COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2008

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 Nos. 2007AP1724-CR
2007AP1725-CR

Cir. Ct. Nos. 2005CF163
2005CF177

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DENNIS E. REIMER,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Ozaukee County: JOSEPH D. MCCORMACK, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Dennis Reimer appeals from judgments of conviction of fleeing an officer and three counts of bail jumping. He also appeals from an order denying his postconviction motion. He argues the circuit court

judge interfered with his cross-examination of a witness and demonstrated bias by commenting on credibility during closing arguments. He further claims he was denied the effective assistance of trial counsel because counsel did not object to the judge's indications of bias and effectively conceded guilt on the fleeing charge during closing argument. We reject the claims of error and affirm the judgments and order.

¶2 Charges against Reimer for fleeing an officer, bail jumping, and knowingly violating a domestic restraining order were tried to the court.[1] When defense counsel was examining witness Carrie Ives about her phone bill and whether it showed incoming calls, the circuit court judge commented that his phone bill does not reflect the numbers of incoming calls. The judge then asked the witness if she receives a record of all the calls made to her. The witness indicated that on her cell phone bill she did but not on her home phone bill. The judge then asked her if the call from Reimer was made to her cell phone. The witness said, "No, it was made on my home phone, but I got previous calls." The judge then directed defense counsel to move on.

¶3 Reimer contends that the judge's interruption of the cross-examination and conversational comments about the judge's own telephone bill effectively ended cross-examination and denied Reimer his Fifth Amendment rights. He quotes ***State v. Garner***, 54 Wis. 2d 100, 104, 194 N.W.2d 649 (1972):

> But even where there is no jury, the judge should not take an active role in trying the case for either the state or the defense. The judge who acts as an advocate skates on thin ice in any judicial hearing and runs the risk of turning the

[1] Reimer was acquitted of the misdemeanor charge of intentionally violating a restraining order.

> adversary system into an inquest wherein the trier of the fact calls and questions the witnesses.

That is the extent of his argument.

¶4 We first observe that Reimer waived this issue by not objecting during trial and not raising it in his postconviction motion. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***State v. Huebner,*** 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. We generally do not consider an issue raised for the first time on appeal. ***State v. Whitrock***, 161 Wis. 2d 960, 969, 468 N.W.2d 696 (1991). Overlooking waiver, the issue has no merit.

¶5 Circuit courts have authority to interrogate witnesses. WIS. STAT. § 906.14(2) (2005-06).[2] "'The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state.'" ***State v. Carprue***, 2004 WI 111, ¶42, 274 Wis. 2d 656, 683 N.W.2d 31 (quoted source omitted). The judge need only do so carefully and in an impartial manner. ***Id.*** Here the judge expressed confusion about the witness's testimony that her phone bill reflected incoming calls. He questioned the witness to clarify the point. Not only was his question limited and not suggestive of partiality or improper motive, the case was tried to the court and there was no risk of improper influence on a jury. The suggestion that the judge's direction to "move on" foreclosed any further examination of the witness about her phone bill or incoming calls has no

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

basis. Reimer makes no explanation of what additional questions defense counsel was precluded from asking. Reimer's right to cross-examination was not violated.

¶6 During closing argument the defense argued that Reimer's version of the fleeing incident was more credible than the police officer's. To that end the defense argued that because Reimer realized he was going to get "nailed" for driving a car after revocation, he was compliant with the officer and was "really not trying to get away from the officer once he's recognized." The circuit court commented:

> He has a certain thought process that becomes available to the Court that's undisputed, which is he doesn't think like you think or I think because he doesn't foresee consequences or he doesn't get out on the road without any license plates and without a license, which we know he did. So he doesn't even think like we think. You wouldn't do that, would you, neither would I.

¶7 When defense counsel replied that the situation should be assessed using common sense and personal experiences, the court stated:

> Your client … doesn't think the same way, that's why he did what he did. And we know no matter what happened in terms of the fleeing, we know he was operating after revocation, that's not even contested. We know he was operating a vehicle without a license plate on it.
>
> …
>
> So we know he's a revoked person who's driving a motor vehicle on a public highway without a license plate. What does that tell you about him, he's a person who can't see past his nose as far as future consequences; that we know.
>
> …
>
> I don't have to be Dr. Whoever to figure that out. I don't have to be Dr. Phil to tell you that. He tells us that.

¶8 Defense counsel responded, "the implication of what the Court's thinking here or the reasoning is, that if he sees the cop, he doesn't connect the dots at that point." The court replied, "No, he's going to get away first. Then later he connects the dots. And he realized after he makes a few phone calls that he's in trouble."

