COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2632-CR **Cir. Ct. No. 2012CM695**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER J. MCMAHON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: WILLIAM F. KUSSEL, JR., Judge. *Affirmed.*

¶1 STARK, P.J.[1] Christopher McMahon appeals a judgment of conviction and an order denying his postconviction motion alleging his trial counsel provided ineffective assistance. We affirm.

BACKGROUND

¶2 McMahon was charged with one count of misdemeanor theft of movable property, contrary to WIS. STAT. § 943.20(1)(a). At trial, B.R. testified he first noticed four of five rolls of green chain-link fencing, in addition to some firewood, were missing from his property on September 26, 2012, and he reported the loss to law enforcement. On September 29, B.R. left his residence with his brother at about 5:45 a.m. in his brother's pick-up truck. Shortly after departing, they saw a white car with a hitched trailer near B.R.'s property on the side of the road; the white car had not been there when B.R.'s brother arrived that morning. B.R. and his brother testified they stopped and inspected the apparently unoccupied white car and noted its license plate number. After turning back to B.R.'s residence because they felt uneasy, they saw the white car speeding past them on the highway. After some pursuit, the white car eluded them after it reversed course three times on the highway, turned off its lights, and ultimately outran their truck.

¶3 B.R. testified that after this incident, he again reported to law enforcement that his fencing was missing and also reported the license plate number of the vehicle involved in the September 29 incident. Deputy Scott Wedemayer testified he ran the plate and determined McMahon owned the white

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

car. Officer Matthew McDonald testified that he was dispatched to McMahon's residence in Portage County, where four rolls of green chain-link fencing were found in McMahon's backyard and eventually removed by law enforcement. Deputy Wedemayer confirmed the fencing rolls on McMahon's property matched the roll that remained in B.R.'s possession.

¶4 McMahon presented three witnesses—Kimberly Rushman (his fiancée), Rushman's adult son, and McMahon's mother—all of whom testified that they saw four rolls of green fencing at various times and in different positions at McMahon's residence before September 26. He also called a fourth witness who on September 30 observed matted down indentations on McMahon's lawn in different places than where the fencing rolls were found on McMahon's property by law enforcement on Septemer 29. McMahon testified that he was an avowed dumpster-diver who found four rolls of green chain-link fencing in a dumpster near a construction site in Wisconsin Rapids anywhere between three to seven weeks before September 29. McMahon did not deny that he had stopped his vehicle on the side of a road on the morning of September 29, but he claimed his vehicle's engine had overheated during an early morning dumpster-diving trip to Tigerton, which forced him to pull off the highway. McMahon explained that he was not near the vehicle when B.R. and his brother examined it because he had gone for a walk and that when he returned, he hid upon seeing them inspecting his vehicle in fear they could have been armed.

¶5 The jury found McMahon guilty of the theft charge. McMahon filed a postconviction motion in which he alleged his trial counsel provided ineffective assistance. After testimony from trial counsel and McMahon over the course of

two hearings,[2] the circuit court denied the motion, concluding trial counsel was neither deficient nor caused McMahon prejudice. McMahon appeals, again arguing his trial counsel was ineffective. We discuss further facts regarding the trial and postconviction hearings below.

DISCUSSION

¶6 Whether counsel was ineffective is a mixed question of law and fact. ***State v. Jenkins***, 2014 WI 59, ¶38, 355 Wis. 2d 180, 848 N.W.2d 786. The circuit court's findings of historical fact, including circumstances of the case and conduct of counsel, are upheld unless clearly erroneous. ***Id.*** Whether counsel's performance was constitutionally adequate is a question of law reviewed de novo. ***Id.***

¶7 To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that his or her trial counsel's performance was deficient and that this performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). To establish deficiency, the defendant must show trial counsel's representation "fell below an objective standard of reasonableness." ***Id.*** at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" and we will not second-guess reasonable strategic decisions. ***Id.*** at 689. A seemingly unwise strategic decision does not create deficiency so long as it is "reasonably founded on the facts and law under the circumstances existing at the time the decision was made." ***State v. Smith***, 2016 WI App 8, ¶14, 366

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

Wis. 2d 613, 874 N.W.2d 610 (citation omitted). To establish prejudice, a defendant is required to show that but for the errors committed by counsel at trial, it was reasonably probable the outcome of the trial would have been different. ***State v. Burton***, 2013 WI 61, ¶49, 349 Wis. 2d 1, 832 N.W.2d 611.

