COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2012

Diane M. Fremgen
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. 2011AP2593-CR **Cir. Ct. No. 2009CT697**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COREY R. ROBERTSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Corey Robertson appeals a judgment of conviction, entered on a jury verdict, for operating while intoxicated, second offense, and an order denying postconviction relief. Robertson argues he received

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

ineffective assistance of counsel and is entitled to a new trial in the interest of justice. We reject Robertson's arguments and affirm the judgment and order.

BACKGROUND

¶2 The State charged Robertson with operating while intoxicated and operating with a prohibited alcohol concentration, both as second offenses, as well as operating after revocation. At trial, officer Gordon O'Brien testified that on September 25, 2009, at approximately 12:29 a.m., he was on patrol in Augusta, when he observed a vehicle traveling in front of him weaving within its lane. O'Brien stopped the vehicle after observing it cross the centerline twice.

¶3 When O'Brien made contact with the driver, who was subsequently identified as Robertson, O'Brien smelled alcohol and observed that Robertson's eyes were bloodshot and "glossy." Robertson denied drinking and explained a friend had spilled beer in his vehicle. O'Brien administered field sobriety tests to Robertson. After Robertson showed signs of impairment on the tests, he admitted drinking two beers. He also told O'Brien he drank some mouthwash. O'Brien did not smell any mouthwash on Robertson. O'Brien placed Robertson under arrest for operating while intoxicated and took him to the hospital for a blood draw. Testing revealed Robertson's blood alcohol concentration was .120 grams per 100 milliliters.

¶4 Robertson testified that on that night, he went to a small town bar to meet a friend. He was at the bar for one to one and one-half hours and, during this time, he drank three twelve-ounce beers. Robertson was not concerned that the beers would affect his driving. He explained he weighed 250 pounds at the time and, using an alcohol chart, showed that his consumption of three beers would not cause him to have a prohibited blood alcohol concentration.

¶5 After Robertson left the bar, he noticed a car behind him. When the car accelerated to get closer to him, Robertson knew, based on "past experiences," that it was a police officer and he was going to be pulled over. He explained that he once was a bartender, and he knew from experience that small town police officers will follow vehicles leaving bars at night and stop them. Robertson has been pulled over many times in small towns and some stops did not even result in a ticket. He also has been asked to perform field sobriety tests "well over half a dozen times" and has never received an operating while intoxicated citation in Wisconsin.

¶6 Robertson explained that when he observed the officer behind him, he started "chugging" mouthwash in preparation for the upcoming stop. He drank a "large portion" of the bottle of mouthwash because he did not want the officer to smell alcohol and administer field sobriety tests. Robertson was later "shocked to find out that [mouthwash] actually contained over 20 percent" alcohol.

¶7 Once stopped, Robertson told O'Brien he had not been drinking because he felt O'Brien was not "being honest with [him] by pulling [him] over." Robertson knew that he would be required to perform field sobriety tests and wanted to see how the officer was going to justify the administration of the tests.

¶8 Robertson also explained his license had been revoked because of a prior operating while intoxicated offense in Minnesota. He explained he had not planned on driving that night but had been "kick[ed] to the curb" when a girl showed up at his friend's house. He conceded he was drunk, and the Minnesota officers "were nice about it." Robertson explained he "took responsibility for it and moved on." He took steps to get his license reinstated, and the Wisconsin

Department of Motor Vehicles told him his license was in compliance. He is very careful about not drinking and driving.

¶9 At the end of Robertson's testimony, the court, on behalf of one of the jurors, asked the following question: "You indicated you've done field sobriety tests approximately six times. Why were you pulled over and there was no reason to suspect alcohol consumption?" Robertson replied,

> I've been pulled over many more times than that. Like I said, in my earlier life, I had actually – I probably – by the time I was 18, I had my license suspended for too many tickets that were not alcohol related. And with that goes – a lot of times you don't get pulled over for a PBT, but I've only noticed at night. You do not get pulled over and given a PBT when you start looking at daylight hours. When you start looking at bar close, and you start looking at 1:00 in the morning, even midnight, as the joke goes, the only two people in a small town at that time of night are cops and criminals; so that goes hand in hand. There have been some times when I have been drinking and I do smell like alcohol and I don't blame the officer for giving me a PBT, but I've passed them up until 2008 [the Minnesota OWI] in the situation with my friend John.

