

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2003

Cornelia G. Clark
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. 03-0228-CR

Cir. Ct. No. 00CF000079

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LARRY D. LAKES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Larry D. Lakes appeals from a judgment convicting him as a party to the crime of armed burglary and armed robbery, and from an order denying his motion for postconviction relief. He seeks a new trial on the grounds that the prosecution violated its discovery obligation and his trial attorney had a conflict of interest. He also argues that the evidence was

insufficient to show that he lacked consent to enter the burglarized residence. We reject his claims and affirm the judgment and order.

¶2 The evidence at trial was that in the afternoon of February 12, 2000, Lakes was at the residence rented by Donna Allison in the city of Sheboygan. Allison was not home at the time, but David Orvis, who also resided there, was. Harvey Johnnies was also there. Johnnies and Lakes used the residence to sell illegal drugs. At one point Lakes left the residence with Joshua Adamavich and two others. They drove to Milwaukee and back. While in Milwaukee, Lakes had contact with a man named Carlos. Carlos and two other individuals followed Lakes and Adamavich back to Allison's residence in a separate car. Lakes, Adamavich, and the three persons from Milwaukee entered the residence. Shortly after entering, guns were displayed and the Milwaukee persons started to rob the occupants. Lakes reportedly screamed something like, "I told you guys not to mess with me." During the incident Johnnies, who was in a bedroom selling drugs, was assaulted and robbed. Adamavich indicated that earlier in the evening Lakes told him he had a guy in Milwaukee he wanted to come and rob the place. Adamavich also said he fled with Lakes and one of the Milwaukee men and later divided up the money from the robbery.

¶3 The parties stipulated that for impeachment purposes witnesses Adamavich and Johnnies had two and four prior convictions, respectively. After trial, Lakes discovered that Adamavich really had more than fifteen prior convictions when juvenile adjudications were counted. It was also discovered that Johnnies had twelve prior convictions, including juvenile adjudications. In his postconviction motion Lakes argued that the prosecution breached its discovery obligation by failing to fully disclose the criminal and juvenile records of Adamavich and Johnnies. The trial court found that the prosecution violated WIS.

STAT. § 971.23(1)(f) (2001-02),¹ and did not have good cause for the violation. The request for a new trial was denied because the trial court concluded that the violation was harmless.

¶4 We need only consider the prejudice prong of the three-part test used to determine whether the prosecution violated its discovery obligations and whether the defendant is entitled to relief.² See *State v. DeLao*, 2002 WI 49, ¶¶14-15, 252 Wis. 2d 289, 643 N.W.2d 480 (three-part test is whether a violation occurred, whether the prosecution has shown good cause for the violation, and whether the defendant was prejudiced). A question of law is presented which we review independently of the trial court's determination. *Id.*, ¶15. The error is harmless if the State demonstrates beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Norman*, 2003 WI 72, ¶47, 262 Wis. 2d 506, 664 N.W.2d 97.

[T]he reviewing court should consider a variety of factors, including but not limited to the frequency of the error, the nature of the State's case, the nature of the defense, the importance of the erroneously included or excluded evidence to the prosecution's or defense's case, the presence or absence of evidence corroborating or contradicting the erroneously included or excluded evidence, whether erroneously admitted evidence merely duplicates untainted evidence, and the overall strength of the prosecution's case.

Id., ¶48.

¹ WISCONSIN STAT. § 971.23(1)(f) (2001-02), requires the prosecution to disclose “[t]he criminal record of a prosecution witness which is known to the district attorney.” All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The State does not argue that the trial court erred in finding a violation and the absence of good cause.

¶5 Lakes believes that impeachment of the testimony of Adamavich and Johnnies would have been more forceful had the jury been advised of the correct number of their prior convictions. The trial court noted that it would not have “counted” the witnesses’ prior juvenile and traffic convictions. It suggested that it would have allowed seven and six prior convictions for Adamavich and Johnnies, respectively. The disparity in number is not as great as Lakes cites. Additionally, the jury learned that Adamavich had been charged with respect to this incident and had entered into an agreement whereby the prosecutor would make certain sentencing recommendations. Johnnies himself admitted that he used Allison’s residence to sell drugs and was in fact engaged in an illegal transaction when he was robbed. We are not persuaded that the increased number of prior convictions would serve to enhance the impeachment of Adamavich and Johnnies. It would do nothing more than confirm for the jury that Adamavich and Johnnies had criminal backgrounds.

¶6 More importantly, Adamavich and Johnnies were not the only witnesses to establish the elements of the crimes. Orvis testified that after leaving the residence, Lakes called and asked another person to keep Johnnies at the residence. Orvis saw Lakes come into the house with the Milwaukee people and immediately thereafter the guns were brandished. Orvis heard Lakes yelling. He saw Lakes leave with the other intruders. Lakes also asked Orvis to lie and say that Lakes had been at the house all day and had not gone to Milwaukee.

