon which to rely in making its findings. We therefore conclude that, had counsel raised timely objections to the admission of the confessions and to testimony about their contents, no reasonable probability exists that the result of the proceedings would have been different.

e. Failure to Object to Detective Panasiuk's Testimony Regarding Other Robberies in the Neighborhood

¶55 At trial, the State elicited testimony that Muskin fit the general description of one or more of the persons suspected of involvement in other armed robberies that had occurred in the neighborhood where the charged crime occurred. Detective Peter Panasiuk gave the most expansive testimony, stating: "We've had a rash of robberies, probably about 15 or 18 robberies over the last couple of months," and stating at three points that Muskin fit the general description of one or more of the persons suspected of involvement in the other robberies. Muskin's trial counsel did not object to any of this testimony, and, in fact, allowed Panasiuk to restate on cross-examination prior testimony that Muskin fit the description of persons suspected of the other crimes.

¶56 Muskin contends that this testimony was inadmissible other acts evidence, and that his trial counsel rendered ineffective assistance by failing to object to it. Evidence of prior acts (other acts) is admissible only when it is offered for an acceptable purpose stated under WIS. STAT. § 904.04(2),[15] is

[15] WISCONSIN STAT. § 904.04(2) provides:

(continued)

relevant, *see* WIS. STAT. § 904.01, and its probative value substantially outweighs the dangers of unfair prejudice, confusion of the issues or misleading the jury, *see* WIS. STAT. § 904.03. ***State v. Muckerheide***, 2007 WI 5, ¶20, 298 Wis. 2d 553, 725 N.W.2d 930.

¶57 We assume without deciding that testimony regarding other robberies in the neighborhood is inadmissible other acts evidence, and that counsel's failure to object was deficient performance. We nonetheless conclude that Muskin was not prejudiced by this error. As noted, the evidence against Muskin included his own confession to the crime, as well as the confessions and trial testimony of four coactors implicating Muskin in the robbery. In the face of such evidence, we must conclude that even if trial counsel objected to the detective's testimony there is no reasonable probability that the trial would not have resulted in a guilty verdict.

> OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> (b) In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

f. Failure to Impeach Detective Panasiuk

¶58 Muskin argues that his trial counsel deficiently failed to impeach the detective who interrogated Muskin and took his confession, Detective Panasiuk. At trial, Panasiuk testified that Muskin at first denied any involvement in the robbery when Panasiuk was interviewing him. When asked why he did not record Muskin's initial denials in Muskin's signed confession, the detective offered that many times a confessing defendant does not want to include the fact that he initially lied. As Muskin argues, this testimony appears to be at variance with Panasiuk's preliminary hearing testimony. There, Panasiuk testified that Muskin never denied his involvement in the robbery during the interview. Muskin further notes that Panasiuk testified at trial that the victim's Social Security cards were submitted for "fuming," a fingerprinting process, but that no usable fingerprints were found. But, at a prior proceeding, Panasiuk testified that fuming had not been attempted because the cards had already been "dusted" for fingerprints, and that, once dusted, surfaces do not yield usable fingerprints by fuming.

¶59 Muskin argues his trial counsel rendered ineffective assistance for failing to impeach Panasiuk regarding these inconsistencies between his testimony and his prior statements.[16] Assuming without deciding that trial counsel's failures to impeach Panasiuk regarding these apparent inconsistencies constitute deficient performance, Muskin again fails to show that such deficiencies prejudiced the

[16] The State asserts that "[f]ailing to impeach a witness does not satisfy the deficient performance prong of the ineffective assistance of counsel claim." This response to Muskin's argument regarding counsel's alleged failure to impeach Panasiuk is inadequate. Obviously, trial counsel's failure to impeach a key witness (like Panasiuk) will constitute deficient performance in many cases. *See, e.g.* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶¶16-17, 27-28, 286 Wis. 2d 721, 703 N.W.2d 694 (counsel's failure to impeach the testimony of a key witness was a "glaring omission" constituting deficient performance).

outcome. We note that Panasiuk was an important witness because he took Muskin's confession. However, it is unclear how cross-examination of Panasiuk regarding these particular inconsistencies would have significantly undermined the reliability of the confession. Regardless, even without Muskin's confession, jurors heard the testimony and confessions of four coactors implicating Muskin. We therefore conclude that, even if counsel had used these inconsistencies to impeach Panasiuk's credibility, no reasonable probability exists that the outcome of the proceedings would have been different.