¶8 We may review either deficient performance or prejudice first; if the defendant fails to carry his or her burden on one, we need not review the other. ***State v. Williams***, 2000 WI App 123, ¶22, 237 Wis. 2d 591, 614 N.W.2d 11. We shall only reverse the conviction if confidence in the trial's outcome is undermined to the point that the result is unreliable or unfair. ***Strickland***, 466 U.S. at 687.

I. Failure to shield McMahon from impeachment due to a prior conviction

¶9 McMahon pled guilty to one count of misdemeanor criminal damage to railroad property fourteen years before the date of the trial. Without objection by McMahon's trial counsel, the circuit court concluded pre-trial that McMahon could be asked if he had been convicted of a crime, and when he answered yes, how many times. *See* ***Nicholas v. State***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). McMahon was present for this discussion, and trial counsel explained to him how to answer the latter question by stating he had one prior conviction. After McMahon elected to testify, he was asked these questions on cross-examination and responded that he had been convicted of "[o]ne crime about 15 or 16 years ago."

¶10 Outside the jury's presence, on the State's motion and over the objection of defense counsel, the circuit court ruled that McMahon had opened the door to permit questions about the circumstances of the prior misdemeanor conviction because he failed to provide the correct age of his conviction. The State then examined McMahon regarding the conviction:

> Q. You have been convicted in the past?
>
> A. Correct.
>
> Q. What was that for?
>
> A. Uh, criminal damage to railroad property.
>
> Q. You were also stealing at the time, were you not?
>
> A. Yes.
>
> Q. And they were willing to dismiss the theft count in order for you to plead to the criminal damage to railroad property?
>
> A. Correct.
>
> Q. You were stealing railroad equipment?
>
> A. No.
>
> Q. What were you stealing?
>
> A. The timbers that were supporting the – some sign, or something like that.

Trial counsel for McMahon neither objected during this line of questioning nor followed with any redirect examination.

¶11 McMahon first argues his trial counsel was ineffective because he failed to object before trial to the introduction of the misdemeanor conviction. *See* WIS. STAT. § 906.09(2). While acknowledging Wisconsin does not follow FEDERAL RULE OF EVIDENCE 609(b), McMahon claims, without citing any authority, it is "common practice" for defense attorneys to object to admission of misdemeanor convictions over ten years old. He argues counsel had no tactical reason not to argue for exclusion of the prior conviction because the case hinged on credibility and the jury would likely draw the troubling inference that because he committed the past offense he likely committed the crime at issue. Finally, he

contends the nature of the prior conviction had nothing to do with honesty, and its minimal relevance was likely outweighed by the danger of unfair prejudice.

¶12 Trial counsel testified at the postconviction hearing that he knew of the prior conviction. Although trial counsel claimed to have objected to use of the conviction prior to trial,[3] he admitted he did not object to its use immediately before or at trial. Trial counsel recognized McMahon's prior conviction involving property damage arose out of an attempt to steal property and, therefore, was substantially similar to the offense alleged at trial. As a result, the fact that McMahon's prior misdemeanor was older than ten years did not necessarily mean an objection would have been successful, as "all prior convictions are relevant to a witness' character." ***State v. Gary M.B.***, 2004 WI 33, ¶23, 270 Wis. 2d 62, 676 N.W.2d 475. In addition, counsel was quite concerned McMahon lacked credibility and would be difficult to control on the witness stand. The circuit court found at the postconviction hearings that McMahon "frequently overruled counsel on procedural matters" and that "he tend[ed] to keep talking and explain things" beyond what was necessary. Therefore, rather than attempt to exclude evidence of the prior conviction at trial, McMahon's counsel recommended that McMahon waive his right to testify. *Cf.* ***State v. Pitsch***, 124 Wis. 2d 628, 638, 369 N.W.2d 711 (1985) (trial counsel's strategic decision may extend to advising defendant not to testify in his own defense to avoid impeachment if based upon accurate pretrial investigation into number of convictions). We will not disturb trial counsel's reasonable strategy founded upon the factual circumstances and the law. *See*