¶7 Allison’s testimony also corroborated Lakes’s involvement in the crimes. She observed Lakes not as a victim but as a participant. She heard Lakes yelling at people in the living room.

¶8 Finally, the jury learned that Lakes lied to police about his presence at the residence on the day of the crimes and his knowledge of Orvis and Johnnies. He had also told police he had never been to the residence when in fact he had stayed there for short periods of time. This evidence shows consciousness of guilt. *See State v. Bauer*, 2000 WI App 206, ¶6, 238 Wis. 2d 687, 617 N.W.2d 902 (evidence of acts intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge). In light of the evidence, the failure to disclose the correct number of prior convictions for Adamavich and Johnnies did not contribute to Lakes's conviction. Lakes was not prejudiced by the prosecution's discovery breach.

¶9 Lakes next argues that his trial attorney, George Limbeck, had a conflict of interest and thus deprived Lakes of the effective assistance of counsel. The potential conflict was Limbeck's representation of Adamavich in a Sheboygan county misdemeanor case which concluded with a plea of no contest on October 29, 1999.³ Lakes asserts that Limbeck suffered from divided loyalties exhibited by Limbeck's failure to impeach Adamavich with his extensive criminal history about which Limbeck had to have known, failure to elicit the terms of Adamavich's plea agreement with respect to these crimes, and failure to request a jury instruction on the testimony of accomplices.

In order to establish a Sixth Amendment violation on the basis of a conflict of interest, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel had an actual conflict of interest. Determining what constitutes an actual conflict of interest must be resolved by looking at the facts of the case. An actual conflict of interest exists when the

³ Limbeck was substituted as counsel for Lakes in August 2000. Lakes's trial commenced on November 9, 2000.

defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected. Once an actual conflict of interest has been established, the defendant need not make a showing of prejudice because prejudice is presumed. Counsel is considered *per se* ineffective once an actual conflict of interest has been shown.

State v. Love, 227 Wis. 2d 60, 71, 594 N.W.2d 806 (1999). While the trial court's findings of fact will be sustained unless clearly erroneous, "the ultimate question of whether an actual conflict of interest existed is a conclusion of law that we decide without deference to the trial court's ruling." *State v. Kalk*, 2000 WI App 62, ¶13, 234 Wis. 2d 98, 608 N.W.2d 428.

¶10 We observe that Limbeck's representation of Adamavich terminated well in advance of Limbeck commencing his representation of Lakes. The representation of Adamavich had nothing to do with these crimes; there was no expectation of future representation of Adamavich; and there was no suggestion of any confidential information passing between Adamavich and Limbeck which would affect Lakes's case. We agree with the trial court that Lakes merely speculated that Limbeck had the motivation to "go easy" on Adamavich. No reason for Limbeck to do so was established. In short, there was no link between Limbeck's prior representation of Adamavich and his representation of Lakes. Lakes did not establish by clear and convincing evidence that Limbeck actively represented conflicting interests. See *M.S. v. State*, 822 So. 2d 449, 453 (Ala. Crim. App. 2000) (mere proof that defendant's attorney represented a prosecution witness is insufficient; there must be a showing that the earlier representation was substantially and particularly related to the later representation of the defendant, or that counsel actually learned particular confidential information during prior representation of the witness that was relevant to the defendant's case).

¶11 The final issue is whether there was sufficient evidence that Lakes did not have consent to enter the residence, an element of burglary. Our review of the sufficiency of the evidence is to determine whether the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992). We must accept the reasonable inferences drawn from the evidence by the jury. *See State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990).

¶12 WISCONSIN STAT. § 943.10(1) requires proof that the intentional entry occurred “without the consent of the person in lawful possession.” Lakes argues that that statute cannot be read to mean that only the person whose name appears on the lease can give permission. He explains that he entered by permission of Adamavich and that because Adamavich was given permission by Allison to bring friends to the residence, he was there by consent of a person in lawful possession of the home. We need not decide the scope of lawful possession because there was evidence that not even Adamavich was supposed to be at the residence. Allison testified that prior to February 12, 2000, she told Adamavich he should not be at her place because he was wanted by the police. Also, Allison indicated she had asked Lakes to move out and that she had not seen him for about a week before the robbery because she had asked him to leave again. Despite testimony that Adamavich, and even Orvis, could bring friends to the residence as they pleased, Allison’s specific requests that Adamavich and Lakes should stay away trump general permission. Allison was not at home when Lakes and Adamavich were at the residence earlier in the day. She did not see them in the room when she returned in the early morning of February 13, 2000. She was in

the bathroom when Adamavich and Lakes returned to the residence and did not see them until after the robbery was underway. The evidence permits a reasonable inference that neither Adamavich nor Lakes had permission to be at the residence despite their entry without incident.

By the Court.—Judgment and order affirmed.

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