3. Cumulative Prejudicial Effect of Counsel's Error and Assumed Errors

¶60 Finally, we examine whether the cumulative effect of the error and assumed errors of trial counsel undermines our confidence in the outcome of this proceeding. *See* ***State v. Harris***, 2008 WI 15, ¶110 and n.54, __ Wis. 2d __, 745 N.W.2d 397 (Wisconsin courts examine prejudice based on the cumulative effect of counsel's deficiencies). We do so by "aggregate[ing] the effects of the multiple errors in determining whether their overall impact satisfies the standard for a new trial." ***Id.***

¶61 In many cases, the cumulative effect of counsel's error and the errors assumed for purposes of this analysis would doubtless require remand for a new trial. However, as noted, the evidence against Muskin was substantial. Muskin was convicted on the strength of the testimony and confessions of four coactors, and his own confession. Based upon the overwhelming nature of the evidence against Muskin, we therefore must conclude that there is no reasonable probability that the outcome would have been different absent the error and alleged errors.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶62 LUNDSTEN, J. (*concurring*). I join all portions of the majority opinion, except ¶¶24-33 and 49-50 dealing with Muskin's allegation that the prosecutor's multiple references to race denied Muskin his right to a fair trial.

¶63 As the majority points out in a footnote, skin color may be relevant for identification purposes and, when used as such, racial references are proper. Majority, ¶31 n.6. In ***Griffin v. Wainwright***, 760 F.2d 1505, 1512-13 (11th Cir. 1985), a decision cited in that footnote, multiple references to a white victim's race not only did not deprive a black defendant of his right to a fair trial, but also were proper identification references. Here, several of the race references, perhaps about ten, were identification in nature and proper. I agree with the majority, however, that the racial references should have stopped once they ceased to serve an arguably legitimate purpose.

¶64 What prompts the majority's concern is the fact that the prosecutor here adopted the habit of referring to the victims as "the white couple," instead of something more neutral, such as "the couple." I agree with the majority that multiple gratuitous references to race are a red flag. But the cold record before us provides insufficient evidence for this court to be speculating that the purpose of the prosecutor's multiple gratuitous references to race was an intent "to inject race into the proceedings," Majority, ¶31, or that the references were an "impermissible attempt to appeal to the fears and prejudices of a jury." Majority, ¶50.

¶65 Indeed, it would have been remarkably bad strategy for the prosecutor here to use the racial references to play to racial bias. The race of the

victims and the perpetrators hardly needed emphasizing; the jurors viewed all of the perpetrators, one of the victims, and were properly told that the other victim was also white. Given the danger of offending jurors who might be sensitive to attempts to play to racial bias, it would have been dimwitted to repeatedly intentionally call attention to what was readily apparent. The jurors needed no reminding that the victims were white and the perpetrators black. Instead, the most likely explanation for what happened here is that the prosecutor thoughtlessly got in the habit of using "the white couple" as shorthand, rather than "the couple."

¶66 The majority relies on several cases for the indisputable proposition that courts must not tolerate appeals to racial prejudice by prosecutors. What the majority does not make clear, however, is that none of those cases involved references for identification purposes. ***United States v. Cannon***, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (prosecutor referred to black defendants as "bad people"); ***Smith v. Farley***, 59 F.3d 659, 663-64 (7th Cir. 1995) (prosecutor compared the defendant to a fictional character "Superfly," an "unmistakable" racial stereotype); ***United States v. Doe***, 903 F.2d 16, 23-25 (D.C. Cir. 1990) (prosecutor stated that "Jamaicans are coming in, they're taking over the retail sale of crack …."); ***United States v. Grey***, 422 F.2d 1043, 1044-46 (6th Cir. 1970) (prosecutor gratuitously pointed out that the black defendant was "running around with a white go-go dancer"); ***Reynolds v. State***, 580 So. 2d 254, 255-57 (Fla. Dist. Ct. App. 1991) (repeated references to female sexual assault victim as white where identity was not an issue); ***State v. Varner***, 643 N.W.2d 298, 302, 303-05 (Minn. 2002) (a juror made a racially charged comment to other jurors).

¶67 The majority is understandably concerned about racial bias in the courtroom, but it has picked the wrong case to opine that the prosecutor possibly

attempted to use a defendant's race against him. At most, Muskin's appellate challenge on this topic warrants a reminder that gratuitous references to race have the potential, intended or not, of appealing to racial bias.