COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2870-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS A. LISNEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Richland County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 DYKMAN, J.[1] Douglas Lisney appeals from a judgment convicting him of disorderly conduct while using a dangerous weapon, and from a subsequent order denying his motion for postconviction relief. Lisney argues that he is entitled to a new trial because he was denied his right to a fair trial and because he

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000).

received ineffective assistance of counsel. Lisney contends his right to a fair trial was violated because: (1) the prosecutor asked questions, with no good faith basis, implying that Lisney attempted to influence another witness; (2) the prosecutor vouched for the credibility of the victim during closing arguments; (3) the trial court denied his request to exclude the victim from the courtroom during the trial; and (4) the prosecutor failed to disclose exculpatory and impeachment evidence, pursuant to the duties detailed in ***Brady v. Maryland***, 373 U.S. 83 (1963). In addition, Lisney contends that his trial counsel violated his right to effective assistance of counsel when he failed to: (1) object to the prosecutor's alleged misconduct and move for a mistrial; (2) call a witness that Lisney claims was key to his defense; and (3) request a jury instruction both on defense of others and on allowing the jury to consider a witness' prior convictions when assessing his credibility.

¶2 We conclude that there was no prosecutorial misconduct, the trial court properly refused to exclude the victim from the courtroom, and trial counsel provided effective assistance. Accordingly, we affirm.

I. Background

¶3 On June 13, 1998, Douglas Lisney went to the Bunker Hill Tavern. During the course of the evening, several fights broke out, many of them involving Christopher Koch. In the early morning hours of June 14, 1998, a fight broke out between Christopher Koch and Lisney. It was undisputed that, during the course of the fight, Lisney stabbed Koch in the side with a hunting knife.

¶4 The State charged Lisney with disorderly conduct while using a dangerous weapon, in violation of WIS. STAT. §§ 939.63(1)(a) (1995-96)[2] and 939.22(10). Lisney pleaded not guilty and a jury trial ensued. At trial, Lisney claimed self-defense, testifying that he stabbed Koch only after Koch jumped on top of him and began punching him. Lisney also testified that his and Koch's argument began after Koch grabbed Cathy Couey's hair, who was also at the tavern. Lisney stated that he told Koch to stop and that was when Koch attacked him. Couey did not testify.

¶5 Koch contradicted Lisney's testimony, claiming that it was Lisney who instigated the fight, by getting "right up in my face and telling me he was going to kick my ass." Koch testified that he pushed Lisney against his chest to create distance between them and then Lisney stabbed him.

¶6 At the close of the trial, the jury was given an instruction on self-defense, but not on defense of others. The jury returned a verdict of guilty. After sentencing, Lisney filed a motion for postconviction relief, which the trial court denied. Lisney appeals.

[2] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

II. Analysis

A. Fair Trial

1. Prosecutorial Misconduct

¶7 If prosecutorial misconduct "poisons the entire atmosphere of the trial," it violates due process. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996) (internal quotation omitted). However, "[r]eversing a criminal conviction on the basis of prosecutorial conduct is a 'drastic step' that 'should be approached with caution.'" ***Id.*** (quoting ***State v. Ruiz***, 118 Wis. 2d 177, 202, 347 N.W.2d 352 (1984)). The court in ***Ruiz*** enumerated a number of factors that must be balanced in deciding whether a new trial should be ordered for a prosecutor's misconduct:

> the defendant's interest in being tried on evidence validly before the jury; the public's interest in having the guilty punished; the public's interest in not burdening the administration of justice with undue financial or administrative costs; the public's interest that the judicial process shall both appear fair and be fair in fact; and the interest of the individuals involved—the witnesses and family of the victim—not to be subjected to undue trauma, embarrassment or inconvenience.

Ruiz, 118 Wis. 2d at 202.

a. *Improper questioning*

¶8 Lisney first argues that he is entitled to a new trial because the prosecutor asked improper questions during cross-examination. Specifically, Lisney contends the prosecutor repeatedly posed questions suggesting to the jury that the prosecutor knew that Lisney told a witness, Cathy Couey, what to say to the police. Lisney's counsel objected to the questions because they presented

contested issues as though they were facts. The trial court sustained these objections, and the jury was instructed to disregard them. We agree with the State that whatever prejudice was caused by the prosecutor's questions was cured by the trial court's instruction.

