

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2007

David R. Schanker
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. 2006AP2322-CR

Cir. Ct. No. 2004CF533

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH A. HINRICHS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON and ROGER W. LeGRAND, Judges. *Affirmed.*

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

¶1 PER CURIAM. Joseph Hinrichs appeals a judgment of conviction and an order denying his postconviction motion. The issues relate to admission of evidence of prior crimes. We affirm.

¶2 Hinrichs was found guilty of robbery by use of force, theft, and resisting or obstructing an officer in connection with one incident. The allegation was that Hinrichs went to the residence of Wesley Nelson, demanded money from him, beat him up, and took money. The State moved to admit evidence that Hinrichs was convicted of burglary, battery, and dognapping for having in 1999 kicked in Nelson's door, struck him in the eye, and stolen his television and dog. The State asserted that Hinrichs was still on parole for those offenses at the time of the current crimes. The court granted the motion on the theory that the other-acts evidence was admissible to show intent and motive, among other things. *See* WIS. STAT. § 904.04(2) (2005-06).¹

¶3 The test for other-acts evidence is: (1) whether the evidence is offered for a permissible purpose; (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the jury, or needless delay. *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). A trial court's decision to admit other-acts evidence is a discretionary one, and we affirm if the trial court reviewed the relevant facts, applied a proper standard of law, and, using a rational process, reached a reasonable conclusion. *State v. Gribble*, 2001 WI App 227, ¶39, 248 Wis. 2d 409, 636 N.W.2d 488.

¶4 On appeal, Hinrichs argues that the circuit court erred by admitting this evidence. Part of his argument goes to all three previous convictions. He argues that the previous crimes were not sufficiently identical to the present

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

allegations to make the evidence admissible on this theory. However, it is not necessary that the earlier crimes be identical, or even nearly so, to be admissible for some of the purposes provided in WIS. STAT. § 904.04(2). In this case, for example, the earlier convictions are admissible, at minimum, to show that Hinrichs had a motive to take revenge on Nelson for Nelson having reported the earlier crimes for which Hinrichs was incarcerated. The evidence was properly admitted.

¶5 Hinrichs also argues that the earlier dognapping conviction does not go to motive or intent. We disagree. That conviction, as a part of the earlier conduct, is as relevant to motive as the others. Hinrichs may also be arguing that the dognapping charge was unfairly prejudicial because it would serve only to show, in Hinrichs' own words, that he "was a complete jerk." However, the implication here is that there is no other legitimate purpose for the evidence, which is a contention we have already rejected. Balancing the danger of unfair prejudice against its probative value, the court could reasonably admit the dognapping charge.

¶6 Hinrichs argues that, during opening and closing argument, the prosecutor misstated certain facts about the earlier convictions and that, as a result, Hinrichs was convicted based on "false evidence." In particular, he argues that the prosecutor presented the earlier crimes as having occurred together in one incident, when in fact there is a basis to conclude that the battery did not occur in the same visit as the burglary and dognapping, during which Nelson may not have been home.

¶7 We note first that the use of the term "false evidence" is inapt. Even if it is true that the prosecutor misstated the content of the evidence, arguments of

counsel are not evidence, and the evidence itself does not become false by virtue of having been mischaracterized during argument.

¶8 The State argues that Hinrichs waived this issue because he did not object to the prosecutor's statements when they were made during argument. The State relies on familiar case law requiring contemporaneous objections that we need not describe here. In reply, Hinrichs appears to concede that no contemporaneous objection was made, and instead he argues that his argument at a pretrial conference against admission of the prior crimes was sufficient to be considered an objection to the prosecutor's descriptions during argument. This argument is meritless. The two issues are separate and would result in entirely separate rulings.

¶9 In addition, even if the issue about the prosecutor's argument had been properly framed in postconviction proceedings as a claim that counsel was ineffective for not objecting, we would reject the argument. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. *Id.* at 697. To demonstrate 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.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶10 In this case, there is no prejudice. The prejudice, if any, would arise from the degree to which the prosecutor's allegedly erroneous description was more damaging to Hinrichs than a *correct* description. Although not arguing

ineffective assistance in this appeal, Hinrichs does try to explain why the allegedly incorrect description was prejudicial to him. However, his argument is vague and unspecific. We are unable to see any sense in which the “incorrect” description of the earlier crimes as one event would be more prejudicial than the “correct” description as two events, at least not to the degree that would undermine our confidence in the outcome of the trial as a whole.

By the Court.—Judgment and order affirmed.

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