¶9 Reimer argues that by this commentary the circuit court improperly introduced character evidence and demonstrated bias. There was no contemporaneous objection to the circuit court's remarks and any challenge to the propriety of the circuit court's conduct is waived. ***Huebner***, 235 Wis. 2d 486, ¶10. Further, Reimer's postconviction motion only alleged that trial counsel was ineffective for not objecting to the circuit court's introduction of character evidence and did not raise a claim that the court's comments demonstrated judicial bias. The judicial bias claim is raised for the first time on appeal and is also waived. ***Whitrock***, 161 Wis. 2d at 969.

¶10 We consider Reimer's contention that the circuit court's comments constituted the introduction of character evidence under an ineffective assistance of counsel analysis recognizing that only if there was actual error could counsel's performance be deemed deficient or prejudicial.[3] *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to present legal challenge is not deficient performance if challenge would have been rejected). We summarily reject the notion that because the circuit court mentioned Reimer's conduct in driving without a license it was using character evidence or

[3] The circuit court did not conduct a ***Machner*** hearing on Reimer's claim of ineffective assistance of counsel because it concluded there was no merit to the underlying claims of error which drew no objection.

specific instances of conduct to attack Reimer's credibility. *See* WIS. STAT. § 904.04(1) (prohibiting the introduction of evidence of a person's character to show that the person acted in conformity with that character); WIS. STAT. § 906.08(2) (prohibiting extrinsic evidence of specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility). The circuit court's comments came during closing argument and were in direct response to defense counsel's argument that it was credible to believe that Reimer was compliant with the attempt to stop him because he knew he was going to get caught in any event. The court was commenting on Reimer's credibility. Defense counsel was given insight to the court's finding on Reimer's credibility and by engaging defense counsel in a dialogue, the court gave the defense an opportunity to respond to the court's perception of Reimer's credibility. The court's manifestation of its skepticism of Reimer's compliant attitude is not error simply because the expression of disbelief was not postponed until the conclusion of the trial. ***Ace Associates, Inc. v. Nagy***, 13 Wis. 2d 612, 618, 109 N.W.2d 359 (1961). Further, the court's skepticism of Reimer's credibility did not demonstrate bias but was expressed as part of the court's fact-finding role. *See* ***id.*** The circuit court's comments during the defense closing argument were not error and trial counsel was not ineffective for not objecting.

¶11 Reimer's additional claim of ineffective assistance of counsel is that counsel effectively conceded guilt on the fleeing charge during closing argument. Trial counsel's concessions during closing argument which are the "functional equivalent" of a guilty plea are improper if done without the defendant's consent. *See* ***State v. Gordon***, 2003 WI 69, ¶24, 262 Wis. 2d 380, 663 N.W.2d 765. Before considering the merits of Reimer's claim, we must again observe the issue is

waived as it was not raised as part of Reimer's postconviction motion.[4] *See* ***State v. Elm***, 201 Wis. 2d 452, 463, 549 N.W.2d 471 (Ct. App. 1996).

¶12 Reimer contends that defense counsel's argument on the fleeing charge was weak and failed to make the stronger points that charging Reimer with fleeing was not contemplated by the officer at the time of the incident but was an afterthought or a decision by the district attorney. Reimer testified that he did not flee the officer but merely drove into a subdivision and, in plain view, waited for the officer.[5] Reimer suggests that closing argument that only pointed out the officer's failure to report Reimer's explanation that he had pulled into a subdivision was inadequate and a concession of guilt because it did not argue for acquittal on the basis of insufficient evidence.

¶13 Defense counsel's closing argument was not the functional equivalent of a guilty plea on the fleeing charge. Whether or not the officer ticketed or arrested Reimer for fleeing when he first made contact with Reimer after the incident is irrelevant to guilt or innocence. That fact does not bear on any element of the crime. Moreover, counsel's argument was a strategy decision on how best to mount an attack against the fleeing charge. Counsel chose to attack the officer's recollection of the incident. Counsel's choice was reasonable in light of evidence that Reimer increased his speed when the officer activated his siren

[4] Reimer's postconviction motion alleged that trial counsel was ineffective for abandoning a line of cross-examination with the officer that effectively conceded the officer's credibility and his guilt of the fleeing charge.

[5] The officer testified that he activated his siren and flashing lights and followed Reimer for approximately one-half mile before terminating the pursuit on the crest of a hill due to safety concerns and Reimer's increased speed. Once the officer crested the hill, he did not see Reimer's car.

and lights and passed several cars on a hill to avoid the officer. Merely because counsel's strategy was unsuccessful does not mean that his performance was legally insufficient. *See* ***State v. Teynor***, 141 Wis. 2d 187, 212, 414 N.W.2d 76 (Ct. App. 1987).

By the Court.—Judgments and order affirmed.

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