COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0809-CR **Cir. Ct. No. 01CF000088**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TONY L. GADICKE,

DEFENDANT-APPELLANT.

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

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Tony Gadicke appeals a judgment of conviction and an order denying his postconviction motion. He raises several issues related to his trial. We affirm.

¶2 Gadicke was convicted of one count of intimidating a victim and one misdemeanor count of battery, both as a repeater. Gadicke first argues that the circuit court erroneously exercised its discretion by not allowing him to ask the victim at trial whether she had ever been convicted of a crime. Gadicke's attorney sought to recall the victim to the stand, near the end of the defense case, because counsel had forgotten during cross-examination to ask the victim about her prior convictions. The court denied the request on the ground that doing it in this manner would unduly emphasize the question and unduly prejudice the State.

¶3 We conclude the court did not err. Although the victim's conviction would ordinarily be admissible under WIS. STAT. § 906.09 (2001-02),[1] what made it properly excludable in this case was the manner in which the evidence was going to be presented. The court may exclude this type of evidence if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 906.09(2). By allowing the question about prior convictions in isolation, near the end of the defense case, the court could reasonably conclude that the jury would give it undue weight. Furthermore, it had already been established before trial that the victim had only one prior conviction, and the probative value of one conviction is modest.

¶4 Gadicke also argues that his trial counsel was ineffective by forgetting to ask the above question. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

(1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one. ***Id.*** at 697. We affirm the trial court's findings of fact unless they are clearly erroneous, but the determination of deficient performance and prejudice are questions of law that we review without deference to the trial court. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). To demonstrate prejudice, the defendant must show that 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. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.*** We conclude that Gadicke has not shown prejudice. As stated above, the probative value of one prior conviction is low. Our confidence in the outcome is not undermined.

¶5 Gadicke next argues that the court erroneously exercised its discretion by denying his request for an adjournment of trial so he could procure the attendance of a witness he had subpoenaed. According to Gadicke's offer of proof, this witness would have testified about when certain photographs were taken. The photos, according to Gadicke, showed injuries that Gadicke had sustained to his face and were intended to support his claim of self-defense. At trial, Gadicke testified that the photos were taken three or four days after the date of the charged offenses in this case. We conclude that any error was harmless. An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189. The witness appeared and testified at the postconviction hearing. She said that the photos were taken between October 31 and Thanksgiving. The crimes in this case occurred October 27. Therefore, we regard the witness's testimony as having little probative value. While her testimony supported Gadicke by establishing the general time period, it also

weakened Gadicke's testimony by allowing for the possibility that the photos were taken nearly a month later and, therefore, may have shown injuries from other causes.

¶6 Finally, Gadicke argues that the court erred by allowing testimony about his pre-arrest failure or refusal to answer questions from police officers. We conclude that any error here was harmless. We note that Gadicke did not address harmless error in his opening brief, and declined to file a reply brief addressing the State's harmless error argument. We are satisfied that a rational jury would have rejected Gadicke's self-defense theory in the absence of the challenged testimony.

¶7 For future reference, we remind appellant's counsel that citations to the record are required for statements of fact in briefs. WIS. STAT. RULE 809.19(1)(d) and (1)(e). The appellant's brief in this case was missing record references for basic and crucial facts related to the arguments advanced. Furthermore, the "statement of the case" consisted of little more than a nearly verbatim recitation from the complaint. The allegations in the complaint were irrelevant with respect to the issues Gadicke argues on this appeal.

By the Court.—Judgment and order affirmed.

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