[3] Trial counsel claimed this objection occurred "in conference" at some point before trial, although neither the circuit court's findings nor the record reflect when this conference was held or that such an objection was made.

Smith, 366 Wis. 2d 613, ¶14. Counsel is not deficient because McMahon chose to ignore counsel's recommendation and exercised his right to testify on his own behalf, thus subjecting himself to impeachment with evidence of his prior conviction.

¶13 Second, McMahon claims trial counsel was deficient for failing to adequately prepare him to testify about the prior misdemeanor conviction. However, this argument directly contradicts the findings of the circuit court at the postconviction hearings, in which the court stated, "the opening of the door tended to be [McMahon's] fault." The court noted that prior to trial, McMahon was instructed how to answer the questions regarding the conviction, and "it was very clear that he heard and understood" this discussion. The court further found that trial counsel "did spend significant time" with McMahon to explain how to address the question. Contrary to McMahon's own claim that he had an unspecified "learning disability" and difficulty with answering yes or no questions, the court found that McMahon was of average intelligence—having obtained a college degree—and required no greater attention than what trial counsel provided to adequately answer the question. McMahon does not argue these findings are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶14 Third, although McMahon does not argue the circuit court erred in ruling the door had been opened, he argues trial counsel "failed to remain vigilant" and object to any of the State's questions, citing ***State v. Cathey***, 32 Wis. 2d 79, 89, 145 N.W.2d 100 (1966), for the proposition that "a witness cannot be impeached by showing an arrest where there is no conviction." ***Id.*** At the postconviction hearings, trial counsel explained he did not object to this line of questioning because his initial objection was unsuccessful, and he thought additional objections would likely have the same result, as well as draw the jury's

attention to the nature of the underlying conviction. Although trial counsel stated at the postconviction hearings he regretted his lack of objection, hindsight does not permit us to declare deficient this reasonable strategic decision. *See* ***Smith***, 366 Wis. 2d 613, ¶14.

¶15 Fourth, McMahon contends trial counsel was deficient for failing to request WIS JI—CRIMINAL 327[4] to ensure the jury did not consider any testimony regarding the misdemeanor conviction as relevant to McMahon's guilt rather than his character for truthfulness. We again note that trial counsel's tactical approach, once the door had been opened, was to avoid highlighting the misdemeanor conviction any more than necessary, including by requesting such an instruction. We will not disturb counsel's reasonable tactical decision on appeal. *See* ***Smith***, 366 Wis. 2d 613, ¶14.

II. Failure to shield witness from impeachment

¶16 Rushman testified that McMahon had told her several weeks before September 26 about finding fencing rolls in a dumpster, and that she saw green fencing rolls in different positions on the property. When Rushman was cross-examined, the State asked her if she had been convicted of a crime. Rushman responded, "ordinance, yes," to which the State then responded by reading to her

[4] WISCONSIN JI—CRIMINAL 327 (2001) states:

> Evidence has been received that the defendant (name) has been [convicted of crime(s)] …. This evidence was received solely because it bears upon the credibility of the defendant as a witness. It must not be used for any other purpose, and, particularly, you should bear in mind that a [criminal conviction] … at some previous time is not proof of the guilt of the offense now charged.

the case number of the violation—"Wood County Case 08-CM-553." Trial counsel explained at the postconviction hearings that prior to trial, Rushman told him she had only been convicted of an ordinance violation. However, trial counsel did not object to the State's question because after his discussion with Rushman, the State informed counsel that Rushman had in fact been convicted of a crime, and counsel relied upon the State's incorrect information.