Later, after the jury had been dismissed for deliberations, Robertson's counsel informed the court that Robertson told her he misheard the juror's question and thought the juror asked about preliminary breath tests, not field sobriety tests. Robertson was upset with the answer he gave. The court responded that, at this point, it did not believe anything could be done.

¶10 The jury found Robertson guilty of operating while intoxicated and operating with a prohibited blood alcohol concentration. He was acquitted of the operating after revocation charge.

¶11 Robertson filed a postconviction motion, alleging his trial counsel was ineffective and he was entitled to a new trial in the interest of justice.

Following a ***Machner***[2] hearing, the court denied Robertson's motion. Robertson appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

¶12 To succeed on an ineffective assistance of counsel claim, Robertson must prove (1) his counsel's representation was deficient and (2) he was prejudiced by his counsel's deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to prove deficient performance, Robertson must establish that his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* ***id.*** However, there is "a strong presumption that counsel acted reasonably within professional norms." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong is satisfied.

¶13 An ineffective assistance of counsel claim is a mixed question of law and fact. ***Id.*** at 698. We accept the circuit court's factual findings unless they are clearly erroneous; however, the ultimate determination of whether counsel's performance was deficient and whether it prejudiced the defendant is a question of

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

law we review independently. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

¶14 Robertson argues his trial counsel was ineffective in three ways. First, Robertson contends counsel was deficient for failing to prevent the jury from learning about his "prior bad acts"—specifically, the prior operating while intoxicated conviction, his prior traffic stops, and his participation in multiple field sobriety tests. In support, Robertson relies on ***State v. Alexander***, 214 Wis. 2d 628, 571 N.W.2d 662 (1997).

¶15 ***Alexander***, however, is distinguishable from the present situation. There, the defendant stipulated to the prior alcohol offenses and moved the circuit court to keep evidence of these prior offenses from the jury. ***Id.*** at 637. The state objected, and the court allowed the state to admit evidence of the convictions. ***Id.*** at 637-38. Our supreme court held the circuit court had erroneously exercised its discretion by admitting the evidence because "when the *sole* purpose of introducing any evidence of a defendant's prior convictions … is to prove the status element, and the defendant admits to that element, its probative value is far outweighed by the danger of unfair prejudice to the defendant." ***Id.*** at 651 (emphasis added). Here conversely, Robertson's counsel did not offer the evidence in an attempt to help the State meet its burden of proof on the status element. Instead, counsel testified she offered the challenged evidence for strategic purposes.

¶16 Specifically, Robertson's trial counsel testified she assumed at least one juror would know that a first operating while intoxicated offense is not criminal and by having Robertson be open about his first offense, she was trying to build credibility with the jury. She elaborated that when reviewing testimony

before trial, Robertson was very believable about how he took responsibility in that case because he made a mistake and that mistake made him very careful about drinking and driving. She wanted the jury to infer that he was not pleading guilty in this case because he did not operate while intoxicated.

¶17 Counsel further explained that if the jury believed Robertson was being open and honest about everything, it was more likely going to believe that he drank a large quantity of mouthwash before he was stopped. She elaborated that the testimony regarding Robertson's prior stops and participation in field sobriety tests was necessary to "lay the groundwork for why he had a reasonable basis for believing that he might improperly have been pulled over on the night in question." She opined that without the testimony about prior stops, there would have been no explanation for why he would drink the mouthwash.