¶9 After the objections were sustained, however, the prosecutor asked Lisney: "Did you ever say to Cathy [Couey], gosh, I just stabbed somebody. Please tell them that this guy pulled your hair and I had to protect you." Lisney's attorney did not object to this question and the trial court did not instruct the jury to disregard it. Therefore, Lisney asserts the jury was improperly influenced.

¶10 In ***Fields v. Creek***, 21 Wis. 2d 562, 124 N.W.2d 599 (1963), the supreme court held that it is improper for trial counsel to ask a question which assumes the existence of a material fact which has not been proven. ***Id***. at 571. Prosecutors are allowed considerable latitude in argument, but they are limited by facts introduced in evidence, and the fair and reasonable conclusions to be drawn from those facts. ***State v. Nemoir***, 62 Wis. 2d 206, 213 n.9, 214 N.W.2d 297 (1974).

¶11 We conclude that the prosecutor's questions were based upon existing evidence, and were not prohibited by ***Fields***. Lisney had already admitted that he had gone back into the bar after the stabbing to talk to Cathy Couey, and explained he stabbed Koch in order to protect her. Furthermore, Lisney admitted that he had lied to the police when they first questioned him and also told them initially that no one had harassed Couey at the bar. Based on these facts, it was not unfair or unreasonable for the prosecutor to question the substance of Lisney's conversation with Couey.

b. Vouching for the victim's credibility

¶12 Lisney claims that the closing statement made by the prosecutor improperly vouched for the credibility of the victim. In ***Turner v. State***, 64 Wis. 2d 45, 218 N.W.2d 502 (1974), the court held that an attorney may state that the evidence convinces him and should convince the jurors, as long as it is clear that the opinion is based solely upon the evidence in the case. ***Id.*** at 54.

¶13 During closing argument, the prosecutor said:

> I believe that things went as Mr. Koch said…. Why do I believe that Chris Koch is telling the truth? That's a hard thing for me to say. I've convicted the man over 21 times. It's a hard thing. It's an amazing situation that I'm standing up here and telling you that I believe he's telling the truth in this case. Okay. When I say I believe that, I'm simply talking about believing it because of the same evidence that you heard. It's not I know some mythical secret thing that you guys don't know I'm not talking about–talking on the basis of this. I believe he's telling you the truth. One of the first reasons for that is because of Mr. Koch himself. That aside, I realize it's a big thing to put aside, he's essentially a good old boy. He's not a sophisticated, wiley sort of person.

¶14 Although the prosecutor did state several times that he believed Koch was telling the truth, he also immediately qualified his opinion with the statement that his opinion stemmed from the evidence. We therefore cannot conclude that the prosecutor's closing argument "so infect[ed] the trial with unfairness as to make the conviction a denial of due process." ***State v. Adams***, 221 Wis. 2d 1, 21, 584 N.W.2d 695 (Ct. App. 1998).

c. Withholding exculpatory evidence

¶15 Lisney argues the prosecution withheld exculpatory and impeachment evidence, contrary to his duties under ***Brady v. Maryland***, 373 U.S.

83 (1963). Specifically, Lisney claims that the prosecutor violated his duty when he failed to provide to the defense information regarding four statements made by Couey in an interview with the prosecutor: (1) Couey told the prosecutor that Koch attacked her; (2) Koch grabbed Couey's hair and dragged her; (3) at that point, Lisney jumped in; (4) it was Couey's impression that Lisney was trying to help her.

¶16 However, the prosecution's failure to disclose evidence does not violate a defendant's due process right unless the evidence is within the prosecution's exclusive possession. ***State v. Rohl***, 104 Wis. 2d 77, 89, 310 N.W.2d 631 (Ct. App. 1981). Exclusive possession 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. ***Id.***

¶17 The four statements which Lisney contends the State was obliged to provide to him can be found in a transcript of the sheriff's interview of Couey, which was provided to Lisney prior to trial. The prosecutor was not obligated to share his notes with Lisney if all the factual information he obtained from Couey was contained in the transcript.

2. Presence of the Victim at Trial

¶18 Lisney contends that Christopher Koch should have been excluded from the courtroom to provide a fair trial. He claims that the court erred in allowing Koch to observe the testimony of other witnesses before he gave his own testimony because he was likely to adapt his story to conform to what other

witnesses had said. Under WIS. STAT. § 906.15(2)(d),[3] Koch was permitted to remain in the courtroom. Thus, Lisney is really asserting that § 906.15(2)(d) is unconstitutional as applied because it deprived him of the constitutional right to a fair trial.