¶17 Ordinance violations are not admissible to impeach a witness, as WIS. STAT. § 906.09 only speaks to admission of criminal convictions. ***State v. Chu***, 2002 WI App 98, ¶37, 253 Wis. 2d 666, 643 N.W.2d 878. McMahon argues trial counsel was deficient by failing to prevent the State from asking Rushman about her non-criminal conviction. Regardless of whether trial counsel was deficient, McMahon fails to show this admission was prejudicial.

¶18 Rushman's testimony at trial clarified she had not been convicted of a crime. McMahon's assertion that the State caused confusion by providing the criminal case number is unavailing. The circuit court found the jury was not "greatly misled that there was a criminal conviction" due to this line of questioning. Furthermore, the admission likely had little effect on the outcome of the trial. The State also questioned Rushman's credibility by making the jury aware she was McMahon's fiancée, depended upon him for housing, and was financially supported by McMahon at the present time. Regardless of any claimed improper impeachment of Rushman's testimony, there is no reasonable probability of a different outcome had trial counsel objected.

III. Failure to present evidence

¶19 McMahon and his witnesses testified on direct examination that the fencing rolls had been on his property long before B.R.'s fencing was stolen. In response, the State introduced photographs taken by officer McDonald of the fencing rolls on McMahon's property and cross-examined the witnesses regarding the lack of grass growing in and around the fencing before it was seized by law enforcement.

¶20 McMahon argues trial counsel was deficient for failing to disclose to the State and introduce at trial photographs and a video recording taken by McMahon. The images showed indentations in his lawn allegedly caused by the fencing consistent with his witnesses' testimony that the fencing had been on his property in other locations and was recently moved before discovery by law enforcement. McMahon also claims trial counsel failed to call a Portage County law enforcement officer who accompanied officer McDonald to McMahon's residence to testify regarding indentations she observed elsewhere on McMahon's lawn. McMahon contends this evidence would have bolstered his witnesses' credibility and countered the State's own photographs of the fencing rolls on his property.

¶21 Although McMahon terms the "unpresented" evidence as both exculpatory and rehabilitative, trial counsel stated at the postconviction hearings that the visual evidence added nothing of value to the case. Trial counsel instead explained he determined it would be more effective to present the testimony of witnesses who saw the fencing rolls in McMahon's backyard prior to September 26. Once again, we shall not in hindsight second-guess trial counsel's reasonable strategy. *See* ***Smith***, 366 Wis. 2d 613, ¶14.

IV. Failure to object to burden shifting

¶22 Finally, McMahon claims the State engaged in impermissible burden shifting two times during the trial: first, during cross-examination of McMahon by asking whether McMahon had returned to the dumpster where he claimed to have found the fencing rolls to find out who owned them; and second, in closing arguments, by suggesting McMahon knew how to subpoena witnesses other than his family who had seen the fencing or could say from where he acquired it. McMahon argues trial counsel's failure to object to both instances was "simply unprofessional."

¶23 McMahon's conclusory assertions fail to establish deficiency on this point. Trial counsel explained he did not believe either statement was burden shifting and that objections on either point could highlight the considerable weakness of McMahon's case to the jury. Trial counsel's strategy was reasonable. The prosecutor's question and argument were not directed to a lack of defense, but instead, to questions about viability of the defense presented. "A prosecutor's comment by questioning or argument about the shortcomings of the defense evidence does not, *per se*, constitute a shifting of the burden of proof." ***State v. Patino***, 177 Wis. 2d 348, 379, 502 N.W.2d 601 (Ct. App. 1993). In addition, trial counsel also recognized that objecting during closing argument is usually disfavored. *See* ***State v. Draize***, 88 Wis. 2d 445, 454, 276 N.W.2d 784 (1979).

By the Court.—Judgment and order affirmed.

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