¶18 We conclude that Robertson's trial counsel articulated a valid strategic reason for offering the challenged testimony. Her determination to offer this evidence in order to bolster Robertson's credibility and provide a basis for why Robertson would believe he was going to be improperly stopped and why he would drink a large amount of mouthwash was reasonable. Counsel was not deficient. *See* ***State v. Domke***, 2011 WI 95, ¶49, 337 Wis. 2d 268, 805 N.W.2d 364 (Counsel's performance is not deficient unless it is based on an "irrational trial tactic" or "based upon caprice rather than judgment.") (citation omitted).

¶19 In any event, based on the overwhelming evidence against Robertson, we also conclude that the admission of the challenged evidence did not prejudice Robertson. O'Brien testified that he observed Robertson weave within his lane and cross the centerline twice. Robertson smelled like alcohol, but denied drinking. After the field sobriety tests indicated he was impaired, Robertson

conceded he was drinking. Testing revealed Robertson's blood alcohol concentration was .120 grams per 100 milliliters.

¶20 Robertson next argues his counsel was ineffective for failing to move to sever the alcohol-related charges from the operating after revocation charge. Because the jury acquitted Robertson of the operating after revocation charge, this argument is based on the premise that counsel's failure to move to sever the charge caused the jury to learn about the prior operating while intoxicated offense. However, counsel explained that she offered that evidence to bolster Robertson's credibility, and we have already determined that the revelation of the prior offense was reasonable given counsel's trial strategy.

¶21 Moreover, at the postconviction hearing, the circuit court concluded it would not have granted a motion for severance. The court observed that the operating after revocation charge was properly joined with the alcohol-related offenses because they resulted from the same incident. *See* WIS. STAT. § 971.12(1). The court reasoned that Robertson was not prejudiced by the joinder because, even assuming counsel did not want the jury to learn about the prior operating while intoxicated conviction, there were ways to try the case without revealing why Robertson's license was revoked. We agree. Counsel is not deficient for failing to file a motion that would not have been granted. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

¶22 Robertson next asserts counsel was ineffective in how she handled the jury question regarding field sobriety tests. Specifically, at the postconviction hearing, Robertson argued counsel should have requested the court to bring the jury back so that Robertson could clarify his answer and the court could strike any

reference to preliminary breath tests. On appeal, he also argues trial counsel should have objected to the question or moved to strike Robertson's answer.

¶23 At the postconviction hearing, the circuit court concluded counsel was not deficient for failing to move to bring the jury back. The court determined that, even if counsel had requested to bring the jury back, it would not have recalled the jury. It reasoned that, while evidence can be reopened in "extraordinary circumstances," the testimony in this case "certainly didn't rise to th[e] level" of bringing the jury back for further instruction or clarification. Because the court would have denied any request to bring the jury back, counsel was not deficient for failing to move to interrupt jury deliberations. *See* ***Simpson***, 185 Wis. 2d at 784.

¶24 Additionally, the juror's question and Robertson's answer supported his defense. Through this question and answer, Robertson was able to assert that small town police officers routinely stop vehicles at night to check the occupants for impairment. Counsel was not deficient for failing to object to that question or answer.

¶25 Finally, Robertson argues, as a subset of his argument regarding counsel's alleged failure to move to bring the jury back, that the circuit court "could have done something to mitigate the issue raised by the defendant, but chose not to, causing error." Robertson has offered no legal authority to support his proposition that the circuit court has a sua sponte duty to bring the jury back from deliberations upon hearing that a defendant is upset with one of his answers. We will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

II. New Trial in the Interest of Justice

¶26 Robertson argues he should be granted a new trial in the interest of justice based on his trial counsel's ineffectiveness. The State responds that we should not consider this assertion because Robertson failed to develop a legal argument in his brief-in-chief supporting this assertion. We agree. *See* ***id.*** Although we observe that Robertson offered a legal argument supporting this assertion in his reply brief, we will not consider arguments raised for the first time in a reply brief. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

¶27 In any event, we note that our discretionary reversal power is formidable, and we exercise it sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. Because we concluded Robertson's trial counsel was not ineffective, Robertson would not be entitled to a new trial in the interest of justice on that basis. *See* WIS. STAT. § 752.35.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.