¶19 The record does not show, however, that Lisney has notified the attorney general of his constitutional challenge to the statute. When a constitutional challenge to a statute is made, the attorney general must be "served with a copy of the proceeding and be entitled to be heard." WIS. STAT. § 806.04(11); *see* ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 116-17, 280 N.W.2d 757 (1979) (holding that § 806.04(11) applies to all constitutional challenges of laws and not just declaratory judgments). "Under the Kurtz rule a party will be foreclosed from challenging the validity of a statute unless the attorney general is given an opportunity to appear before the court and defend the law as constitutionally proper." ***In Matter of Estate of Fessler***, 100 Wis. 2d 437,

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[3] WISCONSIN STAT. § 906.15 provides, in relevant part:

> (1) At the request of a party, the judge or court commissioner shall order witnesses excluded so that they cannot hear the testimony of other witnesses….
>
> (2) Subsection (1) does not authorize exclusion of any of the following:
>
> ....
>
> (d) A victim, as defined in s. 950.02 (4), in a criminal case or a victim, as defined in s. 938.02 (20m), in a delinquency proceeding under ch. 938, unless the judge or court commissioner finds that exclusion of the victim is necessary to provide a fair trial for the defendant …. The presence of a victim during the testimony of other witnesses may not by itself be a basis for a finding that exclusion of the victim is necessary to provide a fair trial for the defendant ….

443, 302 N.W.2d 414 (1981). The record does not show that Dahl notified the attorney general of his constitutional challenge. We therefore decline to address this issue.

B. Effective Assistance of Counsel

1. Failure to object

¶20 Whether counsel's performance was deficient and prejudicial is a question of law. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, we will uphold the trial court's factual findings concerning the circumstances of the case and counsel's conduct and strategy unless they are clearly erroneous. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Counsel is presumed to have acted properly; a defendant must demonstrate that his attorney made serious mistakes that could not be justified in the exercise of objectively reasonable professional judgment. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). First, Lisney claims the trial counsel erred in not objecting to the prosecutor's question, as noted in ¶9, and his statement regarding Koch during closing argument, as noted in ¶13. We have already determined that the prosecutor did not act improperly in both instances, and therefore, we conclude that trial counsel's decision to refrain from objecting did not constitute deficient performance.

2. Failure to call a witness

¶21 Lisney contends next that the trial counsel's tactical decision not to call Cathy Couey as a witness constituted ineffective assistance of counsel. The trial court examined trial counsel's strategy in the postconviction hearing, and found that although Couey could have supported Lisney's claim that he was acting

in defense of her, she was an unreliable witness. She had not cooperated with Lisney's counsel early on in his investigation. She had disappeared before the trial and did not appear in court when subpoenaed. Trial counsel testified that he did not want to take the chance of relying on her. The trial court concluded, and we agree, that trial counsel's decision did not constitute deficient performance, given the surrounding circumstances.

3. Failure to Request a Jury Instruction

¶22 Lisney argues trial counsel was deficient in not requesting WIS JI-CRIMINAL 825, Defense of Others. During the postconviction hearing, trial counsel testified that requesting the Defense of Others instruction would have diluted his self-defense argument. The trial court concluded that trial counsel's performance was not deficient because although some attorneys may have taken a different approach, the trial counsel had exercised his judgment adequately. There were several factors trial counsel had to take into account when deciding upon a defense strategy: the unreliability of testimony from Couey, the impact of multiple jury instructions on the minds of jury members, the strength of his main argument, and the amount of evidence available to support other arguments. We conclude that trial counsel's decision did not fall below an objective standard of reasonableness.

¶23 Lisney also contends that trial counsel was ineffective in his failure to request a jury instruction permitting the jury to consider the complaining witness' prior convictions when assessing his credibility. The trial court concluded that Lisney was not prejudiced by the omission. The court stated that although Koch's credibility was an important issue, the jury had been told of Koch's prior convictions many times during the trial, by both the prosecutor and

trial counsel, and that it gave a general instruction on credibility. The court found trial counsel's performance adequate, given the totality of the information the jury received at trial regarding the convictions and credibility of Koch. We agree with the trial court that the general instruction was sufficient and therefore conclude that Lisney was not denied effective assistance of counsel.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. § 809.23(1)(b)4.